

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

MALAYSIA

EXECUTIVE SUMMARY¹

Malaysia should be maintained on the Watch List, and an out-of-cycle review should be conducted toward the end of 2003. Improvement is noted in government will, evidenced by increasing numbers of inspections and raids. Bottlenecks remain at the prosecutorial stage, and lack of deterrent sentencing results in organized criminals remaining free to produce and export product with impunity around the globe. Malaysia was first placed on the Priority Watch List in 2000, remained there in 2001, and was lowered to the Watch List in 2002, to recognize some progress made against illegal optical disc plants.

Strong anti-piracy statements from high-level government officials, and increased inspections and raiding activity, including against licensed and unlicensed optical disc factories (chiefly under the Optical Disc Act), indicate strong recognition by the government of Malaysia of the seriousness of the piracy problem. Nonetheless, the Malaysian government is working hard, not smart, as optical disc piracy continues to be exported around the globe, the retail market remains decimated by piracy, and pirates fail to be punished because of prosecutorial and judicial bottlenecks, lack of IP expertise, and failure to impose deterrent penalties.

Required action for 2003:

Enforcement

- Run more surprise factory raids (licensed and unlicensed) under the Optical Disc Act, as well as more raids of photocopy shops, residential photocopy and other book/photocopy production centers, with seizures and closures where warranted.

Prosecutions

- Prosecute high-profile cases against non-compliant or unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offences, with full investigations of links to other crimes where applicable.
- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers to prosecute high profile copyright cases involving production, distribution and export of copyrighted materials, particularly pirate optical discs, end-user piracy of business software, or offset piracy/illegal photocopying of books.
- Institute charges of copyright violations within 30 days after full documentation is received from copyright owners.
- Secure convictions against businesses that are replicating pirated optical discs.

Courts

- Assign piracy cases to judges trained and experienced in IP cases with a view towards establishing specialized IP courts.
- Issue directive on the need to impose deterrent sentencing on infringers.
- Issue and enforce sentencing guidelines, with systematic reviews of acquittals and inadequate sentences, and disclosure of reasons if any are not appealed (including appeals of corporate end-user piracy cases in which imprisonment is not imposed).

¹ For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to filing.

MALAYSIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	42.0	75%	40.0	80%	41.0	80%	42.0	85%	40.0	80%
Records & Music ³	110.2	70%	148.9	70%	15.6	65%	5.0	40%	13.0	70%
Business Software Applications ⁴	82.7	70%	75.0	70%	75.4	66%	67.8	71%	63.8	73%
Entertainment Software	NA	NA	56.4	93%	NA	98%	164.0	99%	135.2	99%
Books	8.3	NA ⁵	8.2	NA	8.0	NA	8.0	NA	8.0	NA
TOTALS⁶	243.2		328.5		140.0		286.8		260.0	

PIRACY IN MALAYSIA

Malaysia Remains One of the World's Leading Producers and Exporters of Pirate Optical Media (CD, Video CD, DVD, CD-ROM)

Beginning in the late 1990s, authorities in China, Macau, Hong Kong, and other jurisdictions started to crack down on the pirate production and export of optical media products—including music and video CDs, and CD-ROMs containing entertainment, educational and business software and literary material. As a result, Malaysia became an increasingly attractive destination for the organized criminal enterprises that are running optical media factories and distributing their output worldwide. There are currently at least 38 optical disc

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ The estimated piracy level for sound recordings for 2000 represents an adjustment of the 60% figure reported in IIPA's 2001 Special 301 filing. The loss figure for 2001 is an estimate of legitimate sales displaced by piracy. Previous years' loss figures were estimated sales revenue in the pirate market. With the sharp drop in prices for pirate product, this estimation method no longer reflects the losses inflicted by piracy.

⁴ BSA's 2002 loss numbers are preliminary. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$63.0 million at 62% were identified as preliminary. BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above.

⁵ While the Association of American Publishers does not have an overall piracy level for the Malaysian market, a local copyright organization estimated in 2001 that about 30% of revenues are lost each year from illegal campus copyshops in Malaysia. However, more recent raids and surveys of the situation near universities suggests the piracy take of copyshops in those neighborhoods runs at more like 50-60% of the total market. Recent successful raids undertaken in June 2001 at Tar College and Putra University unearthed the full extent of the problem. Copy-shops conspire with students and pre-print books they learn have been adopted on students' booklists, to have them ready for the start of the school term.

⁶ In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Malaysia were \$316.5 million. Because BSA's were revised, estimated total losses to the U.S. copyright-based industries in Israel in 2000 increase to \$328.5 million.

plants in the country, including at least 86 production lines; but unlicensed underground facilities also continue in operation.⁷ The total estimated capacity of the verifiable plants is at least 301 million discs per annum, which amounts to over-production for the domestic market. Today, Malaysia's enormous excess capacity for the production of optical discs results in massive pirate production for export. Recent seizures of Malaysian-produced pirate product were found on every continent in the world.⁸ Investigations have revealed that ownership of many Malaysian OD production facilities for entertainment software is tied to Greater China syndicates run primarily from Taiwan, Hong Kong and China. Disturbingly, optical disc pirates in Malaysia have begun the practice of "disc gouging," namely, tampering with source identifiers used to identify the loci of production of a disc.

Piracy Decimates the Domestic Market

The Malaysian market for copyrighted materials of all kinds remains dominated by piracy, hurting domestic Malaysian as well as foreign creators.⁹ The problem is particularly acute for optical media products, including uncensored music and video CDs (VCDs), DVDs, and CD-ROMs containing entertainment, educational and business software and literary material. For example, pirate copies of *Star Wars: Attack of the Clones* were readily available on the street prior to theatrical release at RM5 (US\$1.32) in VCD format, or RM10 (US\$2.63) in DVD format. Retailers selling at RM5 (US\$1.30) per VCD now offer a free VCD for every four or five VCDs purchased. Retailers have also started selling three or four VCDs for RM10 (US\$2.63). Competition is intense between the pirate retailers. Pirate shops (with no names or signs) have also sprung up, located at the end of the entry point where the many pirate VCD, DVD and CD stalls are located. When raids are conducted, pirate shops have ample time to close since officers from the Ministry in charge of copyright enforcement in Malaysia, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) sweep the stalls upfront. Pirate audio CDs also remain widely available throughout the country for about RM5 (US\$1.32).

