

Piracy and IPR in the Publishing Industry

According to an assessment by the U.S. Chamber of Commerce, counterfeiting and piracy cost the United States nearly \$250 billion annually.¹ The Association of American Publishers (AAP) estimates that American publishers lost over \$600 million last year due to copyright piracy; and with the internet as a basis for reproduction and transmission, it seems this number will only grow in the years to come.² In Argentina, for example, a total of 1.2 million books under 800 titles are pirated every year with an estimated \$10 million annual loss in revenue.³ As the international community continues to grow and become increasingly interconnected, the importance of being able to adequately protect oneself or one's business worldwide cannot be understated.

I. What Constitutes Piracy?

Publishing piracy/copyright violation includes the unauthorized use, reproduction, and/or distribution of material, electronic or printed, that is covered by copyright law in a manner that violates one of the copyright owner's exclusive rights. A copyright does not cover ideas and information but only its particular expression in any given work. In the USA, the copyright holder has the exclusive right to, and authorize others to:

- Reproduce or copy the work for sale (Mechanical and Distribution Rights)
- Create derivative works based on the work
- Distribute copies of the work to the public by sale, rental, lease/lending or other transfer of ownership
- Perform or display the work publicly - this includes the right to perform the work publicly by means of a digital audio transmission in the case of sounds recording. (Performance and Broadcasting Rights)

These rights, however, are not unlimited in scope and are subject to a variety of limitations as explained in sections 107-121 of the 1976 Copyright Act. Some of the main limitations and exceptions are:

- Idea – Expression Dichotomy
A copyright gives the owner rights to a particular expression of a given idea and not to the overall idea or theme related to the work.
- Exhaustion of Rights
Permits the transfer or resale of a particular legitimate copy of a work by the owner of a copy, but does not allow the making or distribution of additional copies. *Some countries have parallel importation restrictions that allow the copyright holder to control the aftermarket.
- Fair Use/Fair Dealing
Copyright law does not prohibit all copying or replication of a work, this doctrine consists of four non-exclusive factors in order to analyze whether the copying and distribution of a work without permission from or payment to the copyright holder is legitimate.
 - The purpose and character of the use of copyrighted materials
 - The nature of the copyrighted work
 - The amount and substantiality of the portion used in relation to the work as a whole

¹ <http://www.reuters.com/article/newsOne/idUSTRE49C7EI20081013>

² http://www.publishers.org/main/IntCopyright/intCopyProtect/intCopy_01_01.htm

³ <http://www.laht.com/article.asp?CategoryId=12393&ArticleId=336281b>

- The effect of the use on the potential market value of the copyrighted material
- Accessible Copies
In many countries including the USA it is legal to produce alternative versions of a work without the express permission of a copyright holder in order to produce alternative versions (ex: in Braille or large type) in order to provide improved access for blind or visually impaired individuals. This does not allow for the translation of a work for resale in another language.

A full list of U.S. copyright limitations law can be found here:

<http://www.copyright.gov/title17/>

Additional resources concerning copyright law in the US can be obtained at:

www.copyright.gov

II. Venues for Piracy (Websites, file sharing, Pirate Bay, full printed books)

As new technologies have become increasingly available to the public, new ways of pirating media have also arisen. With the advent of the internet, new possibilities for displaying, sharing and networking have made it difficult to stop, or even track illegal activities. Many publishers and authors remain unaware of the Internet's role in placing their industry and products at risk as it provides easy access and versatility to any who seek it. A variety of venues for piracy, ranging from full printed copies of works to scans of works, making the material available to the general public for free, now confront legitimate copyright holders.

The problem has also grown worse in recent years. Only a few years ago, there were still a relatively few number of major person to person (P2P) networks, file sharing services, and websites that made such material easily available. Now, however, an expanding appetite for e-books and materials has spawned a bumper crop of pirated editions on Web sites like Scribd and Wattpad, and on file-sharing services like RapidShare and MediaFire.⁴ Many P2P networks such as Bit Torrent, eDonkey, Usenet, IRC and public FTP sites, commonly used as venues for piracy, also make it extremely difficult to monitor copyrighted material. This is crucial, as it is often the responsibility of individual copyright holders to monitor the use of their products.

These acts of piracy are committed by businesses as well as individuals. All too often, the kinds of piracy publishers and authors experience abroad bears no resemblance to college students downloading their favorite songs, movies, and books off the internet. In fact, for-profit, criminal syndicates are responsible for much of contemporary foreign piracy and are thriving abroad. Factories throughout China, Southeast Asia, Russia, and elsewhere are churning out millions of copies of copyrighted works, sometimes before they are even released by the right holders. These businesses have even grown so large and profitable that several industry reports in recent years suggest that dueling pirate operations have carried out mob-style "hits" against criminal competitors.

