

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

MALAYSIA

Special 301 Recommendation: Malaysia should remain on the Watch List.

EXECUTIVE SUMMARY

The government of Malaysia has taken some significant steps in the fight against major piratical activities in Malaysia over the past several years. Specifically, after a spate of raids and inspections in previous years, in 2006, many optical disc plants folded their tents. While recognizing the danger that these plants will simply move to more hospitable territories, this movement or closure of at least eleven plants out of Malaysia (our current numbers have 32 registered plants in the country, compared with 43 last year) signifies the commendable efforts of the Malaysian government to tackle the optical disc over-production problem that plagued it for years. In addition, continued sustained efforts against pirate retail outlets have largely driven retail piracy underground,¹ leaving the domestic market for pirate optical discs dominated by street stalls instead.

Notwithstanding the progress made, some problems remain in terms of piracy and lack of adequate enforcement in Malaysia.² Pirate entertainment software production for export continues to be a major concern. While optical disc plants should continue to be monitored for pirate production, Customs authorities also need to continue to enhance monitoring of exports of entertainment software, and take measures to address problems of false documentation, a regular occurrence in exports originating from Malaysia. Book piracy in the form of massive illegal photocopying in and around university campuses remains an issue of concern, and the authorities, while cooperative, have not succeeded in lowering piracy levels there. End-user piracy of business software remains a major source of losses for the business software industry. Finally, prosecutors, while taking greater numbers of cases than before, sometimes do not succeed with cases due to lack of experience, procedural hurdles, or problems and delays experienced at court.

The government of Malaysia is presently engaged with the U.S. negotiating a free trade agreement (the proposed USMFTA) (the 5th round of which just concluded in Sabah, Malaysian Borneo). The USMFTA will hopefully be concluded in 2007 with strong commitments on intellectual property, including improvements to the copyright system, and other normative changes, e.g., a commitment to accede to and fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). It is hoped that the various changes in Malaysia signal in part the recognition by the government of

¹ See, e.g., *Software and Games Worth RM23m Seized*, New Straits Times, January 30, 2007 (noting a raid of the Endah Parade in Seri Petaling outside of the city center of Kuala Lumpur, in which MDTCA confiscated about 225,000 DVDs and CDs containing pirated computer games and other software worth RM23 million from three shops located on the second floor of the Endah Parade shopping complex). The article notes that the raid lasted seven hours, that the premises had been raided three times last year, that the owners had tried to hide their business by operating inside a hair salon, and that as a result of the raid, three workers were detained.

² For example, there has been a reduction in the number and size of legitimate music retailers by about 20% nationwide. The larger record companies are trying to sell music in other formats, such as through kiosk boxes, whereby consumers may download music of their choice at music stores, rather than purchasing entire albums.

the importance of copyright to the local economy (at an ASEAN seminar in March 2006 in Tokyo, the Malaysian representative noted the increase in local films produced from seven in 2000 to twenty-two in 2004).

PRIORITY ACTIONS REQUESTED IN 2007

- **Continue Monitoring Optical Disc Plants for Piratical Activity, and Inspecting Plants, Seizing Discs and Equipment**
- **Increase Seizures of Pirate Exports at the Border, Focusing on Entertainment Software**
- **Tackle Internet-Based Piracy and “Mobile” Piracy**
- **Conduct Raids Against Illegal Photocopying Operations, Track Underground Operations**
- **Take Stronger Steps to Deter End-User Piracy of Business Software, Including More Inspections of Businesses Suspected of Using Unlicensed Software, and Implementing Software Asset Management**
- **Prosecute More Cases, Including Factory Cases:** In general, there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts in Malaysia (e.g., against distribution warehouses, factories, pirate photocopy shops, etc.).
- **Confirm Liability for Landlords Leasing Space to Pirate Sellers:** IIPA would like to see the Malaysian government take actions to discourage landlords from renting to tenants engaged in piracy activities. The authorities should be given authority to seal premises of retail outlets for investigation purposes, which would have the effect of discouraging landlords from renting the premises to pirates.
- **Address Organized Crime/Use All Available Forensic Techniques**
- **Enact Anti-Camcorder Piracy Legislation:** The government of Malaysia should enact standalone legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture cinemas while a motion picture is being exhibited.
- **Amend/Modernize Copyright Law, Optical Disc Law (Prohibit “Gouging” of Discs, Allow Inspections Offsite, and at Any Time, Day or Night), Join WIPO “Internet” Treaties**

For more details on Malaysia's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006³

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	22.0	45%	38.8	49%	55.5	52%	40.0	45%	110.2	70%
Business Software ⁴	NA	61%	82.0	60%	73.0	61%	77.0	63%	79.2	68%
Entertainment Software ⁵	28.0	90%	23.4	91%	12.9	91%	NA	90%	NA	NA
Books	9.0	NA	10.0	NA	10.0	NA	9.0	NA	8.3	NA
Motion Pictures ⁶	NA	NA	NA	91%	36.0	50%	38.0	50%	42.0	75%
TOTALS	59.0		154.2		187.4		164.0		239.7	

PIRACY UPDATES IN MALAYSIA

Some Pirate Production Continues in Licensed and Unlicensed Plants, Despite Government Efforts: The number of licensed optical disc plants has been substantially reduced from 43 in year 2000 to 32 in year 2006.⁷ There are well over 163 production lines, with a capacity to produce 570.5 million discs per year (a conservative estimate).

Pirate Exports of Entertainment Software Still a Problem, Despite Decreased Exports/Increased Seizures for Other Industries: The over-capacity to produce optical discs in Malaysia continues to present enormous challenges to the Malaysian government, both in terms of saturation of the domestic market by pirate product and exports, especially of entertainment software. Some industries have noted improvements in seizures of air shipments out of Malaysia (leaving trucks and trains as the latest modes of export to transport pirate products to Thailand).⁸ Nonetheless, pirate entertainment software products continue to be exported out of Malaysia and found in seizures in Asia (Thailand, the Philippines and New

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Malaysia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁴ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁶ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁷ A. Manisegaran, Director of Copyright, Malaysia Intellectual Property Corporation, gave the talk "APEC Anti-Counterfeiting and Piracy Initiative and New Trends in Copyright Related Cultural Industries" as the Country Paper at the ASEAN+3 Copyright Seminar held in Tokyo, March 1-3, 2006. In the report, he reported that the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs (MDTCA) had acted against 31 illegal (unlicensed) factories since 2000, and that actions had been taken against 38 licensed factories since that time for unauthorized production of optical discs. The report notes seizures of R86.2 million worth of optical disc production equipment.

