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Susan F. Wilson
Director 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 2014 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 79 Fed. Reg. 420 (Jan. 3, 2014)

Dear Ms. Wilson:

The International Intellectual Property Alliance (IIPA) provides this response to the above-captioned Federal Register Notice that invites “written submissions from the public concerning foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”

Under Section 182 of the Trade Act of 1974 (Trade Act) as amended (19 U.S.C. 2242), the United States Trade Representative (USTR) is required annually to identify such countries and to “determine which, if any, of these countries to identify as Priority Foreign Countries,” i.e., whether “[a]cts, policies, or practices that are the basis of a country’s identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.” USTR has also created two additional lists, the Priority Watch List and the Watch List, and places a trading partner on one of those lists if “particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons that rely on intellectual property protection.” The entire process is commonly referred to as the Special 301 review.

IIPA has participated in every Special 301 review 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 and territories. In this year’s filing, including this Submission Letter and appendices, IIPA reports on 42 countries/territories noted in the chart in Section C of this Submission Letter, and mentions 4 additional countries in this letter for issues related to bilateral, regional, or multilateral IPR obligations worthy of discussion.

IIPA requests that Ukraine be maintained as a Priority Foreign Country. IIPA also requests that 9 countries appear on the Special 301 Priority Watch List and that 19 countries appear on the Special 301 Watch List. IIPA has also recommended that USTR conduct an Out-of-Cycle Review (OCR) later in 2014 on Italy and Spain. IIPA will also file under separate cover a Notice of Intent to Testify at the February 24, 2014 public hearing on Special 301.



A. THE IIPA'S INTEREST IN THIS FILING AND SPECIAL 301

The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open 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. These include all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service; entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, 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](#), [BSA | The 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 2013, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc. The study tracks the economic impact and contributions of U.S. industries creating, producing, distributing, broadcasting or exhibiting copyright materials, including computer software, videogames, books, newspapers, periodicals and journals, motion pictures, music, and radio and television programming. For the first time, we reported that the "core" copyright industries added over \$1 trillion in value to the U.S. economy in a single year, accounting for almost 6.5% of the total U.S. gross domestic product (GDP). These industries employed nearly 5.4 million U.S. workers – nearly 5% of the total private employment sector – with jobs paying an average of 33% more than the rest of the workforce. They also grew at an aggregate annual rate of 4.7%, more than twice the rate of growth for the U.S. economy. The core copyright industries accounted for \$142 billion in foreign sales and exports, far more than sectors such as aerospace, agriculture, food, and pharmaceuticals and medicines.¹ The link between copyright protection and economic growth is documented by the World Intellectual Property Organization (WIPO) in its report, *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), compiling studies employing virtually the same agreed-upon methodology in 40 countries.² Other studies have measured the contribution of certain sectors to national economies,³ or the multiplier effects of reducing piracy on contribution to national GDP, job growth, and tax revenues.⁴

¹See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, November 19, 2013. The report and summary can be accessed at 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.

²WIPO *Studies on the Economic Contribution of Copyright: Overview* (2013), available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf, last accessed December 17, 2013. In 2003, WIPO published a guidebook on the economic parameters to develop such studies entitled *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication No. 893) (2003), at http://www.wipo.int/export/sites/www/freepublications/en/copyright/893/wipo_pub_893.pdf. The Guide, developed by an experts' group, describes methodologies for measuring the role of copyright industries in domestic economies. These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy.

³For example, the Motion Picture Association Asia Pacific has issued a series of "Economic Contribution of the Film and Television Industry" studies for India (2010), Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), and Hong Kong (2009). See Motion Picture Association Asia-Pacific, *Research and Statistics*, at http://mpa-i.org/index.php/research_statistics.

⁴See, e.g., BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf, and numerous other country studies linked from <http://portal.bsa.org/piracyimpact2010/index.html>.



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 market access barriers to U.S. copyrighted products and services. Content industries are forced to face unfair competition from those who 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 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),⁵ estimated 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. Others have issued reports on the economic consequences of piracy for specific industry sectors.⁶ On January 14, 2014, the United Nations Office on Drugs and Crime (UNODC) launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeit goods.⁷ Rampant piracy not only damages existing authorized distribution channels, but also impedes the evolution of legitimate new channels for distribution.