Entertainment software companies continue to report devastation to their local market, as pirates continue to dump product—both PC games and those for play on consoles—on the local market at prices as much as 95% below legitimate retail. The number of retail outlets in open spaces, such as SS2, Bangsar, Taipan, Ampang and Jalan Alor, have been significantly reduced, in part due to increased raiding activity discussed below. However, pirate vendors have now moved to fixed shops in these areas (two to five per area) and continue to provide pirate product. Major problems also remain in shopping complexes such as Sg. Wang, Low Yat Plaza, and Imbi Plaza in Klang Valley; and in Holiday Plaza & City Square in Johor. Mini-

⁷ IIPA has heard that there may be as many as 43 plants and 109 lines, which would increase capacity to 381.5 million discs per year. These are conservative estimates of capacity, and compensate for down-times and movement and set-up of machinery.

⁸ Pirate music CDs from Malaysia have been seized throughout Asia, Latin America, Australia, Europe, and Africa: many infringing music discs that flooded the Kenyan market in 2001 originated in Malaysia, as have pirate discs seized in Mauritius and Ghana. Malaysia remains a major supplier of pirate video CDs and DVDs to Asian destinations via Singapore, and these products have turned up in South Africa, the U.K., New Zealand, and the U.S. Malaysia is also a leading source of high quality counterfeit business software products, which are shipped via Singapore into the United States and other markets. With regard to entertainment software in CD-ROM format, Malaysia continues as the world's single leading source of pirate product.

⁹ For example, in many of the raids carried out on behalf of the Association of American Publishers (AAP) in 2002, Malay authors' titles, like *Pengajian Malaysia* by Nazaruddin Haji Mohd Jali, *Pengaturcaraan* by Marini Abu Bakar, Norleyza Jailani and Sufian Idris, and *Statistik Untuk Teknologi Maklumat & Industri* by Mohammad Khatim Hasan, were found among the many books being pirated.

theaters (mostly in East Malaysia) frequently show and advertise movies that have not been approved for theatrical release by the Malaysian government.

Aside from the optical disc plants which alone could overwhelm the local market, recent news reports indicate that crime syndicates are even taking to the high seas, manufacturing pirated (burned) music, movie and game CDs, and VCDs for distribution in Malaysia and elsewhere, in order to avoid enforcement.¹⁰ So-called “burn-to-order” piracy on CD-recordable discs (CD-R) has emerged in Malaysia in 2002. While some pirate entertainment software (all formats, including PC, PlayStation®, PlayStation2®, and Xbox) is being produced in smaller “burn-to-order” operations, factory production for export still dominates among pirate formats in Malaysia, showing up in such far away places as South Africa. Pirate CD-R discs of music recordings are turning up more frequently in Malaysian night markets (the estimated monthly production capacity of CD-R burning facilities in 2001 was 1.2 million CD-R discs). Malaysian pirates continued to use the Internet as a marketing medium, delivering pirate product to customers via mail or courier service. An even newer phenomenon involves consumers and pirate business owners auctioning off pirate copies of games and other products on Internet auction sites. Pirates of entertainment software have increasingly used deceptive means to fool authorities into believing they are “authorized” by right holders, adding an additional investigative challenge to Malay authorities investigating piracy.¹¹

Book piracy (especially textbooks, scientific, technical, or medical books) grew slightly worse in 2002, with more photocopy piracy and more pirates moving underground and distributing out of their cars/vans, and with evidence of pirate books being exported to the Middle East and elsewhere. Houses used by pirates as photocopying centers have gone high-tech with video cameras installed to spot raiding MDTCA officers. Student leaders are recruited to take orders among fellow students and pass them to the pirates. The pirates package the pirate copies of books with new cover designs to confuse the authorities as to which is the legitimate copy.

Corporate/institutional (“end user”) piracy of business software (such as when a business buys one legal copy of a business software application and loads it on all the office’s computers) remains a serious problem (piracy rates increased from 66% in 2000 to 70% in 2001 and remained at 70% in 2002), especially since corporate directors and business managers are not held accountable by being prosecuted for piracy taking place on their premises. Not only is it impossible for legitimate producers to compete against pirates based on price, but pirates also evade censorship laws and offer consumers unexpurgated music and audiovisual products.

A disturbing concomitant to piracy in Malaysia, especially in recent years, has been increasing threats and violence to right holders and enforcement officials. While this phenomenon (including some instances in which notes containing death threats to government officials were wrapped around daggers) may, ironically, actually signal some success among Malaysia’s enforcement officials in getting at the heart of the piracy problem, it is an uncomfortable reminder that piracy has become a dangerous and organized criminal activity,

¹⁰ Disturbingly, there were some cases in which pornographic materials were even “disguised” as Motion Picture Association animated movie titles, by having the MPA title covers pasted onto the VCD covers.

¹¹ For example, one entertainment software company reports that exporters regularly falsify documents, and neither the Customs in Malaysia nor in the target country verified the legitimacy of documentation, or required/verified proof of identity. In another instance, companies in Malaysia have tried to establish and obtain licenses to run “Internet cafes” on an entertainment company’s behalf, without that company’s authorization!

perpetrated by dangerous criminals and a whole web of organized crime syndicates.¹² MDTCA officers were authorized in late 2002 to carry pistols when they take a VCD, DVD or CD piracy raid. However, a more recent directive prohibits them from firing their weapons unless they are in bodily danger (and then, they may only fire warning shots).