Even legitimate businesses find ways to exploit gaps in copyright law both domestically and abroad. For example, Google has also been targeted for having pirated many publishers' material by scanning full, or nearly full, texts onto its website and making them available to the public for free. Using Google Book Search, anyone can search through scans of millions of books Google has made available. Google has also made it clear it plans on scanning millions more. Although they have proposed a

⁴ <http://tech.mit.edu/V129/N26/long4.html>

settlement with authors and publishers, the issues of legality and the precedent that these actions set remain untouched.

III. International Copyright Law

When doing international business it is important to remember that there is **NO** international copyright law that will automatically protect your copyright. Protection against unauthorized use depends on country's individual laws. However, this does not mean that there is no protection available. An author or publisher who wants copyright protection in a country should first determine the extent of protection available for foreigners within the country, and the degree of IPR enforcement. There are in fact a number of international treaties that focus on the issue of IPR and international copyrights.

- **Berne Convention for the Protection of Literary and Artistic Works**

The Berne convention is the oldest international treaty in the field of copyright, and sought to provide a more uniform and comprehensive system for international copyright law. In order to achieve its goal "to protect, in as effective a manner as possible, the rights of authors in their literary and artistic works," the Berne Convention has undergone a number of changes in order to remain effective. Since its first iteration in 1886 it has undergone revisions starting first in Berlin in 1908, and later in Rome in 1928, Brussels in 1948, Stockholm in 1967, and Paris in 1971.

The foundation of the convention focuses on three basic principles. The first principle is "national treatment" which allows works originating in one member state to be afforded the same rights and protections that each of the member states would grant their own nationals. The second foundation is automatic protection, meaning that no formality of registration, deposit etc. is required to receive national treatment. Lastly, there is independence of protection, according to which, the availability and use of rights granted in other countries is independent of protection from the country of origin of the work.

In particular, the convention is designed to operate for the benefit of the author and his successors in title. Both the published and unpublished works of authors are protected for nationals/residents in a member country OR for authors that first publish their works in a member country or concurrently in a non-member country. Specifically, the convention grants exclusive rights of translation, reproduction in any manner including audio or visual recording, performance and broadcasting, as well as adaptation rights to the rights holder. "Moral Rights" are also provided for the author allowing an author to claim a work and to object to any distortion, mutilation, or other modification or derogatory action related to the work which would be prejudicial or harmful to his/her honor or reputation.

- **World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)**

After realizing that more needed to be done in order to internationally protect the rights of copyright holders, and that "guided development" of national programs to combat piracy were deficient, the WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions adopted two treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 1996. These treaties can be seen as continuations of the Berne Convention because they ensure that no weakening of author's rights is to occur, and that the treaties will grant more extensive rights and contain no provisions contrary to the Berne Convention. These treaties also stipulate that any interpretations of the treaty that diminish rights protection below levels established in the Berne Convention will be considered unacceptable.

The WCT also has provisions to avoid misunderstandings between other treaties by stating that the treaty “shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties,” such as the Agreement on Trade Related Aspects of International Trade (TRIPS). The main provisions of the WCT cover issues pertaining to: the rights applicable to the storage and transmission of works in digital systems, the limitations on and exceptions to rights in a digital environment, technological measures of protection, and rights management information.

- Storage of Works in Digital Form

The conference states that “The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.” This also applies to storage of materials via a digital medium since it is still classified as a reproduction, however, the definition of “storage” has been debated and justifiable exceptions have been made.

- Transmission on Digital Networks

In an effort to grant copyright owners the exclusive right of authorization for the dissemination of their work over the internet or similar networks, differences in legal characterizations of digital transmissions across national law and the complexity of the situation led to an “umbrella solution.” This solution stated “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them,” allowing the particulars to be dealt with by national legislatures. Additionally, a statement was adopted attempting to clarify liability issues of service and access providers for digital access networks: “It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).”

- Limitations and Exceptions in the Digital Environment

When defining the limitations and exceptions to the treaty, the drafters realized that they could not foresee all possible problems so issued this statement: “It is understood that the provisions of Article 10 [of the Treaty] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” A three-step test is used to determine viable limitations and exceptions.

- Rights Management Information

Under the treaty, measures of protection and rights management information necessary to license and monitor uses are left to the interested right-owners, however; legal provisions also exist under articles 11 and 12 of the treaty. Rights Management Information is defined in the treaty as “information which identifies the work, the author of

the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”

Article 11 stipulates that contracting parties must provide adequate and effective legal remedies and protection against the circumvention of effective technological measures used by authors in connection with either the exercise of their rights under this treaty or the Berne Convention or that restricts acts, in respect to their works, not allowed by the authors concerned or permitted by law.

Article 12 of the treaty requires Contracting Parties to “provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention, (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.” Infringement of rights includes both exclusive rights and rights of remuneration. Additionally, the creation or implementation of rights management systems that impose formalities not permitted under the Berne Convention or this treaty, such as prohibiting the free movement of goods, or impeding the rights of the rights holder, as set forth under this treaty are prohibited.

