

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Malaysia should remain on the Watch List, with an Out-Of-Cycle Review (OCR) to monitor the decrease in the level of attention copyright piracy received in Malaysia in 2008, and to determine whether the Ministry of Domestic Trade and Consumer Affairs (MDTCA) has once again returned enforcement efforts to appropriate levels, including raiding for all types of copyright piracy on an *ex officio* basis and without undue delays.

Executive Summary: A recent article entitled, *The Piracy Goes On*, from one of Malaysia's top newspapers, tells the unfortunate story of piracy in Malaysia in 2008.¹ The piracy situation worsened in 2008, since the new Minister of Domestic Trade and Consumer Affairs (MDTCA) has determined that raids will generally be run only on the basis of right holder complaints, and in some cases, not without the green light of the Secretary General of MDTCA. In addition, some industries report that enforcement decision-making functions are being overseen by officers from the Malaysian Administrative and Diplomatic Service (MADS), many of whom are not trained for this role. The end-result is far fewer enforcement actions in 2008 than during any of the previous five years.² Pirates, seizing upon this gap in coverage, returned to shopping complexes to engage in open and blatant piracy. Photocopying of academic materials by commercial centers near universities also increased. The establishment of IP Courts in 2007 in several cities in Malaysia brought hope for a greater level of deterrence, but the results have not been promising so far. Up until early 2009, the new Minister and Secretary General of MDTCA had even declined to meet with some industry representatives, although meetings are now ensuing. Piracy in Malaysia has harmed the local economy as well as foreign authors and right holders. As an example, physical music sales dropped 20 to 25% in 2008, and as a result, EMI Records shut down its Malaysia operation. Universal Music outsourced its finance operations to India, resulting in the loss of about 35 Malaysian jobs.

Priority Actions Requested in 2009: IIPA requests that the government of Malaysia take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Ensure that qualified enforcement officers from the MDTCA enforcement division return to handling all enforcement operation functions, including copyright inspections, raids, case preparations, and prosecutions. To the extent that officers from MADS who are not well trained on copyright enforcement issues have been given greater responsibility in 2008 over piracy matters, purview over such matters in 2009 should generally return to qualified officers.
- Revert to and improve on the previous proactive enforcement administration system whereby dedicated MDTCA enforcement division officials were empowered to make immediate decisions on an *ex officio* basis, rather than on a complaint-basis, and take actions similar to other government enforcement agencies such as the Police and Customs.
- Commence more cases at the courts, decreasing the huge discrepancy between the number of inspections, reported at more than 100,000 in 2008, and the number of infringement cases, which numbered only slightly more than 1,000 in 2008. Significant cases should be brought against optical disc factory owners, mobile device pirate operations, illegal photocopying operations, and chief financiers of piracy, including landlords of fixed premises. Deterrent sentences should be sought, employing the expertise that should now exist in the new IP courts.
- Instruct the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL) and other like local councils, who are ultimately in charge of licensing night market vendors, to curtail the uncontrolled piracy activities at shopping centers, other fixed premises, and night markets.
- Curb pirate entertainment software exports, and unlicensed use of games in Internet cafés.

Legislation

- Adopt stand-alone legislation to ban use of or intent to use an audiovisual recording device to record a movie in a theater.

¹ *The Piracy Goes On*, The Star Online, January 10, 2009, at <http://biz.thestar.com.my/news/story.asp?file=/2009/1/10/business/2984527&sec=business>.

² *Id.* The Star article reported that the Minister of Domestic Trade and Consumer Affairs, Datuk Shahrir Abdul Samad, when asked if piracy was one of his main priorities, replied that it was not. By November, he was quoted as saying the Ministry was ready to renew its fight against piracy.



- Adopt legislation to modernize the copyright law, including fully implementing the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Join the WCT and WPPT.
- Adopt legislation to combat Internet piracy, *inter alia*, by promoting Internet service provider responsibility, including statutory notice and takedown and mechanisms to deal with all forms of Internet piracy, including P2P file sharing, expeditiously.
- Adopt or amend legislation to enable courts to impose statutory damages for infringements.
- Amend the optical disc laws to ensure source identification (SID) code applies to recordable discs, to prohibit “gouging” of source identification codes from discs and allow inspections offsite and at any time, day or night, and make other needed changes.
- Resolve market access barriers, including lifting the quantitative and investment restrictions on foreign television broadcasts, and lifting the restriction on foreign advertising on terrestrial broadcast channels.

