

MALAYSIA

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

Special 301 Recommendation: Malaysia should remain on the Watch List.¹ In addition an out-of-cycle review (OCR) should be conducted during 2011 to assess Malaysia's progress toward carrying out the priority action items set forth below and to evaluate Malaysia's Special 301 status in light of such assessment.

Executive Summary: Malaysia stands poised to set itself apart from its regional neighbors in creating a modern copyright protection and enforcement system. A new draft amendment to the Copyright Act 1987 would make some important improvements to the law, seeking to implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), putting into place mechanisms to remove illegal content and halt activities of websites and services involved in infringement (including those outside Malaysia), and adding a new stand-alone protection against the unauthorized camcording of movies in a theater. Malaysian authorities continued to work with right holders against physical piracy, which resulted in some significant seizures, and undertook efforts against other problems like enterprise end-user software piracy, software piracy in new computers and piracy of published materials. Internet connectivity, especially broadband, has increased dramatically in the past year, creating an urgent need for a framework to address the proliferation of online piracy that is likely to follow. The Trade Descriptions Order 2010 will hopefully help curb the sale of illegal, unlabeled product. IIPA notes the positive outcome in the ODVD optical disc piracy litigation. At the same time, the dismissal of the Basic Electronics case is deeply disappointing, as is the lack of transparency with regard to the reasoning behind that decision. It reemphasizes the need to formalize and expand the specialized IP courts, along with training of key officers to handle important IP cases such as Basic Electronics. The publishing industry reports a lack of standard enforcement procedures, leading to some uneven enforcement, and other industries report the need for computer forensics training to deal with online piracy and for investigations up the supply chain from distributor to source. IIPA supports Malaysia's inclusion in the Trans-Pacific Partnership (TPP) containing a strong forward-looking IP chapter.

Priority Actions Requested in 2011:

1. Provide transparency on the Basic Electronics litigation result, explaining the reasoning behind the dismissal and options for redress against blatant acts of piracy in the future by the same company or others.
2. Assign more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establish 15 Criminal Sessions courts around the country.
3. Clean up rampant optical disc piracy and mobile device piracy in shopping malls, night markets and other fixed premises in the Klang Valley by, *inter alia*, instructing the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL) and other like local councils, who are in charge of licensing night market vendors, to effectively address this problem; and enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions with the ultimate goal of jail sentences as a strong deterrent.
4. Pass 2010 Copyright Amendment Bill, with fixes as enunciated in this document to ensure compliance with international norms, foster effective cooperation by service providers with right holders in combating online infringement (including notice and takedown), achieve full implementation of the WCT and WPPT (and commence the process to join those treaties) and provide landlord liability.
5. Publicize a substantial number of successful convictions by the IP courts where jail sentences or deterrent fines were meted out.
6. Implement a government-led software audit initiative to drive the use of legal software in the corporate sector.
7. Reestablish autonomous enforcement by the Ministry of Domestic Trade, Co-Operatives and Consumerism's (MDTCC) enforcement division (where officers trained in enforcement decided when and where to conduct

¹ For more details on Malaysia's Special 301 history, 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>.



enforcement actions), including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.

8. Make a renewed push for university legalization, and specifically, get the Ministry of Higher Education to start a campaign toward legalizing textbook “adoption” practices.
9. Amend the optical disc laws to ensure that source identification (SID) code applies to recordable discs, to prohibit “gouging” of source identification codes from discs, to allow inspections at any location and at any time, day or night, and to make other needed changes.
10. 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.

PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries.² The following provides updates and new issues that arose throughout 2010 and early 2011.

Basic Electronics Case: The criminal case against Basic Electronics (M) Sdn. Bhd. as well as its directors was dismissed with little transparency from the Prosecutor's office. This case, dating back to a raid in 2004 that yielded more than 880,000 pirated entertainment software discs, suffered from delays, postponements, and procedural missteps (e.g., the charges finally entered in October 2006 were based on less than 1,000 discs that were verified). MDTCC even secured one of the many continuances in 2008, again without notifying industry. Industry has sought more information from MDTCC about any possible appeal or next steps but has not been able to learn the detailed grounds for the decision. At the time of the seizure, Basic Electronics was one of the world's largest manufacturers and distributors of pirated PC game product, and is believed to have spanned Malaysia, Thailand, and Singapore, with exports worldwide of pirated PC games. IIPA registers deep disappointment about the method of handling this case, and wishes to understand the reasoning behind the decision and what can be done to ensure Basic Electronics and others do not continue in the business of game piracy.

