

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

MALAYSIA

Special Statement of Condolence Regarding Recent Events in Malaysia: The copyright industries collectively express our deep sadness over recent events surrounding the devastating *tsunami* and the enormous loss of life, and extend our condolences to the families of those in Malaysia who have lost loved ones, and sympathies to those who have been displaced or have otherwise suffered as a result.

EXECUTIVE SUMMARY

Special 301 Recommendation: Malaysia should be maintained on the Watch List, and an out-of-cycle review should be conducted to evaluate progress on the actions IIPA has proposed must be taken (see below).

Overview of Key Achievements/Problems: The copyright industries note cooperation from the government in Malaysia in 2004 in the form of continued raids, including against optical disc plants, retail stores, copy shops, and companies suspected of using illegal software. Some of the raids have netted impressive seizures. Post-raid, the courts, while remaining backlogged (reports indicate that over 600 cases remain pending), have succeeded in meting out several severe criminal penalties, sending a message to those still engaged in piracy in Malaysia about the punishment that may be forthcoming. The overall effect of these developments is, for some industries, lowered piracy levels (e.g., 50% for motion pictures, down from 75% in 2002), and increased revenues for motion pictures and recorded music.

Notwithstanding these notably positive developments, there remain some disturbing trends. Malaysia remains a significant source of production and export of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs, etc.), including what is certain to be a more than doubling of pirate DVD exports leading all around the globe (see table below). Malaysia remains the most significant producer/exporter of pirate optical disc entertainment software in the world. The domestic piracy situation for business software remains bleak, presents difficulties for book publishers, and continues to harm the recording industry, as sound recording piracy began to tick up at the end of 2004.¹ The judicial system is marred by substantial backlogs and far too many acquittals. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Malaysia were US\$188.4 million.

U.S. Trade Representative Robert B. Zoellick and Malaysia's Minister of International Trade and Industry Dato' Seri Rafidah Aziz signed a Trade and Investment Framework Agreement (TIFA) on May 10, 2004, establishing a bilateral forum to address trade issues, including intellectual property rights. The TIFA should be understood in the context of the Bush Administration's "Enterprise for ASEAN Initiative (EAI)" announced in October 2002, by which the United States offered the prospect of bilateral free trade agreements with ASEAN countries that are committed to the economic reforms and openness inherent in an FTA. We look forward

¹ There were even signs that, despite the enormous enforcement efforts in 2003, the "pirates were back" as early as March 2004. Jacqueline Ann Surin, *Coffee Break: Return of the pirates*, The Edge Malaysia, March 15, 2004 ("it took only six months before the pirated CD, VCD and DVD vendors came back on the streets").

to the TIFA forum to act as a catalyst for the changes necessary to the legal and enforcement infrastructure in Malaysia.

Actions to be Taken in 2005

Enforcement

- Tackle the optical disc pirate production problem, through an enforcement campaign aimed at licensed and unlicensed factories, seizing pirate materials and equipment, and forwarding significant numbers of cases to prosecutors.
- Investigate factory owners and inspect factories which may be involved in the production of pirated products in off-hours, and who may otherwise be circumventing the optical media regulations by keeping stampers, equipment and documentation offsite. Where appropriate, cases should be brought against the owners of factories involved in such illegal operations.
- Intercept pirated products/materials at the borders (KLIA, Johor Port, and other control points), monitor exports, and take measures to address the problem of false documentation; obtain cooperation from Malaysia Airlines Cargo to tackle pirate exports; allocate adequate manpower to tackle the export problem; purchase necessary equipment to help detect illegal shipment, e.g., more x-ray scanners; and establish a government reward scheme for targeting export syndicates.
- Continue enforcement efforts against piracy occurring domestically, focusing on book piracy, end-user piracy, Internet café piracy, and illegal use of all copyrighted materials at universities.
- Thoroughly investigate links between piracy and organized crime, and prosecute syndicate members under copyright and other appropriate laws.
- Raise public awareness by publicizing cases and seizures, giving press conferences and interviews, launching public awareness campaigns to educate the public about protection of intellectual property rights, issuing articles in the press about the importance of copyright, and issuing strong statements stating that all offenders will be criminally prosecuted.
- Evoke sufficient government will to exercise the discretionary powers provided for enforcement authorities under the optical disc law.

Courts

- Establish specialized IP courts and assign all piracy cases to prosecutors and judges trained and experienced in copyright.
- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers.
- 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.
- Ensure that all cases taken on appeal have a prosecutor assigned to avoid stagnation in the court process.
- Decrease or ease documentary requirements imposed on right holders.
- Swiftly prosecute high-profile cases against licensed as well as unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offenses.
- Swiftly prosecute businesses and business owners/managers/directors using unauthorized software or other copyrighted materials, photocopy shops making illegal copies, etc.
- Issue a directive on the need to impose deterrent sentencing on infringers, and issue sentencing guidelines.

Laws

- Join and implement the WIPO Treaties and make changes (e.g., copyright term extension) to meet the latest international standards or trends of copyright protection.
- Modernize the optical disc statute to (1) cover “burning” of recordable discs; and (2) ensure that inspection authority is available and used in any place where optical media production activity may be occurring.
- Adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A good example of such legislation is Hong Kong’s Organized and Serious Crimes Ordinance (OSCO).

In January 2005, USTR concluded an out-of-cycle review, to evaluate whether Malaysia has made progress in reducing the manufacture and export of pirate optical discs, deciding to keep Malaysia on the Watch List.