ENFORCEMENT IN MALAYSIA

Optical Disc Factory Inspections and Raids Evidence Growing Government Resolve to Fight OD Piracy

Malaysian authorities clearly recognize the scope and seriousness of the optical media piracy problem. They appear committed to the fight against OD piracy, and in many cases, work ably and willingly with our affected industries. Since 2000, Malaysia has actively raided many pirate optical media production facilities, and 2002 was a seminal year in implementing the inspection and raid provisions of the Optical Disc Act. Working with the motion picture and music industries, MDTCA conducted 12 factory raids from January to December 2002. Twelve of the raids were conducted against licensed factories, while two were against unlicensed plants, and one was against a licensed plant found in a location other than that endorsed on the license. Generally, the machinery found at the unlicensed plants (including seven replication machines, one of which was a DVD line, several printing machines and some “metalisers”),¹³ was dismantled and/or seized, while the machinery found in the licensed plants was generally only sealed (or not sealed at all), depending on the evidence found at the plant.¹⁴

The very fact of these raids and the findings of piracy indicate at once the resolve of the Malaysian government to take more concerted action against both licensed and unlicensed plants in 2002, but also the continuing seriousness of the optical disc piracy problem, and the as yet inadequate overall enforcement efforts in Malaysia. These raids will, if past experience holds true, never result in deterrent penalties. It must be noted that not a single optical disc license has been suspended as a result of these raids, and not a single factory owner has gone to jail or sustained deterrent fines. These facts demonstrate a flawed enforcement system where the guilty often go unpunished.

As discussed in detail below, if the Malaysian government is going to have a chance at defeating the optical disc piracy problem, owners of these plants engaging in piracy must be punished with deterrent sentences, including jail time actually served. Until that happens, plant managers and owners will continue to bear the relatively minimal risks of piracy—a highly

¹² IIPA looks to the government to cease the practice of MDTCA officers taking down the names of lawyers and clients' representatives on their lists, since copies of the so-called “visit list” is then given to the pirate, which raises significant safety concerns for industry representatives. MDTCA has already issued a directive indicating that this practice is incorrect, but the practice continues, especially among different branches of the MDTCA.

¹³ A “metaliser” is a machine that puts a coating of metal on an optical disc (usually aluminum) to reflect the laser in a CD player. The disc is then transferred to a spin coater, where a layer of UV lacquer is coated and cured over the aluminum.

¹⁴ For example, in October 2002, a routine inspection of a licensed factory uncovered infringing optical discs containing MPAA member films from which the SID codes had been scoured concealed in a storage area within the plant. The discs, submitted for forensic analysis against exemplar discs obtained from this plant, revealed a positive match, and to our knowledge, the three replicating machines have now been sealed by the MDTCA.

profitable and relatively safe illegal activity to engage in. It is also worthy of note that in one of the plants inspected, in which highly suspicious discs were found (with SID codes scoured off), the authorities even refused to seal the machinery pending the outcome of the forensic investigation.¹⁵ It is hoped that throughout 2003, even greater efforts will be made on the part of MDTCA to bring to justice plants that continue to pirate, seemingly with impunity, notwithstanding their status as licensed entities with the government. If the Optical Disc Act is to be effective, license revocations and prosecution of owners must become part of the enforcement equation following raids uncovering serious breaches of optical disc production licenses.

More Raids Against Piracy in 2002

The Malaysian government added greater resources to the fight against piracy in 2002. In the second quarter of 2002, MDTCA recruited an additional 285 enforcement officers, with 160 of those officers reportedly dedicated to an “Anti-Piracy Task Force.” The 160 officers are divided into three teams (an “intelligence team” to learn source information at the manufacturing level, a “factory team” to conduct plant inspections/raids, and a “retail team” to run domestic raids), of which 100 are in the Klang Valley while 30 are based in Penang and Johore Baru. This placement of enforcement officers is a very positive step aimed at curtailing domestic piracy, and we commend the government for its devotion of manpower and resources.

The number of raids grew in 2002 as a result of this greater devotion of resources. For example, between January and November 2002, the motion picture industry, in conjunction with authorities, conducted 20 Internet or export related raids, 82 warehouse raids, and 511 retail raids, including sustained raids in the two most infamous pirate areas in Malaysia (Petaling Street in Kuala Lumpur and Holiday Plaza in Johor Bahru). Unfortunately, these actions have had very minimal impact due to post-raid enforcement problems.¹⁶ As noted, there were 12 optical disc factory raids in 2002. Raiding activity against music piracy also picked up, with reports of hundreds of raids run against music pirates. Seizures during raids in 2002 have also increased due to two large-haul raids netting 500,000 pirated discs. In a series of recent raids (from August to November 2002), the motion picture industry was able to thwart thousands of pirated discs from leaving the country. With the increase in the export of illegal optical discs through the mails, industry has been working with the MDTCA in tackling the export problem by getting the cooperation of the courier companies and National Post, and seminars and meetings have been held to this effect. Two recent courier cases are worthy of mention, in which the Police at Kuala Lumpur Airport stopped pirated products being exported from Malaysia, arresting two Mauritians attempting to smuggle pirated music, film and software products out of the country. Both were detained by the Police for several days, and immediately went before the court on criminal charges.¹⁷

¹⁵ The entertainment software industry notes that “scoured” discs are being found all over the world, sourced to Malaysia. The phenomenon of “disc gouging” become far more prevalent in 2002.

¹⁶ Less impressive has been the fight against hawker stalls, night markets and vendors in open areas selling movies that have not been approved by the authorities in Malaysia, and pornographic VCDs and DVDs that were to be the subject of a nationwide crackdown announced in August 2001. The deadline for compliance was said to be September 1, 2001 for some areas, and October 1, 2001 for others, but well over a year later, the problem remains, and it appears local police slowed down their enforcement efforts, leaving the MDTCA to carry most of the weight.

¹⁷ IIPA understands that both the accused were convicted on documents produced by the local music industry group (RIM) and the Motion Picture Association.

