

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2004 SPECIAL 301 REPORT

# MALAYSIA

### EXECUTIVE SUMMARY

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**Special 301 Recommendation:** Malaysia should be maintained on the Watch List. The government of Malaysia has announced that on April 1, 2004, it will impose price controls on music and motion picture optical discs. Subsequent to that announcement, a new Minister of Domestic Trade and Consumer Affairs was appointed. IIPA trusts that the new Minister will examine the utility of imposing price controls and reverse or at least delay the imposition of price controls pending further consideration. In the event price controls are imposed, IIPA recommends that Malaysia be placed on the Priority Watch List. IIPA also recommends that an out-of-cycle review be conducted later in the year, which should evaluate whether Malaysia has made progress in reducing the manufacture and export of pirate optical discs.

**Overview of Key Achievements/Problems:** In 2003, Malaysia demonstrated that given the proper government will and adequate resources, retail piracy and pirate optical disc over-production can be reduced. An enforcement crackdown beginning in May 2003 succeeded in curtailing domestic retail piracy of most copyrighted materials in Malaysia, and resulted in successful actions against pirate optical disc production facilities. Despite progress, however, Malaysia remains a significant source of production and export of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs, etc.). Malaysia remains the number one producer and exporter of pirate console-based entertainment software in the world. Book piracy remains a serious problem, although the government has supported a campaign to promote legal use of published materials on university campuses and has run some raids against pirate photocopy shops.

Some other problems remain in Malaysia that introduce unnecessary and unhelpful market distortions and threaten to undermine the enforcement efforts taken by the government in 2003. Most serious of these is the threatened imposition of price controls against locally produced audio and video compact discs. IIPA strongly opposes the imposition of price controls on any copyrighted materials in Malaysia. Imposition of price controls is at cross purposes with Malaysia's interests in reducing piracy and providing incentives for investment, would hurt Malaysian creators, performers, and producers, and could have the unintended effect of driving legitimate production outside of Malaysia. Another market distortion/disincentive involves the hologram sticker program (in which copyright owners must purchase hologram stickers and apply them to product sold in Malaysia), which actually imposes greater costs on legitimate copyright businesses. A further problem involves the traditional lack of follow-up to raids, including failure of prosecutors to swiftly handle and courts to swiftly decide an ever-increasing docket of cases (e.g., prosecutions of optical disc pirates have been rare, providing inadequate deterrence).

#### **Actions to be taken in 2004**

##### Enforcement

- Ramp up efforts to defeat optical disc piracy (e.g., through more surprise factory raids and follow up on licensed facilities previously caught pirating).

- Sustain enforcement efforts against retail, and step up enforcement against book, piracy.
- Prosecute high-profile cases against non-compliant or unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offenses, with full investigations of links to other crimes where applicable, for example, money laundering offenses, offenses involving illegal business practices, etc.
- Thoroughly investigate links between piracy and organized crime, including persons and organizations outside of Malaysia that exercise control over pirate operations within Malaysia.
- Instruct Malaysian Customs to work with industry (including freight companies) and U.S. Customs on monitoring exports and seizing optical discs bound for export; take measures to address the problem of false documentation of exporter and export product information.

### Prosecutions

- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers to prosecute high profile copyright cases, including cases against organized criminal enterprises.
- Institute charges of copyright violations for non-arrest cases within 30 days after full documentation is received from copyright owners; speed up processes toward convictions.
- Decrease or ease documentary requirements imposed on right holders.

### Convictions

- Adhere to the recent Chief Justice's directive (February 3, 2003) to judges to treat copyright cases as "priority cases" and not to postpone cases for frivolous reasons.
- Secure convictions against businesses and business owners/managers/directors that are replicating pirated optical discs, against corporations using unauthorized software, and other commercial pirates (e.g., pirate photocopy shops).
- Assign piracy cases to prosecutors and judges trained and experienced in copyright.
- 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.
- Ensure that all cases taken on appeal have a prosecutor assigned to them to avoid their stagnation in the court process.

For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to filing.<sup>1</sup> Please also see previous years' reports.<sup>2</sup>

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<sup>1</sup> <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

<sup>2</sup> <http://www.iipa.com/countryreports.html>.