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Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars)										
and Levels of Piracy: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Records & Music	26.2	60%	16.0	45%	22.0	45%	38.8	49%	55.5	52%
Business Software	180.0	60%	156.0	59%	159.0	60%	82.0	60%	73.0	61%
Entertainment Software	NA	NA	NA	83%	28.0	90%	23.4	91%	12.9	91%
Books	NA	NA	9.0	NA	9.0	NA	10.0	NA	9.0	NA
Motion Pictures	NA	NA	NA	NA	NA	91%	36.0	50%	38.0	50%
TOTALS	206.2		212.0		154.2		187.4		164.0	

PIRACY CHALLENGES IN MALAYSIA

Hard Goods Piracy Reemerges at Fixed Premises and in Night Markets: Due to declining enforcement actions in 2008, hard goods piracy, including distribution of factory-produced optical discs and the “burning” of illegal content onto recordable discs, has reemerged, with open and blatant pirate outlets mushrooming throughout the country, particularly in suburban areas where enforcement is less concentrated. Night market piracy stalls have continued to flourish in Malaysia notwithstanding significant information supplied to the government of Malaysia on a continual basis. As a result, the music industry has suffered a significant deterioration of its legitimate market. The music industry lost an estimated US\$25.7 million in 2008, with piracy levels increasing to over 60% (compared with losses of US\$16 million and 45% piracy level in 2007). The areas of Kuala Lumpur, Kota Kinabalu, Johor Bharu, Penang and the rest of the Klang Valley remain the hardest hit by hard goods piracy.

Exports of Pirate Entertainment Software From Malaysia Still Detected: Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software still was detected in 2008 with numerous seizures of pirated game product at Malaysian borders, including one shipment of 15,500 pirated PC games destined for a foreign market. The problem of pirate movie and music exports, once a major issue in Malaysia, has been mitigated by the presence of industry and MDTCA representatives who are stationed in Kuala Lumpur International Airport to monitor and stop such exports.

Mobile Device Piracy on the Rise in Malaysia: Mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, has easily become one of the most serious piracy problems in Malaysia. Mobile penetration in Malaysia has exploded over the past several years and was estimated by the Malaysian Communications and Multimedia Commission (MCMC) to be 93% by the end of 2008. While many fixed locations previously engaging in

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Malaysia. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Malaysia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

unlawful uploading/downloading have legalized their practices, many more have not yet done so. For example, for the music industry, piracy in the form of illegal loading of full tracks and ringtones occurs both over the air through wireless transmissions and through over-the-counter sales. The problem affects other industries as well, for example, publishers report some downloading of reference books and dictionaries onto mobile devices.

Book Piracy Worsened in 2008: The book piracy situation deteriorated in 2008. The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. The level of illegal photocopying increased in 2008 in most areas near campuses. Some changes in the modus operandi of photocopy pirates cause publishers further concern, since pirates can now save soft copy scans of textbooks onto computers or portable hard drives and directly print the books from their computers, thus making detection and identification of infringers more difficult. Other continued attempts to make piracy harder to detect include the setting up of shop facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities, or storing pirate stock in vans for easy delivery and difficult detection by authorities. Certain areas within Klang Valley have worsened, including Subang Jaya campuses, Universiti Putra Malaysia (UPM), University of Malaya (UM) and KDU College. Dozens of shops line each campus, and most academic buildings at universities contain on-campus shops. The problem at universities is further perpetuated through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for illegal photocopying.

Internet Piracy Broadens: The negative effects of Internet piracy, whether direct downloads from websites, P2P file sharing, deep links, advertising sites (for hard goods sale or delivery), or cyber lockers, are starting to have a significant deleterious effect on legitimate copyright owners' businesses. As of 2008, Malaysia hosted almost 15 million Internet users, which represents 59% Internet penetration. Broadband penetration grew substantially, from 1 million to at least 1.2 million broadband subscriptions by the end of the third quarter.⁴ Music piracy from Internet sources remains most prevalent. One local Malay artist, *Mawi*, noted as early as 2006, "A simple search on the Internet reveals that the whole content of Mawi's first solo album[, "*Mawi...Yang Tercinta*" is] 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."⁵ Pirate business software on the Internet is primarily available through peer-to-peer file sharing services. Publishers have also noted some online piracy, with sites offering scanned copies of books (in PDF or a similar format) for download.⁶ A continuing problem in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods.