⁸ U.S. Customs statistics confirm that fewer pirate imports from Malaysia were seized at U.S. borders in 2006. See http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ipr/seizure/trading/fy06_ipr_stat.ctt/fy06_ipr_stat.pdf, at 3.

Zealand); Europe (Belgium and Germany); the Middle East; South Africa; Latin America;⁹ and even the United States.

Book Piracy: The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. Dozens of shops line each campus, and most academic buildings at universities contain shops. Despite regular cooperation between book publishers and Ministry of Domestic Trade and Consumer Affairs (MDTCA) officials, the problem has gone largely unchecked, especially at on-campus facilities.¹⁰ Furthermore, as the off-campus shops have gone underground, the problem has become harder to detect. Shops will often set up facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities. While MDTCA officials are well-intentioned (taking raids against commercial photocopy centers near university campuses, especially in the Klang Valley), they need training on how to track and deal with such underground operations, including consistent instructions from superiors to MDTCA officers on how to handle raids and which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and on how to protect right holders. Other structural difficulties include the fact that there have been no *ex officio* actions taken to combat book piracy, and MDTCA has not, to date, conducted raids at night.

The universities and educational authorities (Ministry of Higher Education) must become more engaged, especially regarding practices of on-campus facilities. While universities have, to date, cooperated with right holders in distributing copyright protection posters and the like, industry would like to see them take a more active role in legitimizing practices on campuses. The Ministry of Higher Education should encourage universities to ensure campus-based copyshops are not engaging in infringing activity, and both the Ministry and university administrations should take measures to encourage lecturers and students to use legitimate materials.

Finally, publishers have noted a significant upswing in online piracy, with several sites offering scanned copies of books (in PDF form or similar) for download.

Internet Piracy and “Mobile” Piracy: In terms of Internet piracy, two disturbing developments in 2006 are worthy of note in Malaysia: the increasing focus on mobile music piracy in the form of over the counter sales (e.g., in shopping complexes and other fixed premises) and mobile downloads (both true tones and full tracks), and the emergence of more “hard goods” websites offering the distribution of pirated movies. In 2006, MDTCA together with Motion Picture Association representatives, were seizing on average 500 website-related packages per day at post offices.

Less clear is the extent to which peer-to-peer technologies are being widely employed for piracy in Malaysia. Malaysia boasts roughly 11 million Internet users, but broadband penetration, while having grown in 2005 faster than any other Southeast Asian market, remains

⁹ On March 2, 2006, there was a seizure of entertainment software transshipped through the U.S. from Malaysia and destined for Paraguay. There were over 18,000 discs in about 20 boxes. In November 2006, U.S. Customs intercepted five shipments of pirated entertainment software discs originating from Malaysia again bound for Paraguay. A total of 7,500 counterfeit and pirated copies of a top ten video game, released just a week earlier, were seized.

¹⁰ Not only have pirate photocopy centers infiltrated campuses, but the problem is being perpetuated 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.

relatively low.¹¹ Nonetheless, it is no surprise that Internet-based piracy is an increasing threat to legitimate copyright owners, including local Malay artists.¹² In 2004, 2,176 online software infringements were traced to Malaysian ISPs; this number skyrocketed to 10,169 in 2005 and declined only slightly to 9,676 in 2006. Internet-based piracy is beginning to affect other industries, with the book publishing industry noticing its first significant Internet piracy problems during 2006. Internet cafés are also known to facilitate illegal activities or use unlicensed software, including entertainment software. The MDTCA has been reluctant to run raids against such cafés and often asks that companies resolve such matters through private contracts/licensing.¹³ The Malaysian government should take broader action to address Internet piracy, including expediting drafting/consideration of copyright law amendments to enhance and facilitate online enforcement.

Domestic Retail Piracy (Optical Disc) Curtailed, But Night Market Piracy Remains:

While there has been some success in driving piracy out of shopping complexes and other fixed premises in some parts of the country, optical disc piracy of music, motion pictures, and other products still exists in large numbers through vendors at night markets.¹⁴ The success in the shopping complexes has been due to sustained enforcement activity by the MDTCA as well as the filing of civil actions by industry against landlords and tenants of such premises. The record industry has submitted a memorandum to the Ministry of Local Government and Housing regarding night markets and holding landlords responsible. However, there has not yet been movement in this area by the Malaysian government.

Camcorder Piracy:¹⁵ In 2006 13 pirate versions of Motion Picture Association member company titles distributed globally were forensically linked to illegal copies being made on camcorders in Malaysian cinemas. An essential element in the fight against camcorder piracy is

¹¹ For example, from October 2004 to September 2005, the number of broadband lines in Malaysia increased by 61.6%, placing it in the top ten in the world in terms of growth, see Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. However, DSL still is the dominating access technology with over 98% of the market share. See Point Topic Ltd., *World Broadband Statistics Q3 2006*, December 2006, at <http://www.point-topic.com/contentDownload/dslanalysis/world%20broadband%20statistics%20q3%202006.pdf>.

¹² Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006 (describing that top-selling musical act Mawi cannot thrive in “the piracy-infested local music scene where CD copies go as low as RM10 for three pieces and free Internet downloads are easily available at a few clicks.” The article notes record sales of 170,000 copies and 120,000 copies for two of the band’s efforts, though notes that

this is only a small percentage of the real sale. The Domestic Trade and Consumer Affairs Ministry recently reported that the raids in Sarawak revealed that 95 per cent of Mawi’s albums sold throughout the State were actually pirated copies. A simple search on the Internet reveals that the whole content of Mawi’s first solo album ... are available for download. All you need is a registration with the portal and a stable Internet connection to get free Mawi tracks saved onto the hard disk.

¹³ MDTCA insists that “cease and desist” letters be sent before they even considering raiding Internet café premises. The letters are largely ignored by the café operators or result in alerting the café operator that follow-up raids are possibly forthcoming. The café operator then removes the offending pirated or unlicensed software from the computer workstations for a period of time and simply reinstalls the software when the operator believes that the likelihood of a raid has passed.

¹⁴ *But see* note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that the number of “open air” pirate vendors had been reduced from 2,386 to 512 since 2001.