**MALAYSIA ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 – 2003<sup>3</sup>**

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	38.0	50%	42.0	75%	40.0	80%	41.0	80%	42.0	85%
Records & Music	40.0	45%	110.2	70%	148.9	70%	15.6 <sup>4</sup>	65%	5.0	40%
Business Software Applications <sup>5</sup>	NA	NA	79.2	68%	75.0	70%	75.4	66%	67.8	71%
Entertainment Software	NA	90%	NA	NA	56.4	93%	NA	98%	164.0	99%
Books	9.0	NA	8.3	NA	8.2	NA	8.0	NA	8.0	NA
<b>TOTALS<sup>6</sup></b>	<b>NA</b>		<b>239.7</b>		<b>328.5</b>		<b>140.0</b>		<b>286.8</b>	

## **IIPA DEEPLY OPPOSES PRICE CONTROLS IN MALAYSIA**

In September 2003, the Ministry of Domestic Trade and Consumer Affairs advised industry representatives that it intended to impose price controls on certain copyrighted materials; the government has further indicated that these controls will enter into effect on April 1, 2004. IIPA deeply opposes the imposition of price controls for copyrighted materials. Such a move would be unprecedented in the world and could set an unacceptable precedent for similar schemes in Asia and other regions. It is no accident that not a single country in the world has ever introduced price controls on optical disc products. Price controls are designed to create consumer safeguards only for essential products in which competition may not be relied upon to achieve a society's goals. Such controls distort markets and do not reflect market realities. They discourage necessary investment in infrastructure, which may be needed for revitalization or growth in a sector. In the case of Malaysia, such controls may also bankrupt local businesses and drive needed investment out of Malaysia, since the controls apply to product manufactured in Malaysia.

There are other compelling political reasons why the Malaysian government should avoid the course of imposing price controls on copyrighted materials. Imposition of government price controls in Malaysia would demonstrate a lack of commitment to a market economy and would make it much more difficult for the United States to finalize a Trade and Investment Framework Agreement (TIFA) with Malaysia. Price controls would make companies less likely to invest in Malaysia's economy and in the development of local Malaysian authors, filmmakers, artists, musicians, programmers, designers, and creators. Such disinvestment would promote the resurgence of piracy in Malaysia and thus price controls would be at cross purposes with

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

<sup>4</sup> Statistics for 1999 and 2000 represent estimated pirate sales revenue in the pirate market (i.e., pirate profits).

<sup>5</sup> BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>6</sup> In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to U.S. copyright-based industries in Malaysia in 2002 were \$243.2 million. IIPA's revised loss figures are reflected above.

Malaysia's enforcement campaign. Indeed, the Malaysian music industry notes a 40% drop in local album releases in 2003, and a 20% drop in revenues;<sup>7</sup> price controls would only further exacerbate the already-declining market for Malaysian talent. Finally, in setting prices, the Malaysian government would practically take on the thought process of pirates, who base prices of illegal discs on the cost only of materials and manufacture. Simple manufacturing costs do not capture the costs of research and development, development of talent, including local talent, marketing, license fees, taxes, and the value of the intellectual property in copyrighted materials, as well as the costs due to losses resulting from the many legitimate creations that are unprofitable. For example, in the record industry, nine out of every ten releases fail ever to return a profit. No government-ordered price control could do justice to the complicated combination of legitimate costs and risks borne by legitimate right holders.

If the Malaysian government follows through by imposing price controls in April 2004, IIPA recommends that Malaysia be placed on the Priority Watch List.

## **PIRACY IN MALAYSIA**

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### **Enforcement Crackdown Had Positive Impact, But Pirate Optical Disc Production Remains a Serious Problem**

In 2003, some major actions against pirate optical disc production dipped into Malaysia's production capacity. Nonetheless, there remain a reported 38 optical disc plants in the country, including at least 86 production lines; there are also some unlicensed underground facilities. The total estimated capacity of the verifiable plants is at least 301 million discs per annum.