- **Agreement on Trade-Related Aspects of International Trade (TRIPS)**

The TRIPS agreement is an international treaty administered by the World Trade Organization (WTO) and was originally negotiated at the end of the Uruguay round of the General Agreement on Tariffs and Trade (GATT) in 1994. TRIPS introduced intellectual property law into the international trading system for the first time, and remains the most comprehensive international agreement to date that focuses specifically on intellectual property. Intended to set minimum standards for intellectual property rights (IPR) regulation, the TRIPS agreement includes several requirements that nations’ laws must meet for copyright rights. The TRIPS agreement has since undergone a clarification of its scope, in the form of the Doha Declaration in 2001, in response to developing countries’ concerns that developed countries were insisting on an overly narrow interpretation TRIPS.

TRIPS is currently the most important multilateral instrument for the globalization of intellectual property law because ratification of TRIPS is a requirement for all WTO member states. As a result, any country seeking the easy access to international markets that can be obtained through WTO membership must, at minimum, enact IPR legislation as stipulated by TRIPS. In accordance with the WTO charter, treaty obligations are to apply equally to all member states, however; realizing that many developing countries had no current legislation or enforcement mechanisms concerning IPR, developing countries were allowed extra time to implement the applicable changes to their national laws. Expiring in 2005 for developing countries, this transition period has since been extended to 2016 for the worlds least developed countries and could possibly be extended further.

TRIPS, much like previous agreements concerning copyrights, has a number of objectives including the reduction of distortions and impediments to international trade, the promotion of effective and adequate protection of IPR, and ensuring that the measures and procedures to enforce IPR do not themselves become barriers to legitimate trade. These IPR protection and enforcement objectives also fall under the

caveat that they should contribute to the promotion of technological innovation and the transfer/dissemination of knowledge, while balancing the rights and obligations of producers and consumers to mutual advantage, and be conducive to social and economic welfare.

- General Provisions

The TRIPS agreement, in deference to other previous international treaties focusing on IPR related issues that have preceded it and their progress, sets initial standards for compliance requiring that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention in their most recent versions be met. Therefore, with the exception of the Berne Convention's provisions on moral rights, all of the main provisions of these conventions are incorporated by reference, in Articles 2.1 and 9.1 of the TRIPS agreement, and become obligations under TRIPS between WTO/TRIPS member countries. Building on this foundation, the TRIPS agreement adds a number of additional obligations concerning matters that previous conventions either did not address or were seen as having addressed inadequately.

Common to all categories of IPR covered by the agreement, the regulations pertaining to national and most favored nation (MFN) treatment of foreign nationals cover obligations encompassing not only substantive standards of protection, but also issues involving the availability, acquisition, scope, maintenance, and enforcement of IPR and its use as described in the agreement. The concept of National Treatment prohibits discrimination between a member state's own nationals and nationals of other member states, while the MFN treatment clause prohibits discrimination between nationals of other Member-States. It should be noted, however, that there are some limited exceptions to the TRIPS MFN obligations. An example of one of these limitations would be that exceptions allowed under the preexisting WIPO IPR conventions, are also allowed under TRIPS. Additionally, where exceptions allow material reciprocity, a consequential exception to MFN treatment is allowed.

It is also important to note that, whereas previous treaties left the settlement of IPR disputes solely under the jurisdiction of civil courts, TRIPS disputes are settled using WTO dispute settlement mechanisms. While not providing an immediate recourse for the resolution of individual IPR issues, WTO dispute settlement adds an option for governments to advocate on behalf of industries. An example of how this works in practice can be found in the section entitled "WTO Dispute Settlement" under the Special 301 Report heading.

- WTO Dispute Settlement

While the U.S. continues to pursue the resolution of ongoing WTO-related disputes, the most efficient and preferred method of resolving IPR concerns continues to be through bilateral dialogue. Here is an example of how the WTO dispute settlement process works.

- April 2007 – The United States requested WTO dispute settlement consultations with China concerning deficiencies in China's legal infrastructure for the protection and enforcement of copyrights and trademarks on a wide range of products. After consultations failed to resolve the issue the U.S. requested the formation of a WTO panel to review the situation.
- September 2007 – A WTO panel was established to examine the case.
- March 2009 – The WTO Dispute Settlement Body (DSB) filed a report ruling in favor of the U.S. stating that: China's denial of copyright protection to works that do not meet Chinese content review standards was in violation of TRIPS and that China's customs regulations cannot allow the public auction of seized counterfeit goods after only removing the infringing mark. In regards to U.S. claims

pertaining to China's thresholds for criminal prosecution and conviction of counterfeiting and piracy: the panel found that it needed additional evidence before it could uphold U.S. claims that China's criminal thresholds are too high under Article 61 of TRIPS requiring that criminal enforcement measures must reflect and respond to the realities of the commercial marketplace.