For more details on Malaysia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

MALAYSIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004²										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	36.0	50%	38.0	50%	42.0	75%	40.0	80%	41.0	80%
Records & Music	55.5	52%	40.0	45%	110.2	70%	148.9	70%	15.6 ³	65%
Business Software Applications ⁴	74.0	63%	77.0	63%	79.2	68%	75.0	70%	75.4	66%
Entertainment Software ⁵	12.9	91%	NA	90%	NA	NA	56.4	93%	NA	98%
Books	10.0	NA	9.0	NA	8.3	NA	8.2	NA	8.0	NA
TOTALS	188.4		164.0		239.7		328.5		140.0	

PIRACY IN MALAYSIA

The following piracy phenomena prevail in Malaysia:

- **Optical Disc Pirate Production for Export:** Pirate exports of optical discs remain the most damaging form of piracy to the copyright industries. The Malaysian government reports the existence of 32 optical disc plants producing finished content; however, IIPA believes there may be as many as 43 total optical disc production plants and 126 production lines (93 of

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission, at www.iipa.com/pdf/2005spec301methodology.pdf.

³ Statistics for 2000 represent estimated pirate sales revenue in the pirate market (i.e., pirate profits).

⁴ BSA’s final 2003 loss and level numbers consist of the U.S. publishers’ share only of its global piracy losses in Malaysia, as broken out in October 2004 (based on the July 2004 BSA/IDC Annual Global Piracy Survey, at <http://www.bsa.org/globalstudy/>). In previous years, the “global” number did not include many computer applications such as operating systems and consumer applications such as PC gaming, personal finance, and reference software. In 2004, for the first time, these applications are included in the estimated losses, resulting in a significantly higher loss estimate (\$129 million in estimated losses in 2003, \$77 million of which is the U.S. publishers’ share). IIPA notes for clarity that the \$91.1 million and 75% piracy rate posted on the IIPA website in May 2004 were based on the older methodology which is why they differ from the new numbers.

⁵ ESA’s reported dollar figure reflects the value of pirate product present in the Malaysian marketplace as distinguished from definitive industry “losses.”

which produce pre-recorded product). That calculates to a capacity of 441 million discs per year, including 325.5 million pre-recorded discs.⁶ Even with legitimate/licensed production in Malaysia of sound recordings, motion pictures, entertainment software and blank recordable CDs of an estimated 50 million discs per year, it is clear that Malaysian optical disc plants massively over-produce. The resulting massive exports of pirated materials (e.g., seizures of pirate DVDs emanating from the Malaysian plants more than doubled in 2004 over the previous year, according to the latest statistics) should not be surprising.⁷ Pirate discs from Malaysia have, either directly, or through elaborate and highly sophisticated transshipment routes, landed in at least 23 countries on five continents, including the United States.⁸ The Malaysian government continues to face a massive problem. The problem must be solved by dealing with licensed factories as well as unlicensed ones.

- **Retail Piracy of Digital and Traditional (Hard Goods) Media:** After the crackdown of 2003, in which MDTCA ran thousands of raids, yielding seizures of millions of pirate optical discs, piracy levels in the domestic market decreased temporarily. However, it is surprising how quickly pirates filled the void once enforcement waned in the early part of 2004.⁹ MDTCA Minister Datuk Shafie Apdal even admitted that usage of pirate “software” (and, we assume he meant, other copyrighted materials) increased in 2004, basing his assumption on the number and size of seizures. We applaud the Minister’s recognition of the growing scope of the problem, and while the raids documented below demonstrate enormous will on the part of the government to tackle the piracy dilemma, the government simply must adopt an even more aggressive approach to eradicate piracy in Malaysia, especially with respect to prosecution of those responsible for the source of piracy — i.e., the producers, the distributors (exporters). There is also increasing evidence that pirates have simply shifted tactics, becoming more mobile, or, in some cases, even attempting to pay Malaysian police officers to leave them alone.¹⁰

⁶ IIPA’s calculation of disc capacity is explained in the methodology statement cited above. Even a Ministry of Domestic Trade and Consumer Affairs (MDTCA) official (Mr. Dahuri) estimated, at a public conference in October 2004, that Malaysian optical disc producers have a total capacity of 500 million discs per year.

⁷ MPAА reports, for example, seizures in the UK of pirate materials from Malaysia of 856,210 units in 2004, compared with 224,931 in 2003.

⁸ Australia, Austria, Belgium, France, Germany, Sweden, Spain, Portugal, Tunisia, Romania, Singapore, Thailand, United Kingdom, Indonesia, Philippines, India, Nepal, Turkey, Kuwait, South Africa, Nigeria, Bolivia, and the United States. Seizure statistics provided by UK Customs/UKFACT indicate that Malaysia is by far the Asia-Pacific region’s biggest exporter of pirate DVDs to the UK.

⁹ Jacqueline Ann Surin, *Coffee Break: Return of the pirates*, *The Edge Malaysia*, March 15, 2004. The article gave Mel Gibson’s movie, *The Passion of The Christ*, as an example of “just how efficient the piracy machinery has become since its return.” The movie was released on February 25 in the United States. Less than two weeks later, not-very-clear VCD copies were available in Malaysia for only RM6 (US\$1.58). Clear DVD copies wrapped in crisp plastic wrappers complete with a poster cover flooded the open market for just RM11 (US\$2.89) in the Klang Valley right after. To date, the “Passion” has not been approved for viewing in Malaysia.