Unfortunately, Malaysia also continues to harbor many optical disc (OD) factories having the capacity to over-produce pirated materials. There is also evidence that exports of pirate copyrighted materials, especially of entertainment software (mainly console-based games like Xbox and PlayStation2<sup>®</sup> plus some personal computer games) continue unabated. Such materials reportedly continue to flood the Middle East markets, and have shown up in Latin America, Australia, South Africa, Sweden and the United Kingdom, among other markets. The entertainment software industry is extremely frustrated by the inability of the Malaysian government to address the problem of pirate console game exports.<sup>8</sup> Ownership of many Malaysian OD production facilities for entertainment software is tied to Greater China syndicates run primarily from Taiwan, Hong Kong and China. OD pirates in Malaysia regularly engage in "disc gouging," namely, tampering with source identifiers used to identify the location of production of a disc. Pirate motion picture DVDs and VCDs from Malaysia are also being intercepted in Australia, the United Kingdom, the U.S., South Africa, and throughout Europe, while pirate music CDs seized in the United Kingdom were destined for Singapore, Nigeria, Cambodia, Europe and the U.S. There have also been some seizures of DVD "stampers" in Malaysia that were imported from Indonesia in 2003.

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<sup>7</sup> Terrina Hussein, Piracy Affecting AIM 2004, *The Malay Mail*, 21 January 2004.

<sup>8</sup> In particular, the industry has been frustrated by its inability to track and pursue manufacturers and exporters due to false exporter documentation. Pirate exporters are known to hire others to ship pirate entertainment software out of Malaysia using false names and addresses. IIPA is deeply concerned at the ease with which exporters are able to falsify export documents and freely export illegal products from Malaysia to other countries around the world.

Book piracy remains a serious problem in Malaysia, with both pirate photocopy operations and offset publishing stymieing legitimate publishers trying to do business in Malaysia. Particularly stubborn is the piracy of academic materials on university campuses, although the MDTCA just supported the publishers in a campaign to spread the legitimate use of published materials on university campuses. U.S. book publishers also suspect that pirate book exports are emanating from Malaysia, landing in such far-off locations as Southern Africa. Finally, there is some evidence that, despite the recent crackdown on retail piracy, many pirates are simply stockpiling pirate materials awaiting the end of the crackdown before re-entering the market with full vigor.<sup>9</sup>

One recent phenomenon in Malaysia is the rise of Internet cafes. These cafes, in addition to providing Internet access, allow customers to use copyrighted material, including entertainment software. Unfortunately, many of the copyrighted materials used in these cafes are pirate copies, and entertainment software companies do not license to such facilities. Therefore, it is extremely important that Internet cafes be made to license the use of copyrighted materials. Currently, there are roughly 600 to 1,000 unlicensed Internet cafes. In order to prevent crime and establish healthy business practices for Internet cafes, the Malaysian government should ensure that Internet cafes use legitimate copyrighted materials.

## **ENFORCEMENT AND THE COURTS IN MALAYSIA**

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### **Crackdown Curtails Domestic Retail Piracy and Removes Some OD Production Equipment from Operation**

The government crackdown in the middle of 2003 was unprecedented and resulted in reductions of retail piracy from the markets in Malaysia for most industry sectors (i.e., the numbers of street vendors has decreased dramatically, and there have even been decreases in the availability of pirate optical discs in notorious Petaling Street markets). Much of the remaining retail trade is carried out underground (i.e., by vendors approaching customers on the street, who then wait for the vendor to bring product from another secret location) or less obviously (i.e., displaying legal product on shelves and bringing out pirate copies only for quick sale or on request). The Malaysian government should be commended for its efforts in taking steps to eradicate retail piracy. The government must be urged to sustain its efforts, as we are very wary that piracy operations will revert to previous levels if enforcement actions decline. IIPA notes that the recent crackdown has had little effect on piracy availability at major shopping complexes like Sg. Wang, Low Yat Plaza and Imbi Plaza in Klang Valley and the Holiday Plaza & City Square in Johor, for example.