¹⁵ The vast majority of movies that are pirated are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These master recordings are sold to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale. As a result of camcorder piracy, many motion pictures also become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the U.S. theatrical release and well before their international debuts.

the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. The government of Malaysia claims its law already prohibits the making or possession of “contrivances” used to infringe copyright (Section 41(g)), and believes that this outlaws unauthorized camcording. However this provision only covers the one contrivance (i.e., the recording device) and the penalty for a violation of this provision is merely a fine of between US\$1,143 to \$11,430. Coverage through a specific law aimed at illegal camcording activity occurring in movie theaters is a far more effective way to combat this problem. We urge the government of Malaysia to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation. We also note that, to the extent theft of film prints is not covered in any law at present, such activity should also be prohibited in Malaysia.

ENFORCEMENT UPDATES IN MALAYSIA

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006 MALAYSIA		
ACTIONS	BUSINESS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	23	117
NUMBER OF VCDs SEIZED	-	153,000
NUMBER OF DVDs SEIZED	-	20,965
NUMBER OF CD-Rs SEIZED	NA	
NUMBER OF INVESTIGATIONS	47	117
NUMBER OF VCD LAB/FACTORY RAIDS	-	9
NUMBER OF CASES COMMENCED	5	117
NUMBER OF INDICTMENTS	3	38
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	3	15
ACQUITTALS AND DISMISSALS	0	20
NUMBER OF CASES PENDING	10	83
NUMBER OF FACTORY CASES PENDING	-	31
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	-	7
SUSPENDED PRISON TERMS	-	
MAXIMUM 6 MONTHS		3
OVER 6 MONTHS		3
OVER 1 YEAR		1
TOTAL SUSPENDED PRISON TERMS		7
PRISON TERMS SERVED (NOT SUSPENDED)		
MAXIMUM 6 MONTHS		
OVER 6 MONTHS		
OVER 1 YEAR		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		
NUMBER OF CASES RESULTING IN CRIMINAL FINES	3	
UP TO \$1,000		13
\$1,000 TO \$5,000	1	6
OVER \$5,000	2	1
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	17,000	

MDTCA Remains Actively Engaged in Fight Against Piracy, But Cannot Stop Proliferation of Night Vendors: By the sheer number of raids, it would appear the Malaysian government has been very active in 2006. Statistics obtained from the MDTCA indicate that the Ministry has conducted approximately 24,735 copyright enforcement raids between January 1 and November 5, 2006. Most of these actions were initiated by the MDTCA *ex officio*, from their own information and from information supplied to them by the industry, and many of these were directed against retail stores.¹⁶ A symptom of the successful efforts to weed out piracy in retail

¹⁶ Out of these actions by MDTCA, the motion picture industry reports that between January 1 and October 31, 2006, its investigators undertook 312 investigations and participated in 2,019 raids, resulting in the seizure of 823,073 pirate

stores has been a proliferation of pirate night and street vendors. This increase is notwithstanding the government's (Cabinet) ban on open-air sales of all optical discs, and may be due in part to the uncertain jurisdiction as to policing and enforcing the laws at night markets. The licensing of night market vendors/stalls comes under the jurisdiction of the local authority, under the purview of the Ministry of Local Government and Housing (as opposed to the MDTCA). At the outset, IIPA noted that the local authorities should not be issuing licenses at all to vendors of optical disc products. Further, they have their own enforcement personnel who could be deployed to enforce the ban should there be any unlicensed vendors or vendors engaging in illegal activities.

Regarding business software end-user piracy, the Business Software Alliance, working with the MDTCA, was able to conduct a record twenty criminal end-user actions and three retail actions in 2006, leading to one criminal conviction against an end-user pirate.¹⁷

Plant Numbers Decrease Due to Government and Industry Efforts, and in 2006, There was Increased Enforcement Against Pirate CD-R and DVD-R "Burning" Labs: The government of Malaysia is to be commended once again for making further strides in 2006 tackling pirate optical disc production. In 2006 alone, there were as many as ten successful raids on licensed factories (and two raids on unlicensed facilities), in which Malaysian law enforcement authorities seized or sealed 14 DVD replicating machines and 11 VCD replicating machines that were suspected of having been used to manufacture pirated optical discs.¹⁸ The

VCDs, 1,952,694 pirate DVDs, 93,310 pirate "burned" CD-Rs, 50,460 pirate "burned" DVD-Rs, and 1,126 CD-R/DVD-R burners. A total of 546 new criminal prosecutions and 7 administrative actions were initiated, resulting in 1,271 favorable decisions and 50 administrative declarations.

¹⁷ In March 2006, the press reported the first ever "on-the-spot" raid of an end-user software pirate, resulting in discovery of 125 copies of suspected infringing software worth an estimated RM173,000. See Chandra Devi, *Tougher Stance On Software Piracy*, New Straits Times, March 30, 2006 (the article also noted that 2005 *Ops Tulen* saw 17 raids of end-user software pirates with seizures amounting to RM370,000 worth of hardware and RM98.6 million worth of software). More raids were reported in May, see Malaysia *Seizes US\$92,000 Worth Pirated Software Copies in Surprise Raids*, Associated Press Newswires, May 3, 2006. In addition, 2005 saw the first-ever criminal end-user conviction in a contested case that went through a full trial. However, the conviction is now on appeal, a process that can take a year or more. Unlike cases for other industries, end-user software piracy cases are sourced and investigated by the Business Software Alliance before being brought to the MDTCA for enforcement action.

¹⁸ Two large-scale raids, one in 2006, and one just several weeks ago, are representative of the kinds of serious actions taken against optical disc pirate production by the MDTCA.

- In the August 4, 2006 raid, Malaysian Ministry of Domestic Trade & Consumer Affairs (MDTCA) officers, accompanied by Motion Picture Association (MPA) representatives, raided a licensed optical disc production factory in Kuala Lumpur suspected of manufacturing pirated VCDs and DVDs, arresting seven men and impounding two DVD and one VCD factory production lines. Records seized in the raid showed the operation had manufactured 90 million pirated optical discs since 2000, generating illegal profits of US\$118 million. In addition to the seized replication equipment, the Kuala Lumpur raid netted an offset printer, three silk screen printers, 15 stampers and more than 10,000 pirated VCDs and DVDs, all of which were infringing MPA member company movie titles. All of the seized discs had either erased SID codes or no SID codes at all. MDTCA charged the company and the arrested workers with violations under Section 21 of Malaysia's Optical Disc Act, i.e. illegally obliterating Source Identification Codes (SID) on optical discs and manufacturing discs without SID codes.
- In the January 16, 2007 raid, Malaysian Police raided an unlicensed replicating facility in Klang, Selangor, arresting four men, aged 22 to 36, and seizing six VCD replicating lines, two printing machines, two metalizing and coating machines, and other ancillary machinery. The seized replicating machines were worth an estimated US\$1.7 million and were capable of producing 21 million pirate discs per year, generating potential revenue of US\$30 million. With the factory machinery, police seized 4,000 pirated VCDs, including just-released Motion Picture Association (MPA) member company films such as *Night at the Museum*. Also seized were popular Malaysian films such as *Tentang Bulan*. It is believed that the factory, which was hidden behind a plastics factory to avoid police detection, had been in operation for about two years.

