

# SINGAPORE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA urges USTR to place Singapore on the Special 301 Watch List .

**Executive Summary:** While the copyright law and enforcement provisions of Singapore's Free Trade Agreement with the United States, which came into force in 2005, have been largely successful, several significant shortfalls must be addressed. Corporate end-user piracy of business software continues unabated; and with only a single prosecution in such cases, and inadequate penalties available, Singapore's FTA compliance can be questioned. Singapore's music market is beset by piracy, online and offline, and the government's response is clearly inadequate. Its continued refusal to bring public prosecutions of music pirates, and its failure to bring Internet Service Providers into a cooperative stance with rights holders, also raise serious FTA compliance questions. Singapore should also join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious.

### ACTIONS WHICH THE SINGAPORE GOVERNMENT SHOULD TAKE IN 2010:

- Enhance enforcement against end-use business software piracy, and fulfill its FTA obligations, by protecting informants, adopting a reasonable construction of the "wilfulness" requirement, and increasing potential criminal penalties.
- Fulfill its FTA obligations by bringing public prosecutions against significant instances of music piracy, both online and offline.
- Engage with ISPs to make responsible repeat infringer policies a regular feature of the landscape, and otherwise to encourage cooperation with right holders to combat online piracy.
- Improve enforcement against imports of piratical music CDs.
- Adopt legislation specifically outlawing camcording in Singapore cinemas.

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2010 marks five years since Singapore's landmark Free Trade Agreement with the United States, and specifically its copyright law and enforcement obligations, came into force. For the most part this agreement has been a success for the copyright industries. IIPA congratulates Singapore's government for successfully resolving a flagrant FTA violation by clearly establishing the exclusive right of sound recording producers over non-interactive transmissions of their recordings through simulcasting (simultaneous retransmission of broadcast signals). The supportive efforts of US negotiators on this complex issue culminated favorably in December 2009, with the announcement of license agreements between the recording industry and Singapore's leading broadcaster, MediaCorp, regarding simulcasting.

Unfortunately, the half-decade of experience under the FTA also clearly demonstrates that in some key areas, the full potential of this pact is far from being achieved. Singapore is also falling behind global anti-piracy



trends in at least one other area not directly addressed by the FTA -- camcording. IIPA urges the US government to focus its efforts in the following areas during bilateral discussions with Singapore in 2010:

**More Effective Enforcement Against End-User Piracy of Business Software.** Singapore continues to suffer from unacceptably high levels of corporate and institutional piracy of business software. This end-user piracy -- the willful use of pirated or unlicensed software in the workplace -- has long been the most significant feature of software piracy in Singapore, and the form of infringement that inflicts the greatest losses on U.S. business software companies. Although the overall business software piracy rate has edged down from 36% in 2008 to 35% in 2009, corporate end-user piracy continues unabated.

When Singapore took on the obligation, in its Free Trade Agreement with the United States, to provide criminal remedies for willful infringements of copyright for purposes of commercial advantage or financial gain, IIPA was hopeful that this would lead to more effective enforcement against business end-user software piracy.<sup>1</sup> The FTA provision also requires remedies that "include imprisonment as well as monetary fines sufficiently high to deter future acts of infringement consistent with a policy of removing the monetary incentive of the infringer." In its Copyright (Amendment) Act 2004, intended to fulfill Singapore's FTA obligations, Singapore adopted Section 136(3A) to enable the criminal prosecution of willful infringers who act to gain a commercial advantage. Section 136(3A) was enacted specifically to facilitate criminal prosecution of business end-user software pirates.

Unfortunately, the hopes generated by this FTA provision and its implementation in Singapore law have not been realized. Five years after the FTA came into force, there has been only a single completed prosecution of a corporate end-user pirate under Section 136(3A), and that prosecution resulted in the imposition of penalties that fall far short of the level required to "remove the monetary incentive of the infringer."<sup>2</sup> In two other cases, after raids in 2007 on corporate end-user pirates, with support and considerable assistance from the Business Software Alliance (BSA), the prosecutions were abruptly dropped in 2009, without any official explanation.<sup>3</sup> This history casts considerable doubt on Singapore's compliance with its commitments under the USSFTA.

Although the reasons for Singapore's failure to deliver on this commitment remain opaque, at least three factors may be contributing to the near-total dearth of prosecutions for end-user piracy of business software. All these shortcomings should be addressed as part of a comprehensive strategy to deal effectively with this serious problem.

First, detecting end-user piracy typically depends on inside information from informants within the company or other institution engaged in the infringement. In Singapore, many informants are afraid to step forward, despite the offer of monetary incentives, because they fear retribution, including threats to their physical safety as well as to their future employability. BSA has asked Singapore authorities to consider solutions such as not requiring informants to provide sworn statements in search warrant applications that are then turned over to the target company; but these efforts have proven inconclusive. Until the police and prosecutors can agree upon a means for protecting informants, it is difficult to generate leads for prosecutions.