New Internet Café Server-Based Piracy Surfaces: A major problem for several years in Malaysia involves the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many cases, such premises set up standalone computers loaded with unauthorized or pirated copies of a game. The cafés then shifted to a "client-server" model, in which the unauthorized software is installed at the server level on-site, and the customers' machines are granted access to the same copy on the server. In 2007, the industry saw the development of a new "scheme," involving Internet café operators entering into arrangements with third parties that provide access to an off-site server hosting or storing the game software. The café's on-site server is then granted access to the game software on the off-site server (which effectively controls all activity related to the use of the game at the cafés), and in turn, the café's server permits access to the same software to the many computer machines located on-site. The off-site server will typically require the on-site server to authenticate itself, and thus, if the link to the off-site server is severed, all services that may be available to the café's computers through the on-site server will be rendered inoperable. Thus, once the link is broken, the café's computers are effectively wiped of all data or evidence of infringing activity. The proliferation of such methods of evasion complicates post enforcement verification and thus emboldens those refusing to obtain appropriate licenses for video game product used in such commercial settings.

End-User Piracy of Business Software Stunted IT Growth in Malaysia: The willful use of unlicensed or pirate software in the workplace in Malaysia continues to cause losses to Business Software Alliance companies, seriously compromising the businesses of resellers and distributors of genuine software, and stunting the growth of the IT sector. The PC software piracy rate has remained essentially flat for the past several years at around 60%. This is below the median software piracy rate for the region.

⁴ Malaysian Communications and Multimedia Commission, at http://www.skmm.gov.my/facts_figures/stats/index.asp.

⁵ Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006.

⁶ Sites particularly noted include piradius.net and eastgate.net.my.

Camcorder Piracy Causes Massive Losses to Film Producers: A vast number of movies 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 copies are then distributed to pirate “dealers” throughout the world and over the Internet. During the first half of 2008, there were eight detections of illegal camcording in Malaysian cinemas. The government should enact stand-alone legislation to criminalize illegal use of or intent to use audiovisual recording equipment in a movie theater to record a film off the screen. Such a law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement.

Capacity Remains Too High in Licensed and Unlicensed Optical Disc Plants; Blank Disc Production Needs to be Regulated: There were as many as 30 optical disc production plants as of December 1, 2008, with capacity to produce hundreds of millions of discs per year, and dozens of facilities that produce blank CD-Rs and DVD-Rs. IIPA remains concerned about the high production capacity, which easily dwarfs legitimate demand in Malaysia, as well as the cessation of raids on licensed factories. It is troubling that MDTCA renewed a suspended license of one manufacturer in 2007 despite several pending criminal and civil actions against it. Other problems include the failure of the government to properly monitor blank CD-R manufacturing plants and to require such plants to apply source identification codes. Two main problems leave IIPA and the industries affected concerned: 1) there remain few actions against the licensed plants; and 2) facilities licensed to press recordable-only formats remain exempt under the law from mandatory source identification (SID) codes. Given the instances of pirate production by recordable-only factories, SID Code standardization is considered the best practice.

ENFORCEMENT CHALLENGES IN MALAYSIA

Need to Reverse Overall Slowing of Enforcement Activity: The overall slowing of enforcement operations (especially after March 2008) in Malaysia has much to do with the change of the Minister of Domestic Trade and Consumer Affairs, to Y.B. Dato' Shahrir Bin Abdul Samad, who unfortunately to date has given lower priority to anti-piracy operations and assigned enforcement to come officers who have little or no legal and enforcement knowledge of copyright piracy matters. Proactive, *ex officio* raiding against piracy appears largely to have come to a halt, as MDTCA's apparent new policy is that they will only act upon receiving complaint from a copyright owner, and they have indicated that any *ex officio* action from the Ministry is not to be expected in the near future (we note here and below that publishers have always been bound by a complaint requirement). MDTCA statistics indicate that the number of cases launched by MDTCA dropped from a high of 4,390 cases in 2004 to 2,333 raids in 2007, to just 668 in 2008. In 2007, 3,666,060 pirate units were seized, compared with only 1,837,946 in 2008) The music industry, as an example, lodged 951 complaints via an online facility on the MDTCA website relating to hard goods piracy during the second half of the year, but only one quarter of them have even received a response from the Malaysian government.