- Copyright Provisions

Recognizing that the Berne Convention, incorporated in the TRIPS agreement, already provided adequate basic standards for copyright protection, it was determined that it (Articles 1 through 21 and Appendix of the Berne Convention of 1971) should be used as the foundation for expanding existing levels of copyright protection. Excluding the rights conferred in Article 6*bis* of the Berne convention pertaining to Moral Rights (see above) or rights derived from this article, the provisions of the Berne Convention cover issues such as the subject matter to be protected, minimum terms of protection, and the rights to be conferred and permissible limitations to copyright holders. The Appendix covers some limitations to the right of translation and reproduction allowed by developing countries under certain conditions.

In addition to the aforementioned basic standards set down in the Berne Convention, the TRIPS agreement sought to further clarify and include certain issues.

- Article 9.2 of TRIPS reinforces that copyright protection extends only to specific expressions of ideas and not to the ideas, procedures, methods of operation, or mathematical concepts involved.
- Article 10.1 provides that the source or object code of a computer program, regardless of form, shall be protected as a literary work under the Berne Convention. This means that only the limitations applicable to literary works may be applied to computer programs and further mandates that the general term of protection of 50 years applies to computer programs without the possibility of application of shorter terms under the photographic works and works of applied art provisions.
- Article 10.2 clarifies that databases, and other data or material compilations, shall be protected under copyright, provided the selection or arrangement of its contents constitute intellectual creations, even in cases where the non-copyrighted data is included. This provision also confirms that regardless of their form, whether machine readable or other, that databases must be protected and that such protection shall not extend to the data or material itself while at the same time not prejudicing any preexisting copyrights within the data or material itself.
- Article 11 provides that authors shall, in certain circumstances, be able to prohibit the commercial rental to the public of originals or copies of their copyrighted work given that the such rentals has led to extensive copying of the work materially impairing the exclusive rights of reproduction conferred in that member state to authors and their successors in title.
- In clarification to Article 7(1) of the Berne Convention, referring to the terms of copyright protection, protection shall be awarded for the life of the author and 50 years after death. In certain cases, as defined in paragraphs 2 through 4 of the article (BC), allowances were made for shorter terms; however, Article 12 of the TRIPS agreement supplements this section by affirming that: whenever the protection of a work (excluding photographic and works of applied art) is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication,

or, in situations where authorized publication does not fall within 50 years of the making of the work, 50 years from the end of the calendar year of its creation.

- Article 13 requires member states to confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with the standard use of a work nor unreasonably interfere with the legitimate interests of the rights holder. This provision applies to all limitations and exceptions previously permitted under the Berne Convention and Appendix, as incorporated under TRIPS, while clearly stipulating that such limitations and exceptions must be applied in a manner that does not infringe upon the legitimate interests of the rights holder.

More on International Treaties and conventions concerning International

Copyright Law and IPR can be found below:

World Trade Organization (WTO)

WIPO International Treaties and Conventions

Universal Copyright Convention (UCC)

Additionally, for a more comprehensive list of U.S. Government, Private, and Inter-Government IPR resources please visit: http://www.stopfakes.gov/sf_who.asp

Treaties Cannot Compel Enforcement

For all the progress that has been made through international treaties such as TRIPS, the WCT and WPPT, and FTA's, the reality is that these laws require enforcement to be meaningful. Laws do not enforce themselves; they require conscious action from publishers and authors policing their materials all the way up to the governments and security forces that impose and implement them. There can be many reasons for a failure in enforcement; some major obstacles include a lack of competent police, prosecutors, and/or judges. Often multiplying the problem of insufficient resources is also a lack of political will to enforce copyright laws. While training programs can attempt to alleviate some of these problems, a lack of political will often negates the benefits of such endeavors.

In the U.S., a good system of copyright protection is considered a critical element in developing domestic creative industries that drive economic development. We must also recognize that not all countries share this view. Many are willing to sacrifice the long-term social and economic benefits that can come from the development of these industries in favor of instant gratification. Unfortunately, these pirate operations provide jobs and income in many developing countries. Worse, some take the regrettable view that paying for legitimate copies of works is merely an exercise in sending money out of their country to foreign rights holders without recognizing that these actions undermine the ability of copyright to encourage and develop their nation's own creative industries and culture. Politically, these views also overlook the potential benefits that could be derived from tax revenues that legitimate business would pay, as well as the good jobs and income that come with the increase in foreign investment that is encouraged by the establishment and enforcement of good copyright protection systems.