¹⁰ See Ioannis Gatsiounis, *Malaysia’s CD pirates make a comeback*, Asia Times Online, March 18, 2004, at http://www.atimes.com/atimes/Southeast_Asia/FC18Ae01.html. The article points out that, while the crackdown in 2003 did seem to make a dent in blatant piracy, one could still find pirate materials in March 2004 “in the shopping malls, on night-market tables, from Kota Bharu to Penang to Kuala Lumpur.” The article notes the increasing mobility of pirates, evidenced by “more empty (original) covers on display,” more “walkie-talkies” radioing orders to a clerk who brings the requested disc. The article also highlights possible corruption, noting that “several vendors interviewed for this article admitted to paying bribes to law-enforcement officials, before [October 2003] and after. One vendor operating in a popular mall in the capital said the fees varied, ‘depending on how many officers show up for a ‘check’,” but said about RM100 (\$26) per officer usually ‘keeps them moving.’” The evidence indicates that many vendors have moved to fixed premises, with two to five pirate shops in each location. Pirate vendors are also reducing the profile of infringing product by displaying only original products in the shops. In some cases, pirated products are available in behind-the-counter catalogs, while the pirated discs are stored in nearby shops or parking lots. Major shopping complexes that remain a concern are Sg. Wang, Low Yat Plaza and Imbi Plaza in Klang Valley and the Holiday Plaza & City Square in Johor.

- **Book Piracy:** Book publishers report regular cooperation from the Ministry of Domestic Trade and Consumer Affairs (MDTCA) with raids against commercial photocopy centers near university campuses, especially in the Klang Valley. However, the scourge of photocopying on a commercial scale continues. Publishers report that, in response to the expectation of raids on commercial off-campus centers, photocopying operations are moving underground or into on-campus facilities such as libraries, student centers and academic buildings. The problem is being perpetuated further through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for the photocopying. Institutions of higher learning should be monitored closely to ensure that these practices are not tolerated.
- **End-User Piracy:** The unauthorized use of copyrighted software in businesses — end-user piracy — is an increasing global problem, including in Malaysia. End-user piracy of business software causes the greatest percentage of losses to that industry. The breadth and extent of the problem can be seen from the response the Business Software Alliance received from the public when it announced a reward campaign for information on end user infringers. Over a two month period BSA received over 400 reports. Based on BSA's previous experience with such campaigns, the figure is very high and reflects the severity of the problem.
- **Internet Café Piracy:** The entertainment software industry in particular notes the continued prevalence, despite some raids and seizures in 2004, of Internet cafés in Malaysia (it is believed that there are over 2,000 Internet cafés in the country, about 80% of which are unlicensed) which, in addition to providing Internet access, serve up unauthorized copyrighted materials on computers for a consumer's use. It is extremely important that all unlicensed Internet cafés be made to license the use of copyrighted materials.

It should be noted that not only do foreign right holders suffer due to piracy in Malaysia, but Malaysian artists also suffer, leading in November of this year to a delegation of Malaysian filmmakers going to India to complain about piracy of Malayalan films in the state of Thirucananthapuram in India. Out of those meetings, Thirucananthapuram Chief Minister Oommen Chandy assured the delegation that steps would be taken to curb the video piracy of Malayalan films in the State.¹¹ It is clear that it is in Malaysia's own self-interest to eradicate piracy.

Organized Crime in Malaysian Piracy Operations Requires Appropriate Legal/Enforcement Response

For many years, IIPA has received anecdotal evidence indicating a high level of organization and sophistication among the pirate groups operating in Malaysia. Indeed, prior to the outbreak of massive piracy in Malaysia, such organization could be seen only in places like Taiwan, Hong Kong, China, and Macau. IIPA believes that, in part as a result of good enforcement of IPR laws in places like Hong Kong and Macau in the late 1990s, piracy, especially optical disc pirate production, migrated to Malaysia, but under the same ownership groups as in China, Taiwan, Hong Kong, etc. Recent years' reports have highlighted arrests in Malaysia and elsewhere in Southeast Asia of foreign nationals — often illegal immigrants recruited by criminal syndicates — at optical disc plants producing pirated materials for export.

¹¹ See <http://www.newindpress.com/NewsItems.asp?ID=IER20041119222440&Title=Kerala&rLink=0>.

The level of sophistication of these groups makes it highly likely that these factories' ownership can be traced to organized criminal elements. Unfortunately, IIPA and its members' resources, informational and otherwise, can only go so far to trace the illegal activities involving piracy to other illegal activities and the organizational structure of these syndicates.¹²

The Malaysian government must develop a comprehensive strategy to weed out such elements from its society. Right holders continue to develop cases that demonstrate the involvement of organized criminal groups. However, to date, the Malaysian authorities have generally been content with raids and seizures, rather than investigating and bringing to justice those entities which control such piratical activity. The copyright law and the optical disc law, for example, are not adequate to tackle this challenge. Other laws, such as those criminalizing money laundering, fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime problem in Malaysia. IIPA requests USTR to obtain from the Malaysian government copies of all relevant laws, and then to work with Malaysia to establish a comprehensive approach to organized crime and organized piracy, with the aim of obtaining some key prosecutions of chief financiers and owners of criminal enterprises engaged in copyright piracy in 2005.

