

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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*Submitted via regulations.gov Docket No. USTR-2011-0021.*

Mr. Stanford McCoy  
Assistant U.S. Trade Representative  
for Intellectual Property and Innovation  
Office of the U.S. Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

**Re: IIPA Written Submission Regarding 2012 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2012 Special 301 Hearing (76 Fed. Reg. 81555, Dec. 28, 2011)**

Dear Mr. McCoy:

The International Intellectual Property Alliance (IIPA) submits this response to the Federal Register notice which invites “written submissions from the public concerning foreign countries’ acts, policies or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act [of 1974].” Under Section 182, more commonly referred to as “Special 301,” the Office of the U.S. Trade Representative leads an interagency process to identify countries that deny adequate and effective protection of intellectual property rights or that deny fair and equitable market access to U.S. persons who rely on intellectual property protection (19 U.S.C. §2242). IIPA has participated in every Special 301 cycle since the 1988 Trade Act created this process, providing public comments on acts, practices and policies regarding copyright law, piracy, enforcement and market access in selected foreign countries. In this year’s filing, including this Submission Letter and appendices, IIPA reports on 41 countries noted in the chart in Section C of this Submission Letter, including 33 which we recommend be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act. IIPA has also recommended that USTR conduct one Out-of-Cycle Review (OCR) later in 2012. IIPA will also file under separate cover a Notice of Intent to Testify at the February 23, 2012 public hearing on Special 301.

## A. THE IIPA’S INTEREST IN THIS FILING AND THE SPECIAL 301 PROCESS

The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software, entertainment software (interactive games for videogame consoles, handheld devices, personal computers and the Internet), and educational software; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [Business Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).



In November 2011, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2011 Report*, prepared by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The “core” copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$931.8 billion or 6.36% of the U.S. gross domestic product (GDP) in 2010. These industries provide nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals.<sup>1</sup> Linkages between copyright protection and economic development in other countries are documented by the World Intellectual Property Organization’s 2012 study on the *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, compiling similar studies in 30 countries.<sup>2</sup>

While these studies amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by overseas piracy and other market access barriers to U.S. copyrighted products and services. Content industries continue to contend with those who, in the absence of good protection and enforcement, engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with the massive proliferation of illegal services that are unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them. An independent study released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),<sup>3</sup> estimates the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010 and, growing to \$80-240 billion by 2015. For many countries in this submission, rampant piracy is not only impeding the evolution of legitimate channels for distribution, but also threatens to permanently damage or displace existing and authorized distribution channels that are unable to compete with infringing business models.

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## B. SUMMARY OF THE IIPA 2012 SPECIAL 301 SUBMISSION

The IIPA 2012 Special 301 Submission provides information intended to assist the U.S. Government in defining concrete plans of action for the year ahead, to reduce global piracy levels, and to open markets to U.S. copyright content in the identified countries. Section C of this Submission Letter provides the IIPA recommendations for the 2011 Special 301 lists. Section D summarizes 12 major cross-cutting initiatives and challenges involved in improving copyright law and enforcement and lowering market access barriers to U.S. copyrighted materials. Appendix A to the submission includes all the country surveys.<sup>4</sup> Appendix B describes IIPA members’ methodologies for estimating the scope of piracy in various countries. Appendix C provides a chart of countries/territories’ placement on Special 301 lists by USTR since 1989.<sup>5</sup> Information about the Special 301 histories of countries/territories on which IIPA has filed in the past, whether recommended for placement on a list this year, deserving special mention, or appearing on past lists, is available as an Additional Appendix on the website, at [www.iipa.com](http://www.iipa.com).

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<sup>1</sup>See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. The entire report as well as summaries can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). Core copyright industries are those whose primary purpose is to create, produce, distribute or exhibit copyright materials. These include books, journals, newspapers, and periodicals; motion pictures; recorded music; radio and television broadcasting; and computer software.

<sup>2</sup>World Intellectual Property Organization, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, 2012 (on file with IIPA).

<sup>3</sup>Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy (2008)*)

<sup>4</sup>Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Amanda Wilson Denton, Steven Metalitz, and Eric Schwartz, and are based on information furnished by IIPA’s seven member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

<sup>5</sup>Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of “priority foreign countries,” provides that the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.” Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these 15 countries/territories named by IIPA are particularly vulnerable.