B. SUMMARY OF THE IIPA 2014 SPECIAL 301 SUBMISSION

The IIPA 2014 Special 301 Submission provides information intended to assist the U.S. Government in defining plans of action for the year ahead to reduce global piracy levels and to open markets to U.S. materials protected by copyright in the identified countries/territories. Section C of this Submission Letter provides the IIPA recommendations for the 2014 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.⁸ 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 1989.⁹

⁵Frontier 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).

⁶The Motion Picture Association has commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan* (2011) and *Economic Consequences of Movie Piracy: Australia* (2011). BSA's most recent study estimating the software piracy rate and commercial value of unlicensed software in more than 100 markets is at www.bsa.org/globalstudy. BSA plans to release an updated study in the second quarter of 2014.

⁷See 'Counterfeit: Don't buy into organized crime' - UNODC launches new outreach campaign on \$250 billion a year counterfeit business, UNODC website, January 14, 2014, at <http://www.unodc.org/counterfeit/>, accessed January 24, 2014. The campaign, *Counterfeit: Don't Buy Into Organized Crime*, informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk, and contributes to other ethical and environmental concerns. See also International Intellectual Property Alliance (IIPA), *Statement of IIPA Hailing United Nations New Campaign "Counterfeits: Don't Buy Into Organized Crime"*, January 14, 2014, at http://www.iipa.com/pressreleases/2014_Jan14_IIPA_Statement_UN_Anti_Counterfeit_Program.PDF.

⁸Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Amanda Wilson Denton, Eric Schwartz, and Steven Metalitz, 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.

⁹Many 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 countries/territories named by IIPA are particularly vulnerable.



C. IIPA RECOMMENDATIONS FOR THE 2014 SPECIAL 301 LISTS

This year IIPA has recommended 42 countries/territories: for designation as a Priority Foreign Country, or for placement on the Priority Watch List or Watch List; or noted as Special Mention or Additional Countries for copyright, enforcement, and/or market access-related concerns.

PRIORITY FOREIGN COUNTRY	PRIORITY WATCH LIST	WATCH LIST	OUT-OF-CYCLE REVIEWS	SPECIAL MENTION
Ukraine	Argentina Chile China (306) ¹⁰ Costa Rica India Indonesia Russian Federation Thailand Vietnam	Belarus Brazil Bulgaria Canada Ecuador Greece Israel Kazakhstan Kuwait Mexico Romania Saudi Arabia Switzerland Taiwan Tajikistan Turkey Turkmenistan United Arab Emirates Uzbekistan	Italy Spain	Hong Kong Malaysia Philippines
				ADDITIONAL COUNTRIES
				Albania Bosnia and Herzegovina Estonia Georgia Macedonia Malta Moldova Montenegro
1	9	19	2	11

D. INITIATIVES OR CHALLENGES FOR 2014: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, AND STRENGTHEN LAWS

This submission and its appendices aim to define and seek implementation of solutions to significant commercial hurdles faced by the copyright industries of the U.S. The following list of cross-cutting initiatives and challenges summarizes actions governments must execute to reduce copyright piracy, open markets to legitimate U.S. copyright exports, and ensure that adequate legal structures are in place to lower piracy levels.

1. The Need for Deterrent Enforcement Responses to Copyright Piracy

Copyright piracy increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes:

- the illegal copying, uploading, downloading, making available, communicating, and streaming of copyright materials on the Internet or mobile networks, or contributing to, benefitting from, promoting, or otherwise inducing the same, including, for example, websites or services that often cloak themselves under the

¹⁰The notation “306” refers to monitoring of a country’s compliance with trade agreements with the U.S. under Section 306 of the Trade Act.



guise of legitimacy with advertising and payment methods, giving consumers the impression they are authentic;

- the unauthorized use of software or other copyright materials by enterprises or governments;
- the illegal camcording of movies from theaters;
- the illegal photocopying or pirate offset printing of books;
- the illegal public performance, broadcast, or dissemination via cable of audiovisual works or sound recordings; and
- hard-disk loading of software or other copyright materials onto computers, laptops, smart phones, tablets, or other mobile devices without authorization or license.