Such countries are often simply unwilling to commit the resources necessary to provide effective enforcement of copyright. This problem is made even worse in countries where the pirating industry supports a large number of people or is responsible for a significant amount of cash-flow. At best, these countries will do the minimum they need to do in order to prevent excessive trade friction with the United States and its

other trading partners. In recent years, some like-minded countries have even worked together at the international level to weaken existing international standards of copyright protection. These countries' arguments are often framed in terms of encouraging development or cultural diversity, and premised on the notion that copyright protection is antithetical to the interests of developing countries. Fundamentally, what we see is a challenge and backlash against TRIPS and other such agreements. For this very reason, as we continue to work hard for progress in individual countries enforcement, we must also remain vigilant and keep a close eye on attempts to undermine established international standards of copyright protection with the understanding that, without proper enforcement, these treaties are powerless.

IV. Countries that Tolerate Piracy and the Special 301 Report

The Congressional International Anti-Piracy Caucus highlighted onerous piracy problems in five countries in particular—China, Russia, Canada, Spain and Mexico. Notorious web sites operating in both China and Russia disseminate electronic or scanned copies of U.S. books and journals without authorization, threatening to undermine the market for legitimate products. In China, companies such as Kangjian Shixun are cooperating with government-run libraries to obtain and disseminate electronic files of scientific and medical journals to legitimate producers' primary customers. In Russia, selected sites have been featuring illegal copies of U.S. publishers' works for years. In both cases, governments are looking the other way. Canada and Spain, in turn, lack an adequate legal infrastructure to deal with Internet-based infringements. The cooperation of internet service providers (ISPs) in curbing unauthorized practices is critical in creating a robust online marketplace in the future. AAP commended the Caucus for recognizing that neither Canada nor Spain has provided a climate that encourages this crucial cooperation. In Mexico, book and journal publishers continue to experience significant illegal photocopying of academic materials on and near university and school campuses.⁵

Every year the Office of the United States Trade Representative (USTR) conducts a review of the global state of IPR protection and enforcement. In an effort to promote and maintain effective international IPR standards, the Special 301 Report seeks to address broad global trends and highlight positive accomplishments in the IPR arena, while also identifying growing and ongoing concerns with international trading partners. The designations and actions in this report are a product of continued consultations with affected stakeholders, foreign governments, Congressional leaders, as well as U.S. government interagency discussions. The 2009 iteration of the Special 301 Report examined issues of IPR protection and enforcement in 77 countries, resulting in 46 countries being selected for inclusion in the Priority Watch List, Watch List, or Section 306 Monitoring categories. USTR will also conduct Out-of-Cycle Reviews (OCRs) on a number of trading partners to monitor IPR progress and consider their placement in the Special 301 Report.

- **Priority Watch List:** China, Russia, Algeria, Argentina, Canada, Chile, India, Indonesia, Israel, Pakistan, Thailand, and Venezuela
- **Watch List:** Belarus, Bolivia, Brazil, Brunei, Colombia, Costa Rica, Czech Republic, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Hungary, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru,

⁵ http://www.publishers.org/main/PressCenter/Archives/2009_May/AntiPiracyCaucus2009.htm

Philippines, Poland, Romania, Saudi Arabia, Spain, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam

- **Section 306 Monitoring:** Paraguay
- **Out-of Cycle Reviews:** Fiji, Israel, Philippines, Poland, Saudi Arabia

Internet and Digital Piracy

As the availability of broadband Internet services continues to increase worldwide, the use of the Internet as a mechanism for the dissemination of copyright-infringing products and materials becomes increasingly problematic. Specifically, Internet piracy has been noted as a significant concern in a number of trading partners such as Canada, China, Greece, Hungary, India, Indonesia, Korea, Malaysia, Philippines, Poland, Romania, Russia, Spain, Taiwan, Ukraine, and Vietnam. These IPR infringements range from the piracy of telecasts, music, films, games, to scanned books and are increasingly being accessed not only through media such as computers but also cellular phones, smart devices, flash drives and other mobile technologies. The U.S. government is actively seeking new ways to combat these issues and continues to urge governments to ratify and implement the WIPO Internet Treaties in order to provide the tools necessary to protect copyrighted materials in the digital environment.

Positive Developments on IPR Protection & Enforcement

- **Korea** has been removed from the Special 301 Watch List recognizing significant improvements made during the previous year. This is coupled with the Korean Government's continued policy direction of improving its IPR regime.
- **Taiwan** is being removed from the Special 301 Watch List following an OCR. While under review, Taiwan has established a Specialized IPR Court and made progress in implementing the Ministry of Education Action Plan for Protecting IPR on School Campuses. Additionally, Taiwan's legislature has enacted a new law providing limitations on Internet Service Provider (ISP) liability given that ISPs establish and follow certain procedures including an expeditious notice-and-takedown and Taiwan prosecutors have recently initiated significant prosecution connected to P2P networks under 2007 reforms to Taiwan's copyright law.
- **China** was commended for its efforts during the Beijing Olympics when its government launched a coordinated crackdown on unauthorized retransmission of sporting events and online activities related to the Olympic Games. These efforts resulted in a reported 453 online infringement cases, ultimately leading to 192 sites being shut down, 173 sites being required to remove the infringing content, 88 sites receiving administrative punishment, and 10 cases being referred for criminal prosecution. This episode demonstrates that, when the Chinese Government chooses to exercise its political will to address an IPR issue, it can yield results.
- **Russia** has acceded to the WIPO Internet Treaties and has made progress combating software piracy.
- **Chile** has acceded to the Patent Cooperation Treaty and has created a special division within the Chilean police force to deal with IPR related crimes.
- **Egypt** issued the first jail sentences for IPR offenses, in several criminal cases involving software piracy.