25 replicating machines were capable of producing more than 87 million pirate discs in a year. Criminal charges under the Optical Discs Act of 2000 and Copyright Act of 1987 have been brought against the company and directors of two of these plants, Empayar Canggih Sdn Bhd and Universal Fitlink Sdn Bhd. Criminal action is proceeding in both cases. In October 2006, another optical disc plant was found to be pressing discs without SID Code during a routine inspection, and is now under further investigation. As a result of factory raids in which piratical activities are detected, the plants are generally “sealed” and equipment removed following such raids.

In addition to the plant/factory raids, there were some very significant raids in 2006 against groups engaged in massive “burning” of copyright content onto recordable discs.¹⁹

Ensure Coverage of Blank or Recordable Discs Under Optical Disc Regime: It is essential in 2007 that MDTCA ensures that any plants which indicate that they are producing on “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand recordable production, be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided for production (even recordable-only plants). Evidence has emerged regarding pirate pre-recorded production at such plants.²⁰

Exemplar Program: In 2006, MDTCA engaged in two comprehensive exemplar collection rounds, with samples collected from licensed facilities (listed below), irrespective of format, and with industry representative participation. However, while Malaysia’s exemplar collection regime is now considered first rate, IIPA remains concerned that facilities licensed to press recordable only formats remain exempt under the law from mandatory SID Code. Given the instances of pirate production by recordable only factories, SID Code standardization is

¹⁹ The following recounts four major actions against CD-R and DVD-R “burning” piracy in 2006:

- In January 2006, enforcement officers raided another optical disc burning lab in Penang, seizing 224 CD-R burners and 160 DVD-R burners.
- On May 29, acting on a tip from an informant, a team of ten Malaysian Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers, accompanied by Motion Picture Association representatives, raided a house in Penang that was being used as a burning lab for pirated optical discs. The raiding party arrested a 42-year-old man and seized 200 DVD-R burners and 83 CD-R burners, along with 15,800 blank DVD-Rs. The seized burners are estimated to have been capable of producing as many as 8,760,000 pirated DVD-Rs and 2,423,600 CD-Rs in one year, yielding revenues of RM102,141,600 (US\$29,244,058), assuming the burners were in operation eight-hours-a-day, seven-days-per-week.
- On July 4, acting on a tip to the Motion Picture Association (MPA), a team of 30 Malaysian Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers, accompanied by MPA representatives, raided a facility in Kuala Lumpur that was being used as a burning lab for pirated optical discs. The raiding party arrested a 28-year-old man and a 25-year-old woman and seized 315 CD-R burners, along with 11,453 pirated VCDs, many of which were infringing MPA member company titles. The seized burners are estimated to have been capable of producing as many as 35,838,362 CD-Rs in one year, yielding revenues of RM179,191,810 (US\$47,784,482), assuming the burners were in operation eight-hours-a-day, seven-days-per-week. A second raid, on a warehouse associated with the burner lab, resulted in the seizure of 27,109 pirated VCDs, the majority of which were infringing MPA member company titles.
- On October 2, Malaysian Ministry of Domestic Trade & Consumer Affairs (MDTCA) officers, accompanied by Motion Picture Association (MPA) representatives, raided a clandestine printing factory in Sepang, Selangor, arresting three men and seizing three printing machines, 40 silk screens, 208 printing plates and 102,000 blank DVD-Rs and CD-Rs.

²⁰ For example, MDTCA inspected a licensed recordable plant, H.I.Edar, in February 2004, finding 13 film stampers and 4,000 pressed titles). Reportedly, on January 17, 2006, MDTCA raided another recordable-only facility, resulting in clear evidence of pirate disc production.

considered the best practice. The following is the list of known plants from which exemplars were collected.

Optical Disc Production Plants and Locations in Malaysia (From Which Exemplars Have Been Collected as of February 2007)		
No.	Name of Plant	Location
1	Multimedia Manufacturing Sdn Bhd.	Selangor
2	Express Audio Industry Sdn Bhd.	Selangor
3	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
4	Digital Data Technologies Sdn Bhd.	Selangor
5	Discatech Multimedia Sdn. Bhd.	Cheras, Kuala Lumpur
6	Elite Digital Technologies Sdn Bhd.	Selangor
7	Jenama Evolusi Sdn Bhd.	Selangor
8	Polinta CD Manufacturer Sdn Bhd.	Selangor
9	Memory Tech Sdn. Bhd.	Selangor
10	Summit CD Manufacture (M) Sdn Bhd.	Cheras, Kuala Lumpur
11	Vintage Technology Sdn Bhd.	Johor
12	Pioneer Solution Sdn Bhd.	Selangor
13	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
14	BLG Edutainment (M) Sdn Bhd.	Selangor
15	Digital Data Technologies Sdn Bhd.	Selangor
16	Dragon Optical Media Technologies Sdn Bhd.	Selangor
17	IP SoftCom (M) Sdn Bhd.	Penang
18	Jenama Evolusi Sdn Bhd.	Selangor
19	The Phoenix Press Sdn Bhd.	Penang
20	Replitex CD industries Sdn Bhd.	Selangor
21	Union Triumph Sdn Bhd.	Johor
22	Tri-Commercial Sdn Bhd.	Selangor
23	Daxon Technology Sdn Bhd.	Pulau Pinang
24	Dragon Optical Media Technologies Sdn Bhd.	Kuala Lumpur

Exports Decrease, Except for Entertainment Software: Malaysia continues to be the country of origin for much of the factory replicated pirated entertainment software products on optical disc exported around the world. Improvements in seizures of pirated materials have occurred in air shipments out of Malaysia (leaving trucks and trains as the latest modes of export to transport pirate products to Thailand). The government claims that since 2002, its “Special Export Unit” has seized almost 1.3 million discs valued at R9.6 million.²¹ Other measures taken by the Malaysian government in 2006 to decrease exports include the purchase and installation of scanners in all main ports and airports, to ensure that not only containers but also luggage and parcels sent by airmail or courier can be scanned. More must be done, especially since the entertainment software industry reports no improvement for their industry. The government must continue to aggressively intercept pirated products/materials at the borders (KLIA, Penang, Johor Port, etc.), with special focus on eradicating the export of pirated entertainment software. Measures should also be taken to address the problem of false documentation, a regular occurrence in exports of pirate video games originating from Malaysia. It is important that the government of Malaysia adopt sanctions that can be imposed on persons who use false information on documents submitted to government authorities in relation to the movement of goods across Malaysia’s border or in-transit. Malaysia should have provisions in its criminal code that provides for penalties (for example, monetary fines and imprisonment) for those involved in commercial piracy/counterfeiting and the use of false information.