We understand that from May 23 to June 16, the government mobilized approximately 800 police officers and 250 officials from the Ministry of Domestic Trade and Consumer Affairs (MDCTA), and other enforcement agencies to conduct a crackdown on all activities of pirate optical disc distributors and retailers and the criminals that support them. In that period, the government conducted almost 2,000 raids, resulting in the seizure of over 3.15 million pirate optical discs and 153,369 pornographic VCDs valued at 16.22 million Malaysian ringgit (US\$4.27 million) and the arrest of 1,046 individuals. Factory raids were carried out on 12

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<sup>9</sup> Pirate DVDs, VCDs and CDs are making a strong comeback, with pirate vendors displaying only the covers of movies for customers to point at; some of these covers have hologram stickers on them, which is meant to deceive enforcement officials into believing that they are selling legitimate copies. Pirates are also using minors/children as peddlers of pirated product.

facilities, including seizure of 18 replicating lines (with the dismantling of 16 lines). Virtually all the factory raids have been carried out by the Malaysian government on its own initiative (except one initiated by the motion picture industry), with much of the information being provided by Malaysian government informants.<sup>10</sup> Finally, the government has procured the resources necessary to seize and hold equipment from unlicensed plants that was used in the illegal manufacture of optical discs, storing that seized equipment in its own government-owned warehouses.<sup>11</sup>

Book publishers continued to get some raids against pirate photocopy shops, with several high-profile raids near the Universiti Sains Malaysia (USM) following the distribution of the Association of American Publishers' copyright awareness posters which were endorsed by the MDTCA and distributed to all public and private colleges in November. However, publishers report inconsistencies in the raiding processes at the ground level. For instance, while seizure of infringing materials found on the premises is routine, seizure is inconsistent at best of photocopying machines, binding machines and similar implements that are key to the infringement process. Likewise, documentation practices vary widely among officers in different jurisdictions, as some officers fail to document ISBN numbers and authors' names—information crucial to a successful continuation of legal action. Furthermore, officers are in some cases apt to make spontaneous requests of publishers at the site of a raid, such as provision of cameras for documentation or even transport for confiscated materials. Even more seriously, some AAP members have reported instances of defendants tampering with evidence at the site of a raid, with enforcement officers looking on. Finally, a few officers have been all too accommodating to infringers' requests for identification cards from publishing representatives at the site. AAP members would like to see MDTCA's educational efforts for officers stepped up, including issuance of guidelines regarding raid procedure and requirements and clarification of publishers' roles on site.

AAP members also point to vastly improving reproduction technologies such as digital scanners and high-speed photocopiers as a major source of increases in lost revenue. The Malaysian government must be prepared to deal with the increases in volume and quality of pirate product that these technology improvements will continue to generate. In addition, as photocopy shops are increasingly targeted for action, publishers are seeing operations move "underground," toward a system of "made-to-order" production in residential areas, with campus delivery by car or van. It is vital that enforcement authorities adapt to these changes in procedure and venue.

For the business software industry, *ex parte* orders continue to be issued, allowing the government to conduct raids against those suspected to be engaging in the unauthorized use of business software, so-called end-user piracy of software. The entertainment software industry continues to note a significant problem of export of its product in 2003. As for retail, there are indications that the pirate retailers have merely slipped underground, guarding their enormous stockpiles of pirated entertainment software titles, until they perceive that the current campaign has ceased. In addition, there are reports from industry sources that optical disc production lines have largely shifted to console-based entertainment software as the content of choice, which could explain why exports of this product have not abated.

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<sup>10</sup> In addition, the government has not hesitated in inspecting or raiding politically well connected targets, indicating a strong government will to tackle this problem.

<sup>11</sup> For raids on licensed plants, the machinery is generally sealed, and some equipment has reportedly been released to licensed plants upon payment of a court bond.