There have also been tremendous difficulties and delays in obtaining approvals for raids from MDTCA from early 2008. Bureaucratic problems and political interference have hindered enforcement most significantly in Johor. Simple retail piracy raid requests, which easily would have been run within a few hours of lodging a complaint as recently as 2006, now take in excess of a month for mere approval in some cases, or in other cases, result in no response at all or outright rejections. Meanwhile, other industries report that Police continue to run *ex officio* raids on their behalves, and that there has been no deterioration in relationships with other government authorities, like the Ministry of Home Affairs (in charge of censorship certification), the Malaysia Communications and Multimedia Commission (which deals principally with Internet matters). Industry has reached out to all the authorities, including in localities like Penang, Johor and Kuala Lumpur. As noted, the new Minister of Domestic Trade and Consumer Affairs and Secretary General did not meet at all with some industries, although meetings have occurred in February 2009, which is hopefully indicative of a positive change.

While IIPA Applauds Establishment of IP Courts in Malaysia, Problems Remain: IIPA applauds the establishment of specialized courts in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. While in recent years the courts had meted out some fairly significant verdicts in commercial piracy cases, it is hoped that the establishment of these new IP tribunals will spur greater efficacy in the timing and

deterrence of the judicial system. Unfortunately, in 2008, IIPA notes several difficulties in the court system that must be addressed. There remains a significant court backlog, leading to delays in case adjudication. One example involves a civil litigation brought by Columbia Pictures against ODVD, a local licensed factory that is alleged to have produced illegal copies of the film, *Stuart Little*. The case, initiated in 2003, only received a first hearing in November 2008. Despite the suit and an ongoing criminal prosecution, and despite assurances by the previous Minister of MDTCA that there would be no further issuance of optical disc plant licenses, ODVD was granted a new license in 2007 to operate their factory, although to date there is no evidence it is back in service. Second, since most cases are focused in Kuala Lumpur, it may be that more dedicated judges are needed there. Third, some industry groups report difficulties in obtaining information from MDTCA about ongoing cases.

Issues in Prosecuting Commercial Pirates: In addition to the overall decrease in enforcement, IIPA has noted for many years hurdles in seeking adequate prosecutorial preparation of cases. In the past, a major concern was lack of resources in the Attorney General's chambers, leaving MDTCA officers themselves to be deputized to handle trials (even when they had no experience conducting a criminal trial). On a positive note, industry reports indicate that sixteen Deputy Public Prosecutors, thirteen for Kuala Lumpur, and one each for Selangor, Penang, and Johor, will be permanently assigned to MDTCA to assist in prosecuting copyright cases. It is hoped that this will lead to a more effective and efficient prosecution of infringers. Other problems involved the choice of cases to criminally prosecute. The most successful recent cases have been those brought against factory owners under the auspices of the Attorney General's office. The least successful have involved raids in which only a few illegal titles were found or no titles were found, but evidence of a much larger operation was not used to investigate "up the chain." With the decrease in raiding activity nullifying any deterrence from raiding the past few years, it is hoped at least that major piracy operations would be targeted for prosecution in 2009 in order to re-establish such deterrence.

Other problems relate to procedural hurdles and mishandling of dockets. Some industries have encountered various problems, ranging from missing documents due to the poor file management of the authorities, attrition leading to a constant flow of new officers who need to re-acquaint themselves with a case file, last minute preparation for cases, prosecutors being ill-informed of the case file, and lack of transparency (often the only way industry knows about a criminal case is through the subpoena of witnesses), and failure of prosecutors to provide status updates. All of these factors may (and sometimes have) resulted in criminal cases being lost. Slow prosecutions of cases are also problematic, leading to cases becoming stale (like the ODVD case which arose from a raid in 2003, but which only went to trial in November 2008) or defendants absconding. Perhaps the most significant problems involve compromises in the system. For example, many instances have arisen in the past in which factory owners came forward to stop an optical disc factory raid, but instead of arresting the owners, the factory workers were arrested. Links to organized or gang-related piracy must also be explored more carefully.⁷ Finally, prosecutors must receive more training and expertise so they can be more confident when faced with aggressive and experienced defense trial lawyers.