ENFORCEMENT AND THE COURTS IN MALAYSIA

Factory Raids Occurring, but Licensed Factories Still Off-the-Hook

In 2004, MDTCA officers raided 11 licensed factories (5 registered factories and 6 unregistered ones), resulting in seizure of 10 VCD lines and 2 DVD lines.¹³ As a result of these raids, dismantled replication lines were moved to government controlled warehouses. In addition, during 2004, MDTCA conducted two raids on CD-R burner facilities, one on a printing facility and one against cassette replication facility. There are 16 factory cases currently in court

¹² See *Suspected CD Pirate Crashes Van Fleeing Authorities*, Bernama.com, August 12, 2004, at <http://www.bernama.com/bernama/v3/news.php?id=85994> (in which it was reported that a suspected member of a syndicate distributing pirated optical discs crashed his van into several vehicles while attempting to escape MDTCA officials; the man was apparently unloading 250,000 discs of local and international artists worth RM1.5 million from his van when he noticed the presence of enforcers).

¹³ E.g., *RM3 Million Processing Machine, 84,000 Pirated VCDs Seized*, Bernama.com, July 10, 2004 (pirate VCD processing operational for four months, located behind a steel factory on the same plot of land to evade the authorities' attention).

- On February 9, 2004, MDTCA enforcement officers raided a licensed VCD factory, and found it illegally replicating pirated copies of U.S. motion pictures; only one machine was sealed, as the mould was found to be without any SID codes. Examples were taken from both lines for forensic examination.
- On July 6, 2004, MDTCA officers conducted a raid on a suspected DVD factory in Kajang Technology City, Selangor, seizing one VCD replicating line, one printing machine, one compressor, two VCD players, two television sets, 500 music VCDs and 30 stampers; the equipment seized alone was estimated to be worth RM1.5 million (US\$394,774). Significantly, 2,000 pirated CDs of local musicians, including Siti Nurhaliza, Raihan, Search, Wings, Saleem, Liza Hanim, Alleycats and Jamal Abdillah, were seized. Two men believed to be in the factory at the time of the raid reportedly escaped through the ceiling.
- On October 5, a team of five enforcement officers from Kuala Lumpur raided a licensed optical disc factory in Johor. After a 30-minute wait, upon entry, the officers found two DVD replicating lines, one of which was broken down into pieces. No DVD products were found in the factory, but the officers extended their search within and outside the building and discovered discs lying on the ground at the back of the building within the factory compound. Observing a long pipe connecting the factory to an adjacent building, the officers decided to check the second premises. They used force to gain entry and found bags of DVDs (SID Codes erased), stampers, order forms and title lists. The pipe connecting the two premises, which looked like a drainage culvert, was actually a PVC tunnel about 8-10 inches wide that had been used to transport DVDs from the factory into the second premises for packing. Two factory workers were arrested and one DVD replicating machine was seized, along with 4,115 DVDs, 90 stampers, and 29 silk-screens, infringing U.S. motion pictures.

proceedings and another 26 cases awaiting registration before the courts. For reasons unknown, the MDTCA have yet to fully exercise their powers under the Optical Disc Law against errant licensed factories.¹⁴ In fact, there is much concern over the apparent relaxation by MDTCA of restrictions on issuing new manufacturing licenses to plants claiming to be CD-R/DVD-R producers. The MDTCA must utilize their powers to issue warning letters and eventually cancel licenses in the case of licensed factories violating the law.

The Malaysian Government Chemist (KIMIA) Optical Disc Forensic Laboratory, which became fully operational in 2004, is being underutilized. In particular, the government facility is only being employed reactively, for corroborative post-raid evidence, rather than pro-actively, in order to direct enforcement personnel towards copyright infringing producing facilities. It is vital that the forensic laboratory facilities produce worthwhile results. The lab has yet to be put to proper use.

Retail Raids Continue in Malaysia, and Arrest Numbers Up in 2004

Obtaining retail raids in Malaysia has not been a major issue; usually, hundreds of raids are run against retailers each year.¹⁵ Nonetheless, since the 2003 Copyright Law amendments

¹⁴ In what was expected to be a very important raid against a major syndicate, a licensed optical disc factory was inspected in late October 2004. Unfortunately, nothing was found except some stampers of Indian movies and karaoke music discs. Indications are that the factory was tipped off, e.g., the factory had no hesitation allowing the inspectors in and were casual about the inspection. It is suspected that pirate factories now keep all stampers, order information, and incriminating evidence offsite. A follow-up raid occurred later in the year against the suspected distribution entity tied to this factory. At that time one million discs, stampers, and manuals were found in the raid. Unfortunately, reports thus far indicate that the MDTCA is only going to charge the “fall guy”—not the owner of the syndicate—with one count of violating the Optical Disc Act. We also understand that the store (in Ampang) is apparently open again and continues to sell pirated goods. The MDCTA still has not provided results of its forensic testing and other follow-up it was going to do in relation to this raid. In addition, it has been suggested to right holders that it is necessary for them to conduct further surveillance and investigation linking the operations and owners—clearly a high risk proposition for private, non-law enforcement entities. In another case, a licensed factory was caught in the act of producing pirate products and machines in the factory were sealed after positive forensic testing. However, two subsequent visits to the factory by the MDTCA enforcement officers revealed that the seals had been removed and production continued as normal. Despite such a blatant act, no action was taken against the factory.