**C. IIPA RECOMMENDATIONS FOR THE 2012 SPECIAL 301 LISTS**

This year IIPA has recommended 41 countries/territories for placement on the Priority Watch List or Watch List, for monitoring under Section 306 of the Trade Act, or as deserving of special mention for copyright, enforcement, and/or market access-related concerns.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306	COUNTRIES DESERVING SPECIAL MENTION
Argentina Canada Chile China (306) Costa Rica India Indonesia (GSP) Russian Federation Thailand Ukraine (GSP)(OCR)	Belarus Brazil Brunei Colombia Egypt Greece Israel Italy Kazakhstan Lebanon Malaysia Mexico Philippines Romania Saudi Arabia Spain <sup>6</sup> Switzerland Tajikistan Turkey Turkmenistan Uzbekistan Vietnam	Paraguay	Albania Bulgaria Hong Kong Hungary Latvia Moldova Singapore Taiwan
10	22	1	8

**D. INITIATIVES OR CHALLENGES FOR 2012: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, STRENGTHEN LAWS**

This Submission and its Appendices aim to define and seek implementation of concrete solutions to significant commercial hurdles faced by the content industries of the United States, including those producing business software, motion pictures, entertainment software, music, and books and journals. The following list of cross-cutting initiatives or challenges summarizes what must be done to reduce piracy, open markets to legitimate U.S. copyright business, and ensure that adequate legal structures are in place to keep piracy levels lower into the future.

**1. The Need for Deterrent Enforcement Responses to Copyright Piracy**

Copyright piracy as we know it today increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes the unauthorized use of software within businesses (or by governments); the illegal copying, uploading, downloading, making available, communicating, or streaming of copyright materials on the Internet or mobile networks (including, for example, rogue sites often cloaking themselves in a disguise of legitimacy with advertising and payment methods recognized by consumers as “authentic”); the illegal camcording of

<sup>6</sup>Some IIPA members were of the view that Spain should be removed from the Watch List at this time. However, other IIPA members believe that removal would be premature given the perilous state of the Spanish market at the time of this filing.



movies from theater screenings; the illegal photocopying of books or pirate offset printing of popular titles; the illegal public performance or broadcast of audiovisual works or sound recordings; and hard-disk loading of software onto computers without authorization or license. Related to piracy are activities such as the development, manufacture and distribution of circumvention devices used to access and make copies of copyright materials protected by technological protection measures; the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and the unauthorized decryption of Pay TV signals, as well as other activities facilitating unlawful use of copyright materials.

Too often, whether due to lack of political will or inadequate rule of law, countries fail to address piracy effectively. The overarching objective for the copyright industries therefore remains to secure in countries around the world effective legal frameworks capable of providing deterrent enforcement against copyright piracy and working to ensure that enforcement authorities robustly use these legal frameworks to combat copyright infringement. To do so, countries should:

- dedicate enforcement resources commensurate with the scale of the piracy problem, to provide for “effective action” and “remedies that constitute a deterrent”<sup>7</sup> to infringement as the minimum required by the TRIPS Agreement, through civil, administrative, and criminal action, and effective adjudication in the courts;<sup>8</sup>
- train and empower enforcement authorities to investigate and prosecute copyright offenses;
- update laws and enforcement tools to meet the current piracy challenges;<sup>9</sup>
- direct government agencies, state-owned enterprises, enterprises, contractors, and educational institutions to use only legal software, legal copies of textbooks and other educational materials, and other copyright materials, and to ensure their networks or computers are not used for infringing purposes;
- ratify and fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and enforce resulting prohibitions as a means of reducing piracy;
- encourage cooperation by Internet service providers with all content owners, including notice and takedown systems and effective and fair mechanisms to deal with repeat infringers; and
- enact and enforce measures to make it illegal to use or attempt to use an audiovisual recording device to make or transmit a copy of a motion picture.

## 2. Internet Piracy

Transformative developments on the Internet and mobile (WAP, 3G, Wi-fi) networks have opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. But they also have led to massive infringement of music, movies, games, software, published materials and other copyright materials. A January 2011 study by Envisional concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4% illegal BitTorrent downloading; 5.1% illegal downloading from infringing distribution hubs; 1.4% was illegal video streaming; and 5.8% was other P2P filesharing (eDonkey, gnutella) or Internet protocols, such as Usenet, that are used for file sharing.<sup>10</sup>

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<sup>7</sup>For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) should impose penalties that remove the monetary incentives that drive the pirate trade. Small fines do not deter pirates who stand to gain hundreds of thousands to millions of dollars. Recidivism is endemic in many countries. Deterrence requires substantial prison sentences in these cases.

<sup>8</sup>In many countries, specialized IP courts have been established, in addition to IP- or cybercrime-intensive investigative units with police and prosecutors. In the most successful examples, such specialized courts or divisions are starting to make a difference in their localities.