## Post-Raid Investigations, Prosecutions, and Court Cases Fail to Deter Piracy in Malaysia

Unfortunately, as has long been the case in Malaysia, the cogs of justice seem to slow dramatically after a successful raid, and results have been anything but a deterrent. For the music industry, five defendants were convicted in 2003 and fines of RM1,000 (US\$263) to RM32,000 (US\$8,422) or a jail sentence of one to five months imposed. While the three defendants who failed to pay their fines actually served or are serving their sentences, meanwhile, over 845 cases for all industries lingered on without resolution, many from as far back as 1997; and there has never been a conviction against an end-user pirate of business software.<sup>12</sup> A recent case is cause for great concern. A courier and two criminal associates were caught attempting to smuggle pirate print reels of four major motion pictures—valued at US\$50,000 each—out of the country. While the courier was sentenced on January 4, the penalty under the smuggling statute—1 day in jail and a \$2500 fine—is totally non-deterrent (the other defendants will be tried in September 2004 but were released on bail). While the quick processing of this case is commendable, the outcome is unacceptable. The Malaysian government needs to do more to ensure that these kinds of cases receive top attention and that prosecutors work to achieve maximum sentences attainable under the laws.

The enforcement system falters post-raid largely due to delays in preparing cases for prosecution, lack of investigative or prosecutorial expertise, and an overburdened docket of cases to bring forward. Cases arising out of police raids generally fare better than those arising out of MDTCA raids, since public prosecutors in the Attorney General's Chambers who have law degrees handle the police cases, while MDTCA prosecuting officers, usually legally untrained, and in some cases mere investigating officers or office administrators, handle the MDTCA cases. In preparing a case for prosecution, MDTCA investigators face no strict filing deadline, so cases languish in the preparation of documents, and/or go dormant, in the latter case often because the defendant has absconded or the particular officer handling the case has been transferred.<sup>13</sup> Representatives of right holders are also not informed of the transfer or of the new officer taking over the files. Even before cases proceed to trial, MDTCA officers find themselves under considerable pressure to settle piracy cases under other statutes (e.g., the Price Control Act, or the Trade Descriptions Act), which avoids complex legal issues but results in purely nominal penalties.

Even in police cases which are handled by legally trained prosecutors, long delays are the norm, as copyright cases are given low priority, subject to numerous postponements, and only rarely result in formal charges being brought (with even fewer resulting in convictions). As can be imagined, such results have had very little deterrent effect on the pirates in Malaysia. There are also unduly burdensome documentary requirements imposed on copyright owners in the bringing of piracy cases. Copyright owners are required to execute statutory declarations, including extensive and detailed information on copyright ownership for the titles infringed upon (such as the date and place of first publication or creation) as well as providing copies of each

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<sup>12</sup> The business software industry group, BSA, has brought three contested end-user cases in Malaysia, with all of them failing to result in conviction (the last two in 2003), probably due to the technical and difficult nature of investigation and prosecution of such cases.

<sup>13</sup> If a defendant has absconded, the case will result in a "discharge not amounting to an acquittal" (DNAA), sending the case into a "dormant" state, unless the defendant can be caught.

title involved in the case.<sup>14</sup> For entertainment software companies that release hundreds of titles each year, providing copies of the work, collecting and transmitting copyright information is not only an undue burden on time, but also proves to be expensive. Malaysia should look to neighboring countries which have simplified documentary requirements for the bringing of cases.

## **Malaysian Government Must Focus in 2004 on Development of Specially-Trained Prosecutors and Judges to Handle Copyright Cases**

The Malaysian government should devote the resources necessary in 2004 to develop a cadre of highly qualified, specialized, well trained 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. Some IIPA members have provided training toward this end in 2003.<sup>15</sup> 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.<sup>16</sup> The judiciary is also in drastic need of reform. Judges presiding over copyright cases are almost always unfamiliar with the copyright law, resulting in numerous problems of interpretation,<sup>17</sup> and ultimately, in delayed and non-deterrent justice (and small, non-deterrent penalties in the few cases that reach judgment).<sup>18</sup> IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform:

- 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 (and possibly a specialized intellectual property court).<sup>19</sup>
- Measures should be taken to ensure that pirates do not get away, and judges should enforce directives intended to speed the process of charging/indicting defendants,<sup>20</sup> in line

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<sup>14</sup> One potentially positive development in 2003 involved the "corporatizing" of the Intellectual Property Division of the MDTCA, making it a statutory body. MDTCA will now reportedly have the statutory authority to provide proper presumptions and ease current documentary burdens regarding copyright ownership.