- **Saudi Arabia** established a website resource for its Violations Review Committee providing information about copyright prosecutions and court cases increasing transparency for rights holders.
- **Sweden** recently convicted four defendants for their connection to the PirateBay website, a well-known virtual market for copyrighted materials. Additionally, Sweden has implemented a new measure allowing rights holders involved in civil proceedings to find the identities of individuals implicated in the unauthorized exchange of digital content from ISPs.
- **Vietnam** has passed a circular criminalizing commercial scale copyright and trademark infringement in an effort to meet TRIPS obligations.

Priority Watch List Countries

China

China's compliance with its TRIPS obligations and IPR enforcement remain top priorities for U.S. trade representatives who look forward to working with China to implement the WTO Dispute Settlement Body's recommendations and rulings from the *China – Measures Related to the Protection and Enforcement of Intellectual Property Rights* case. While the shared goal of significantly reducing IPR infringement throughout China has yet to be realized, the Chinese Government continues to show increased interest in its largely ineffective and non-deterrent IPR enforcement regime. Despite these actions strong concerns regarding IPR in China remain.

In 2008, 81% of IPR-infringing product seizures at the U.S. border were of Chinese origin representing a 40% increase in terms of value from 2007. Of particular concern is the rise of internet piracy, retail and wholesale trademark counterfeiting, market access barriers, preferential treatment for domestic goods, IPR related enforcement in general, and specifically, reports that officials are urging more lenient enforcement of IPR laws in response to the financial crisis and the need to maintain jobs. Piracy of books, journals, and software also remain key concerns. It the position of the U.S. that a stronger approach toward IPR protection and enforcement would help contribute to a more robust and innovative economy, and that IPR enforcement actions should be initiated, cases decided, and remedies granted, based on the merits of each case and in accordance with domestic and international law.

Russia

While Russia has made some progress by enacting legislation to improve IPR protection, the slow implementation of its commitments to the November 2006 bilateral agreement on IPR remains problematic. U.S. copyright industries estimate a loss of over \$2.7 billion in 2008 due to copyright infringement, especially through online piracy. In the IPR Bilateral Agreement, Russia pledged to deter piracy and counterfeiting through criminal penalties, stronger border enforcement, and by bringing its laws into compliance with WTO and international IPR norms. However, despite its progress in some IPR areas, such as acceding to the WIPO Internet treaties, Russia must ensure that government agencies are fully empowered to combat IPR piracy and that the Russian Customs Code, Civil Code, and Law on Medicines comply with IPR Bilateral Agreement and TRIPS obligations.

Argentina

Although cooperation between Argentina's enforcement authorities and U.S. copyright industries remain positive, stronger IPR protections and enforcement mechanisms are required to combat the pervasive access to pirated and counterfeit materials. Copyright piracy, Argentina's most significant illegal market, remains a major problem in numerous industry sectors due to ineffective civil penalties and a judiciary reluctant to impose deterrent-level penalties in criminal cases.

Canada

Despite reaffirmation of its commitment to improve IPR protection and enforcement during 2007 and 2008, the Canadian government has failed to promptly and effectively implement key copyright reforms such as implementing the WIPO Internet Treaties, which Canada signed in 1997. Additionally, Canada needs to improve its IPR enforcement system in order to curb the volume of infringing materials being moved into and through the country by securing Canada's weak border measures and enabling authorities to take effective action against the trade of counterfeit and pirated goods. As the U.S.'s largest trading partner, the U.S. is deeply concerned with Canada's IPR regime.

India

India has recently made great progress in improving its IPR infrastructure. The U.S. continues to urge India to provide stronger protection for copyrights and patents by enacting legislation and implementing the provisions of the WIPO Internet Treaties. Piracy and counterfeiting remain a serious problem in India and India's criminal IPR enforcement remains fairly weak. In order to rectify this situation, India needs concerted police action against individuals involved in the manufacture, distribution, or sale of pirated and counterfeit goods, as well as swift judicial responses to IPR infringement and the imposition of deterrent-level sentences.

Indonesia

There has been little progress, and what appears to be backward movement from previous advances, on IPR issues since 2006. One of the main failures of the Indonesian IPR enforcement regime has been the prosecution of IPR crimes where cases tend to move slowly and few result in successful convictions. Furthermore, these convictions often result in small fines that do not deter repeat infringers. Reports also indicate that the National IP Task Force, responsible for coordinating IPR protection and enforcement efforts, is ineffective and that, overall, the number of raids has decreased.