<sup>9</sup>Piracy (both online and offline) has been taken over in many countries by organized crime syndicates, linked across national boundaries, that control large amounts of capital, and exploit complex distribution networks. The private sector does not possess the tools, nor usually the legal authority, to investigate and fight organized crime. In addition, such organized groups or other commercial pirates can become violent, and company representatives and counsel have in some countries experienced threats on their lives, physical intimidation, or attacks leading to injury when doing their jobs to investigate piracy, and this has prevented enforcement activity by the private sector in many instances. Governments can step up to this challenge, including encouraging countries by applying their organized crime laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, to bring enhanced remedies to bear against syndicate operations involved in piracy, including, *inter alia*, disclosure of information being used to commit piracy and seizure or freezing of assets. Since 2000, INTERPOL has recognized the need for national and international enforcement authorities to coordinate their efforts and cooperate with IP right holders to fight IP crimes including piracy.

<sup>10</sup>Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).



Although there are many commonalities, each industry sector has its own unique experience with online piracy phenomena most harmful to them:

- The motion picture industry's windows for distribution (including theatrical, on-demand, Pay TV, home video, and legitimate online services) have been decimated by the availability of Internet downloads or streaming of their films. To give just one example, the recent hit, *The Grey*, which was released on January 27, 2012 in the United States and Canada, was reportedly already available for illegal download on the *isoHunt* BitTorrent site the next day. By mid-afternoon on January 30, isoHunt itself reported that 3,000 people were downloading *The Grey*, or better said, a 1.2 gigabyte pirated version of *The Grey*.
- Online piracy is by far the greatest priority issues for the music industry, which faces a global Internet piracy problem estimated at 95%. To effectively address this problem, it is essential for governments to attack both the supply and demand sides of the piracy equation, through education, criminal and administrative actions where appropriate, a sound framework for civil actions, and legislation that creates incentives for network service providers to address the use of their networks and services for infringing purposes. Mobile piracy (e.g., through the use of "apps" to illegally download content onto a mobile device) is also becoming more prominent, especially in countries with significant mobile penetration and mobile broadband (WAP, 3G, Wifi).
- Online piracy of entertainment software continues to be overwhelmingly international, as reflected in ESA vendor monitoring of peer-to-peer (P2P) and direct download activity. Conclusions drawn from ESA's online vendor monitoring of P2P activity during 2011 indicates that the vast majority of peer connections participating in the unauthorized file sharing of ESA member titles were undertaken by Internet subscribers in foreign countries. ESA vendors identified Italy, Brazil, China, Russian Federation, and Spain as the top five leading countries in overall numbers of detected connections to select ESA member titles on public P2P networks. Other countries moving up in terms of detections compared with 2010 include India (7th place), Poland (8th place), Romania (10th place), United Kingdom (11th place), Israel (12th place), Greece (13th place), Portugal (14th place), and Turkey, rounding out the top 15. ESA vendor monitoring of material made available on "direct download" sites also reveals increases in the number of web links to infringing ESA member game software, and even more dramatic increases in the number of unique URLs through which users directly download infringing copies. This monitoring also highlighted that the vast majority of sites that facilitate web-based game piracy are hosted on facilities outside of the United States.
- Book and journal publishers are plagued by sites that provide and deliver unauthorized digital copies of medical and scientific journal articles on an illegal subscription basis. With the rapid adoption of electronic reading devices (e-readers) and tablets, online piracy affecting trade books (fiction and non-fiction) and academic text books has increased significantly;
- Counterfeit business software products are prevalent on certain auction and e-commerce sites, as well as on well-constructed sites and services that fool consumers, selling well-packaged but poor quality counterfeit copies of language-learning and other software.
- Internet cafés continue to provide opportunities, particularly in developing countries, for getting access to infringing music, motion pictures and videogames.

IIPA's filing to the U.S. Trade Representative in its 2011 Special 301 Out-of-Cycle Review of Notorious Markets presents a non-exhaustive but illustrative list of examples of notorious online piracy services.<sup>11</sup> Many of the online "notorious markets" listed in that filing are discussed in detail in the country reports appended to this submission. This list demonstrates that many bad actors are abusing various technologies – all of which have legitimate uses – in order to foster widespread copyright piracy. These include:

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<sup>11</sup> See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 *Fed. Reg.* 58854 (September 22, 2011), *Docket No. USTR-2011-0012*, October 26, 2011, at [http://www.iipa.com/pdf/2011\\_Oct26\\_IIPA\\_Notorious\\_Markets\\_Submission.PDF](http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF).