A longstanding issue with respect to slow prosecution has been the case against a notorious pirate operation – BASIC Electronics (M) Sdn. Bhd, that is believed to span Malaysia, Thailand, and Singapore, with exports worldwide of pirated PC games. The entertainment software industry has patiently awaited progress on this case for the last five years. A raid in 2004 yielded more than 880,000 pirated entertainment software discs. Several years later, and after procedural missteps (e.g., the charges finally entered in October 2006 were based on less than 1,000 discs that were verified) and several postponements (including three continuances in 2008 alone), the case is now on its sixth set of trial dates. Disappointingly, it was MDTCA that secured one of the continuances in 2008, without notifying industry even after it had previously assured industry that it did not foresee any further postponements and would press for trial to proceed without delay. Industry requested a formal explanation from MDTCA officials regarding the circumstances of the postponement but did not receive a response.

Shopping Center and Night Market Piracy Grow Out of Control: The local industries have supplied voluminous information to the authorities about shopping center and night market piracy over the past two years. Yet, the markets remain open for business. The Ministry of Local Government and Housing, and Kuala Lumpur City Council

⁷ For example, in a raid in 2005, six Malaysian individuals were arrested in Nigeria for optical disc piracy offences, and in addition, evidence has emerged in the past few years between syndicates in Malaysia and the United Kingdom, China, South Africa, Indonesia, Pakistan, and the Philippines.

(DBKL) and other like local authorities, who are ultimately in charge of licensing night market vendors, must take actions to curtail this uncontrolled piracy activities at shopping centers and night markets.

Publishers Bear Burden to Prepare Authorities for Enforcement Efforts Against Book Piracy: While publishers have generally had good relationships with officials at the MDTCA, MDTCA has never taken *ex officio* actions on behalf of publishers, instead placing the burden on publishers to prepare complaints, along with all the necessary evidence and supporting documents in order to initiate a raid. The supporting evidence includes surveillance reports on possible targets, photographs of the targets, and if feasible, trap purchases. While MDTCA officials conduct 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 on how to handle raids, which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and how to protect right holders from being harassed or threatened by pirates. Better preservation of evidence by prosecuting officials, and better and more proactive investigations are needed to curtail photocopy piracy in Malaysia, which has increasingly gone underground or become harder to detect or identify. While MDTCA has been open to suggestions and is willing to work hand in hand with the local universities in structuring policies and strategies to eradicate piracy on campuses, the universities themselves have to date been reluctant to get involved, apart from periodic distribution of public awareness information. IIPA would like to see the universities take a more active role in legitimizing practices on their campuses and would like to see more oversight of these efforts by the Ministries of Education and Higher Education.

Internet Piracy Requires a Coordinated Response and Cooperation from ISPs: The relevant authorities in Malaysia should respond to the threat of Internet piracy in a coordinated manner, and service providers should take responsibility regarding online infringements and show a willingness to cooperate with efforts to address online piracy. To the extent advertising sites profit from hard goods piracy, MDTCA should become more proactive in investigating links between the Internet and hard goods piracy. As for other piracy phenomena like P2P file sharing, the copyright law can be used to hold end-users liable and to provide a roadmap for service providers as to what direct and indirect activities are illegal. Specifically regarding service providers, the Malaysian Communications and Multimedia Commission (MCMC) must remain a strong presence in the fight against Internet piracy, and in particular, must help enforce the provisions of the Communications and Multimedia Act (1998).⁸ Section 263 of the CMA requires a service provider to “use his best endeavor to prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia,” and “assist the Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia.” Right holders have traditionally enjoyed good cooperation from service providers, e.g., in 2007 and into 2008, 19 websites notified by the Motion Picture Association to service providers were taken down. Other industries report, however, that noncompliance by ISPs is on the rise, and perhaps this signals a trend that should be addressed early.

Good cooperation with the Malaysia Post Office has also resulted in a decrease in the number of shipments sent out pursuant to orders on websites (in 2007, the Motion Picture Association, Entertainment Software Association, and MDTCA managed to lower the number of shipments from 500 to 800 packages per day to a low of 100 to 300 packages per day). Between January and October 2008, the Business Software Alliance sent 1,334 takedown notices to ISPs pointing out the existence of infringing software on their networks. There remain some challenges involving Internet piracy which must continue to be addressed, and in part can only be addressed with service provider cooperation. For example, identifying the owner of a website is difficult without the help of service providers, since basic information available to right holders is usually false.