Related to piracy are activities such as:

- the development, manufacture, distribution, or deployment of (and services related thereto) circumvention technologies, software, devices, or components, including game copiers, mod chips, key codes and cracks, used to access, copy, or otherwise use copyright materials protected by technological protection measures (TPMs);
- the development, manufacture, or distribution of “media boxes” including “HD players,” in which gigabytes or terabytes of storage space can accommodate hundreds of high definition movies and other content, and boxes that can directly link to websites providing illegal downloading or streaming, and to televisions and smart TVs for displaying the unauthorized content;
- the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and
- the development, manufacture, or distribution of pay TV decryption technologies, devices, or components; or the unauthorized decryption of, or line-tapping to illegally obtain access to, pay TV signals.

Too often, whether due to lack of political will or inadequate rule of law, countries fail to address piracy effectively. The overarching objectives for the copyright industries therefore remain: 1) to secure globally effective legal frameworks capable of providing deterrent enforcement against copyright piracy; and 2) 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”¹¹ to infringement as the minimum required by the World Trade Organization’s TRIPS Agreement,¹² through civil, administrative, and criminal action, and effective adjudication in the courts;¹³
- train, build capacity, and empower enforcement authorities to investigate and prosecute copyright offenses;
- update laws and enforcement tools to meet the current piracy challenges, including organized crime and cybercrime syndicates;¹⁴

¹¹For 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.

¹²*Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), Art. 41.

¹³In many countries, specialized IP courts have been established, in addition to special IP or cybercrime investigative units with police and prosecutors. In the most successful examples, such specialized courts or units are making a difference in reducing piracy.

¹⁴Piracy (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



- direct government agencies, state-owned enterprises, contractors, and educational institutions, to use only legal software, legal copies of textbooks, educational materials, professional and scholarly publications, 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 (ISPs) with all content owners, including notice and takedown systems for the hosted environment, and effective and fair mechanisms to deal with repeat infringers, non-hosted infringements, and infringements on foreign websites; and
- enact and enforce measures to make it illegal to use or attempt to use an audiovisual recording device in an exhibition facility to copy or transmit a motion picture, in whole or in part.

2. Internet Piracy

Transformative developments on the Internet and mobile (WAP, 3G, Wi-Fi) networks have created opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. Estimates suggest almost 2.8 billion individuals use the Internet as of 2013, according to the International Telecommunications Union (ITU). ITU estimates almost the same number of mobile and fixed broadband users, due to a surge in mobile broadband connectivity which has almost doubled in the past two years. This connectivity has had a positive transformative effect on many economies, and provides significant opportunities to copyright-intensive industries to build legitimate businesses based on their products and services. Unfortunately, the opportunities are compromised by the challenges of Internet and mobile piracy. According to NetNames, an astonishing 23.8% of all Internet bandwidth in North America, Europe, and the Asia-Pacific was devoted to copyright infringement.¹⁵ A similar 2011 study concluded that nearly half of all infringing activity occurred using BitTorrent, with the rest divided among cyberlockers, peer-to-peer (P2P) downloading and uploading, forums or bulletin boards, and streaming.¹⁶ Research also indicates there is a correlation between shutting down a major suspected piracy service, or improving enforcement legislation, and increases in legitimate distribution of copyright materials.¹⁷

The harm from Internet (and mobile) piracy cannot be overstated. Unauthorized downloading or streaming of a motion picture, for example, often sourced to a single illegal camcording incident, can decimate box office sales and harm subsequent release windows.¹⁸ Online and mobile piracy threatens the viability of licensed platforms, and erodes the capacity of artists, musicians, filmmakers, performers and songwriters to earn a living from their craft. Online piracy of entertainment software continues to be overwhelmingly

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; this has prevented enforcement activity by the private sector in many instances. Governments can step up to this challenge, including 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 (such as seizure or freezing of assets) to bear against syndicate operations involved in piracy. 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.

¹⁵David Price, *Sizing the Piracy Universe*, NetNames, September 2013 (available to registered users).

¹⁶Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).

