

BRUNEI DARUSSALAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Brunei Darussalam should be placed on the Watch List.¹

Executive Summary: While having the ninth highest per capita income in the world (purchasing power parity of \$50,300 as of 2010, and higher than the United States),² Bruneians have not supported a legitimate market for copyright materials. The music industry had celebrated the cleaning up of the retail market, but music piracy has sadly re-emerged. Further, with the Internet population being over 85 percent of the country as of June 2010 (up from only 46% just three years ago), the problem of Internet piracy has grown with illicit P2P filesharing becoming more rampant. Service providers have been doing little to cooperate to ensure people are using legitimate product while the absence of any enforcement and ISP liability laws compound the problem. Although music in the form of “Ring Back Tone” subscriptions, ringtone and full song downloads are widely and commercially available both over cellular communication networks and over the counter, there are presently no license agreements in place for such digital music exploitation. End-user piracy of business software remains a problem in Brunei; preliminary data indicates the commercial value of unlicensed U.S. software in 2010 was \$7 million, with a piracy level of 66%.³ IIPA requests that the market once again be cleared of pirate product to facilitate a legitimate copyright marketplace.

Priority Actions Requested in 2011:

- Have Commercial Crime Unit (CCU) run a new sweep of the pirate retail markets in Brunei on an *ex officio* basis.
- Impose an additional condition of licensing all retailers under the existing Miscellaneous Licences Act (Chapter 127 – Act No. 6 of 1979) that these retailers commit NOT to deal with pirated optical discs or digital music. The Government should have the authority to terminate the trading license based on official report or Statutory Declaration from right holders that this commitment is not being fulfilled.
- Royal Brunei Customs should clean up the pirate retail markets on an *ex officio* basis given that the burden of proof that duties have been paid is on the pirate retailers. As import duties must be paid on all imported optical discs, Customs may seize all imported optical discs for nonpayment of such duties under the Brunei Customs Import Duties Order, 2007 (Notification No. S45).
- Formally warn/encourage the cellular communications and Internet service provider companies to take steps to ensure that their platforms and networks are not used to facilitate copyright infringement.
- Establish effective enforcement practices for the Internet, including amendments to the Electronic Transactions Order (2000) to provide for service provider responsibility for copyright infringements and therefore to promote service provider cooperation with right holders to halt online infringement.
- Have the Ministry of Education (MOE) prioritize IP awareness in schools on top of their existing ICT curriculum, including showcasing their role in managing use of copyright, encouraging students at all levels, including K-12 and university, to use genuine copyright materials, and fostering all students’ and businesses’ awareness of their obligations to respect and follow intellectual property laws.

¹ For more details on Brunei, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

² See *World Factbook, Brunei*, at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html?countryName=Brunei&countryCode=bx®ionCode=eas&rank=9#bx>.

³ BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Brunei. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at <http://www.iipa.com>.



PIRACY AND ENFORCEMENT UPDATES IN BRUNEI DARUSSALAM

Retail Music Market Piracy Reemerges: Pirate optical discs containing music are once again openly offered for sale in retail outlets. In 2009, an anti-piracy campaign involving the Royal Brunei Police Force (RBPF), Attorney General's Chambers (AGC) and the local recording industry group had successfully eradicated 90% of music piracy from the retail markets.⁴ Unfortunately, the Brunei Government has insisted upon right holder interventions and involvement at every step of the enforcement process.⁵ The local recording industry association conducted a new market survey in November and December 2010, and found eleven shops still openly selling pirated music discs, while three others were selling discreetly under-the-counter to regular customers without displaying the music CDs. Despite two raids by the Royal Brunei Police, the pirate retailers remain in operation and have grown stronger. For example, the biggest pirate 'emporium' known as Yajuta or w.w.w.video has since opened two more outlets selling 100% pirate music discs.

Growing Internet and Mobile Piracy: Brunei boasts an Internet penetration of over 85 percent as of the second quarter of 2010 (341,000 Internet users out of nearly 400,000 inhabitants in the country), according to the Bruneian Authority for the Info-Communications Technology Industry (AiTi).⁶ As a result, the problem of Internet piracy has grown, with virtually 100% piracy of digital music used in Brunei, including infringing downloads and ringtones. As of February 2010, the estimated mobile penetration was well over 100 percent, at 430,000 mobile subscriptions.⁷ The Brunei Government should ensure that with the development of broadband comes an increased awareness of the need to enforce rights in the online space.⁸ To date, Brunei Internet service providers have not cooperated with right holders, in part likely due to the fact that they are quasi-government entities related to AiTi. In addition to unlicensed use by Brunei's two cellular communications companies, it is estimated that approximately 30 mobile phone retailers are providing illegal music downloads.

Pirate Exports: The Recording Industry of Malaysia (RIM) reports that pirates in Brunei produce discs for export, transported by road to the town of Limbang in Sarawak, Malaysia (on the island of Borneo). Thus, not only is the Bruneian market wholly controlled and operated by infringers, but it also contributes to the availability of pirated products in neighboring markets such as Malaysia.