Good Cooperation with Authorities Continues Against Business Software End-User Piracy: The Business Software Alliance (BSA), working with MDTCA, was able to conduct more than 30 criminal end-user raids in 2008. BSA notes that 6 criminal cases were commenced out of those 30 raids, and that 116 cases remain pending in the courts.

⁸ *Communications and Multimedia Act, 1998*, at http://www.commonlii.org/my/legis/consol_act/cama1998289/.

Entertainment Software Piracy Remains a Significant Problem: The entertainment software industry's joint anti-piracy program with the motion picture industry entered its second year in 2008. The program's aim remains the reduction of large-scale replication and global export of pirated game product from Malaysia, which remains one of the primary sources of pirated game product in the world. The joint program resulted in raids against one factory, a burning operation, storage centers, cybercafés, and numerous retail shops. Tens of thousands of pirated games for multiple gaming platforms were seized, as well as several replicating lines, numerous stampers and burners and other manufacturing equipment. Thousands of pirated game products, both optical discs and game cartridges, were also seized at the Malaysian Postal Center. The industry expresses frustration with respect to the lack of follow-up with respect to post raid activities. Investigations into suppliers and others further up the chain should be a routine occurrence so as to address higher levels of pirate operations. Instead, there is considerable delay in initiating such investigations, if they are conducted at all. For example, the industry continues to support a case against a burning lab operation that resulted from a raid in 2007 but there has been little progress to date, in part due to what government has described as a manpower shortage.⁹

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the Government of Malaysia through participation, organization, and devotion of resources to trainings and public awareness activities in 2008. It should be noted in general, however, that the number of trainings went down in 2008, mainly due to lack of interest on the part of MDTCA to meet with or engage in training with industry. Some exceptions included the Business Software Alliance's continued participation in the Ops Sikap Tulen (Original Attitude), which MDTCA started in July 2007 and continued to gain traction on in 2008. The aim of the campaign was to cultivate a lifestyle that respected intellectual property, and to change behavior and mindsets to use only original and licensed software. As part of the 2008 campaign, educational messages and enforcement were expanded to the states of Penang and Selangor. Extensive media coverage included press conferences and press statements on raids conducted to support the campaign. The BSA also commenced an Internet awareness campaign in 2008 called "B4USurf" in June 2008, with the support of the Ministry of Education, targeting youth between 13 and 18 years old. The objectives of the campaign were to raise awareness of the risks and dangers of the Internet and the urgent need for youths to learn how to surf safely and responsibly. It is also directed toward the inclusion of Internet "wellness" education into the general school curriculum. The Motion Picture Association also engaged in training activities, including a seminar for prosecutors held on January 25-27, 2008 in Pahang, involving 50 participants consisting of MDTCA prosecuting officers and DPPs from the Attorney General's Chambers. The training covered aspects of investigating copyright infringement and conducting a criminal copyright prosecution. Another seminar on Internet investigations and prosecutions was held in Penang on August 22-24, 2008, involving 40 participants consisting of MDTCA prosecuting officers and DPPs from the Attorney General's Chambers. The training covered aspects in relation to Internet investigations, computer and Internet forensics investigations, and a basic understanding of telecommunications.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law in Need of Modernizing Revisions: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments¹⁰ strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$5,550) 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 on an *ex officio* basis. Unfortunately, as we have highlighted in this report, MDTCA has deemphasized *ex officio* actions in 2008. The 2003 amendments also failed to make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall. They failed, for example, to:

⁹ In June 2007, MDTCA raided a clandestine disc-burning lab located in a three-bedroom condominium in Kuala Lumpur, seizing 12 computers and 90 disc burners, nearly 50,000 pirate optical discs containing games, movie and business software, 7,200 blank optical disks, a number of stampers, and various documents and other items. The condominium was vacant during the raid and therefore no arrests were made at the time. The evidence seized indicated that the burner lab may be run by the same syndicate linked to an earlier burner raid. Although MDTCA noted at the time its plans to investigate all leads involving this possible syndicate connection with the goal of prosecution and did obtain some helpful intelligence, significant investigative progress has not been made due to lack of manpower. Industry is concerned that the substantial time lapse since the raid was conducted has left the investigative trail cold.