¹⁷See, e.g., Brett Danaher, Michael D. Smith, Rahul Telang, Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, January 21, 2012, available at SSRN: <http://ssrn.com/abstract=1989240> or <http://dx.doi.org/10.2139/ssrn.1989240> (increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively relative to changes in the control group); Dianna Dilworth, *How to Stop Piracy: Carnegie Mellon Professor Michael Smith at DBW*, January 16, 2013, at http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw_b31162 (Carnegie-Mellon Economist Michael D. Smith indicates his research demonstrates that every 1% reduction in Megaupload usage translated into a 2.6-4.1% increase in legitimate digital sales).

¹⁸The motion picture industry's distribution patterns (including theatrical, on-demand, pay-TV, home video, and legitimate online services) have been undermined by the availability of Internet downloads or streaming of their films.



international, as reflected in ESA vendor monitoring of P2P and direct download activity.¹⁹ 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, as well as sites that traffic in illegally obtained subscription login credentials, and increasingly face online piracy of trade books (fiction and non-fiction) and academic textbooks. Counterfeit software products remain prevalent on certain auction and e-commerce sites, as well as on professional-looking sites that deceive consumers, selling well-packaged but poor quality counterfeit copies of software.

As one mechanism to bring to light concerns over businesses built on Internet and mobile piracy, the U.S. Government has launched, as part of the “Special 301” process, an “Out-of-Cycle Review of Notorious Markets.” Through this process, the U.S. Government has successfully identified key online and physical marketplaces that are involved in intellectual property rights infringements. IIPA has participated in each Notorious Markets OCR, most recently in October 2013, in which IIPA identified almost 80 notorious online marketplaces, some of the most accessed sites in the world.²⁰ The Notorious Market process has led to positive developments, including: closure of some Internet websites whose businesses were built on illegal conduct; greater cooperation from some previously identified “notorious” and other suspect sites; and the facilitation of licensing agreements for legitimate distribution of creative materials.

To effectively address Internet and mobile piracy, governments must attack both supply and demand. Education and criminal and administrative actions all have a role to play. A sound framework for civil actions, and legislation that creates incentives for network service providers to curb the use of their networks and services for infringing purposes, are also essential. Some of the solutions are quite straightforward. Governments must provide adequate legal frameworks for the protection of copyright online, including provisions that: implement the WCT and WPPT (discussed below); recognize online piracy as a form of cybercrime;²¹ and foster cooperation among stakeholders (including ISPs) in the online supply chain to combat online infringements.²² It is notable that online piracy rates in many of our FTA partners are quite high, including countries like Australia and Singapore which have unacceptably high rates of online piracy—at least for films and music. For free trade agreements to fulfill their promise of fostering legitimate commerce, it is critical that each our trading partners adopt measures to effectively address their serious online piracy problems.

Increasingly, the role of advertising and ad networks in sustaining piracy has come under scrutiny. Some companies have decided to take affirmative steps to terminate such practices.²³ In some cases, advertisers may be unaware that their advertisements appear on sites that facilitate access to infringing content. It is imperative that the ad networks that contract with site operators to feed ads on their sites make

¹⁹For 2013, ESA vendors identified Russia, Brazil, Italy, Ukraine, Spain, and India as the top countries in overall numbers of detected connections to select ESA member titles on public P2P networks.

²⁰IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, at http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf.

²¹Governments should join and implement the Budapest Convention, 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.

²²Many 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 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 and to address infringements in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.

²³See, e.g., Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads> (reporting decisions by Coca-Cola and Samsung to divest from *zing.com* over piracy concerns).



ethical business decisions. We applaud those who have already done so, and urge all the responsible participants in the online advertising ecosystem to act to ensure that such infringing websites do not benefit from their advertising activities.²⁴ Similar choices are being made by payment processors (online services as well as more traditional credit card companies) to halt services to pirate or counterfeit operations.²⁵ Finally, the role of search engines in the copyright value chain needs further scrutiny. As an indication that more needs to be done to establish the right framework for legitimate commerce in copyright materials, the music industry just noted its 100 millionth notice to a major search engine,²⁶ and a study conducted for the motion picture industry suggests that users searching for legal content are more often than not being directed to pirated content online.²⁷