- **Sohu/Sogou** (China); **Xunlei** (China) (which operates an unauthorized deep linking service called “**Gougou**”); and **Zing.vn** (Vietnam), which are sites that collect links to infringing content and provide users the ability to engage in piracy through “deep linking” – by which they bypass the homepage of the other site and link to the illegal content directly;
- **ThePirateBay.org** (Sweden); **Isohunt** (Canada); **Demonoid** (Ukraine); **BTJunkie** (Sweden ISP);<sup>12</sup> **Kat.ph** (formerly **Kickasstorrents.com**) (Canada); **Torrentz.eu** (Canada); and **Rutracker.org** (Russia), which are sites that employ or facilitate the use of the BitTorrent file sharing protocol to enable pirated content –including very large files -- to be quickly located and downloaded;
- **Megaupload/Megavideo** (Netherlands/New Zealand);<sup>13</sup> **Putlocker.com** (United Kingdom); **Wupload.com** (Netherlands); **Simdisk.co.kr** (and other “webhards” in Korea); **4Shared.com** (registered in the British Virgin Islands); **Gogobox.com.tw** (Taiwan), which are “one-click hosting sites,” colloquially referred to as cyberlockers, which provide access to large libraries of infringing files;
- **vKontakte** (Russia) (which was just found civilly liable for infringement), which is an online social networks which features search functionality specifically designed and operated to enable members to upload music and video files, hundreds of thousands of which contain unlicensed copyright works, which other members search and stream on computers and mobile devices;
- **Letmewatchthis.ch** (Germany); **Video2k.tv** (Russia); **Movie2k.to** (Romania), which are audiovisual “linking” sites, which aggregate, organize, and index links to files stored on other sites;
- **Seriesyonkis.com** (Spain) and **3000filmes.com** (Brazil), which are dedicated “streaming” sites for infringing first-run movies and television content;
- **TaoBao** (China) and **Eachnet.com** (China), which are examples of auction sites of growing concern to several of the copyright industries including the business software, book publishing, and audiovisual industries, other business-to-business (B2B) and business-to-consumer (B2C) sites which have been found to specialize in certain types of illegal merchandise, and sites like **Modchip.ca** (Canada) and **ConsoleSource.com**, which sell circumvention devices into countries where such trafficking is illegal;
- “Usenet” service that market to P2P users much more heavily and directly than do traditional subscription Usenet services;
- **Zaycev.net** (Russia), a popular Russian site dedicated to the free, unlicensed distribution of music for download;
- **Warez-bb.org** (currently hosted in Luxembourg) and **BaixedeTudo** (Brazil), which are examples of forum sites, forum index sites, or blog sites dedicated to distributing infringing content, and also allow for the distribution of hacked or cracked software codes and programs.

The significant challenges of online piracy requires a multi-faceted approach, but some of the solutions are quite straightforward. Governments around the world must recognize the need for proportionate and effective steps to curb online piracy, and provide adequate legal frameworks for the protection of copyright online, including provisions in line with the two treaties adopted by the World Intellectual Property Organization (WIPO) in December 1996, the WCT and the WPPT,<sup>14</sup> provisions recognizing online piracy as a form of cybercrime,<sup>15</sup> and provisions that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain to combat online infringements.<sup>16</sup> Effective

<sup>12</sup>Reports indicate that BTJunkie has shut down as of February 6, 2012.

<sup>13</sup>*MegaUpload* is a one-click hosting site or “cyberlocker” (with headquarters located in New Zealand) which allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The seven owners of the site were, in January 2012 subjected to criminal indictments in the United States for amassing huge profits from facilitating massive amounts of copyright infringement.

<sup>14</sup>This should include express recognition of protection of reproductions in the online environment, regardless of their duration (i.e., temporary as well as permanent copies capable of being further copied, communicated, or perceived should fall within the exclusive reproduction right), since business and consumers engage in the full exploitation of copyright materials they receive over a network without ever making a permanent copy. This should also include a WIPO treaties-compatible definition of “communication to the public” including an interactive “making available” right.

<sup>15</sup>Governments should join and implement the Council of Europe Cybercrime Convention, Budapest, 23.XI.2001, which contains, in Articles 10 and 11, obligations to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and to outlaw intentional aiding and abetting of such crimes.

<sup>16</sup>Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all



enforcement is critical to ensure the healthy development of a legitimate online market, and it must take place before it is too late to recover markets that are severely damaged by widespread and persistent piracy in all its forms.