¹⁵ The following is a sampling of some of the major raid results in Malaysia in 2004:

- March 31: As part of *Ops Tulen* enforcement program, about 12,000 copies of pirated software and CDs worth more than RM1 million were seized in raids at two shopping complexes (Subang and Petaling Jaya) in operations by the Selangor enforcement division of MDTCA; suspects were to be charged under Trade Descriptions Act 1972, liable for a fine of up to RM 100,000 (US\$26,313) if found guilty. See <http://thestar.com.my/news/story.asp?file=/2004/4/9/nation/7729688&sec=nation>.
- June 16: A team of nine enforcement officers from the MDTCA G17 squad assisted by six enforcement officers from the MDTCA (Penang), MDTCA (Butterworth) raided an infamous 24-hour VCD outlet (the operator is known as Blue King) and four of its stores in Bukit Mertajam, Penang. Total seizures amounted to 85,000 discs, 2 television sets, 2 VCD players, 2 speakers, 1 amplifier and numerous VCD display racks. Estimated value of the total seizure is about RM716,300 (approximately US\$188,500).
- October 3: UK Customs seized 42,900 pirate U.S. motion pictures and other pornographic discs at the Dover Channel crossing in a German-registered van from a town near Frankfurt. The driver was detained but claimed he did not know what the 40-plus boxes contained and that it was his first week on the job. The discs were unaccompanied by paperwork indicating place of origin, but on examination proved identical to previously seized discs that originated in Malaysia and were transhipped through Singapore.
- November 2: A syndicate notorious for dealing in pirated DVDs and pornographic VCDs was the target of Home Affairs Ministry raids. Four teams of six enforcement officers each simultaneously raided pirate operations in Banting, Sepang, Kuala Selangor and Klang. In all, 21,334 DVDs and 624 pornographic VCDs valued at RM350,000 (US\$92,091) were seized. A 40-year old man believed to be the mastermind behind the syndicate's operations was arrested at one of the locations, and in the Banting raid, two duplicating machines worth about RM12,000 (US\$3,157) each were seized.

providing MDTCA officers with the power of arrest, there has been a significant increase in the number of arrests in 2004.¹⁶ It also appears that many of the raids caught the pirates by surprise, and MDTCA showed no hesitation in 2004 in using necessary force to enter the premises involved.¹⁷ MDTCA also seems to have taken aggressive steps to stamp out retail piracy by devoting greater manpower to “public” places to deter piracy.¹⁸ Finally, MDTCA seems to be willing to go to great lengths to shut down retail piracy in Malaysia.¹⁹ Notwithstanding these positive results, the Malaysian government continues to be unable to finally shut down recidivist targets; in one egregious example, a “licensed” distributor of VCDs was raided in 2004 for the 78th and 79th times!²⁰ In addition, some irregularities continue to occur, including tip-offs of raids.²¹

More Effort Needed to Stop the Flow of Pirated Exports from Malaysia

It is critical that the Malaysia government take more aggressive action in 2005 to monitor and seize exports of pirated products on the way out of Malaysia.²² It is helpful that the Kuala Lumpur International Airport (KLIA) authorities now allow industry representatives to maintain a permanent staff at the airport to monitor the post and cargo center, but simply put more must be done. IIPA urges the Malaysian government to establish a dedicated government reward scheme specifically targeting the export of pirated discs, and to incorporate this into the government’s outreach campaign to educate the general public about the protection of intellectual property rights. In particular, the Malaysian government must recognize and take into account the correlation between pirate syndicates’ involvement with people smuggling, pornography, and other organized crimes.

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- During “Operation Eradicate,” a special initiative launched by the motion picture industry in early December 2004 and lasting through the year-end holidays, enforcement authorities undertook more than 65 separate surveillance and raid operations, resulting in the seizure of 25,847 VCDs, 68,526 DVDs, and 18 arrests.

¹⁶ The motion picture industry reported 661 retail-related arrests between October 1, 2003 to January 6, 2005.

¹⁷ For example, on February 17, 2004, in an unprecedented move, MDTCA “cleaned” a shopping mall in Penang of all 12 pirate disc outlets at the Prangin Mall. A team of 15 officers, tired of “tip-off[s] from ‘tontos’ stationed at the entrance and various exits of the mall,” proceeded to use crowbars, screwdrivers, cutters and other tools to force open shuttered outlets, in many instances, forcing the pirates to offer to open the shops themselves. More than 10,000 pirated discs stashed in the ceiling, including computer games and software, were seized from the 12 outlets, as well as VCD and CD players, TV sets and other equipment, totaling more than RM80,000 (US\$21,049).

¹⁸ The press reported that in August 2004, the Malaysian government had begun “assigning two enforcement officers to each shopping complex.” See Sangeetha Nair, *Pirated disc peddlers on ‘forced holiday’*, Sept. 4, 2004, *The Malay Mail*, at Penang Online, at <http://penang.thestar.com.my/content/news/2004/8/26/8757712.asp>.

¹⁹ The Star reported that MDTCA Minister Datuk Mohd Shafie Apdal has threatened to use the Internal Security Act against pirates of CDs, VCDs and DVDs who are using youngsters to peddle their wares; such a move would empower the Minister of Home Affairs to order the detention or restriction of such persons without trial.

²⁰ On December 6, 2004, MDTCA officers raided a four-story building in Jalan Masjid India, Kuala Lumpur for the 79th time. In April 2004, MDTCA officers had seized pirated VCDs worth about RM10 million (US\$2.6 million) from the same premises. A target of anti-piracy raids since the 1980s, in the December raid, the building yielded 30,000 pirated VCDs and DVDs worth about RM150,000 (US\$39,471). Also seized were more than 100,000 VCD inlay cards. Authorities searched the building for around four hours before finding the pirated discs and other materials hidden in two secret compartments. The raided company is a licensed distributor of VCDs and is believed to have used its license as cover for its pirate activities.