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

The unauthorized use of software within enterprises, also referred to as “enterprise end-user software piracy,” remains a highly damaging form of infringement to the software industry. In the most typical examples, a corporate (or governmental) entity either uses pirated software exclusively, or else purchases one or a small number of licensed copies of software and installs the program on multiple computers well beyond the terms of the license. Client-server overuse, another common example of end-user piracy, occurs when more than the licensed number of 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 most or all of the expense of licensed copies of the software, thus giving them an unfair commercial advantage over their competitors who pay for their software. On a macroeconomic level, countries with high piracy rates compete unfairly with countries that have lower rates.²⁸ Sometimes enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. In many cases, this 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,²⁹ in order to reduce software piracy. The adoption of pre-established (statutory) damages for copyright infringement is also needed in many countries to provide predictability, encourage settlements, and provide “remedies which constitute a deterrent to further infringements,” as required by TRIPS Article 41.³⁰

The use of unlicensed software by government agencies remains a serious and widespread problem. Since the government is often a major, and in some cases the largest, buyer of software in many countries, this has a tremendous impact on sales of legitimate software. It also undermines the credibility of government enforcement efforts against software piracy and sets a bad example for private enterprises to follow.

²⁴Interactive Advertising Bureau (IAB), *Standards, Guidelines & Best Practices*, at <http://www.iab.net/guidelines/508676>.

²⁵ For example, the “CD Cheap” case, involving a criminal counterfeiting ring that employed 10,000 slave computers to sell counterfeit software, was shut down when financial institutions closed the merchant accounts of the sites involved, for violations of terms of service prohibiting fraudulent activities.

²⁶Cary Sherman, *Google's 100 Million Notices*, The Hill, January 13, 2014, at <http://thehill.com/blogs/ballot-box/195107-googles-100-million-notices> (noting the music industry had sent its 100 millionth copyright takedown notice to Google in January 2014, without a “demonstrable demotion of sites that receive a high volume of piracy notices”).

²⁷MilwardBrown Digital, *Understanding the Role of Search in Online Piracy*, 2013, at <http://www.mpa.org/resources/38bc8dba-fe31-4a93-a867-97955ab8a357.pdf>. The study found, “[t]he majority of search queries that lead to consumers viewing infringing film or TV content do not contain keywords that indicate specific intent to view this content illegally,” and “58% of queries that consumers use prior to viewing infringing content contain generic or title-specific keywords only, indicating that consumers who may not explicitly intend to watch the content illegally ultimately do so online.”

²⁸For example, China’s 77% 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 19% PC software piracy rate) pay on average for more than four out of five copies.

²⁹TRIPS Art. 61 requires that this remedy be available against corporate end-user piracy.

³⁰The U.S. has the lowest software piracy rate in the world, due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.



Moreover, the use of unlicensed software creates security vulnerabilities and risks for government agencies. Government software legalization problems arise in many countries, including China, Ukraine, and Korea.

- **China:** The Chinese Government has made numerous bilateral commitments to the U.S. and issued directives to ensure legal software use in government agencies at all levels (central, provincial, municipal, county) and in state-owned enterprises (SOEs). While the Chinese Government has implemented some efforts to legalize software use, it has not been comprehensive and significant problems remain. Fewer efforts have been implemented for the more commercially meaningful SOE sector. We urge the Chinese Government to implement comprehensive legalization programs for government agencies and SOEs that encompasses all types of software, have audit and verification systems, and utilize SAM best practices.
- **Ukraine:** The Ukrainian Government has also made bilateral commitments to the U.S. and issued directives to combat unlicensed software use by the government, but to date has taken woefully inadequate steps toward this result. Ukraine was designated a Priority Foreign Country in 2013 by the U.S. Government for several serious problems, including the “widespread use of infringing software by Ukrainian Government agencies.”
- **Korea:** The Korean Government agreed to obligations on government software legalization in the Korea-U.S. Free Trade Agreement (KORUS); yet there remains a significant problem with several ministries not taking steps to resolve the issue of substantial unlicensed software use.

Comprehensive government software legalization programs that utilize SAM best practices are the best way to address enterprise end-user piracy, both within government agencies, in SOEs (e.g., in China), and in the private sector. Governments should also take steps to ensure that businesses that provide goods and services under government contracts do not use unlicensed software.

End-user piracy is not limited to software but affects other copyright sectors as well. 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.