Second, there seems to be a surprising (and disturbing) range of views among police and prosecutors about what is required to prove "willful" infringement within the meaning of Section 136(3A). Some apparently believe that it is necessary to prove that the infringement was carried out only after a deliberate instruction from an officer of the company to use infringing software. Such an unjustified hurdle could hardly ever be surmounted. Others seem to

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<sup>1</sup> See USSFTA, Art. 16.9.21.a.i.

<sup>2</sup> This case was *Public Prosecutor v. PDM International Pte. Ltd.*, which concluded in April 2006.

<sup>3</sup> The defendants in these two cases were (1) Boonty and (2) Wang & EF Tan.

take the view that if the unlicensed software were only used a few times, even a knowing infringement would not qualify as “willful.” These strained interpretations, which fly in the face of the clear intentions underlying both the FTA provision and the parallel language in the WTO TRIPS Agreement, need to be rejected in favor of a common sense approach, under which only negligent or accidental commercial infringements are excluded from criminal liability.

Finally, even if these hurdles were overcome and a successful prosecution were maintained under Section 136(3A), that statute provides insufficient penalties to assure full deterrence. Section 136(3A) provides a fine of up to S\$20,000 (US\$14,000) or up to 6 months’ imprisonment, or both, with stiffer penalties for repeat offenders. Notably, the maximum fine that can be imposed for a first violation of Section 136(3A) is much less than that available for other copyright offenses defined in Singapore’s law, or for willful trademark counterfeiting.<sup>4</sup> Furthermore, since the fine authorized under Section 136(3A) – unlike comparable provisions in Singapore law -- does not vary with the number of copies involved in the infringement, a high-volume pirate prosecuted under that section is exposed to the same maximum fine as someone who makes very few infringing copies, or even just one.

In the only known case in which a business has been prosecuted under Section 136(3A), the defendant PDM, an interior design company, pleaded guilty to two violations of Section 136(3A). The first count involved 20 infringing copies of an Adobe program that it had installed on its computers; the second count involved 20 infringing copies of a Microsoft program. A third count, involving the installation of 11 Autodesk programs, was taken into account for purposes of sentencing. The total retail value of the programs that PDM had installed illegally was S\$78,174. There was no question that the programs were all used in daily business operations – some over a period of years -- in order to obtain a commercial advantage.

Because PDM pled guilty to two violations of Section 136(3A), the maximum possible fine it faced was S\$40,000. In fact, in consideration of the guilty plea, a fine of S\$30,000 was imposed. In other words, for years of unlicensed use of more than fifty copies of computer programs, PDM had to pay a fine amounting to less than 40% of what it would have paid for the licenses in the first place. Even if the maximum allowable fine had been imposed, PDM would have paid barely 51 cents on the dollar of what it would have cost had it obeyed the law.

The potential that the penalties authorized under Section 136(3A) would fall short of deterrent levels was evident at the time that the law was enacted. Now that this potential has been realized in the PDM case, however, the Government of Singapore should be encouraged to review penalty levels in its copyright law, to ensure that the standard for criminal remedies set forth in the US-Singapore FTA is being met.

**Active Engagement in Enforcement Against Music Piracy, Online and Offline.** The recorded music marketplace in Singapore is under serious stress. Sales of physical product (CDs) is in free fall, with revenues plummeting almost 50% from 2004-2008. Many labels, both international and local, as well as the major international music publishers, have drastically cut back their Singapore offices, or ceased operations there altogether. The retail market has been decimated, and wholesale operations no longer exist in Singapore. Even the weakened remaining market for CDs has to contend with pirate product, sold at makeshift stalls in bazaars and at night markets, or at tourist centers, or imported in counterfeit form from China under the guise of original parallel import products.

Of course, in Singapore as elsewhere, access to music online or via mobile device is a key factor in the demise of the hard-goods marketplace. And, just as in many other markets, the vast majority of that online or mobile

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<sup>4</sup> Section 136(1) (selling or renting infringing copies, or making them for sale or hire) and 136(2) (possession or importation of infringing copies for sale or distribution) are each punishable by fines “not exceeding \$10,000 for the article or for each article in respect of which the offence was committed or \$100,000, whichever is the lower.” Section 136(3) (which prohibits distribution of infringing copies “for purposes of trade; or ... to such an extent as to affect prejudicially the owner of the copyright”) is punishable by a fine of up to \$50,000. Similarly, section 49 of Singapore’s trademark law authorizes significantly higher fines of up to \$100,000 for willful trademark counterfeiting.