²¹ For example, the Malaysian Government claimed that it doubled seizures of pirate product destined for export in 2005 (over 2004), to over 700,000 discs.

Organized Crime/Need for Complex Investigation: There can be little doubt of the involvement of organized crime in Malaysian piracy operations, whether by this term we mean large-scale illegal commercial operation or an operation that involves many individuals conspiring to engage in many different criminal ventures.²² It has also been clear for years that anti-piracy work, either from the industry side or the government side, is fraught with danger.²³ Malaysian authorities must thoroughly investigate links between piracy and organized crime if the government is to begin to adequately address its piracy problem and to successfully remove these syndicate-run operations (such as those that control the large-scale production and export of pirated entertainment software products) from the country.²⁴

A particularly vexing case involves a notorious pirate operation that is believed to span Malaysia, Thailand and Singapore. After extensive investigation and persistent urging by an Entertainment Software Association member company, in 2004, the MDTCA raided the retail store and warehouse of BASIC Electronics (M) Sdn. Bhd. where more than 880,000 pirated entertainment software discs were seized. This case languished for nearly two years, during which only one right holder was asked to verify a small subset of the infringing product seized. Charges were finally entered against the defendants in October 2006, only after much urging from the right holders and the U.S. government. Unfortunately, the charges were based on the less than 1,000 discs verified and do not accurately reflect the scope or nature of the infringing conduct or piracy operation involved. The ESA and its members are actively working with MDTCA to organized and provide manpower to inventory and verify the rest of the seizure (i.e. the remainder of the 880,000 products originally seized) in the hope that charges will be amended to reflect the true scope of the crime. Trial has been tentatively set for April 2007 but as of the writing of this report, a permanent prosecutor has yet to be assigned to this case.²⁵ Given the scale of this pirate operation, this case cannot be allowed to further languish or to result in non-deterrent penalties.

Malaysian Government Must Use Forensics Available: While MDTCA supports the industry's forensic programs in Malaysia where infringing product is found on site in the course of a raid or inspection, MDTCA had not until September 2005 ever submitted samples from sizeable seizures to the Government Chemist to identify the manufacturing source. Industry has been assured by the new Director of Intellectual Property that this is now being done, which is a positive sign.²⁶ Some dynamic middle managers in MDTCA appear enthusiastic to take on more sophisticated investigative operations to target major pirates. One act that might help the government to prioritize and allocate resources to tackle piracy, including organized piracy, most effectively would be the re-establishment of the Special Copyright Task Force to take on these coordinating responsibilities.

²² For example, the music and record industries have learned that some pirates being are involved in a syndicate of loan sharks (unlicensed money lenders).

²³ In a raid run recently on an Internet café by a representative for an entertainment software company in 2005, the owner and the supervisor of the café became agitated and verbally and physically abusive, tossing computers on the floor in the presence of the police. They also took photos of the industry representative with their cell phones and cameras and threatened to distribute the photos to other cafés.

²⁴ The record and music industry understands that MDTCA officers have received training in respect of the Anti-Money Laundering Act 2001, however, to-date, IIPA has no knowledge of any criminal charges being brought against pirates under this Act.

²⁵ The U.S. government has on several occasions intervened in this matter, and it remains critical that the U.S. government continue to stress the importance of successfully concluding this case.

²⁶ See note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that since 2003, 4,523 samples had been tested forensically (but only 41 discrete copyright cases were apparently involved).

New Special Prosecutors Must Attack Organized Piracy Through Investigations and the Courts: The MDTCA has set up a prosecution unit comprising officers who will be trained and equipped to deal with complex litigation from criminal actions brought. In December 2006, the prosecution team underwent a week long training programme in the art of examination and cross-examination of witness, as well as gathering and presenting evidence. IIPA is most pleased that the government of Malaysia has recognized the need to develop a cadre of good prosecutors in order to tackle the piracy dilemma, and looks forward to working with the new prosecutors and assisting in any way our local members on the ground can (i.e., trainings and the like).

Courts' Response to Piracy/Specialized IP Court: IIPA also understands that an Intellectual Property Court has been established as a pilot project in Kuala Lumpur. Understanding that it will take some time for such programs to spread to other cities and provide a uniform quality in the judiciary, unfortunately, the result is that in 2006, there remains a backlog of copyright cases, as there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts.²⁷ For the recording industry, court cases are progressing faster for retail cases where arrests are made during raids than for non-arrest cases. Other cases, however, languish in the current court system. In addition, a number of appeal cases lodged by the prosecution against acquittals, some dating back to 2003, have never been concluded. In addition to steps to speed the processes of the court, the Malaysian government should additionally issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

Section 42 "Affidavit" Provision Causes Serious Problems for Right Holders in Court: Section 42 of the Malaysian Copyright Act has proved problematic in practice, leaving statutory declarations of ownership and subsistence too vulnerable to technical challenges by defendants. Section 42 must be modified to afford right holders with these presumptions in practice. For example, right holders have noted, among other problems, that Section 42, while not expressly requiring the maker of an affidavit (of copyright ownership or subsistence) to be present, has been applied to require presence in practice, since defendants have claimed they have a right to cross-examine the maker of the affidavit. In addition, Section 42 should not contain the wording "at the time specified therein" since it creates confusion (it should suffice to say "copyright subsisted and continues to subsist at all material times"). Finally, the "true copy" requirement is overly burdensome (e.g., a right holder in a motion picture should not be required to produce the bulky film print, or the right holder in books should not be required to produce copies of all the books involved in a particular case).