4. **Hard-Disk Loading, Mobile Device Piracy, and “Media Boxes”**

Not all retail piracy involves the sale of illegal copies directly. One example is “hard-disk loading,” performed by unscrupulous computer manufacturers and dealers who install copies of software without authorization from the copyright holder onto the internal hard drive of the personal computers they sell. Similarly, pirates operate stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material onto any device, cell phone, smart phone, tablet, mp3 player, external hard disk, pen, thumb, flash, or USB drive. Others provide an illegal “app” for a smart phone or tablet to illegally download content, especially in countries with significant mobile penetration and mobile broadband. Another relatively recent phenomenon involves the manufacture, distribution, and use of “media boxes” which facilitate massive infringement. These media boxes are generally manufactured in China and exported to overseas markets, particularly throughout Asia. They can be pre-loaded with hundreds of high definition (HD) motion pictures prior to shipment; loaded with content upon delivery; or plugged directly into Internet-enabled TVs, facilitating easy access to remote



online sources of unauthorized entertainment content including music, music videos, karaoke, movies, and TV dramas. Enforcement authorities must take effective action against these forms of piracy, or losses will mount.

5. Circumvention of Technological Protection Measures (TPMs)

Today, more consumers enjoy authorized access to more copyright works in more diverse ways and at more affordable price points than ever before. A major reason for this progress is the widespread use of TPMs to control and manage access to copyright works. Myriad innovative products and services are currently made available in connection with works protected by TPMs, and new business models that depend on such controls are emerging and being extended to new markets constantly. TPMs also ensure that works made available in hard goods, or in the online or mobile environment, 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). E-Books employ access and copy controls as well.

Unfortunately, just as content owners depend on TPMs to enable new means to disseminate creative content, there are those who build their entire business models around manufacturing and distributing technologies, software, devices, components, or tools (and services related thereto) to fill the demand for gaining unlawful access to the content or copying it. The “mod chip,”³¹ “game copier,”³² 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 TPM legal protection, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to implement such protections adequately or at all. Countries that lack TPM provisions not only fail to afford domestic protections for legitimate online business models, but also serve as a regional or global source of circumvention devices for those who live in countries where such devices and technologies are 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, especially immediately after a title’s theatrical exhibition window opens. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both) from the theater screen and/or sound system. 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 markets just after a film’s theatrical release, and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.

³¹There 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 access controls and allow the play of pirated games.

³²“Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.



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 2013, MPAA identified 819 total illegal recordings of its member company titles from cinemas around the world, including 286 video captures and 533 audio captures. This number does not include the numerous independent or local country films illegally camcorded; producers of these films also suffer gravely from illegal camcording. Anti-camcording legislation – outlawing the possession of an audiovisual recording device in a theater with the intent to copy or transmit all or part of a motion picture – is critical to stopping the rapid increase in camcording. Effective anti-camcording laws have now been adopted in many countries, leading to dramatic drops in the number of pirate titles sourced to those countries' cinemas.³³ The international community is also speaking with one voice on this issue.³⁴

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; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books. Unauthorized commercial copying of entire textbooks by copy shops on and around university campuses is common, often undertaken on a “copy-on-demand” or “print-to-order” basis (from electronically stored digital files) to avoid stockpiling. Commercial print piracy is prevalent in many developing countries, where unauthorized operations obtain masters or copies of books and run unauthorized editions off a printing press, in English or in unauthorized translations. While many pirated copies are rife with errors or obviously of inferior quality, in some cases sophisticated scanning and 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. Universities and educational institutions (especially those which are state-funded or operated) should do more to promote and adopt 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.

8. Optical Disc Piracy

Hard goods piracy, including optical disc (OD) products,³⁵ continues to inflict losses, especially in markets with low Internet penetration. As large-scale factory production of optical discs has waned, smaller, more agile operations that “burn” music, books and reference publications, video games, movies, and software onto recordable media, has increased. CD-R or DVD-R “stack” bays (of ten or twenty discs when “daisy-chained”) are lightweight and can produce multiple discs in minutes. Producers/vendors set up production or distribution operations in a wide variety of locations, including old factories, warehouses, or “burn to order” shops, often blurring any distinction between retail piracy and pirate production. In response,

³³Examples include Canada and Japan.