Hard Goods Piracy, Including Night Market Piracy, Remains A Dominant Concern in Malaysia, Despite Good Enforcement Cooperation: Hard goods piracy, including distribution of local and imported factory-produced optical discs³ and “burned” recordable discs (CD-Rs and DVD-Rs) reemerged in Malaysia in 2009 and remained problematic in 2010. In particular, night market piracy stalls flourish in different locations in Malaysia notwithstanding significant information supplied to the Government of Malaysia on a continual basis.⁴ In several fixed premise locations in Klang Valley, Penang and Johor Bahru, pirates still openly sell illegal products, harming all the industries' legitimate businesses.⁵

The industries experienced generally good cooperation in 2010 against hard goods piracy. The industries report there has been a slight improvement in response times to complaints since establishment of the joint

² For example, the record industry experienced physical piracy losses of US\$16.3 million in 2009 with a 50% piracy level, but this represented only the value of pirate physical media, and additional significant losses are attributable to online piracy, mainly using P2P services. The commercial value of unlicensed software is reported *infra*.

³ Malaysia remains a producer and supplier of pirate optical discs. In January 2010, Royal Malaysia Police raided a licensed optical disc replicating factory engaged in the production of infringing DVDs containing movies and game files. While the raid resulted in the seizure of nearly 14,000 infringing DVDs, the authorities estimated that the facility was capable more than 17.5 million pirated optical discs per year.

⁴ The Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local councils and authorities, who are ultimately in charge of licensing night market vendors, have historically taken little action in respect of the availability of pirated music, movies, and other copyright materials at night markets, notwithstanding voluminous reporting by industry about mall and night market piracy.

⁵ For example, the independent sector of the film and television industry (IFTA) reports that physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that piracy in Malaysia continues to be a heavy burden. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors are often cannot to commit to distribution agreements or offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property.

government-private sector (copyright industries) task force. The motion picture industry reported 235 enforcement actions in 2010, ranging from retail, warehouse, and factory and burner lab raids. Seizures out of these actions included 2 seized production lines, 417,093 pirate factory optical discs, 82,339 burned pirate optical discs, and 543 DVD-R burners. They also report 111 court actions filed in 2010.⁶ The Entertainment Software Association (ESA) reports 18 raids, resulting in the seizure of more than 850,000 pieces of infringing game product and leading to 54 arrests.⁷ Unfortunately, the effectiveness of these raids was undermined by the fact that authorities pursued only 4 criminal cases. The local recording industry lodged 665 complaints with the Malaysian Government and there were 90 enforcement actions and 60 court actions filed in 2010 related to music piracy.

A chief hurdle to enforcement against physical fixed premises and night market piracy over the past couple of years was the decision by MDTCC not to take enforcement without a complaint, but in 2010, the relevant authorities, including the police and the MDTCC, did take *ex officio* actions. Raid results were impressive (albeit aggregate numbers of raids were lower than a couple of years ago when MDTCC coordinated its activities itself without the intervention of MADS), including hundreds of thousands of pieces, and seizures of major equipment used to engage in piracy. The chief problem lies with the non-deterrent results of these raids and actions, for example, retail raids do not lead to permanent closures. Most sites raided are back in operation 48 hours or less after the action was taken. There is also a lack of follow-up investigation up the supply chain and a need for in-depth investigations on these sites' owners.

Internet Piracy Increases Due to Spike in Internet and Broadband Penetration: Malaysia had nearly 17 million Internet users by the middle of 2009, or roughly 60% Internet penetration. Broadband penetration grew as well, reportedly reaching 55.6 percent of all Internet users by the end of 2010.⁸ Faster and more readily available broadband Internet raises the concern of increasing online infringement of all copyright content, whether direct infringing downloads from websites, illicit P2P filesharing (a major issue for the motion picture industry), infringements using BitTorrent sites (game piracy is often accomplished using this technology), accessing infringing files of third parties through deeplinking, auction or advertising sites (for hard goods sale or delivery), illicit MP3 download sites, or infringing use of "blog spots," social networking sites, or cyberlockers.⁹ During 2010, Entertainment Software Association vendors detected 1.07 million connections by peers participating in unauthorized filesharing of select member titles on P2P networks through ISPs located in Malaysia.¹⁰ Breakdowns by ISP show that Telekom Malaysia Berhad subscribers account for approximately 83% of this activity occurring in Malaysia.