### 3. Enterprise (Including Government) End-User Piracy of Software and Other Copyright Materials

The unauthorized use of software within businesses and other enterprises, also referred to as “enterprise end-user software piracy,” stands as the principal and most damaging form of infringement to the business software industry today. Enterprise end-user software piracy occurs when someone in a business enterprise (or government agency) makes the decision to use software without paying for it. In the most typical example, a corporate entity purchases one licensed (or pirated) copy of software and installs the program on multiple computers. Client-server overuse, another common example of end-user piracy, occurs when too many employees on a network have access to or are using a central copy of a program at the same time, whether over a local area network (LAN) or via the Internet. In whatever way this piracy is carried out, it gives the enterprises involved the productivity benefits that the software provides, while foregoing the expense of licensed copies of the software, thus allowing them to enjoy an unfair commercial advantage over their law-abiding competitors who pay for their software. The unfair advantage can be understood on a macroeconomic level as well, since this means countries with high piracy levels compete unfairly with countries which have lower rates.<sup>17</sup> Sometimes enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. In many cases, however, enterprise end-user piracy is undertaken willfully, with management fully aware and supportive of the conduct.

Adequate laws prohibiting the unauthorized use of software in a business setting must be enacted and enforced – including, in appropriate cases, through criminal prosecutions<sup>18</sup> – in order to reduce piracy of business software. The adoption of pre-established (statutory) damages for copyright infringement also is needed in many countries to provide predictability, encourage settlements, and provide “remedies which constitute a deterrent to further infringements,” as required by TRIPS Art. 41.<sup>19</sup>

Enterprise end-user software piracy also occurs in government agencies. Often, foreign governments fail properly to procure licensed software for their hardware purchases, which leads to unauthorized use and under-licensing practices in the public sector.<sup>20</sup> The principal way to address this is through government software legalization programs. It is also critical that governments vigorously pursue legalization of software within state agencies and state-owned enterprises to set an example for private sector businesses and lend credibility to government enforcement efforts against software piracy. Governments should also take steps to ensure that businesses that provide goods and services under government contracts do not do so using unlicensed software.

End-user piracy is not limited to business software but now affects other copyright sectors. For example, in some government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Use of networks, computers, or other equipment owned by a government or public institution to carry out infringement is particularly objectionable. Governments have an opportunity and responsibility to engage in best practices with respect to the handling of intellectual property issues in the operation of government services, and they should be encouraged to lead by example.

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stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior, which has traditionally included notice and takedown, and which at least includes effective and fair mechanisms to deal with repeat infringers in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.

<sup>17</sup>For example, China's 78% PC software piracy rate means that Chinese enterprises competing with U.S. firms pay on average for just over one out of five copies of software they use, while their U.S. counterparts (the US has a 20% PC software piracy rate) pay on average for four out of five copies.

<sup>18</sup>TRIPS Art. 61 requires that this remedy be available against corporate end-user piracy.

<sup>19</sup>The U.S. has the lowest software piracy rate in the world and this is due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.

<sup>20</sup>In countries having significant state-owned enterprises (China being just one example of several), this problem is compounded.



#### 4. Unauthorized Loading onto PCs (Hard-Disk Loading) and Mobile Devices (Mobile Device Piracy)

Not all retail piracy takes place at the point of sale of illegal merchandise. One example is “hard disk loading” performed by unscrupulous computer manufacturers and dealers who install copies of software onto the internal hard drive of the personal computers they sell without authorization from the copyright holder. A similar problem involves mobile devices, which are now nearly ubiquitous worldwide.<sup>21</sup> A cottage industry has emerged in which pirates operating from stalls or kiosks, or masquerading as “repair” shops, offer (either at the point of sale of the mobile device, or afterwards) the illicit downloading onto any device<sup>22</sup> of virtually any kind of copyrighted material.<sup>23</sup> Enforcement authorities must get up to speed with these piracy phenomena and take action, or the losses from this kind of piracy will mount out of control.

#### 5. Circumvention of Technological Protection Measures (TPMs)

Copyright owners use technological protection measures (TPMs) to ensure that works made available in the digital and online environments are not easily stolen. For example, game consoles contain TPMs so that infringing copies of games cannot be played. DVDs are protected by “content scramble system” (CSS) to prevent second-generation copying and subsequent distribution or play, directly or over the Internet. Pay TV, premium cable and satellite services, and Internet services providing legitimate downloads or streaming of motion pictures similarly employ access and copy controls. Many software packages are licensed with some type of technological protection measure (encryption, passwords, registration numbers). EBooks employ access and copy controls as well.