³⁴The 21 members of the Asia-Pacific Economic Cooperation (APEC) 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. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, adopted at 23rd APEC Ministerial Meeting, Hawaii, United States, November 11, 2011.

³⁵OD 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.



programs such as surprise OD production plant or shop inspections and exemplar (sample) disc collection should continue. Where unlicensed or illegal activity is detected, copyright laws or specialized OD laws or regulations should be enforced. As an example of the harm caused, high-quality counterfeit software, DVDs, Blu-ray discs, and box sets of music or audiovisual materials continue to be manufactured in China and find markets throughout Asia, the Middle East, and Africa. Without sustained enforcement actions against these factories or production or distribution hubs, and without prosecution of their owners and financiers, there will be little progress in curtailing this problem.

9. Pay TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet, costs right holders dearly. Other problems include: unauthorized tapping into the lines of legitimate cable TV companies; operators who take broadcast signals by unauthorized means (hacked set-top boxes or “overspill” boxes from neighboring countries), replicating the signal and selling it to consumers without paying for any of the content, a problem of growing severity in several countries in the Caribbean region, as well as Guatemala and Honduras; and rogue pirate TV channels that create their own broadcasts by playing a DVD and airing the signal on their system, a problem re-emerging in Egypt and the broader Middle East and North Africa (MENA) region. In most of these cases, the signals are encrypted, and pirates must circumvent or hack in order to access the content. Regulations and enforcement must therefore focus on prohibiting the trafficking in pay TV or signal theft devices or technologies, the unlawful 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 or of the signal. Licensing of broadcasters and cablecasters, and weeding out unlicensed television distributors, can also be helpful in addressing signal theft.

10. Implementation of IPR Provisions in Trade Agreements

The negotiation of multilateral trade agreements (such as the WTO TRIPS Agreement), as well as regional and bilateral free trade agreements (FTAs) or Trade Promotion Agreements (TPAs) over the past two decades, has proven to be of great value to the U.S. economy. These agreements feature enforceable obligations for our trading partners to modernize their copyright law regimes and improve enforcement procedures. These 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 all parties. In addition to TRIPS implementation, U.S. FTAs or TPAs with 20 countries have entered into force, most recently with Korea, Colombia and Panama in 2012.

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 around the Pacific Rim. The Government of Japan officially joined the TPP negotiations in 2013, bringing the total number of countries negotiating the agreement to twelve.³⁶ Through TPP, enhanced copyright and enforcement standards, building upon those agreed to by TPP negotiating parties that are also current FTA partners, Australia, Singapore, Chile, and Peru, and found in KORUS, should be extended to other countries in the region. Such an outcome will contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the Administration’s goals. IIPA also urges USTR to seek through the TPP negotiations opportunities to address the range of market

³⁶TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.



access impediments identified in various TPP negotiating countries.³⁷ The TPP E-Commerce chapter and market access provisions for services and investment should require TPP negotiating countries not only to eliminate discriminatory taxes and policies, but also to open markets to foreign competition, including in the creative and cultural sectors. We remain hopeful that the TPP negotiations will aid in the elimination of discriminatory barriers as well as bring copyright laws and enforcement regimes into line with evolving global norms.

In addition to implementation issues identified in various country reports in Appendix A, IIPA takes notice of the following countries for issues related to their bilateral, regional, or multilateral obligations in the area of intellectual property rights.