²¹ On December 13, 2004, a team of 30 MDTCA enforcement officers from Penang raided a shopping center popular with cruise ship passengers who visit the island, seizing 14,197 pirate DVDs, VCDs and CDs with an estimated value of RM105,709 (US\$27,818). The retailers appeared to have been tipped off about the raid and were found closing their shops when the raid teams arrived. The indication by enforcement officers that they would use force to gain entry to the outlets persuaded the retailers to allow the officers access.

²² On February 18th, just over one hundred boxes containing 75,000 pirate DVDs were seized at Pos Malaysia at the KLIA. All of the shipments were declared as education material. The boxes were destined for distribution in the Philippines. This was the biggest reported seizure of an outbound shipment of pirated discs from Malaysia in 2004. Titles seized included: *The Lord of the Rings: Return of the King*; *Pirates of the Caribbean*; *Brother Bear*; *The Twin Effect*; *Internal Affairs*; and *Good Boy*.

Malaysian Customs should continue to work with the freight forwarding companies, the postal authority, and other export-related entities in the country to create a solution to the problem of pirated products being shipped from the country despite being supported only by false documentation (including falsely declaring the type of goods contained in the box, providing false name and address for the exporter/shipper). This loophole is problematic not only with respect to pirated products, but also on security-related grounds.

One positive indication that the Malaysian government at least recognizes the severity of the export problem is the visit in October 2004 of a delegation of six senior government officials to the United Kingdom and France in an effort to address Malaysia's optical disc export piracy problem. The delegation was led by MDTCA Secretary General Dato Talaat Bin Haji Hussain. During the trip, the delegation met with enforcement, trade and economics officials from both the U.K. and French governments, seeing for themselves the extent of export of pirated products originating from Malaysia. At the conclusion of the trip, the delegation began brainstorming for solutions, agreeing that an immediate step will be increased factory and airport inspections

Campaign Against Book Piracy Yielding Mixed Results

While MDTCA has taken action against illegal photocopying, publishers reported continuing problems during 2004. While authorities regularly raid off-campus copy shops, shops that are raided simply close up and move to alternate locations or change their mode of operations. In some instances, the alternate locations are not proper storefronts, but rather underground operations based in residential areas or on the university campuses themselves. Commercial operations set up, for example, in an apartment or condominium — an arrangement which offers the additional benefit of an exterior guard house or front desk clerk, who can alert the infringers if authorities arrive to inspect or raid. Furthermore, these underground operations undertake their activities only at night, making it even more difficult to detect and enforce against, and often produce on a “print to order” basis to avoid keeping infringing stock on the premises. They deliver the infringing goods at a designated spot on campus, often in a parking garage or the like, through use of private cars and commercial vans. Van drivers know to return to a legitimate store after making their deliveries if they suspect they are being tailed. Authorities need to be mindful of these changed practices, to raid at night and to devote resources toward ferreting out these underground operations. MDTCA needs to receive adequate resources and training to be able to conduct thorough and effective investigations.

Consistency in enforcement remains a problem as well. While MDTCA is quite helpful in their willingness to cooperate with industry representatives on raids, there seems to be no consistent set of instructions to individual officers regarding seizures and procedures. Officers receive no guidance, for instance, on the numbers of machines and infringing copies to seize in a given raid, so results vary widely. Furthermore, industry representatives accompanying MDTCA officers on raids are often asked to submit names and identification numbers to defendants. This sort of practice has been brought to the attention of MDTCA and the agency has promised to remedy it. IIPA will be monitoring progress in this area.

Likewise, university campus facilities are themselves being used for pervasive illegal photocopying, especially during high-volume copying periods such as the beginning of the academic term. These activities take place largely after hours, often under an informal arrangement for the appropriate personnel to “turn a blind eye” when locking up. The campuses

are being treated as “safe havens” by infringers. IIPA encourages involvement by MDTCA as well as appropriate university administrations and education administrators in working to eradicate this serious problem.

New Campaign Against Business Software Piracy Seems to be Effective

In late 2003, the Malaysian authorities announced a new campaign, called *Rondaan Tulen*, a campaign that follows up on *Ops Tulen*,²³ specifically to target business software end-user piracy. In late May, the government made public announcements that businesses had one week to stop using pirated software after which enforcement officers, working closely with watchdog Business Software Alliance, would begin raiding offices. Raids began soon after the deadline with some impressive results.²⁴ The operation was not limited to businesses engaged in end-user piracy, and seizures included not only software but many other pirated materials.²⁵ Business software right owners report that they do not experience difficulty obtaining *ex parte* civil search orders.

Approaches to Internet Café Piracy May be Working

Some entertainment software publishers, with the help of local law enforcement authorities, have achieved some success in converting certain cafés to legitimate operations.²⁶ Right holders have sent cease-and-desist letters to café owners, sometimes leading to settlements (and licenses), or, where the owner has refused to halt the illegal practices, local authorities have conducted raids and seized the café computers. However, the actions against unlicensed cafés must be sustained and continuous so that there is no backsliding by cafés that are already licensed and so that they will have a deterrent effect on those that have not yet sought to legitimize their operations.

