

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

DISPUTE SETTLEMENT

SINGAPORE

While the U.S.–Singapore Free Trade Agreement (USSFTA) entered into force on January 1, 2004, the copyright and enforcement obligations which it contains did not become fully operative until January 1, 2005. On that date, extensive revisions to Singapore’s Copyright Act, in the form of the Copyright (Amendment) Act 2004, took effect. (One USSFTA copyright obligation—extended terms of protection—took effect on July 1, 2004, under separate legislation.)

Singapore’s copyright law amendments made numerous changes and succeeded in bringing the country’s law into compliance with USSFTA requirements in most areas. Singapore should also be commended for the relatively transparent process which it followed in drafting these amendments. A draft of what became the Copyright (Amendment) Bill 2004 was posted for public comment in late July, with a comment deadline of August 18. While IIPA believes that a comment period of longer than three weeks would have been advisable for such a complex piece of legislation (which also included many significant statutory changes that were not required for USSFTA compliance), we recognize that this procedure offered far greater opportunities for public input than Singapore had offered in the past. It was also apparent that Singapore authorities seriously considered the comments they received, since many changes were made to the legislation before it was formally introduced and then rapidly approved by the Parliament.

However, despite these amendments, there remain some critical areas in which Singapore’s law, at least as of the date of this filing, fails to fully comply with the USSFTA. We hope that ongoing bilateral dialogue will succeed in resolving these problems, some of which will require further amendments to Singapore’s law. If, however, these efforts fail, IIPA urges USG to initiate the dispute settlement procedures of the USSFTA during 2005 to require Singapore to fully meet its FTA obligations. A non-exhaustive list of areas of current non-compliance includes the following.

Service Provider Liability

The Copyright (Amendment) Act 2004 made significant changes to Singapore’s law regarding the liability of network service providers. However, the resulting law, even when supplemented with proposed implementing regulations that are now pending, falls short of full compliance with USSFTA Article 16.9.22. For example:

- The law shelters from full liability a service provider that is receiving a financial benefit from infringing activity, under circumstances not recognized in Article 16.9.22.b.v.;
- When a service provider has not received a notice of claimed infringement from a right holder, the law provides a safe harbor even if the service provider has actual knowledge of infringement, or is aware of facts or circumstances from which infringing activity is apparent, but

nevertheless takes no action to remove or disable access to infringing material, in contravention of Article 16.9.22.b.v.;

- Contrary to Article 16.9.22.b.x., the law completely immunizes a service provider who restores access to material at the request of a subscriber, without granting the copyright owner (at whose request the access was originally disabled) a reasonable period of time to initiate legal action, and perhaps without even notifying the right holder of the “put-back” request;
- Singapore law lacks an expeditious procedure through which the right holder may learn the identity of the alleged infringer, as required by Article 16.9.22.xi.

Exceptions to the Reproduction Right

The Copyright (Amendment) Act, in sections 38A and 107E, created a new exception to the reproduction right that exceeds the bounds permitted under USSFTA Article 16.4.10. The exception applies to all copies that are “incidental” to the technical process of receiving a communication, even an infringing communication, or one that would have been infringing if made in Singapore. The Act also left undisturbed an even broader exception for “user caching” in Section 193E. The combined result is to give broad legal sanction to unauthorized copying within Singapore in connection with transactions carried out over the Internet. These exceptions must be substantially narrowed in order to meet the USSFTA standards (as well as those of the Berne Convention and the TRIPS Agreement).

Statutory Damages

Although the USSFTA Article 16.9.9 requires that Singapore provide right holders with an option for “pre-established” damages, amended section 119 of the Act creates a system in which the court may, in all cases in which statutory damages are elected, award merely nominal, or even zero, damages. This frustrates the goals of predictability and deterrence which statutory damages aim to achieve. The S\$200,000 (US\$122,000) ceiling on statutory damages in a single lawsuit should also be increased in order to achieve deterrence.

Technological Protection Measures

USSFTA Articles 16.4.7 and 16.9.5 have not been fully implemented because, among other reasons:

- The Singapore law gives the government the authority to categorically immunize all trafficking in devices and services that are aimed at circumventing effective technological measures to be listed in a future regulation;
- Deterrent criminal and civil remedies have not been provided for trafficking violations;
- The law only covers technological measures that have been “applied to copies”;
- The proposed implementing regulations would permit the circumvention of certain software access controls (dongles) that are not damaged or defective, or for which a functioning replacement can readily be obtained in the market.

IIPA encourages the U.S. and Singapore governments to continue dialogue aimed at resolving these and similar problems with the FTA implementing legislation.