The government has moved quickly to shut down some websites hosting illegal content upon complaint, and industry reports that some ISPs have been cooperative in taking down illegal content and infringing sites as well as

⁶ Aggregate statistics also show that there were 253 arrests and 4 convictions in 2010, but no further details are readily available, e.g., as to whether the criminal convictions are for cases commenced in 2010 or prior years, nor is sentencing information available.

⁷ For example, acting on a tip-off, MDTCC officers with support from the local industry raided a clandestine factory on March 2, 2010 in the industrial area of Selangor. The raiding party found and arrested five men operating the optical disc production lines, and two DVD replicating lines and over 5,000 pirated DVDs were seized, including *Case 39, Ninja Assassin* and *Alvin and the Chipmunks: The Squeakquel*. See Motion Picture Association, *Five Arrested in Raid on Clandestine Factory by Malaysian Authorities: MDTCC Operation Also Results In Seizure Of Two Replicating Lines*, March 3, 2010 (press release, on file with IIPA). On June 30, 2010, a team of 15 MDTCC enforcement officers, the K-9 unit and local industry raided a location used for almost a year as a warehouse of pirated DVD games in another industrial area of Selangor. A total of 700,000 pirate games (including 560,000 Sony Playstation 2, 105,000 Microsoft Xbox360 and 35,000 Nintendo Wii discs), packed in spindle of 100s, were seized. However, there were no arrests made in connection with the action.

⁸ *Broadband Penetration Rate Exceeds Target To Reach 55.6 Per Cent, Says Najib*, Bernama, January 13, 2011, at <http://kpdnkk.bernama.com/news.php?id=556307>. In addition, the government is to establish 430 more community broadband centers nationwide in the next two years, in addition to the 246 current centers, according to Information Communication and Culture Minister. *430 More Community Broadband Centres In The Offing*, Bernama, January 18, 2011, at <http://kpdnkk.bernama.com/news.php?id=557548>.

⁹ Internet-based piracy harms independent film producers since it prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy can lead to high piracy rates in-country but also raises the threat of exporting the same to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a "day-and-date" release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible. Thus, it is particularly critical for the health of independent film producers that online piracy in Malaysia be prevented.

¹⁰ These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

other self-initiated measures.¹¹ Other ISPs have not been as cooperative, but industry has been able to obtain takedowns by having MDTCC invoke the provisions in the Communications and Multimedia Act 1998 (CMA).¹² The Malaysian Communications and Multimedia Commissions (MCMC), as the regulators of ISPs, should get more actively involved since MCMC could have at least as great, if not greater, an effect on obtaining takedowns compared with MDTCC notices. The entertainment software industry has also reported that MDTCC and the MCMC responded to complaints from rights holders, and successfully shut down three Malaysian sites that were engaged in the sale of infringing game products.

A major reason ISPs do not cooperate without significant pressure is the lack of an adequate legal infrastructure establishing responsibility and fostering cooperation with right holders. The Copyright Act amendments will hopefully change this situation. The government has also reportedly indicated an interest in dealing more generally with cybercrime, and thus should look to join and implement the Council of Europe Cybercrime Convention.¹³ Other major impediments in addressing Internet piracy include the lack of relative know-how among enforcement authorities in dealing with online infringements, and a lack of adequate devoted resources. For example, the authorities do not have experience on forensics for Internet investigations. Also, MDTCC only has two officers responsible for Internet piracy and their main role is to compile information on self-help actions taken by right holders. It is hoped that the Copyright Act amendments and proper implementation including computer training and greater devotion of human and capital resources will foster a more active role for MDTCC, including *ex officio* authority to tackle Internet piracy.