Book publishers have had their share of raiding successes during 2002, with nearly a dozen large raids on both stores dealing in photocopies as well as counterfeit books, as well as residences stocked with books, many for university students (a recent piracy method of choice for book pirates).¹⁸

Also encouraging has been continued support by the Malaysian government against unauthorized use of business software in a business setting, so-called end-user piracy (such as where one copy of software is purchased but then that copy is loaded on many computers without authorization). The government brought five successful end-user raids in 2001 and another five in 2002. Over 900 reports of corporate end user piracy were directed to the BSA hotline in 2002, many of which were generated due to the assistance of the MDTCA. In August 2002, the MDTCA Minister held a press conference to announce a BSA-sponsored crackdown on corporate end-user piracy. The Minister noted that the full force of the law would be used and that directors and managers would be held criminally liable for software copyright infringements. MDTCA also placed newspaper advertisements warning companies of the consequences of using pirated software. The MDTCA also sent more than 300 personal delivery warning notices to companies that had been reported to BSA as having used pirate software. The MDTCA publicized that it would make random checks on offices and companies nationwide, targeting senior management and big corporations, and such visits began in November. IIPA commends the Minister's clear demonstration of government will to tackle this damaging form of piracy.¹⁹

One reason enforcement efforts at the front end have improved in 2002 is that government-industry cooperation has expanded. Such expansion is due in part to the establishment in 2001 of a special enforcement task-force, chaired by the MDTCA, including representatives from all ministries and agencies with any level of responsibility for enforcing intellectual property rights. We are hopeful that this effort will continue and increase in 2003.

¹⁸ Some of these raids netted an astounding number of titles, which should give pause to U.S. authors and publishers who in many instances have their life's academic work stolen from under them, and to the Malaysian government, which should be ashamed that pirates such as these flaunt the rule of law and all academic integrity by copying such materials without having created anything of value themselves. One of the largest raids, run in late November 2002, yielded pirate copies of dozens of titles, including: *Psychological Testing*; 5th Ed. (Wadsworth/ TL) 2001; Bill Sanders, *Flash 5 F/X And Design* (Coriolis/JW) 2001; Anthony Orton, *Learning Mathematics*, 2nd Ed. (Cassell) 1992; John R. Nesselrode, *Individual Development and Social Change* (Academic Press/E) 1985; John A. Axelson, *Counseling and Development in a Multimedia Society* (Brooks/Cole/TL) 1999; Richard I. Arends, *Exploring Teaching* (MGH) 1998; Donald R. Atkinson, *Counseling Diverse Populations*, 2nd. Ed. by (MGH) 1998; Sandra W. Russ, *Affect, Creative Experience and Psychological Adjustment* (Taylor & Francis) 1999; David W. Johnson, *Joining Together* (Allyn & Bacon/P) 2000; Hall, *Economics: Principles and Applications* (South-Western/TL) 2001; Brem & Christine, *Basic Skills in Psychotherapy and Counseling* (Brooks-Cole/TL); Robert William Buckingham, *A Primer on International Health* (Allyn & Bacon/P) 2001; Barbara Knoll, *Second-Language Writing* (CUP); Cherry Campbell, *Teaching Second Language Writing* (Heinle/TL) 1998; Richard E. Watts, *Interventions and Strategies in Counseling and Psychotherapy* (Accelerated Development) (Taylor & Francis) 1999; Jeffrey A. Kottler, *Introduction to Therapeutic Counseling* (Brooks-Cole/TL) 2000; Steven D. Brown, *Handbook of Counseling Psychology*, 3rd Ed. (JW) 2000; Theodore Milon, *Disorders of Personality* PSM III: Axis II (JW) 1981; Fay Fransella, *Personal Construct Counseling: In Action* (Sage) 2000; Kathryn C. Mac Christie, *Becoming a 21st Century Agency Counselor* (Brooks-Cole/TL) 2001; Robert C. Berg, *Group Counseling*, 3rd Ed. (Taylor & Francis) 1998; Bernard Kolman, *Discrete Mathematical Structures*, 4th Ed. (P) 2000; Paul R. Kinnear, *SPSS for Windows Made Simple*, 3rd Ed. (Psychology Press/Taylor & Francis) 1999; Edward J. Coburn, *Programming with Visual Basic 6* (Brooks-Cole/TL) 2000; Paul R. Burden, *Methods for Effective Trading* (Allyn & Bacon/P); Gary D. Borich, *Effective Teaching Methods* (Merrill/P) 1998; Graham Brown et al., *Introduction to Food and Beverage Service*, 1st Ed. (P).

¹⁹ Success of a huge raid for the Association of American Publishers was publicized in the form of a press conference by MDTCA officials in June 2002.

Less Progress Noted on Government Self-Initiation of Raids, Arrests, Deterrent Detentions, and Results in Civil Actions

Somewhat less impressive has been the resolve of the government to initiate raids on its own or to take deterrent actions, including arrests of suspected pirates. The recording industry reports that sometimes the MDTCA has conducted raids on its own initiative, but the results of these have not always been transparent. MDTCA has done little on behalf of other industries, such as the book publishing industry, which faces more underground pirate distribution than in the past (which has traditionally been dominated by copy-shop photocopy piracy).²⁰

Another abiding problem has been the lack of authority for MDTCA personnel to arrest suspected pirates. The Police have arrest powers, but MDTCA traditionally does not, although the industries support the government's apparent intent to enact legislation that would give MDTCA arrest powers, hopefully to be implemented sometime in 2003. In the meantime, the Attorney General has directed MDTCA to make citizen arrests, but MDTCA officers have found this difficult in practice, and as of January 2003, MDTCA had made no arrests under copyright.²¹ Another area of concern is the fact that those arrested are let out on bail, the amounts of which never exceed RM 3,000 (US\$789) to RM 4,000 (\$984)—totally non-deterrent.