Unfortunately, just as content owners would take such self-help measures to protect their content in the face of enormous technological challenges, there are those who build their entire business models around providing devices, tools or technologies to fill demand for gaining unlawful access to the content or copying it. The “mod chip,”<sup>24</sup> “game copier,”<sup>25</sup> and software and technologies used for “soft modding” facilitate piracy on game console platforms and require strong legal measures and enforcement to make space for the sale of legitimate games.

While implementation of TPMs protections has given rise to effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to pass such provisions. Countries that lack TPM provisions, such as Canada, not only fail to afford domestic protections for legitimate online business models, but also serve as a source of circumvention devices for consumers who live in countries where such devices and technologies are rightly prohibited.

#### 6. Illegal Camcording of Theatrical Motion Pictures

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, often just as they open. An unauthorized recording may include a video capture, an audio capture, or both. Approximately 90% of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to steal the audiovisual work (whether image and/or sound) off the theater screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies nearly perfect. All it takes is one camcorder copy to trigger the mass reproduction and distribution of millions of illegal Internet downloads and bootlegs in global street markets just hours after a film’s

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<sup>21</sup>Mobile penetration is over 100% in 97 countries, and had reached 70% in the developing world, according to ITU. *Newsroom • ITU StatShot*, August 7, 2011, at [www.itu.int/net/pressoffice/stats/index.aspx?lang=en](http://www.itu.int/net/pressoffice/stats/index.aspx?lang=en).

<sup>22</sup>Cell phones, mp3 players, external hard disks, thumb drives, flash drives, or USB drives are all illegally loaded in this fashion.

<sup>23</sup>Works infringed include music, ring tones, games, business software, and published materials (including educational materials, medical and nursing titles, and trade books).

<sup>24</sup>There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer) will bypass the handshake and allow the play of pirated games.

<sup>25</sup>“Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.





theatrical release and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.<sup>26</sup>

A multifaceted approach is needed including: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. In 2011, MPAA identified 964 illegal recordings of MPAA member company titles from cinemas around the world; approximately 60% were audio captures. This number does not include the numerous independent films illegally camcorded, and these producers also suffer gravely from illegal camcording.

Anti-camcording legislation – outlawing the use of an audiovisual recording device to make or attempt to make a copy of a motion picture in a theater, or to distribute or transmit such a copy – is critical to stopping the rapid increase in camcording. The U.S. adopted such a law at the federal level seven years ago; several other countries have followed suit; others are considering such legislation; and the 21 members of the Asia-Pacific Economic Cooperation (APEC) grouping committed, in November 2011, to “developing and implementing legal measures to effectively deter unauthorized camcording,” as well as working with the private sector and educating the public.<sup>27</sup> It is clear that if camcording is not made a criminal offense and deterrent penalties are not applied, this crippling source piracy will continue, migrating to territories where enforcement is weak.

## 7. Piracy of Books and Journals

The book publishing industry continues to be plagued by large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses;<sup>28</sup> sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books.<sup>29</sup> Photocopy piracy in most countries involves unauthorized commercial copying of entire textbooks by copy shops on and around university campuses, and undertaken on a “copy-on-demand” basis to avoid stockpiling. Book pirates have shifted tactics and are increasingly electronically storing digitized files of books (academic or otherwise) and fulfilling customer requests on a “print-to-order” basis. Authorities need to recognize this shifting pattern and tailor enforcement efforts accordingly (e.g., by including cyber forensics in their investigations). Commercial print piracy is prevalent in many developing countries where unauthorized operations obtain masters or copies of books and run unauthorized editions, in English or via unauthorized translation, off a printing press. In other cases, licensed local distributors or publishers produce print overruns, printing more copies of a title than permitted by their license. While many pirated copies are rife with errors or obviously of inferior quality, in some cases sophisticated printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

Book and journal piracy calls for aggressive action by law enforcement authorities. But universities and educational institutions (especially those that are state-funded or operated) must do more to promote appropriate use and copyright policies, in particular the use of legitimate books and journal publications. IIPA urges the U.S. Government to ensure that such acts of piracy are fully covered in all bilateral, regional, and multilateral engagements.

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<sup>26</sup>Independent film producers who coordinate release patterns with dozens of national distributors may be especially vulnerable to this type of piracy.