IIPA notes that "presumptions" of ownership are required under Malaysia's current TRIPS obligations, and "presumptions" of ownership and subsistence would be important requirements of an IPR chapter in the USMFTA. While recognizing that the "affidavit" provision of Section 42 does not fully substitute for these presumptions, if the government wishes, it can reinterpret Section 42

²⁷ IIPA members report that some cases from 2002 have still not obtained a single hearing in court. Though many of the criminal end-user software piracy cases have reached the courts, many still remain in the investigation phase, including some cases over two years old. In addition, cases in the courts can still take many years to reach resolution. It has also been reported that cases, once filed, do not move forward, as officers are transferred, etc. Notwithstanding this over-arching problem, the year 2005 saw a couple of breakthrough events in the courts. The MDTCA achieved its first-ever criminal end-user conviction in a contested case that went through a full trial, resulting in a sentence of a fine of RM120,000 (US\$34,358) or six months' jail per charge for directors in default of payment of the fine, for possession of 15 infringing copies of software other than for private and domestic use. The defendant, Sarawak-based Alom Industries Sdn Bhd, is currently appealing the conviction.

so that it is consistent with the presumptions; at present, the way Section 42 is interpreted and implemented in practice calls into serious question Malaysia's compliance with its current international obligations.

Right Holders Now Being Permitted to Access Criminal Files to Initiating Legal Actions Against Infringers: The Copyright Act (Section 52) has previously been interpreted in a way that impedes the ability of injured right holders to take civil actions based on evidence seized by MDTCA, even in raids run pursuant to complaints by rights holders and undertaken with the support of right holders' representatives. In particular, right holders have in the past been refused access to evidence seized by local authorities on the argument that such access would violate a non-disclosure provision in the Act.²⁸ While section 52 of the Copyright Act 1987 has not been amended, a court case decision in August confirmed that right holders have the right to file civil actions based on information gathered in criminal cases.²⁹ Subsequent to this decision, MDTCA and the Attorney-General's Chambers have agreed that information with regards seizures made during a criminal may be forwarded to the copyright owner, for the purposes of lodging concurrent civil actions. Section 52 should still be amended (for clarification), but the MDTCA and Attorney-General's position in following the ODVD case decision is welcomed.

Hologram Sticker Program Does Not Deter Piracy: The IIPA generally supports efforts by governments directed at combating piracy. Historically, IIPA has not found sticker authentication programs helpful in fighting piracy, since, in the end, such programs usually end up adding costs and documentary requirements and other burdens on legitimate right holders, while pirates either do not bear such burdens or costs, or, worse yet, find ways to make fraudulent uses of the means of authentication (either by obtaining legitimate stickers etc. or by fraudulently producing such stickers etc.). IIPA has in the past expressed similar concerns about the program introduced in 2002 in Malaysia. However, IIPA recognizes the efforts of the Malaysian government to use the hologram sticker program to combat piracy, and several members have found benefits from the program.³⁰ IIPA supports the Malaysian government's efforts, but there are several areas which must be changed or the system will be a failure in terms of the aims which it purports to serve. IIPA understands that the MDTCA and Attorney-General's Chambers have suggested amendments to the Hologram Law to address the current

²⁸ A series of raids by the recording industry and MDTCA in 2005 uncovered distribution centers, offices and replicators used by a known syndicate distributing suspected pirate products throughout Southeast Asia. Over one million discs and large quantities of documents and other evidence were seized. While industry wished to bring a civil action, MDTCA, citing Section 52 of the Copyright Act (dealing with the disclosure of information obtained pursuant to the Act) would not provide industry with access to the materials recovered from the raids.

²⁹ On August 8, 2006, the Malaysian Court of Appeals dismissed an appeal by ODVD Manufacturer Sdn Bhd's against a High Court decision that allowed copyright holders to file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies. In September 2002, Malaysia's Ministry of Domestic Trade & Consumer Affairs (MDTCA) raided ODVD Manufacturer Sdn. Bhd., a licensed VCD replicating factory, and seized 1,670 suspected pirate optical discs, some of which were infringing Motion Picture Association (MPA) member company titles. Based on information obtained during the September 2002 raid, Columbia Pictures Industries, Inc., owner of the copyright of the movie *Stuart Little 2*, initiated a civil action against ODVD Manufacturer Sdn Bhd. ODVD Manufacturer Sdn. Bhd. applied to the High Court to dismiss Columbia Pictures' claim on the grounds that the civil action was initiated based on information obtained by the MDTCA during the criminal raid. ODVD Manufacturer Sdn. Bhd. argued that it was illegal for the MDTCA to have divulged information gathered during the raid. The High Court dismissed the application by ODVD Manufacturer Sdn. Bhd., and ODVD Manufacturer Sdn. Bhd. appealed to the Court of Appeal.

³⁰ See note 7, in which the Malaysian government representative to the ASEAN+3 seminar in Tokyo in March 2006 claimed that since January 15, 2003, a total of 135.4 million labels had been used, and that as of November 2005, 3,564 cases had been taken against "offenders who fail to comply with the requirement."

loopholes in the law, which are expected to pass and be gazetted in February 2007. It is hoped those amendments go to some of the issues discussed below.

The benefits to the hologram program as currently operating in Malaysia include the following:

- The implementation of the hologram system has reportedly improved and is developing as a useful investigative tool for both enforcement agencies and industry in identifying parallel imports and pirated and counterfeit products.
- The hologram assists the MDTCA officers to quickly identify premises which are retailing pirated optical discs, enabling them to take immediate action against the illegal traders. To date, the recording industry reports a total of 3,608 cases involving product requiring holograms, including cases against parallel importers.
- The hologram law has substantially reduced parallel imports, especially from China, into Malaysia. Singapore, by contrast, is flooded with parallel imports from China.