Problems have also been noted in civil actions against music, book, and end-user software piracy. In the music cases, pirate vendors often abscond, or their identity is unknown, leaving no defendant to sue. Even where there is a defendant, right holders have noted the high expense of obtaining a search and seizure order, which apparently does not guarantee that the owner of the premises will not refuse entry. In raids carried out on behalf of the Association of American Publishers, MDTCA officers sometimes refused to remove all the infringing goods, as they are: 1) afraid of retaliation against the complainant if the complainant stays too long in the premises; 2) convinced that the amount seized was enough to charge the pirates; and 3) the officers wanted to finish the raid as quickly as possible. It is inexcusable for the Malaysian authorities to leave behind any infringing goods so pirates can essentially continue their illegal activities. The dangers of a raid should be mitigated by calling in the Malaysian police for assistance.

In cases against end-user software piracy, in which civil cases are brought in parallel with criminal cases brought by the MDTCA, the civil cases invariably get bogged down in court, are expensive to bring, and have little deterrent effect in the long run. There are no statutorily imposed deadlines in civil cases, and, as a result, such cases can average between two and four years to resolution. Anton Pillar (AP) actions are risky and expensive to bring, and are ineffective, due to inordinate delay, since it is the practice in Malaysia that permission is needed before entry, and defendants are informed to obtain legal advice and given time to consult with

²⁰ Piracy rates for publishers are now roughly 50%, with evidence of exports of published materials as far away as the Middle East and the U.S.

²¹ Section 117 of the Criminal Procedure Code (CPC) gives police officers the power to remand an accused for up to 14 days to investigate the offense and others involved in it. At present, since the MDTCA officers don't have arrest powers, they lack the logistical support (e.g., a lock-up, handcuffs, etc.) and lack expertise to interrogate those arrested. One example of a raid leading to unsatisfactory results occurred in 2001 in the Batu Caves against a licensed optical disc plant by censorship authorities. The plant was caught in possession of pornographic VCDs and pirate music discs, but no arrests were made and the plant continued operations, as usual, post-raid. After operating for a while longer, the plant was subsequently raided again toward the end of 2002, found to be infringing copyright, and the machines were sealed.

a lawyer before entry (providing an opportunity to remove infringing software from computers). It also takes the courts two to three weeks from the date of filing of an application to approve such an action. Another concern is that proof of copyright subsistence by way of an affirmation of affidavit or statutory declaration pursuant to Section 42 of the Copyright Act may not be sufficient if a case proceeds to trial.

MALAYSIA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	SOUND RECORDINGS ²²
Number of raids conducted	976	227
Number of VCDs seized	1,612,506	
Number of DVDs seized	246,773	
Number of CD-Rs seized	618,570	
Number of investigations	150	
Number of VCD lab/factory raids	11	
Number of cases commenced by MDTCA	962	487 ²³
Number of cases commenced by Police, Customs, censorship board	14	224 ²⁴
Number of Indictments	Unclear	27
Number of defendants convicted (including guilty pleas)	2	4 ²⁵
Acquittals and dismissals	2	2
Number of cases pending	800	21
Number of factory cases pending	24	12
Total number of cases resulting in jail time	0	0
Suspended prison terms	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total suspended prison terms	0	0
Prison terms served (not suspended)	0	0
Maximum 6 months	0	0
Over 6 months	0	0
Over 1 year	0	0
Total prison terms served (not suspended)	0	0
Number of cases resulting in criminal fines	28	
Up to \$1,000	19	
\$1,000 to \$5,000	8	2
Over \$5,000	1	1
Total amount of fines levied (in US\$)	48,538	

Post-Raid Investigations and Prosecutions Fail to Deter Piracy in Malaysia

While appreciating the greater resources being devoted to enforcement on the ground in Malaysia, the enforcement system falters post-raid, due to lack of investigative or prosecutorial

²² Because of prosecutorial bottlenecks and backlogs, the number of cases represented in the chart is the total number of cases brought between 1997 and November 2002.

²³ Id.

²⁴ Id.

²⁵ Id.

expertise and an overburdened docket of cases to bring forward. The results are a Malaysian government in 2002 that clearly worked harder, but not smarter. The failure to effectively prosecute piracy cases is the fundamental flaw in Malaysia's anti-piracy effort, compromising all its progress on other fronts, and Malaysian authorities have barely begun to address the problems. Meanwhile, pirates in Malaysia, who essentially have no fear of being prosecuted, have become more emboldened, and 2002 was fraught with instances of right holders or enforcement officials being threatened with violence.

After a raid is carried out, MDTCA or Malay Police investigators must prepare the case before charges can be filed. The processing path for these cases is bifurcated depending upon whether the Police or MDTCA conducted the raid giving rise to the charges. The MDTCA pathway remains hopelessly backlogged, since there are no strict deadlines for prosecutors to file cases after a raid.²⁶ While an internal directive gives state offices of the MDTCA 21 days to present the case to the Attorney General's Chambers for consent to proceed with a prosecution, this deadline is almost never met. Cases can also be held up at the MDTCA investigation stage (i.e., preparation of the documents for the prosecutor).²⁷ Even in cases in which this consent is obtained, the case has then traditionally been turned over to an MDTCA prosecuting officer. These officials are often not legally trained; in some cases they are simply investigating officers or office administrators who have been assigned to this duty. As a result, these officials generally lack the skills to handle complex legal questions, a fact well known to defendants and their counsel. Accordingly, MDTCA officers are under considerable pressure to resolve piracy cases under other statutes (e.g., the Price Control Act, or the Trade Descriptions Act), which avoids complex legal issues but which results in purely nominal penalties (these laws allow the offender to pay a compound fine, usually a very nominal, insignificant amount), in which event the case never goes to court.²⁸ By contrast, cases originated by the Police often fare better because they are handled by Public Prosecutors in the Attorney General's Chambers who have law degrees. Even in such cases, long delays are the norm, as normally copyright cases are given low priority and usually postponed, and only a tiny minority of cases result in formal charges, and even fewer, in convictions.²⁹

A common problem with prosecutions in Malaysia involves cases in which the pirate successfully avoids a summons or has absconded before being charged in court.³⁰ In most such

²⁶ In raids conducted by the MDTCA, the raiding officer orders the seizure of pirated goods and records the name of the business owner, takes statements from the owner, and then applies to the court to issue a summons against the owner. The MDTCA officer is then personally to serve the summons on the owner, but owners avoid being personally served in order to get a "discharge not amounting to an acquittal" (DNAA), whereupon the case usually goes dormant. Thus, MDTCA almost never gets a conviction.