<sup>27</sup>*Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, adopted at 23<sup>rd</sup> APEC Ministerial Meeting, Hawaii, United States, November 11, 2011. APEC members include Australia; Brunei Darussalam; Canada; Chile; People’s Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Philippines; Russia; Singapore; Chinese Taipei; Thailand; The United States; and Viet Nam. Asia-Pacific Economic Cooperation, *Member Economies*, at <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

<sup>28</sup>Pirate photocopying takes place in a variety of venues, including commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, at on-campus copy facilities located in academic buildings, libraries and student unions, and in wholly illicit operations contained in residential areas or other underground establishments. Some of these operations are highly organized and networked, and technological advances are making the problem worse, since the shift from physical copy machines to electronic files means shops can print infringing books on demand. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate rights holders through collective means or otherwise for copies made).

<sup>29</sup>This problem affects books and journals of all kinds and genres. Unauthorized and unlicensed compilations abound in the academic context as well, in the form of course packs or even “original textbooks” that consist of sections of U.S. publishers’ material, in English or in translation.



## 8. Optical Disc and Game Cartridge Piracy

While piracy is migrating to the online space for most of the content industries, physical piracy, including of optical disc (OD) products<sup>30</sup> and game cartridges, continues to inflict serious losses, especially in markets with low Internet penetration, or where pirate console- or cartridge-based videogames are popular. In response, programs such as regularized surprise production plant inspections and exemplar (sample) disc collection must continue, and where unlicensed illegal activity is detected, copyright laws and specialized OD laws or regulations should be aggressively enforced. Similarly, unauthorized factory production of entertainment software in cartridge format persists in China, for export globally. Without sustained enforcement actions against these factories, and the prosecution of their owners and financiers, there will be little progress in curtailing this piracy problem.

In recent years, factory production of optical discs has somewhat waned as technological developments have meant fewer large-scale factories and smaller, more agile operations that “burn” music, books and reference publications, games, movies, and business software onto recordable media. CD-R or DVD-R “stack” bays (of ten or twenty discs when “daisy-chained”) are lightweight and can produce multiple discs in minutes. They are being set up anywhere, including in factories but also in shops where vendors can “burn to order,” blurring any distinction between retail piracy and pirate production.

## 9. Pay TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, as well as other content (music and sound recordings) costs right holders dearly.<sup>31</sup> Three key problems are identified by the industry. The first is unauthorized cable access, when individuals or groups illicitly tap into the lines of legitimate cable TV companies. This occurs mostly in major metropolitan areas, and may use circumvention or hacking techniques, codes, or devices. The second involves unauthorized operators who take broadcast signals by unauthorized means (hacked set-top boxes or “overspill” boxes from neighboring countries), replicate the signal and sell it to hundreds or even thousands of consumers, without paying for any of the content. The third is subscriber under-declaration, when cable companies do not pay for all the channels they use, or all the subscribers they serve.

Regulations imposing licensing on distributors of signals have in some countries been effective at weeding out unlicensed television distributors and consolidating the market into legitimate options (Lebanon is one example of this). In countries still experiencing major Pay TV theft, governments must take active steps to enforce. Pay TV signals are almost always encrypted; so in addition to strong copyright laws securing all the necessary exclusive rights, signal theft laws should prohibit the decryption of encrypted cable or satellite signals, as well as the onward use of the signals already decrypted (whether lawfully or not), without the authorization of the right holder of the content of the signal (and, if any, of the signal itself).

## 10. Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

The negotiation of bilateral and regional free trade agreements (FTAs) over the past fifteen years has proven to be of great value to the U.S. economy, and have included enforceable obligations for our trading partners to modernize their copyright law regimes and to improve enforcement procedures. The agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries, a true win-win for both parties. At the time of this submission, FTAs with 17 countries had entered into force. FTAs with Colombia, Korea, and Panama have not yet entered into force. The pending negotiations for a Trans-Pacific Partnership (TPP) FTA present an opportunity to expand the benefits of existing FTAs to a broader range of markets

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<sup>30</sup>OD include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Recordables (CD-Rs), digital versatile discs (DVDs), DVD-Recordables (DVD-Rs), universal media discs (UMD), and high definition formats such as Blu-ray.