Thailand

While encouraged by positive statements made by senior Thai officials on making IPR protection and enforcement a higher priority and to address longstanding defects in Thai IPR protection, little progress has been made over the last year in addressing the widespread problems of piracy and counterfeiting. While welcoming the Thai Government's sentiments and the creation of a National Task Force to strengthen IPR protection and enforcement, the U.S. hopes to see the translation of these commitments into concrete actions to reduce extensive entertainment and business software piracy, cable and signal theft, and organized book piracy.

Venezuela

Since its withdrawal from the Andean Community in 2006, protection and enforcement of IPR in Venezuela have continued to deteriorate. Copyright piracy continues to worsen, while proposed copyright legislation threatens to severely undermine current Venezuelan copyright law and bilateral/international standards of IP protection. The U.S. urges the Venezuelan Government to take immediate action to improve IPR protections by amending unsatisfactory legislative proposals or laws, and improve IPR enforcement by especially addressing piracy and counterfeiting.

More information, a complete copy of the current Special 301 report, as well as previous reports, can be found here: <http://www.ustr.gov/about-us/press-office/reports-and-publications>

Additional Copyright Law Information

- **United States Copyright Law:**
 - October 13, 2008 President George Bush signed the PRO-IP Act, which created an intellectual property czar who reports directly to the president. His job is to report on how to better protect copyrights both domestically and internationally. The law also toughened criminal laws against piracy and counterfeiting.⁶
 - Anyone found to have infringed a copyrighted work may be liable for statutory damages up to **\$150,000 for each software program infringed**. For more copyright information, [click here](#)
- **Copyright Law in the People's Republic of China:**
 - (http://www.sharewarejustice.com/documents/Copyright_law_china.pdf)
- **Indian copyright law:**
 - Civil and criminal action may be liable for injunction, actual damages (including infringer's profits), or statutory damages per infringement etc. Moreover, amendments to the Indian Copyright Act in 1994 have substantially increased criminal penalties.
www.indianembassy.org/special/ipr/ipr.htm
- **Singapore copyright law:**
 - [Ownership rights, infringement and remedies](#)
- **Taiwan copyright law:**
 - Civil remedies available to a copyright owner include:
 - a) monetary damages;
 - b) removal of infringement; and prevention of future infringement; and
 - c) publication of a court judgment.For more information, go to <http://www.gio.gov.tw/taiwan-website/5-gp/lpr/ipr.htm>
- **Copyright law of Japan:**
 - In the case of infringement (excluding moral rights) committed by a corporate entity, the amount of the fine is up to 100 million yen. For more information <http://www.cric.or.jp>
- **UK copyright law information**
 - Deliberate infringement of copyright on a commercial scale may be a criminal offence. Copyright infringement can result in 6 months jail time

⁶ <http://www.reuters.com/article/newsOne/idUSTRE49C7EI20081013>

and up to a £20,000 fine. For more details:

<http://www.ipo.gov.uk/types/copy.htm>

- **German copyright law**
 - <http://www.iuscomp.org/gla/statutes/UrHG.htm#l>
- **France copyright Law information**
 - Infringement of copyrights is a criminal offense in France. The fine is up to 300,000 EUR and a term of up to 3 years imprisonment.
 - In an attempt to reduce piracy, the French government has also passed new legislation requiring ISPs to deny Internet access to repeat copyright infringers. Under the new 'HADOPI' legislation, ISPs are obligated to notify their customers twice that they have been accused of copyright infringement before denying them service. If both warnings are ignored, Internet access for that subscriber will be terminated for up to a year – during which period they will be required to continue paying the ISP provider.⁷

VI. How can an SME Publisher find out if their work is being pirated?

Many publishers are beginning to realize there is a growing population of e-readers and have begun to sell copies of their books in electronic formats online before pirated copies are illegally made available to the public for free.⁸ There are also many new small to medium sized companies that specialize in protecting publishers from piracy. New software is available that not only protects PDF and eBook files from website thieves, but also marks them with an ID number and places them in a database specifically for protecting electronic files. Depending on the types of services offered, these eBook anti-theft software/service providers can be useful not only to authors or publishers planning on selling eBooks, but also to copyright holders worried about their works being scanned and made available online for free. Since the copyright holder is ultimately responsible for monitoring use of their work, proactively searching for illegal copies using Google or other search engines, or on P2P networks, can be an alternative method of protecting ones copyright.

Here are a few examples of companies with brief descriptions of their services in order to provide a better idea of what kinds of resources are available.