²⁷ For example, in recording industry cases, there are huge backlogs of cases. For example, in 2000, documents were submitted in 94 cases, resulting in only 11 charges being brought and no convictions. In 2001, MDTCA accepted documents for 177 cases, resulting in 15 charges being brought and one conviction. In 2002, 51 cases were brought before the Ministry, resulting in only one case in which charges were filed. Notwithstanding inquiries to MDTCA regarding the status of these cases, there is no feedback.

²⁸ Most cases are resolved in this manner for the entertainment software industry.

²⁹ The conviction statistics include guilty pleas and don't generally include completed trials.

³⁰ For a case to proceed to court, magistrates require that a summons be personally served on a pirate. This is straightforward if the pirate has been arrested and remanded under Section 117 of the Criminal Procedure Code ("CPC"), but in a majority of cases, no arrest has been made and the defendant may have disappeared, since the magistrate grants consent to charge as much as three months after the raid (provided that documentation is

cases, a summons cannot be served on the pirate, resulting in a “discharge not amounting to an acquittal” (DNAA). Once a DNAA has been issued by the court, the case remains “dormant” unless, e.g., miraculously, the officer in charge of the summons happens to “run into” the pirate by accident.³¹ In most cases, the raid goes for naught, as MDTCA does not devote resources to tracking down disappeared pirates. In a recent development that may bode well for future enforcement, the MDTCA legal office has apparently directed that pirates be charged in court three days after a raid, or otherwise, a warrant of arrest could be issued against the pirate.³²

IIPA strongly believes the appropriate next step is for the Malaysian government to devote the resources to develop a cadre of highly qualified, specialized, well-trained unit of public prosecutors to handle all copyright piracy cases. Such a unit should be made up of those who already possess the legal skills and experience to handle such cases, but may need further training on the complexities arising in copyright cases. IIPA’s members stand ready to assist in the training of such a team once assembled.³³ In the interim, IIPA recommends that, at least in the case of large-scale infringement cases involving CD plants and warehouses, prosecutors from the Attorney General’s Chambers be made available, and notes that some copyright cases arising out of Police raids are already handled in the AG’s office, leading to better results in court than those arising out of MDTCA raids. In practice, MDTCA officials rather than the AG’s Chambers continue to handle some large factory-raid cases.³⁴

The Court System Fails to Expedite Justice Against Copyright Piracy and Fails to Impose Deterrent Penalties on Pirates

As noted, few cases ever proceed to trial in Malaysia, which is close to the heart of the enforcement problem. Due to failures at the prosecution and court stage, Malaysia’s huge investment in enforcement in the past couple of years has been, sadly, wasted.³⁵ Any case that does survive the gauntlet, and which can weather a succession of additional delays in the judicial process, is ultimately brought before a court whose judges are almost always unfamiliar with the copyright law. For example, the presumptions provisions (subsistence and ownership of

complete, e.g., for the Association of American Publishers, after presumption of copyright ownership information and the “examination report” have been handed to the MDTCA).

³¹ One industry reports that even if the infringer is found by the officer for a summons, the infringer can often avoid being called into court by paying the officer. By contrast, in Singapore, if industry is unable to personally serve a summons, it can apply for a “substitute service” to comply the owner to answer the summons in court. If the owner does not answer the summons, the court will issue a warrant of arrest against the owner.

³² Apparently, pirates would be charged without any documentation as to copyright ownership in the seized materials, but the Magistrate would set a date by which all documentation had to be completed.

³³ In fact, the Business Software Alliance, recognizing that it may be a while before dedicated prosecutors from the AG’s Chambers or a newly formed group of prosecutors are available, has plans to provide training in February 2003 to a team of MDTCA officers who are most likely to present its cases in court. The Motion Picture Association has also participated in seminars for both prosecutors and judges.

³⁴ For example, Prosecuting Officers from the MDTCA, not from the AG’s chambers, handled two plant cases recently, a cassette manufacturing case in Penang (Summons No. 62-74-4-2001) and the Swetch case in Johore Baru. In only two known plant cases in Kuala Lumpur and P. Jaya (the “Ting Sony” and the ODVD case) did prosecutors appear from the AG’s Chambers.

³⁵ For example, as noted above, because a defendant must be personally served with a summons to answer charges of infringement, defendants actively avoid accepting service of summons.

copyright) remain, as interpreted in practice, tilted toward defendants.³⁶ In practice, many judges still have allowed defendants to insist on live testimony and cross-examination of the party submitting an affidavit with respect to presumptions. Untrained MDTCA prosecutors are in no position to stop this manhandling of the copyright law. Nor are they effective in persuading judges of the need to expedite trials to bring them to quick closure,³⁷ nor of the need to impose deterrent sentences, even in the handful of cases which actually proceed to that stage. For example, there has never been a criminal conviction in a disputed case for corporate end-user piracy,³⁸ although there have been five convictions for book piracy, albeit with paltry, non-deterrent fines meted out.³⁹

IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform. First, the Malaysian government should follow the lead of several countries in the region by establishing and developing a cadre of highly qualified, specialized, well-trained judges and prosecutors in the area of copyright. Even better would be immediate consideration of the establishment of a specialized intellectual property court. Malaysia's ASEAN neighbor Thailand has had considerable success in using a specialized court to resolve seemingly intractable problems similar to those that Malaysia has long experienced, including huge case backlogs. This model, among others, should be studied to see how it could most expeditiously be adapted for the Malaysian legal environment. Such a court would hopefully understand, for example, the importance of swift evidence gathering, and the need for preventive measures (such as Anton Piller orders) that avoid the destruction of evidence. Such a group of trained judges would also recognize the commercial nature of the crime of piracy, and would therefore understand the important role deterrent sentencing plays in lowering piracy levels.