<sup>15</sup> In April and July 2003, the local recording industry group participated in prosecution training (mock trials) for MDTCA officers. The group also presented papers at two other seminars organized by the government in 2003. Following the loss of the first end-user software piracy case in 2002, in February 2003, BSA provided training to 18 hand-picked prosecutors from the MDTCA. The training was directed primarily on how to gather evidence during an end-user raid and the steps that need to be taken in order to prosecute the case successfully in court. In consultations with the government in 2003, MDTCA also agreed on the need for stronger awareness within the corporate world of copyright and corporate duties under the Copyright Act 1987. IIPA encourages the Commission of Companies, among others, to get involved in this effort.

<sup>16</sup> Also, criminal investigations and prosecutions should not terminate at the vendor or mid-stream supplier level, but should extend to higher levels of syndicate piracy operations. The skills of legally trained prosecutors from the Attorney General's Chambers would be crucial to such higher level investigations and prosecutions.

<sup>17</sup> For example, with respect to presumptions of ownership and subsistence of copyright, notwithstanding amendments to the Copyright Act in 2000 intended to ensure that presumptions are established in copyright cases, judges often favor defendants' challenges to presumptions, and, for example, require prosecutors to provide documents like 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.

<sup>18</sup> The average fine in the only 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.

<sup>19</sup> 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, Anton Pillar orders, and meting out strong criminal punishment against commercial piracy.

<sup>20</sup> In a development in 2002 that was intended to avoid the situation of a defendant running away before being

with the Chief Justice of Malaysia's announcement in April 2003 that copyright piracy cases should be handled as "Priority Cases," meaning fewer postponements and that technically, the judge must hear the case within two months of the case being registered in court and must conclude the trial within three months.<sup>21</sup> Despite this directive from the Chief Justice, there was no significant decrease in postponements or increased speed of adjudication in 2003. The court should also be empowered to try defendants and convict them *in absentia*. Further, defendants released on bail must be required to report to the nearest police station every day, pending the prosecution of the piracy case, to ensure that they do not abscond.

- Sentencing guidelines should be issued (similar to those in Hong Kong and Singapore, where custodial sentences are handed down without exception and high fines are imposed) and strictly enforced for maximum deterrent effect.
- A systematic review should occur of any acquittals and inadequate sentences, including immediate disclosure in writing 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).

## HOLOGRAM STICKER PROGRAM

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IIPA has serious concerns regarding the implementation of the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82), which requires all distributors to pay for and apply stickers inside the shrinkwrap of all optical discs of copyrighted materials distributed in Malaysia, including imported discs. The Malaysian government began enforcing this requirement, which raises the costs to the copyright owner to do business in Malaysia, on July 15, 2003. Thus far, the system has not worked very well. The process for obtaining holograms is extremely burdensome, as only one location gives them out; the documentation is lengthy; and the process is time consuming. Very few arrests have been made of pirates. Three cases reported by the record industry arose out of a counterfeiting operation in China, containing fraudulent record industry company logos. The government has also apparently issued holograms to third party importers who are not licensed to produce/distribute copyrighted materials in Malaysia, and has taken no action against an importer using false license information to obtain holograms. We note other serious concerns over the "hologram" program that raise doubts about the overall effectiveness of such a stickering program for anti-piracy purposes.<sup>22</sup>

- **The Statutory Declaration/Affidavit Is Overly Burdensome:** The Order requires the filing of a Statutory Declaration/Affidavit, including extensive and detailed information on copyright ownership for each title to be released in the Malaysian market as a prerequisite for the issuance of holograms. The government should consider waiving the requirement for a Statutory Declaration and allow the Letter of Authorization alone (with no requirement for legalization of this document) to suffice. However, whatever the government does, it must

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charged, the MDTCA legal office directed a defendant in a copyright piracy case to be charged in court three days after a raid, or otherwise, a warrant of arrest could be issued against the pirate. At least as to the book publishers, this order is not being carried out at all in practice.

<sup>21</sup> Under the Chief Justice's Directive, appeals must be completed within two months of the conclusion of a trial.