Notwithstanding these benefits, IIPA notes several areas which must be improved in order to merit our continued support. We continue to note the following:

- IIPA's chief concern with the issuance of hologram sticker remains added costs to legitimate right holders. Holograms in Malaysia cost 20 sen (US\$0.05). The Minister of MDTCA has reportedly announced recently that holograms will be available for purchase at 16.3 sen (US\$0.04), while IIPA has suggested that the government lower the cost of holograms to 4 sen (US\$0.01), and take other steps to lower indirect costs to legitimate businesses. There remains a relative lack of parity in the costs when compared, for example, to the pharmaceutical industry. IIPA urges the MDTCA to ensure that a meaningful reduction in the cost of the stickers charged to distributors is reflected when a new contract is awarded to the next vendor company selected to produce the hologram stickers.
- Another concern remains overly burdensome statutory declarations/affidavits to receive hologram stickers.
- As noted, occasionally, reports still indicate a lack of auditing as to whom such stickers are provided to (several associations assert that there are instances where pirates or unauthorized parties have used the holograms on pirate/unauthorized product).
- Lack of transparency: The Malaysian government does not at present post hologram numbers (with the full particulars of the applicants and volumes of hologram issued for each number) on MDTCA's website so that the industries and consumers can verify the numbers issued. For the purpose of transparency and avoidance of abuse by the issuing officers, this should be done.
- One of the key benefits from an effective hologram program is that it provides an addition tool to prosecutors to take action against infringers of copyright, since infringers can be prosecuted under the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82) for failing to use holograms (in addition to any possible copyright infringement claims). We understand that MDTCA prosecutors and Deputy Public Prosecutors have expressed the view that the Trade Descriptions Act may not be applicable

to “pirated” optical discs. Section 4(3) of the Act, however, is crystal clear on this point, namely,

Any person who—

- (a) supplies or offers to supply or offers for hire goods which are not affixed with an original label; or
- (b) affixes an original label to goods which are not original goods, commits an offence.

“Original goods” are defined as legitimately produced goods. The fact that Section 4(3)(a) mentions “goods” not affixed with an original label indicates that the Act applies to infringing or pirated copies. Thus, when MDTCA officers arrest traders for selling pirated goods for not having the appropriate hologram stickers on, they should prosecute such cases without hesitation. We believe this is plain from the statute, but support consideration of an amendment if such a clarification would assist MDTCA and the AG’s office to bring more prosecutions for violations of the Act by pirates/infringers.

TRAINING AND PUBLIC AWARENESS

The copyright industries once again organized and/or participated in many training and public awareness activities in 2006 related to copyright protection and piracy issues in Malaysia. These included,

- March 2006: The Business Software Alliance organized a one-day seminar on prosecuting end-user software cases for a team of around 20 MDTCA prosecuting officers responsible for running such cases.
- April 2006: The Motion Picture Association organized a seminar for MDTCA prosecutors and Deputy Public Prosecutors from the AG’s Chambers aimed at strengthening the prosecution team’s ability to bring copyright cases. Jointly with MDTCA and the AG’s Chambers, the industry is preparing a prosecution manual as a guide for the officers. Part 1 of the manual had been distributed to the officers and industry is currently finalizing the complete version of the manual.
- June 20, 2006: MDTCA, MPA representatives, and representatives of Internet service providers (ISPs) met for a discussion on the increasing threat of Internet piracy in Malaysia. At the session, the ISPs agreed to cooperate with the government to tackle the issue of Internet piracy.
- June 2006: MPA representatives worked with the MDTCA in organizing a discussion on best practices for campus anti-piracy with representatives of universities in Malaysia. Given that large numbers of university students are involved in Internet piracy, university administrators must play a role in tackling the problem.
- June 2006: The local record industry group participated in training on “Post-Raid Investigation Techniques,” organized by the International Federation of Phonographic Industries (IFPI)³¹ on June 19, 2006.

³¹ The Recording Industry Association of America (RIAA) is a member of IFPI.

- July, August, September 2006: In view of the increasing number of cases involving camcording in cinemas and the use of sophisticated and difficult-to-detect equipment, MPA representatives organized a series of camcorder piracy training sessions in Penang, Johor and Kuala Lumpur for the cinema operators, MDTCA and police officers.
- September 2006: MPA representatives organized a global Internet enforcement training workshop held in Hong Kong from September 18-19, 2006 aimed at strengthening investigative skills to combat Internet piracy. The head of the Internet Piracy Unit of MDTCA attended the training.
- December 12, 2006: The software industry organized a one-day prosecutorial training for 25 MDTCA prosecutors. A prominent criminal lawyer was engaged to lead the training on evidence and criminal procedure. This was the first of a series of prosecutorial training organized by the software industry to be continued in 2007. The record industry participated in this training.
- December 23-24, 2006: The local record industry group participated in a seminar/dialogue with the State Directors of Enforcement to brief the State Directors on the current status of record industry related issues. Also discussed were anti-piracy figures and strategy.
- Throughout 2006: The local record industry group conducted ongoing trainings and mock trials for MDTCA officers and prosecutors (e.g., as cases come up for hearings). MPA representatives conducted several other training sessions for prosecutors and judges.

MARKET ACCESS

Broadcast Quotas and Investment Restrictions Hamper Legitimate Right Holders: Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during “prime time” hours of 8:30 to 9:30 p.m. Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. These restrictions are extremely damaging and highly prejudicial to U.S. copyright owners in program content, and should be eased or lifted.

Proposed Levy Could Violate National Treatment: The Malaysian government also maintains several other regulatory requirements in the audiovisual sector that effectively combine to impede the growth of the film and home video industries and has announced the possible imposition of further restrictions on foreign products. In October 2005, Malaysia’s Culture, Arts and Heritage Minister, Datuk Seri Dr. Rais Yatim, was quoted in several newspapers supporting the idea of introducing a levy to be assessed against all imported films distributed in Malaysia. The Minister stated that the proposal was specifically for the purpose of assisting the development of the local film industry. While the extent of the proposal remains unclear, audiovisual distributors and exhibitors remain concerned that the imposition of such a levy would place Malaysia at a competitive disadvantage with respect to other markets in the region, may result in a reduction in the importation of films into Malaysia, and may violate Malaysia’s WTO obligations to extend full national treatment to foreign rights owners.

COPYRIGHT AND RELATED LAWS

Copyright Law in Need of Further Revision, But Proposed Amendments Should Not Proceed Without Proper Review and Consultation with Relevant Industries: Copyright protection in Malaysia is afforded under the Copyright Act, 1987, as amended through 2003. The 2003 amendments³² strengthened criminal penalties to up to five years and fined 20,000 ringgit for each infringement and generally gave 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, practically on an *ex officio* basis.³³ The 2003 amendments did not make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall.³⁴

The Malaysian government should modernize its Copyright Act, including fully implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (including by full implementation of TPMs, expressly protecting temporary copies), and joining these treaties to provide adequate protection of copyright in the online age.³⁵ The government should 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.). Legislative changes should also facilitate enforcement in the digital environment, including, *inter alia*, by extending and/or clarifying mall owners' liability for the rampant trade of pirated products that still occurs within many commercial buildings.³⁶ IIPA understands that the government has prepared copyright law amendments that sit in the Attorney General's Office that would aim to implement the WCT and WPPT,³⁷ but there has been no consultation on this bill, and therefore, IIPA is unaware whether it will succeed in fully

³² The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

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 did not go quite that far, they did in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*.