access is to infringing material. Internet music piracy has become pervasive in Singapore, as the household broadband penetration rate has soared from 42% in 2004 to nearly 100% in 2008. In this highly connected, technologically savvy city-state, online music piracy is thriving, via forum sites, unauthorized portal sites, cyber-lockers, and especially peer-to-peer (p2p) file sharing. One leading Singapore ISP, StarHub, estimated that up to 42% of its bandwidth at peak hours was consumed by p2p traffic before it took steps to manage the network more aggressively. Online piracy has not only decimated the legitimate hard-goods market; it has also crowded out licensed download services and digital music stores, such as the local SoundBuzz operation, which was forced to close its doors in July 2009, unable to compete with piracy.

The response of the Singapore government to these depredations against the music industry can best be described as passive. In the online arena, the music industry has been filing complaints with the Intellectual Property Rights Branch (IPRB) of the Singapore police since 2005. These have led to the issuance of a handful of warning letters from government enforcement agencies, with no action whatever in the vast majority of cases. In October 2006, the recording industry filed 25 additional complaints with IPRB against infringers who were uploading music files illegally. The IPRB informed the industry in July 2007 that it would not be taking any action on these complaints and suggested that "collaborative enforcement" was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings. Following a meeting with IPRB in 2007 at which the authorities told the music industry that it would consider enforcement actions in cases involving a "significant number" of music files, IPRB has never responded to industry requests to specify what level of infringement would qualify as "significant." In June 2008, the industry lodged formal complaints with IPRB against two pirate websites hosted in Singapore, and provided extensive follow-up information to the authorities. Eight months later, IPRB told the industry that warnings had been issued, and the files were closed. The government has never responded to industry requests for an explanation of why the site operators were not prosecuted.

The same passive pattern applies with respect to offline piracy. Industry groups have brought numerous complaints to IPRB against night markets and stalls selling pirate CDs in areas such as Bugis and Changi Village. While time is of the essence in these cases, since the stalls move to new locations frequently, IPRB has consistently refused even to investigate them, and have instead directed industry to follow the "self-help" approach, sometimes mislabeled as "collaborative enforcement," in which copyright owners bear the full burden of initiating and prosecuting criminal cases.<sup>5</sup> This pattern has been repeated numerous times. One of the more recent cases involved stalls selling pirate CDs at Boon Keng night bazaar in April 2009. After industry investigators carried out numerous trap purchases, IPRB agreed to carry out a raid on the stalls, and industry groups assembled representatives from the major labels to be able to confirm on the scene the pirate status of items seized. But the raid was aborted at the last minute, on the stated grounds that the specific titles involved in the trap purchases were no longer displayed in the stalls. Short of buying of every single title in the pirate's stock, this approach virtually rules out criminal enforcement, even against stalls that are clearly involved in syndicated distribution operations.

IPRB's consistent refusal to investigate piracy complaints brought to it by industry, and its consistent direction that industry bring private prosecutions, is particularly disturbing because it marks a return to a practice that the FTA was specifically designed to discourage. Article 16.9.21.b of the FTA provides that "Each Party shall ensure that non-private criminal actions are the primary means by which it ensures the effective enforcement of its criminal law against willful copyright or related rights piracy. In addition, each Party shall ensure that its competent authorities bring criminal actions, as necessary, to act as a deterrent to further infringements." Five years after the FTA came into force, Singapore's fulfillment of these commitments is open to serious doubt. The experience of the music industry, at least, is that private criminal actions, far from ceding primacy to government prosecutions, is virtually the

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<sup>5</sup> Long delays in taking action are also common. For example, IPRB conducted a raid against a warehouse and its retail stalls in 2004, resulting in a large quantity of seizures. Five years after the complaint was filed, IPRB informed the industry that the case had been closed, with the perpetrator merely warned, not punished. No explanation has ever been provided either for the outcome or for the delay in reaching it.

only path open to it to combat criminal infringements; and the government's failure to bring criminal actions is a significant part of the explanation for the indisputable fact that music pirates are simply not being deterred in Singapore.

The fight against online music piracy is further hobbled by the widespread unresponsiveness of Singapore's Internet service providers (ISPs). The recording industry sends ISPs, on a weekly basis, notices of infringements carried out by their subscribers. Nearly 4400 such notices were sent in 2007-09, including many that identified IP addresses of subscribers who had apparently engaged in multiple instances of online infringements, mostly through the use of p2p file sharing services. These notices, and requests for the suspension of the accounts of repeat infringers, have been completely ignored. There is no evidence that any notices have been passed on to the infringing subscribers, nor that any ISPs even have a policy to do so. A number of ISPs have even refused to meet with the recording industry to discuss ways to cooperate to deal with digital piracy. The damage inflicted by online music piracy on Singapore's economy and culture, as well as on the interests of U.S. copyright owners, cannot possibly be addressed without cooperation from the ISPs whose facilities and services are being used to carry out infringements; yet that cooperation has been completely lacking.