¹⁰ The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

- Impose mandatory minimum jail sentences for piracy.
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright. Specifically, Section 42 should be amended to afford right holders with presumptions of subsistence of copyright and ownership in practice, and ensure that statutory declarations of ownership and subsistence are not vulnerable to technical challenges by defendants (it should be sufficient that the declaration says "copyright subsisted and continues to subsist at all material times" and the "true copy" requirement is overly burdensome). The maker of an affidavit of copyright ownership or subsistence should not be required to be physically present. 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 a U.S.-Malaysia Free Trade Agreement. At present, the court's interpretation and implementation of Section 42 calls into serious question Malaysia's compliance with its current international obligations.
- Provide for stronger damages in civil copyright cases by providing for statutory damages in civil cases. Statutory damages will act as a strong deterrent to pirates who benefit greatly from infringing acts but are only required to pay a minimum sum for actual losses that the plaintiff is able to prove. Statutory damages could be staggered on a tiered system so that first time infringers pay sizeable but comparatively smaller sums as statutory damages while repeat infringers pay much larger sums.
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.
- Fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, including full implementation of protections against the circumvention of technological protection measures (TPMs) and the trafficking in circumvention devices or services, and expressly protecting temporary copies. Malaysia is one of the few countries in Asia that has not fully implemented and/or joined the treaties yet. IIPA had understood in late 2007 that the government of Malaysia was in the process of preparing copyright law amendments to fully implement the WCT and WPPT aimed for passage in 2008 so that Malaysia could join the WCT and WPPT in 2008 (IIPA also understands that MDTCA made assurances to non-governmental organizations that it would be joining the treaties).
- Extend term of protection to "life plus 70" and 95 years from publication for films and sound recordings etc.
- Extend and/or confirm shopping complex owner liability for the rampant trade of pirated products that still occurs within many commercial buildings. IIPA understands that criminal actions have been filed as test cases against landlords of fixed premises for permitting their tenants to use the premises to sell pirated music. To the extent these cases extend mall owner liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes they will reap long-term, positive benefits in the fight against piracy in Malaysia. IIPA understands that the government intends to file further mall owner actions. We support these actions, and also urge the Malaysian government to create a specific offense for a landlord to permit its premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products.
- Amend Section 52 in line with the August 8, 2006 Malaysia Court of Appeals dismissal of an appeal by ODVD Manufacturer Sdn Bhd's, such that copyright holders may file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.
- Issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

Camcording Law or Provision Needed: IIPA understands that a law to ban camcording has been proposed by MDTCA to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in theater without having to establish the ownership or subsistence of copyright in the recorded film, without the need of a formal complaint, etc. The benefit of a standalone provision in Malaysian law is that it would alleviate the necessity to establish the subsistence and ownership of copyright and the act of infringement of the work being recorded. This proposal was pending at MDTCA as of early 2008. IIPA notes the recent decision to prosecute a suspect under Section 41 (1)(g) of the Copyright Act of 1987 for engaging in copyright infringement when he was caught illegally camcording. This involves a recent arrest of a suspect on Jan 29, 2009 for recording a local film in a movie theater. This suspect is due to be charged

in Court on Feb 27, 2009. While IIPA welcomes this decision by the government to address illegal camcording, IIPA likewise fully supports the MDTCA proposal to expressly ban camcording as a standalone offense.

The Need to Establish Statutory Guidelines to Foster Internet Service Provider Responsibility: IIPA suggests that provisions dealing with secondary liability should be adopted in the copyright law, so that Internet Service Providers (ISPs) will take responsibility for Internet-based infringements occurring over their services, and will have incentives to cooperate with right holders in defeating online piracy. We understand that MyIPO may be working on a draft bill to deal with service provider issues. First and foremost, IIPA notes that the Communications and Multimedia Act (1998), while not setting forth with specificity the mechanisms needed to combat online piracy, does state the important principle that network facilities should not be used to break the laws of Malaysia, and even imposes responsibilities on ISPs to “use ... best endeavor[s] to prevent” their services from being used to break the law, and to “assist the Commission or other authority as far as reasonably necessary” to prevent anyone from breaking the laws of Malaysia, including the copyright laws. This language set an extremely helpful framework for any copyright-specific discussion, and should form the basis for going forward.