³⁴ The 2003 amendments did not make other changes which were necessary either for Malaysia to comply with international standards, or to improve the workings of the enforcement system. They did not, for example:

- 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.

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.

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. IIPA also suggests that provisions dealing with secondary liability be adopted, such that Internet Service Providers (ISPs) will have incentives to cooperate with right holders in defeating online piracy. At least the "aiding and abetting" standard should be adopted so that service providers do not condone piracy on their services.

³⁶ Industry has submitted a Memorandum proposing specific amendments to the Copyright Act 1987, to, *inter alia*, make it a specific offence for a landlord to permit its premises to be used for the distribution or sale of pirated products.

³⁷ IIPA has learned that the legislation was to be tabled in Parliament as early as November 2006, but that no draft has been shared with the U.S. government (e.g., in the context of the FTA negotiation). IIPA also understood that the government planned to share the draft with certain groups such as the U.S. Chamber of Commerce in Malaysia, but has not heard that anyone outside the government has seen a draft.

implementing the WIPO Treaties. IIPA welcomes any opportunity to consult on and review the draft.

Proposed Changes to Optical Discs Act: The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to (1) prohibit the gouging or other removal of SID code from discs; (2) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; and 3) prohibit the unauthorized “burning” of content onto recordable discs.

Organized Crime Legislation: With the involvement of organized criminal syndicates in piracy operations in the country, the government of 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 (1) to 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. 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/IP nexus in Malaysia.

FREE TRADE AGREEMENT

On March 8, 2006, the United States announced its intention to enter into negotiations toward a free trade agreement with Malaysia.³⁸ IIPA submitted a Notice of Intent to Testify at, and Testimony for, a Public Hearing Concerning the Proposed Free Trade Agreement with Malaysia on April 18, 2006, and testified on May 3, 2006.³⁹ The Malaysia FTA should require full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards, including but not limited to those already embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The agreement with Malaysia must also require it to upgrade its copyright enforcement practices, with the goal to ensure that copyright owners and law enforcement officials have available to them the tools necessary to impose effective, consistent, predictable and deterrent penalties on copyright pirates, including in the Internet environment. The negotiations should also aim to dismantle or significantly reduce the market access barriers and discriminatory practices that keep U.S. copyright holders from full participation in the Malaysian market.

While many of the issues are undoubtedly will be dealt with in the IPR Chapter of the FTA,⁴⁰ there are several worth mentioning.

Government Legalization: While previous FTAs have included a commitment for the governments to ensure that use of software in the government is legalized (and that appropriate

³⁸ See The Office of the United States Trade Representative, United States, Malaysia Announce Intention to Negotiate Free Trade Agreement, at http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_Malaysia_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html.

³⁹ The Notice of Intent and Testimony can be found at <http://www.iipa.com/pdf/IIPA%20MalaysiaFTA%20Request%20to%20Testify%20040406.pdf>.

⁴⁰ We conclude this based on an examination of the IPR Chapters of prior FTAs.

software asset management is employed), in today's digital and online environments, it is essential to ensure that government networks are not being used for illegal uses of copyright materials, whether it be software, online publications, music, movies, games, or the like. As a result, governments are recognizing and agreeing that they must take steps to ensure that government computer networks are not used for illegal copyright uses, including peer-to-peer file sharing (P2P). APEC Ministers recommended that "government entities" (which should include educational institutions funded by the State) should ensure that copyright usage, including on P2P networks, is legal,⁴¹ and Leaders cemented the understanding among the 21 APEC Members in November 2006 in Hanoi, Vietnam that all "government agencies" should ensure that copyright usage is legal.⁴² As a result, the government of Malaysia should not have difficulty agreeing to this. IIPA members view the government legalization of copyright materials text as a very important component of a successful FTA.

Signal Theft: IIPA would like to ensure that the problem of Pay TV piracy – signal theft – does not become a major source of trade losses to U.S. owners of broadcast content. Language should be included in the FTA, including the broadcast right and the right to control against the unauthorized decryption of encrypted program-carrying signals (as well as to stop the manufacture or distribution of devices used to decrypt). In addition, language should be included to ensure that onward distribution of signals without authorization (re-broadcast or re-transmission) is also illegal in Malaysia.⁴³

Other Key FTA Issues: Other key FTA asks include the following:

- outlawing the use of an audiovisual recording device to transmit or make a copy of a copyright work from the performance in a motion picture exhibition facility.
- improving customs authority and border enforcement measures.
- outlawing the knowing trafficking in counterfeit labels or illicit (unauthorized) labels affixed to, enclosing, or accompanying (or designed to be affixed to, enclose, or accompany) works or sound recordings.
- outlawing false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.

⁴¹ The APEC Ministers stated the following:

Recommended that APEC Leaders should endorse the principle that government entities should not use illegal software or other content on their computer networks, especially pertaining to Internet usage. This keeps APEC at the forefront of addressing the growing problem of illegal file sharing on the Internet.

⁴² The APEC Leaders stated the following:

We also called on member economies to exercise appropriate oversight to achieve the objective that central government agencies use only legal software and other copyright materials; that such bodies implement effective policies intended to prevent copyright infringement on their computer systems and via the Internet, in accordance with relevant international conventions and domestic laws and regulations concerning copyright and related rights; and that central government funds are not used by contractors or recipient institutions to purchase illegal software or other illegal copyright materials.

⁴³ CASBAA estimates that over US\$4 million is lost due to illegal Pay TV connections (US\$1.8 million) or satellite overspill (US\$2.4 million). See CASBAA, *The Cost of Piracy: Asia-Pacific Pay-TV Industry Study*, October 2006.

Finally, in addition to the problems noted above, there are some other specific concerns which should be addressed by inclusion of commitments in the FTA itself or in side letters. These include ensuring that the optical disc laws are strengthened to:

- cover “burning” of copyrighted content of others onto recordable discs;
- outlaw gouging or scouring of 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 found (e.g., in transit) or stored;
- reinstate the requirement to include SID Codes on blank optical disc media (CD-R/DVD-R etc.) and make the sale of optical discs without SID code an offense;
- ensure that samples (exemplars) are collected from every plant;
- ensure that officers are authorized to seize discs in inspections and make arrests;
- allow right holders to participate in inspections and collect evidence;
- allow for inspections at any time, day or night;
- allow for forcible entry where entry is obstructed;
- provide for automatic revocation if a plant or agent has violated the law.