- **Antigua and Barbuda:** In January 2013, the Government of Antigua and Barbuda sought and obtained from the WTO approval to cross-retaliate against U.S. intellectual property rights worth \$21 million a year as a remedy in an unrelated trade dispute. At the opening of the 2014 session of the country's parliament, Governor General Dame Louise Lake-Tack, in her Speech from the Throne, reportedly confirmed that the Government of Antigua and Barbuda was making the "necessary amendments" to revise the country's intellectual property laws "to invoke the WTO-approved sanctions by removing any protection which U.S. intellectual property may have in Antigua and Barbuda."³⁸ IIPA's firm view has not changed, that suspending intellectual property rights is not the right solution, and that state-sanctioned theft is an affront to any society. Should the Government of Antigua and Barbuda determine to move forward in this manner, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would – by definition – fail to provide adequate and effective IPR protection as required under U.S. trade laws governing unilaterally-granted trade benefits such as those offered under the Caribbean Basin Initiative. In that event, we believe that the U.S. should take appropriate, immediate and robust action to uphold U.S. trade laws.
- **Colombia:** Colombia should be encouraged to take effective steps in 2014 to implement its TPA obligations and to increase the focus of law enforcement officials on needed anti-piracy actions on the streets of Colombia and online. With the January 23, 2013, decision of the Constitutional Court declaring the 2012 amendments to the Copyright Law unenforceable, Colombia is now nearly two years overdue in bringing its copyright law into compliance with the obligations that went into effect with the signing of the TPA in April 2012. We urge Colombia to take the necessary steps to finalize the implementation of the TPA, and in particular to pass copyright amendments restoring the provisions of the 2012 law, and also to address ISP responsibility consistent with the FTA. We look forward to Colombia taking prompt actions that reflect its commitment to building and maintaining a robust and modern intellectual property protection and enforcement regime for Colombian and U.S. creators alike.
- **Korea:** One important aspect of the IP chapter of the KORUS FTA was the commitment Korea made to ensure that its central Government agencies would utilize legitimate software. Software industry representatives have raised concerns about significant under-licensing of software within the Korean Government. Although the Ministry of National Defense has taken steps in the right direction, other Korean Government agencies have to date not taken sufficient action in response to these concerns. For example, auditing appears not to follow best practices in many circumstances and to be nonexistent in others. Korea also fails to provide adequate funding for at least some Korean Government agencies to

³⁷As an example, IIPA notes that Vietnam has some of the most restrictive market access barriers in the world for copyright materials.

³⁸The full text of Governor General Dame Lake-Tack's reported speech is available at http://ab.gov.ag/article_details.php?id=4640&category=38.



purchase the software they actually use. IIPA will be closely monitoring this issue in Korea and will consult closely with the U.S. Government on means to address it.

- **Morocco:** The Moroccan Government agreed to specific government software legalization commitments under the U.S.-Morocco Free Trade Agreement. However, concerns have been raised on behalf of U.S. industry about the failure of the Government to effectively ensure the compliance of certain ministries with these commitments.

11. Implementation of the WCT and WPPT

The WCT and WPPT, in force since 2002, provide a basic legal framework for the protection of online copyright. The WCT now has 91 adherents, while the WPPT has 92. 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. Implementing the WCT and WPPT includes express protection for 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). This is important since businesses and consumers can fully exploit copyright materials they receive over a network without ever making a permanent copy. Implementation also includes a treaties-compatible definition of “communication to the public,” including an interactive “making available” right. Finally, implementation includes prohibiting, through civil and criminal remedies the circumvention of TPMs (access and copy controls) and trafficking in circumvention technologies, software, devices, components, and services. A number of key trading partners, including New Zealand and Israel among developed countries, and Thailand among developing countries, have not yet either ratified or fully implemented these treaties. The United States, which was one of the first countries to implement these changes in its laws 15 years ago, should continue to make it a priority to encourage other countries to follow this path.³⁹ In the more than 17 years since the adoption of the WCT and WPPT at WIPO in Geneva, WIPO has taken some steps to encourage its members to join and implement the treaties, but more should be done.

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;⁴⁰
- discriminatory restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;

³⁹The United States 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.

⁴⁰In 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.



- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- periods during which governments prevent U.S. producers from opening their films, or onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);
- local print requirements;
- onerous import duties or the improper assessment of duties on an *ad valorem* basis;⁴¹
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP; and
- 1) restrictions on cross-border data flows, or 2) requirements that companies locate servers, data centers or other computing facilities in a country as a condition for market access; both of which impede the development of businesses involving software distributed via cloud computing and other digital services.

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 to eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates revenues, 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. Our country should remain committed to a flexible and innovative response to the constantly evolving threats to copyright worldwide. Special 301 remains one cornerstone of the U.S. response. We urge USTR and the Administration to use the Special 301 review and other trade tools to encourage the countries and territories 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,

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/Michael Schlesinger/
/Eric Schwartz/
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⁴¹*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).