²³ The *Ops Tulen* campaign was launched nationwide in 2002, during which the Business Software Alliance (BSA) and MDTCA sent 24,000 warning letters to companies suspected of using pirated software. 300 companies were visited, following up on 1,600 investigations, and resulting in payments of RM100,000 (US\$26,315) to informants. In 2004, about 10,000 warning letters were sent to suspected companies from January to April. See http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0506&pub=Utusan_Express&sec=Home_News&pg=hn_05.htm.

²⁴ *Pirated Software, Hardware Worth More Than RM300,000 Seized*, Bernama.com, June 2, 2004 (enforcement officers of MDTCA raided an oil and gas industry data exchange in Jalan Tun Razak and seized thousands of ringgit worth of pirated and unlicensed software; 10 computers worth RM30,000 (US\$7,894) and 100 pirated software discs worth RM297,000 (US\$78,150) comprising Adobe, Autodesk, Macromedia, Microsoft and Symantec were confiscated).

²⁵ *Malaysia Closes Karaoke Bar in Crackdown*, June 9, 2004, at <http://www.nytimes.com/aponline/international/AP-Malaysia-Piracy-Crackdown.html> (authorities shut down a karaoke bar in Kuala Lumpur for allegedly keeping thousands of unlicensed songs in its computer system; more than 5,000 pirated songs were found on a computer hard drive; in a related raid, MDTCA officers seized eight computers and pirated software worth about RM75,000 [US\$19,735] from two retail stores in Kuala Lumpur's suburbs).

²⁶ M K Anwar & Lyna Mohammad, *Internet café raided over copyright infringement*, July 22, 2004, Borneo Bulletin, at <http://www.brunet.bn/news/bb/thu/jul22h1.htm> (Internet café located in the Serusop Commercial area believed to be using game software without authorization was raided by a team of 10 police personnel from the Commercial Crime Unit; two of the games used in the Internet café belonged to Vivendi Universal Games: *Half-Life* and *Warcraft III: The Frozen Throne*).

Post-Raid: More Criminal Convictions in 2004

The courts in Malaysia meted out some impressive criminal convictions in 2004.²⁷ The motion picture industry, in particular, is encouraged by the progress shown by MDTCA in prosecuting more cases in the courts, resulting in more court decisions and greater deterrent sentencing. In addition, terms of imprisonment are more regularly being meted out, especially in cases involving Internet piracy (in which the average penalties were RM20,800 or US\$5,473, forfeit of seized materials, and 13 days in prison). In other cases, the average penalties are less impressive (optical disc plants: RM100,000 or US\$26,315 and forfeiture of replicating machines; street vendors/retail: RM36,000 or US\$9,472; and warehouses/distributors: RM26,000-30,000 or US\$6,843-7,896; commercial photocopy shops: RM 12,500 or US\$3,300).²⁸ In June 2004, one VCD pirate was sentenced to 12 months in prison for possession of 22 pirate copies, while another was sentenced to 10 months' imprisonment for the first charge of possessing over 300 pornographic VCDs, and 6 months' imprisonment for the second charge of possessing 10,270 pirated VCDs (the sentences are being concurrently served). In May 2004, an offender was sentenced to 16 months in prison for possession of 12 VCDs and selling 8 VCDs. In two other retail cases in April 2004, fines of over US\$500 per infringing copy were imposed.²⁹

Nonetheless, there still remain areas that must be addressed. The backlog of unresolved cases remains substantial and far too many cases result in acquittals (and the leaders of syndicates involved in piracy operations appear never to be prosecuted). In addition, the Business Software Alliance noted that they lost the one end user case that reached judgment in 2004; thus a contested software end user piracy case has never succeeded in Malaysia.

Specialized IP Court and Prosecutors Needed

The increasing activity on the raiding front, while commendable, will not result in deterrence unless and until the courts (including the prosecutors) are equipped to handle the enormous number of cases to be brought in an expeditious and expert manner. Between 2002 and 2004, for example, there has been a huge increase of cases registered in court, e.g., in 2004, 235 motion picture cases have been brought to the court for criminal proceedings, resulting in 30 favorable decisions with 205 cases still pending. Depending on which office is handling a criminal case, prosecutions can be slow and/or ineffective (i.e., when MDTCA officers act as prosecutors, which remains the case in all but the major cases, which are handled by the Attorney General's office).

IIPA recommends several corrective steps or actions to begin the process down the road to meaningful judicial reform:

²⁷ E.g., on November 29, 2004, the Petaling Jaya Court sentenced a 29-year-old man to three years in prison for possessing pirated VCD movies. The defendant, who was arrested in a raid conducted on November 14, 2003, was charged under section 41.1 (D) (possession of infringing copy) of the Copyright Act 1987. The defendant's counsel requested the defendant not be fined, resulting in the three-year jail term, which the defendant is now serving.

²⁸ This is actually a marked improvement over previous averages of RM1,000-3,000 (US\$263-789).

²⁹ On April 15, 2004, in Shah Alam, a man was charged with possession of 22 copies of infringing VCDs of U.S. motion pictures, and was fined RM44,000 (US\$11,579) or four months in jail. In another case on April 16 in Penang, a defendant was fined RM4,000 (US\$1,053) for possession of two infringing VCD copies of the motion picture *Rundown*. On January 7, a judge in Ampang sentenced two defendants to an 18 month jail term and a fine of RM 3.6 million for unlawful possession and distribution of pirated optical discs.