<sup>31</sup>For example, the Cable and Satellite Broadcasters Association of Asia (CASBAA) estimated the cost of piracy of Pay TV and signal theft in Asia alone at well over US\$2 billion in 2010. See CASBAA, *Asia-Pacific Pay-TV Industry 2010*, at [www.casbaa.com/publications?page=shop.getfile&file\\_id=67](http://www.casbaa.com/publications?page=shop.getfile&file_id=67).



around the Pacific Rim. IIPA members believe that the TPP IP text should use the KORUS FTA as a baseline. Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other TPP negotiating countries, will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the current Administration's goals.<sup>32</sup> On January 13, 2012, IIPA filed the views of the U.S. copyright industries on Japan's, Canada's, and Mexico's expression of interest in the proposed Trans-Pacific Partnership Trade Agreement (TPP).<sup>33</sup>

## 11. Implementation of the WCT and WPPT

The WCT and WPPT provide a basic legal framework for the protection of online copyright. These treaties, in force since 2002, now have 89 adherents each. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical in the fight against online piracy, and is a key element of the "adequate and effective" copyright protection that is demanded under the Special 301 program. These standards include clarifying exclusive rights for the online world, and prohibiting through civil and criminal remedies the production of or trafficking in tools that circumvent technological protection measures used by right holders to prevent access to content or the exercise of exclusive rights. A number of key trading partners, including Canada, New Zealand, and Israel among developed countries, and India and Thailand among developing countries, have not yet ratified and/or properly implemented these treaties. The U.S., which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.<sup>34</sup>

One of the key aspects of WCT and WPPT implementation involves adequate and effective protection against the circumvention of TPMs. In order for such protection to be "adequate and effective," as required by the WIPO treaties, countries must address acts of circumvention, trafficking in circumvention devices, tools, and technologies, and the provision of circumvention services (such as the installing of "mod chips" into game consoles). Countries must also ensure that both TPMs that control access to content as well as TPMs that prevent the unauthorized copying or other exercise of exclusive rights are covered. Exceptions to protection in this area must be narrowly tailored to ensure that prohibitions on circumvention are not rendered ineffective. Civil and criminal (and where available, administrative) remedies should be provided

## 12. Market Access Barriers

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment that make it difficult to compete in some foreign markets on a level playing field. All efforts to crack down on piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Thus, the reduction of market access impediments is a key component of ongoing efforts to combat piracy. Among other forms, the market access barriers include:

- ownership and investment restrictions on copyright-related businesses;
- discriminatory or onerous content review/censorship systems;<sup>35</sup>
- discriminatory restrictions including on the ability to fully engage in the development, creation, production, distribution, promotion, and publication of copyright materials;

<sup>32</sup>We note that the KORUS FTA provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

<sup>33</sup>International Intellectual Property Alliance, *Re: Japan's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76478 (December 7, 2011), Docket No. USTR-2011-0018, January 13, 2012, at [www.iipa.com](http://www.iipa.com). International Intellectual Property Alliance, *Re: Canada's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76480 (December 7, 2011), Docket No. USTR-2011-0019, January 13, 2012, at [www.iipa.com](http://www.iipa.com). International Intellectual Property Alliance, *Re: Mexico's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76479 (December 7, 2011), Docket No. USTR-2011-0020, January 13, 2012, at [www.iipa.com](http://www.iipa.com).

<sup>34</sup>The U.S. implemented the WCT and WPPT by enacting Title I of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

<sup>35</sup>In China, for example, entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of their videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.



- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- mandatory blackout periods for films;
- local print requirements;
- onerous import duties or the improper assessment of duties on an ad valorem basis;<sup>36</sup> and
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP.<sup>37</sup>

Whatever form they take, whenever such market access restrictions impede the entry of legitimate products, they make it easier for pirate operations to fill the void, become de facto “exclusive” distributors of the products, and cement strong loyalties with their consumer base that make them even harder to dislodge.

U.S. officials should continue to strive to open markets and eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

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## E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide high levels of protection for copyright, more effective policies and tools to enforce that protection, and freer, more open markets. To meet the constantly evolving threats to copyright worldwide, our country should remain committed to a flexible and innovative response to this threat. Special 301 remains one cornerstone of the U.S. response, and we urge USTR and the Administration to use Special 301 and other trade tools available to encourage the countries identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide.

We look forward to our continued work with USTR and other U.S. agencies on meeting the goals identified in this Submission.

Respectfully submitted,

/Steve Metalitz/  
/Michael Schlesinger/  
/Eric Schwartz/  
/Amanda Wilson Denton/

Counsels for  
International Intellectual Property Alliance

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<sup>36</sup>*Ad valorem* duties are based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e. the physical materials which are being imported). This is a growing, dangerous, and very costly phenomenon to the film industry. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services*, that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

<sup>37</sup>As an example, over the past several years, China has been rolling out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. These include policies providing government procurement preferences for goods or services with locally-owned or locally-developed IP. The Chinese government has made a series of commitments in bilateral negotiations with the United States to eliminate such policies that link government procurement to where IP is owned and developed, including most recently at the US-China Joint Commission on Commerce and Trade (JCCT) negotiations in November 2011.