Second, measures should be taken to ensure that pirates do not get away. Measures mentioned above regarding the ability to dramatically speed up the time after a raid in which the pirate would be charged with the crime, and thus, decrease the possibility that the pirate will be able to abscond, will be an extremely helpful first step. Courts should also be empowered to try pirates and convict them *in absentia*. Thereafter, a warrant of arrest would be issued, and cooperation from the police would be made available to assist in the arrest of the convicted pirates. Further, pirates released on bail must be required to report to the nearest police station every day, pending the prosecution of the piracy case.

³⁶ The 2000 amendment to Section 42 was actually intended to help copyright owners by allowing for a statutory declaration to be affirmed by an agent authorized in writing by the copyright owner. Courts have largely disregarded Section 42. In the meantime, they continue to employ an abundance of caution with respect to presumptions, and have required prosecutors to prove subsistence issues through other documents such as record company receipts of first publication, letters of authority, or sometimes even live testimony of right holder representatives. Failure to comply with these requirements has in some cases led to acquittals.

³⁷ For example, for the Business Software Alliance, seven of eight end-user piracy cases remain pending, some dating back as far back as 1997. Some of the delays are due to numerous requests for adjournments by defense counsel or even the prosecutors themselves which are readily granted by the courts.

³⁸ Consequently, there is little incentive for businesses to legalize, as they do not feel threatened by any consequences for using pirate software.

³⁹ The average fine in five convictions obtained in book piracy cases since 1996 involving U.S. publishers was about US\$800, hardly sufficient to deter a pirate photocopying operation.

Third, sentencing guidelines should be issued and strictly enforced for maximum deterrent effect.⁴⁰ For example, if Malaysian courts were to adopt the sentencing practices of the judiciary in Hong Kong and Singapore, where custodial sentences are handed down without exception and high fines are imposed, a level of deterrence would surely result. By contrast, in the first prosecution of a CD plant in Sungai Buloh in June 2001, the defendants had been charged with 1,000 copyright offenses involving music and films. The accused pleaded guilty to all charges, but was fined only RM100,000 (US\$26,316), or RM10 (US \$2.63) per charge, a mere 0.01% of the maximum possible fine under the Copyright Act. The defendant did not spend a day in jail, and his machinery was returned. Such a result was anything but a deterrent to further infringement, given the undoubtedly huge profits reaped by the pirate in this case.

Fourth, a systematic review should occur of any acquittals and inadequate sentences, including immediate disclosure of grounds for the judgment (necessary in order to appeal a case) as well as the prosecutors' reasons for not appealing a case (including appeals of corporate end-user piracy cases in which imprisonment is not imposed). For example, in the CD plant case discussed above, an appeal was filed, but the Attorney General has still not received grounds for the earlier decision from June 2001.⁴¹

A Proposed New Stickers Program Demonstrates Government Will, But Raises Some Concerns

The Trade Description (Original Label) Order 2002 went into force on January 15, 2003,⁴² introducing a program requiring all distributors to apply stickers available from the government inside the shrinkwrap of all copies of works distributed in Malaysia (whether manufactured locally or abroad) on optical discs (VCDs, DVDs, CD-ROMs, LDs, MDs), including imported discs. Recognizing the government's efforts to curb piracy through the use of stickers, but having experience dealing with such programs in other countries and around the world, the copyright industries express doubts about the overall effectiveness of such a stickers program for anti-piracy purposes. For one, such a program may be prohibitively costly for the

⁴⁰ For an example of a case in which deterrence was not achieved, in one case in 2001 involving end-user piracy of software, the AG's office accepted a plea bargain reducing charges of an end-user pirate from 20 counts to two counts. Section 41(1)(i) of the Copyright Act currently imposes a fine of up to RM10,000 (US\$2,632) for each infringing copy, and/or imprisonment for a term of up to five years, and for any subsequent offense, a fine of up to RM20,000 (US\$5,263) for each infringing copy and/or to imprisonment for a term of up to ten years. In this instance, the not only was imprisonment not imposed, but the fine was reduced to less than a cost of doing business. In early 2002, the Business Software Alliance received assurances from the AG that this would not reoccur without BSA's approval.

⁴¹ Another unfortunate case result was recently handed down in the KTA Sarawak case, involving corporate end-user piracy. KTA Sarawak was acquitted in November 2002 of charges of end-user piracy. The court reported that the acquittal was based on the following: 1) the prosecutors had not properly secured all the evidence; 2) possession of the infringing software required general knowledge on the part of KTA, not proved by the prosecution; 3) the affidavit was deemed inadmissible relating to copyright of the software; and 4) KTA had acted in good faith and had no reasonable grounds for knowing that copyright was infringed (since KTA had issued a Memo and Handbook Warning to employees not to use infringing software prior to the raid). After consultation with BSA, the MDTCA filed notification of its right to appeal the case, and it is expected that the focus of the appeal will center on the issues of "knowledge" and the "good faith/reasonable grounds" on the part of KTA. Many other appeals cannot proceed since the grounds of judgment were never provided in writing, even years after the verdicts were rendered.