- The Malaysian government should follow the lead of several countries in the region by establishing and developing a specialized IP court, with requisite attention paid to judicial reform and training for the judges to be appointed to such a court.³⁰
- The Malaysian government should devote the resources necessary in 2005 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. In the interim, IIPA recommends that prosecutors from the Attorney General's chambers be made available where the scale of the case warrants such involvement, including in cases involving large-scale infringement at CD plants and warehouses.
- 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,³¹ in line with the Chief Justice of Malaysia's announcement in April 2003 that copyright piracy cases should be handled as "Priority Cases," there should be fewer postponements and judges should hear these cases within two months of a case being registered in court and should conclude trials within three months.³² The courts should also be empowered to try defendants and convict them in absentia. Further, defendants released on bail should 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 (recommending custodial sentences and high fines) 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).

The entertainment software industry has reported continuing burdensome documentary requirements in order to bring an infringement case, including the requirement to execute statutory declarations, including detailed information on copyright ownership for all titles infringed upon, and the requirement to provide genuine copies of each title involved in the case. Section 42 of the Copyright Act allows the acceptance of statutory declarations to be submitted as *prima facie* evidence of copyright subsistence without the declarant having to be called into court. Reforms must be such to address this problem for the entertainment software industry.

³⁰ 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. IIPA understands that MDTCA is now seriously considering establishing such a court. See *Ministry mulls intellectual property court—Shafie*, August 17, 2004, at the website http://www.utusan.com.my/utusan/content.asp?y=2004&dt=0818&pub=Utusan_Express&sec=Home_News&pg=hn_04.htm (in which Minister Datuk Shafie Apdal is quoted as saying MDTCA plans to set up a special court to speed up disposal of backlogged intellectual property cases).

³¹ In a development in 2002 that was intended to avoid the situation of a defendant running away before being 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.

³² Under the Chief Justice's Directive, appeals must be completed within two months of the conclusion of a trial.

HOLOGRAM STICKER PROGRAM

In January 2003, the Ministry of Domestic Trade and Consumer Affairs implemented the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82), requiring the affixation of “originality stickers” on audio, audiovisual, and other optical media distributed in Malaysia (e.g., for entertainment software, on the product’s jewel case, beneath the shrinkwrap). However, certain deficiencies in the scheme have emerged at this point, including: the lack of an adequate computer system to process the tedious application requirements and resultant delays in issuing stickers; serious compromises including stickers being issued to pirates (including pirate importers); and stickers being issued to unauthorized distributors. IIPA discourages the Malaysian government from using a hologram, as it adds an additional bureaucratic layer and increases distribution costs (and costs to consumers). It is hoped that the scheme will be further refined to properly rectify those deficiencies.

COPYRIGHT AND RELATED LAWS

Copyright Law in Need of Further Revision

Copyright protection in Malaysia is afforded under the Copyright Act, 1987, as amended through 2003. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003) strengthened criminal penalties (allowing offenders to be jailed for up to five years and fined 20,000 ringgit for each infringement) 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.³³ 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 very positive development.

The amendments did not, however, otherwise address issues raised by IIPA in past filings, e.g., they did not:

- Impose mandatory minimum jail sentences for piracy;
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright;
- Permit disclosure by enforcement authorities to copyright owners of evidence;
- Deem infringing, in civil cases, the “possession and control” of infringing copies for the purpose of sale or other transfer.³⁴

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

³³ We understand that since these amendments went into force, MDTCA has made more than ten retail arrests, all of which have been registered in court as offenses under the Copyright Act

³⁴ Please see the 2003 Special 301 report on Malaysia, at the website <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

Phonograms Treaty (including by full implementation of TPMs, expressly protecting temporary copies) and then should join these important treaties,³⁵ and make other changes consistent with international standards or practice (e.g., term extension to “life plus 70” and 95 years from publication for films and sound recordings etc.). We understand that MDTCA officials have been working on a draft to fully implement the Treaties, but that the draft has not yet been tabled with the Cabinet.

Finally, with the involvement of organized criminal syndicates in piracy operations in the country, Malaysia should be encouraged to adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong’s Organized and Serious Crimes Ordinance (OSCO) which allows Hong Kong authorities to (1) employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Also, as noted, the Malaysian government must develop a comprehensive strategy to weed out such elements from its society. Other laws, such as those criminalizing money laundering, fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime problem in Malaysia. Malaysia must establish a comprehensive approach to organized crime and organized piracy.

IIPA is pleased that the Attorney General’s Chambers, after much urging, decided recently to review Malaysia’s intellectual property laws by setting up a special Copyright Law Revision Committee headed by the AG’s chambers.

Optical Disc Law Needs Further Strengthening

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, including the following:

- Cover “burning” of copyrighted content of others onto recordable discs;
- Ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are stored, and close other loopholes which allow pirates to continue to operate optical disc pirate production outside the boundary of the current OD law;
- 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;

³⁵ 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 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.

- 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;
- The Act should make it an offense to engage in "disc gouging" or "disc scouring."

Price Controls Must Not be Imposed

Finally, IIPA notes that, while Malaysia decided not to impose price controls on entertainment product during 2004, MDTCA retains the authority to impose price controls since the *Gazette* of the Order "Price Control [Price Controlled Goods] 2004" (in effect from January 12, 2005) was never superseded by a subsequent public issuance canceling price controls, (meaning the order was simply never implemented). The Malaysian government should remove the order from the *Gazette* (we assume, by a notice in the *Gazette*), or provide the U.S. government with assurances that the order will never be implemented.

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