Singapore's government has a responsibility to contribute to solving this problem, as well. It pledged in its FTA with the United States to "provide ... legal incentives for services providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials." USSFTA, Art. 16.9.22.a. Since no cooperation is occurring, any incentives the government is offering are manifestly inadequate. More specifically, the FTA clearly exhibits a policy to encourage ISPs to "adopt and reasonably to implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers." Art. 16.9.22.b.vi.A of the FTA makes such adoption and implementation a prerequisite for any ISP seeking to limit the scope of remedies available against it for infringements taking place on its network, including infringements as to which the ISP's liability arises only from its role in transmitting, routing or providing connections, or engaging in associated intermediate and transient storage. See Art. 16.9.22.b.i.A. The fact that, from all that is known, Singapore ISPs have not even adopted any such policies, much less implemented them, raises significant issues of FTA compliance.

IIPA urges USTR to press Singapore's government to step up to these problems. There are many steps, both formal and informal, that the government could take to encourage ISPs operating within its jurisdiction to begin to cooperate with right holders as the FTA specifically directs. These steps should include, but should not be limited to, making responsible repeat infringer policies a regular feature of the ISP marketplace in Singapore. Whether this is achieved through adoption and active enforcement of reasonable contractual terms of service for provision of Internet access, or whether it takes the form of a required "graduated response" program with appropriate due process safeguards before suspension or termination of user accounts, Singapore must move beyond the status quo if it is to make any headway against this well-entrenched problem.

Finally, with regard to hard goods piracy, the prevalence in the market of pirate product imported from China in the guise of legal parallel imports justifies a review of Singapore's policies and practices in this area. In cases involving such importation, Singapore should reconsider its refusal to impose the burden of proof on the defendant to establish that the articles in question were legitimately made in the country of origin. As it now stands, the law requires the plaintiff (or the prosecutor) to prove a negative – that the article was not made with the authority of the copyright owner anywhere in the world – as well as proving the defendant's knowledge of the article's piratical nature. Singapore should also make more active use of its authority to detain shipments of suspected infringing CDs *ex officio*. While this authority is sometimes used with respect to items such as counterfeit alcoholic beverages or tobacco products, it is almost never invoked to enforce copyright protections against importation of pirate CDs.

**Outlawing Camcording.** Although a number of Asian jurisdictions have joined the global trend toward outlawing the unauthorized camcording of feature films in cinemas, Singapore has not yet done so. In 2008, two individuals were caught camcording in Singapore cinemas, but the government declined to prosecute either of them. Clearly this pernicious practice continues; in December 2009, MPAA established that a pirate copy of the film "Ninja

Assassin," available online, was made by camcording in a Singapore cinema. A specific criminal provision against camcording has proven to be an effective anti-piracy tool in many countries that have adopted it. Singapore should follow suit promptly, without waiting until the problem becomes more widespread.

**Entertainment Software:** Entertainment software companies remain very satisfied with the record of the Singapore Government on enforcement for their products, particularly with the efforts of the local police.<sup>6</sup> The Government continues to have an excellent record of cooperation and partnership with the entertainment software industry on educational initiatives aimed at increasing the public's awareness of the importance of protection of copyright in interactive games. There is, however, a rising concern with respect to the sale of circumvention devices, which facilitate the play of pirated games on consoles. Despite provisions in Singapore's Copyright Act outlawing these devices, police were in years past reluctant to initiate enforcement actions against targets engaged in the distribution of circumvention devices. In last year's report, ESA called on Singapore Police elevate the priority of actions against retailers and distributors of such devices. ESA is pleased to report that in 2009 Singapore authorities followed through and conducted several high profile raids on targets engaged in the distribution of large quantities of circumvention devices. While there is a concern about the volume of online downloads of pirated games, ESA is looking to the ISPs in Singapore to address the infringing activities of their subscribers by forwarding to them any notices received regarding specific infringements detected, as well as addressing any persistently infringing subscribers through sanctions available within their terms of service.

**Book Piracy:** U.S. book publishing companies continue to suffer from illegal commercial photocopying in Singapore. The industry needs more support from the Singapore Police in tackling the problems created by **entities involved in book piracy, but response by law enforcement authorities has been less than robust.** Specifically, IIPA would like to see the same model of police-initiated raids that has been successful in tackling optical disc operations in the past employed to combat book piracy, including the use of police investigative powers to bring the syndicate owners to prosecution.

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<sup>6</sup> There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.