⁴² The regulation is found under Section 11 of the Trade Descriptions Act and requires the application of government-issued holograms.

government to run.⁴³ Secondly, such programs have been prone to abuse and fraud in other markets, making enforcement even more challenging.⁴⁴ Third, such a program will impose burdens on copyright owners, particularly on those right holders who do not manufacture in Malaysia, such as the business software and entertainment software industries. For this and other reasons, the business and entertainment software industries should be excluded from the program.⁴⁵ Finally, such a program must not be considered a substitute for sustained on-the-ground enforcement against piracy. IIPA will be monitoring the stickering program carefully to ensure that there is no possibility of fraud or abuse, and that the costs to right holders do not become prohibitive.

COPYRIGHT LAW REFORM

Copyright in Malaysia is governed under the Copyright Act, 1987, as amended through 2000. A major recent legislative development in Malaysia was the passage of the Optical Disc Act (2000), to address rampant optical disc piracy. Based on many of the issues raised in this report, the copyright industries collectively would like to see several changes—mostly minor—to the laws which, if implemented swiftly, would lead to positive gains in the fight against piracy in Malaysia.

Enact Technical Amendments to Optical Disc Act

Several technical amendments to the Optical Disc Act (2000) would go far to improve enforcement against optical disc piracy. Such changes should include:

- making the sale of optical discs without SID code an offense under the Act;⁴⁶
- requiring that samples (“exemplars”) be obtained from licensed plants, by making it a term of the license for the plant to provide sample discs at regular intervals;
- fully authorizing enforcement officers under the Act to seize sample discs when conducting inspections;
- authorizing associated representatives (such as RIM, MPA, etc.) to accompany officers as a matter of right when conducting an inspection on either a licensed or unlicensed plant, to confirm the source of the discs, and to maintain the chain of custody of the discs;
- providing right holders the opportunity to receive sample discs for forensic examination;

⁴³ Security stickers will apparently be sold at RM 0.10 (US\$0.02) during the initial window period and thereafter be increased to RM 0.20 (US\$0.05).

⁴⁴ IIPA has heard reports that stickers may already be showing up on auction, which, if true, would indicate a terrible start to this program.

⁴⁵ For example, Business Software Alliance member company product is packaged in such a way that already makes legal product readily distinguishable from piracy product.

⁴⁶ While Article 19(1) provides, “[a] licensee shall cause each optical disc manufactured by him to be marked with the manufacturer’s code . . . ,” contravention of which is made a punishable offence, sale of such a disc without manufacturer’s code must also be prohibited under the Act to make it as strong as possible.

- authorizing in the Act that enforcement officers have the authority immediately to enter a plant, including, where necessary, by forcible entry (to avoid the phenomenon whereby plants often delay entry to officers in order to dispose of infringing copies);
- providing for automatic revocation of a license for any plant committing an offense under the Act;
- ensuring that the practice of “disc gouging” or “disc scouring” is an offense under the Act.

Enact Minor Amendments to the Copyright Act That Will Significantly Enhance Government Enforcement Capabilities

Several minor amendments (or clarifications through internal documents or regulations) to the Copyright Act would address several significant shortcomings in the current ability to effectively enforce and provide deterrence against piracy. Such changes should include:

- making copyright infringement a public offense (or confirming the same) so that MDTCA officers can initiate investigations *ex officio* and call relevant industry representatives to identify their works once a seizure has occurred;⁴⁷
- imposing mandatory minimum jail sentences under Section 41 of the Copyright Act;
- further amending Section 42 of the Copyright Act, so that affidavits of subsistence and ownership of copyright will be accepted by the courts (as sufficient to establish *prima facie* the subsistence and ownership of copyright), so that the burden of proof is shifted to the defendant regarding such presumptions,⁴⁸ and so that defendants shall bear all costs and expenses in any attempt to dispel the presumption. Section 42 should also be amended to permit agents (in addition to copyright owners) to file such affidavits. Affidavits made before any person having authority to administer oaths should not be subject to the further procedural requirement of having that statement “legalized,” as is presently the case.
- amending Section 52 to permit the disclosure by enforcement authorities to copyright owners and their counsel of documents and other evidence known to them, for the purposes of pursuing court proceedings such as a civil action or an offense under some other law;
- amending Section 36 to reflect a presumption that infringing copies found in the custody possession and control of any person are intended for distribution to the public by sale or other transfer of copyright, and an act of infringement shall be deemed to have been committed.

⁴⁷ It should be noted that the intent of the Act appears clearly to provide for action to be taken by MDTCA and the Police without the need for a right holder complaint. For example, Section 44 of the Copyright Act authorizes MDTCA officers to enter premises without a warrant in certain circumstances. Section 50 of the Act gives officers general powers to investigate, including seizing infringing copies from open premises, which also do not require a warrant.

⁴⁸ One case in which Section 42 was properly applied by the trial court involving an Indian film is now before the High Court on appeal. The outcome of that appeal, expected in 2003, could indicate whether it is necessary to enact a further amendment to achieve the purpose of the 2000 legislation.

Enact Copyright Act Amendments Enabling Malaysia to Join the WIPO “Internet” Treaties

Spurred by a desire to enhance the attractiveness of its Multimedia Supercorridor to high-tech investments, Malaysia took a number of steps in the late 1990s toward updating its copyright laws to meet the challenges of the Internet era; but since then, its modernization efforts seem to have stalled. On April 1, 1999, amendments to the Copyright Act adopted two years earlier were brought into force. These amendments implement in Malaysian law some of the standards contained in the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Changes included recognizing that the copyright owner’s exclusive right of communication to the public embraces the right to make works available on demand (for instance, via the Internet). However, other treaty requirements, such as the protection of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. As a country seeking to play a leadership role in the global electronic marketplace, and to position itself as a leader within the APEC and ASEAN communities in the adoption and implementation of modern intellectual property regimes, Malaysia should ratify both treaties immediately, and should complete work on statutory amendments to fully implement all aspects of both treaties as soon as possible.⁴⁹ These goals are especially urgent now that the WCT and WPPT are in force and are now international minimum standards for the e-commerce environment.

⁴⁹ Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the “Statement to Implement APEC Policies on Trade and the Digital Economy” (Leaders’ Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.