Government Role in Piracy: In the past, there have been suggestions that the pirate syndicates which own and run pirate retail outlets have links or close ties with the government of Brunei, further complicating enforcement efforts. Any such issues that exist must be overcome to successfully defeat piracy in the country. In the Internet environment as well, it appears that Internet service providers believe that they are well-situated and need not cooperate with right holders. At the same time, to the extent illegal actors are willing to legitimize their business practices and go legitimate, industry supports such efforts, and the Brunei Government's position should be to require legalization of all copyright practices or face stern enforcement.

⁴ The Government of Brunei, in its 2010 Special 301 Submission, highlighted this development eradicating music piracy, but did not provide much evidence for steps taken to strengthen the enforcement hand of the government, e.g., by passage of copyright amendments to add *ex officio* enforcement authority. See Brunei Darussalam, *Intellectual Property Rights in Brunei Darussalam in 2009*, February 2010, filed with regulations.gov (on file with IIPA).

⁵ For the 2009 campaign, the local recording industry group sent legal notices to suspect shops and did evidentiary purchases and lodged police reports, making obtaining search warrants easier. However, the Government has also indicated on some occasions that without right holder presence, they cannot act. This requirement, up to and including requiring right holders to be present in the country for enforcement to ensue, has discouraged legitimate business from being in Brunei.

⁶ AiTi, *ICT Indicators 2006-2010*, at <http://www.aiti.gov.bn/statistics.html>.

⁷ Amir Noor, *Mobile Trump PCs in Internet Use*, The Brunei Times, February 3, 2010, at <http://www.bt.com.bn/news-national/2010/02/03/mobiles-trump-pcs-internet-use>. There were more than 400,000 mobile subscribers at the end of 2008 based on estimates provided by the two major cellular communications companies in Brunei. Lost mobile revenue to the music industry, based on an estimated 7.5% of total mobile subscribers purchasing monthly ring back tone subscriptions for 2008, was US\$700,000. The Recording Industry of Malaysia (RIM) also remains unaware of any legal site offering Malay or international repertoire for sale. A new project to provide broadband via underwater cabling will bring greater connectivity in the future. Hadi Dp Mahmud, *Wider Broadband Wireless Access Soon*, The Brunei Times (online), November 25, 2008.

⁸ The independent film and television segment of the motion picture industry reports that generally, online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect in May 2000. The Ordinance provides some tools to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The Ordinance also addresses key Internet issues, such as those in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), like temporary copies, a WIPO Treaties-compatible definition of “communication to the public” including an interactive “making available” right, and prohibitions against trafficking in devices which circumvent technological protection measures (TPMs), although the TPM provisions do not fully implement the WCT and WPPT requirements. However, the law does not provide authorities with *ex officio* raiding powers, and thus, Brunei remains stuck in a complaint-based system. A draft amendment would provide the Attorney General’s Chambers with *ex officio* authority, which will be helpful overall in creating a more workable enforcement structure in the country. IIPA understands the legislation is stalled, however. The copyright laws should also be updated to provide, *inter alia*, statutory damages (e.g., US\$650 per infringing copy), landlord liability, heavier criminal fines (also possibly per-copy based on statutory damages), modernized provisions regarding the sufficiency of affidavits or statutory declarations in court, and presumptions of subsistence and ownership in line with international treaties and best practices.

Measures to Address Internet Piracy: Brunei’s laws do not adequately address online infringement. The Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under Section 10 of the Order, “A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material.” Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a “written law or by a court to remove, block or deny access to any material.” The Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to make service providers responsible for infringements transmitted over their networks when they fail to act responsibly and should also provide mechanisms to foster cooperation, including notice and takedown, and effective and fair repeat infringer policies for non-hosted infringements.

Film Content Review Acts As Piracy Check, But Law Not Employed: Brunei has a content review law administered by the Board of Review which empowers the Board with *ex officio* authority to impose severe penalties against anyone who issues a theatrical film or work intended for public performance without authorization of the Board. The law, however, is presently limited to films (and other works/performances) that are intended for public exhibition and does not presently extend to home video products.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama’s intention to negotiate with Trans-Pacific Partnership countries with the objective of shaping a high-standard, broad-based regional agreement.⁹ Negotiations are proceeding apace with an aggressive schedule and a goal toward completion in 2011. IIPA has submitted public comments to the U.S. Government’s Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright

⁹ See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

goods and services.¹⁰ In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration's goals. The level of intellectual property rights protection for the TPP should be consistent and co-extensive with the FTAs between the U.S. and its current FTA partners. To demonstrate its commitment to a strong TPP, and that it is deserving of the benefits of an open U.S. market as a result of a free trade agreement with the United States, the Government of Brunei should take needed steps to ensure that it overcomes its label as a piracy haven and that it will support a strong substantive and enforcement IP chapter in the TPP.

¹⁰ International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009).