- **Product Padlock**
 - Protect unlimited files and websites that you own, instantly.
 - Immediately lock, disable, and repossess any of you stolen files.
 - Set expiration dates and trial periods for any file.
 - Legally 'lowjack' your files to track their usage worldwide
 - Includes and online digital management system
 - Works with any type of file (software, PDF , video, eBooks, MP3, etc.)
- **EBook Security** (<http://www.ebook-security.com/index.html>)
 - Prevents the illegal file sharing of EXE and PDF files
 - Protects an unlimited number of eBooks, files, and software for the same price
 - Includes user manual and free email support

⁷ <http://torrentfreak.com/france-passes-three-strikes-anti-piracy-law-090512/>

⁸ http://www.washingtonpost.com/wp-dyn/content/article/2009/06/02/AR2009060200967.html?wprss=rss_artsandliving/entertainmentnews

- Works with nearly any payment processor (Clickbank, Pay systems, Paypal, 2Checkout, etc)
- Ability to immediately terminate access for customers who request a refund
- Month-long free trial for only \$2.95
- Displays how many times people unsuccessfully attempted to steal your eBook.
- **BayTSP**
 - BayTSP works with leading companies in the entertainment, software, videogame and publishing industries to protect and monetize their intellectual property.
 - Monitors peer to peer networks like Bit Torrent and eDonkey, Usenet, IRC and public FTP sites for the first instances of unauthorized software and videogame content, can take action to have them removed and monitor for compliance
 - Provides ongoing monitoring and enforcement on peer to peer networks, Usenet, IRC and public FTP sites, can issue takedown notices and monitor for enforcement.
 - Monitors for the first instances of unauthorized content appearing peer to peer networks, IRC, Usenet and public FTP sites, notifies content owner when the leak has been validated and tracks propagation following initial detection.

VII. How to Deal with Copyright or IPR Infringement

In the event of copyright/IPR infringement, there are a number of potential remedies. These actions can vary in severity and seriousness, and the copyright holder, while taking into account the interests of all legitimate third parties, must decide how they wish to respond to the situation. It is ultimately up to the rights holder whether or not they wish to pursue individual cases of copyright infringement; therefore, in some cases, choosing to do nothing may be acceptable.

In cases where a rights holder feels their work has been used inappropriately, but that no financial harm has been done, a simple email to a particular website's manager may be sufficient. If this fails to result in reasonable action to remove the infringed work, contacting the hosting ISP and reporting the infringement with a Digital Millennium Copyright Act (DMCA) Takedown Notice. Upon receipt of a DMCA takedown notice the ISP is required to make its agent's name and address available to ensure proper notification. The infringing website's hosting ISP can be found through a "who is" search on websites such as [Domain Tools](#) or [Whois.net](#). The copyright does not need to be officially registered with the U.S. Copyright Office in order to take advantage of this DMCA provision either.

In order for a DMCA takedown notice to be valid, your notification must:

- Be in writing
- Be signed by the copyright owner or agent; your electronic signature is OK
- Identify the copyrighted work that you claim has been infringed (or a list of infringements from the same site)
- Identify the material that is infringing your work
- Include your contact info
- State that you are complaining in "good faith"
- State that, "under penalty of perjury, that the information contained in the notification is accurate"

- State that you have the right to proceed (because you are the copyright owner or the owner's agent)

More Information Regarding the DMCA:

<http://www.chillingeffects.org/dmca512/faq.cgi>

Sample Takedown Notices

- <http://www.scribd.com/doc/3504180/Sample0-DMCA-Takedown-Notice-for-Scribdcom>.
- <http://dmca.cs.washington.edu/sample.html>

In cases where the copyright or IPR infringement is not electronic, a Cease and Desist (C&D) letter may be more appropriate. Like a DMCA takedown notice, a C&D letter may also be used for online infringements and does not require outside legal assistance. However, since a C&D letter is one of the methods that can lead to a lawsuit if it is ignored, having it written and presented by a lawyer is a good option.

Sample Cease and Desist Letters

- <http://www.utsystem.edu/OGC/INTELLECTUALPROPERTY/contract/cease.htm>
- <http://www.docstoc.com/search/sample-cease-and-desist-letter/>

If these actions fail to achieve adequate results, copyright holders may choose to file a civil lawsuit in federal court in order to protect their rights. At this stage consulting an attorney and acquiring legal counsel is necessary. In cases of willful infringement for profit, the U.S. Attorney may initiate a criminal investigation in addition to the civil lawsuit. Similar legal recourse may also be available in foreign countries; however, in such situations finding qualified legal counsel is critical in navigating that particular country's legal system. There are also many organizations, such as the Association of American Publishers (AAP) and the International Copyright Protection Committee (ICPC), the organization responsible for managing the AAP's anti-piracy programs and related efforts, which work closely with various representatives, government officials, and local authorities overseas.⁹

For a more comprehensive list of U.S. Government, Private, and Inter-Government IPR resources please visit: http://www.stopfakes.gov/sf_who.asp

⁹ http://www.publishers.org/main/IntCopyright/intCopyProtect/intCopy_01_01.htm