Specifically, any draft put forward on service provider issues in the copyright context should avoid the following pitfalls, among others:

- Any draft should not provide blanket immunity from liability for ISPs for infringements occurring on their networks or through their services, but can limit monetary damages as long as it preserves injunctive or other equitable relief.
- Any draft should provide incentives to ISPs to cooperate with right holders, by, e.g., providing for independent copyright infringement liability if a service provider knows, or has reason to know, that infringements are occurring over the service/network. Any approach that shields a service provider from liability even in these circumstances allows it to essentially turn a blind eye to infringements. Notice should be one acceptable method, but not the only method, for making a service provider aware of infringement, and a notice should be able to be filed by anyone.
- Any draft should provide for expeditious takedown of infringing activity by service providers in the case of a notice. A “48 hours” requirement is reasonable, as is a requirement that any pre-release material be taken down “immediately.” (Pre-release material comprises movies, music, games, software, or published materials that have not appeared in the market yet).
- Any draft should contain a counter-notification mechanism, so that it is incumbent upon one who has had material taken down to file such a counter-notification in order for the material to be put back.
- Any draft should contain a termination mechanism for repeat infringers.
- Any draft should provide for court-ordered relief, including terminating specified accounts, or taking reasonable steps to block access to specific, non-domestic online locations, etc.
- Any draft should contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to: 1) ensure that manufacturers or factory owners should not be allowed to import machinery without a valid license from MDTCA, and that MDTCA should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID code from discs; 3) 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; 4) prohibit the unauthorized burning of content onto recordable discs; 5) specifically empower the authorities to shut down factories bases solely on positive forensic examination reports; and 6) ensure that any plants, which indicate that they are producing “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand production to recordable discs be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants. See also the other important improvements sought in the free trade agreement negotiation.

Enact Organized Crime Legislation: With the involvement of organized criminal syndicates in certain 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 fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia.¹¹

FREE TRADE AGREEMENT

While Trade Promotion Authority (TPA) – otherwise known as “fast track” authority – lapsed on June 30, 2007, the U.S. and Malaysian governments have continued to negotiate with each other regarding a possible free trade agreement.¹² The U.S.-Malaysia FTA should include a robust chapter on intellectual property rights, including full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards. These include, but are not limited to, those already embodied in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, the requirement that Malaysia join those two treaties, and the requirement that Malaysia upgrade its copyright enforcement practices. The goal of the enforcement text is 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; and 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.

Some of the key FTA issues include the following:

- Extending term of protection to life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years.
- Requiring the possibility of pre-established, statutory civil damages, in lieu of actual damages, in an amount that provides a deterrent to further infringements, and that is electable by the right holder prior to the conclusion of the trial.
- Providing for presumptions of subsistence of copyright and ownership of copyright, without burdensome documentary requirements or “presence” requirements brought on by groundless defense challenges.
- Criminalizing 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.
- Obtaining commitment by the Malaysian government to immediately join (and implement) the WIPO Internet treaties, the WCT and WPPT.
- Ensuring that use of software in the government is legalized (and that appropriate software asset management is employed), and that government networks are not being used for illegal uses of copyright materials, including over peer-to-peer file sharing (P2P) networks or services.
- 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.
- Ensuring 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, by including an exclusive broadcast right, 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), and in addition, a prohibition against onward distribution of signals without authorization (re-broadcast or re-transmission).

¹¹ Malaysia has the Anti-Money Laundering Act of 2001 (AMLA) of which infringement of copyright is a scheduled offense under the definition of “serious offenses”, and includes attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLA, the government has been slow to use it in copyright infringement matters.

¹² 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 (on March 8, 2006, the United States announced its intention to enter into negotiations toward an FTA with the government of Malaysia).

- Ensuring that the government of Malaysia agrees to take necessary steps to legalize government and other public sector use of software and other copyright materials.

Optical Disc Side Letter: 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 in Malaysia 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 source identification (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.
- Allow right holders to participate in inspections and collect evidence.
- 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, including if the plant is caught illegally replicating discs (finished or recordable).
- Provide that illegal discs found at any factory or licensed premises are presumed to have been replicated by the manufacturer in question.

MARKET ACCESS

Lift Broadcast Quotas and Investment Restrictions: 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.

Lift Onerous Restriction on Foreign Advertising: Malaysia allows only locally-produced advertisements to be aired on terrestrial broadcast channels. Foreign advertisements must therefore be replaced with locally-made advertisements before programs can air. This restriction, which both has a protectionist underpinning, and impedes on right owners’ abilities to freely contract and pursue commercial opportunities in the Malaysian market, should be lifted.