<sup>22</sup> We also note that it is ironic that, at the same time the government is pushing to reduce prices on optical discs sold in the country, it is adding a huge additional burden to legitimate right holders by adding costs and delays to the distribution of their legitimate goods. These additional costs include the actual cost of the "holograms" as well as "compliance" costs such as increased manufacturing costs, e.g., where the hologram must be placed under shrinkwrap of legitimate copyright product.

take steps to ensure that fraudulent information is not used to obtain holograms (which apparently has already happened).

- **Requirement to Allocate and Keep Records on Holograms for Specific Titles is Overly Burdensome:** The Order requires legitimate businesses to allocate serial numbers of holograms to each copyright title. The government should permit purchase of “bulk” holograms, with no restriction on allocation to particular products.
- **Holograms are Overly Costly:** Holograms in Malaysia cost 20 sen (US\$0.05). The government should lower the cost of holograms to 4 sen, and take other steps to lower indirect costs to legitimate businesses.
- **Placing Hologram Under Shrinkwrap is Costly and Overly Burdensome:** The Order requires the hologram to be affixed inside the shrinkwrap. Since many copyright owners have a manufacturing source outside of Malaysia, the government should amend the Order such that placement of holograms outside the shrinkwrap is acceptable for all works.
- **Holograms on Pre-Existing Stock Represent a Major Expense for Legitimate Businesses:** Because the Order requires holograms to be applied retroactively to product released before January 15, 2003, those trying to comply are facing practical and costly obstacles to compliance. The government should dispense with the requirement for product the release date of which is before January 15, 2003.
- **Some Products Should Not Be Made Subject to Hologram Requirement:** The business and entertainment software industries produce “original equipment manufacturer” (OEM) software that is installed or distributed with hardware; at least these products should be exempt from the hologram requirement.

## **COPYRIGHT LAW REFORM/OPTICAL DISC LAW**

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Copyright in Malaysia is governed under the Copyright Act, 1987, as amended through 2003. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003) strengthened criminal penalties and generally gives enforcement authorities more ability to carry out enforcement against copyright piracy, e.g., Section 50A gives MDTCA officials the ability to carry out arrests for copyright piracy.<sup>23</sup> These changes address in part the issue raised by IIPA in past filings about the need to deem piracy a “public crime,” and while the amendments do not go quite that far, they do in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*, so in that regard, we view them as a positive development.

The amendments do not otherwise address issues raised by IIPA in past filings, e.g., they do not impose mandatory minimum jail sentences for piracy; they do not address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright; they do not permit disclosure by enforcement authorities to copyright owners of evidence; and in civil cases they do not deem infringing the “possession and control” of infringing copies for the purpose of sale or other transfer.<sup>24</sup> Malaysia should also make certain other changes in order to more completely implement the WIPO “Internet” treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and to allow it to finally join these treaties.<sup>25</sup> We understand that MDTCA officials have been working on a draft to fully

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<sup>23</sup> We understand that since these amendments went into force, MDTCA has made more than 10 retail arrests, all of which have been registered in court as offenses under the Copyright Act.

<sup>24</sup> Please see the 2003 Special 301 report on Malaysia, at <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

<sup>25</sup> Malaysia amended its Copyright Act in 1999 to partially implement the WCT and WPPT, including the recognition of a broad exclusive right of “communication to the public” including the right to make works available on demand (for

implement the treaties, but that the draft has not yet been tabled with the Cabinet; we look forward to the possibility of reviewing this draft prior to its submission to the Parliament for passage.

The Optical Disc Act (2000) was enacted to address rampant optical disc piracy in Malaysia. The copyright industries would like to see several changes to the law which would lead to positive gains in the fight against optical disc piracy in Malaysia. For example, the sale of optical discs without SID code should be an offense under the Act; samples should be obtained from all plants; officers should be authorized to seize discs in inspections if necessary; right holders should have the ability to participate in inspections and receive samples for forensic examination; officers should be authorized to forcibly enter a plant if anyone obstructs or impedes the inspection; a plant's license should be automatically revoked if the plant or its agents commits any offense under the Act; and the Act should make it an offense to engage in "disc gouging" or "disc scouring."

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instance, via the Internet). However, other treaty requirements, such as prohibiting the circumvention of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. In addition, the law should be clarified as to the protection of temporary copies under the reproduction right.

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