Enterprise End-User Software Piracy Harms Software Companies: The willful use of unlicensed or underlicensed software in the workplace in Malaysia and the installation in new computers of pirated software (hard-disk loading) continue to cause significant losses to the business software industry, seriously compromising resellers and distributors of genuine software, and stunting the growth of the IT sector in Malaysia.¹⁴ After remaining essentially flat for several years, preliminary data indicates that the PC software piracy rate fell by 2 percentage points last year to 56%, with the commercial value of unlicensed software in Malaysia being \$207 million, again a slight decrease from 2009 numbers.¹⁵ BSA has excellent working relationships with the MDTCC. BSA and its

¹¹ In 2010, many service providers continued to be cooperative in taking down infringing material within 48 hours of receipt of a notice. Some service providers were tracking P2P users and taking steps to make it more difficult for those engaging in massive file sharing to continue doing so. During 2010, 29 websites containing motion picture piracy online were taken down by ISPs and web host services. The local music and recording industry group reported a 79% takedown rate, with 38 takedowns out of 37 notices sent. A single notice may be sent for more than one case. In total, there were 48 cases in 2010. The group also reported statistics which detail the growing size and scope of the Internet piracy problem. It reported 6,619 links to cyberlockers containing allegedly infringing files, with 32 links on YouTube and 3 pre-release links (i.e., links to pirate recordings of records not yet released in the commercial market).

¹² *Communications and Multimedia Act, 1998* (CMA), at http://www.commonlii.org/my/legis/consol_act/cama1998289/. 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." The CMA therefore states the important principle that network facilities should not be used to break the laws of Malaysia, and the language above sets an extremely helpful framework for any copyright-specific discussion, and should form the basis for going forward with ISP liability legislation specific to copyright infringement.

¹³ *Government Looking Into Ways To Tackle Cyber Crime*, Bernama, January 17, 2011, at <http://kpdnkk.bernama.com/news.php?id=557241>. According to the article, the Malaysian Deputy Home Minister has indicated the government is "looking into amending relevant legislation to tackle cybercrime." The Council of Europe Cybercrime Convention contains, in Article 10, "Offences related to infringements of copyright and related rights," an obligation to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system," and Article 11 contains the obligation to "establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission" of Article 10 offenses.

¹⁴ The Malaysian Government understands the link between better intellectual property rights protection and benefits to the Malaysian economy. A January 2008 study done by the International Data Corporation (IDC) with BSA entitled *The Economic Benefits of Reducing PC Software Piracy* concluded that decreasing Malaysia's PC software piracy rate by ten percent (from 60% to 50%) would deliver an additional 2,600 new jobs, US\$140 million in tax revenues, and US\$660 million in economic growth in Malaysia.

¹⁵ BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Malaysia. 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 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 www.iipa.com.

members, working with MDTCC, carried out 43 criminal end-user software piracy raids in 2010.¹⁶ Problems remain with prosecution, as there have been few cases to-date where the companies raided have been convicted.

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 movies 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).¹⁷ These copies are then distributed to pirate “dealers” throughout the world and over the Internet. There has yet to be prosecution of a case in Malaysia, despite 63 interdictions since 2006. As such, a specific amendment criminalizing camcording is imperative.

Internet Café Server-Based Piracy Remains an Issue of Concern: A major problem for several years in Malaysia involves the unauthorized use of copyright materials at Internet cafés or Internet game rooms. The prior practice of standalone computers loaded with unauthorized or pirated copies of games has migrated to a “client-server” model, in which the unauthorized software is installed at the server level on-site (or more recently, offsite by third parties), and customers’ machines are granted access to the same copy on the server.

Book Piracy Updates: Rampant unauthorized photocopying on and around university campuses continues to plague book publishers in Malaysia. The situation has not improved, and arguably has worsened. Pirates have changed their mode of operating and are now printing directly from soft copy scans of textbooks saved on computers or portable hard drives, making detection and identification of infringement more difficult. Very few copy shops stockpile copies, and where copies have already been produced, this stock is kept at various locations to avoid detection. Other activities making piracy harder to detect include the setting up of shop facilities in gated residential areas, where a front guard can warn pirates of incoming authorities, or storing pirate stock in vans for delivery to customers and difficult detection by authorities. Piracy of books online is also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

In 2010, several successful raids were conducted. In January 2010, MDTCC with support from industry carried out productive raids on five photocopy shops located near University Putra Malaysia, seizing several photocopy machines and hundreds of infringing copies of books. In June and July 2010, raids were conducted at several photocopy shops near universities in Kuala Lumpur, Perak and Selangor, resulting in the seizure of photocopy machines and hundreds of infringing copies of books. These are welcome developments, but can only deter if they result in adequate penalties that are publicized to dissuade shops from continuing their activities.

Prior reports have highlighted the overall lack of deterrence, due to lack of standard procedures, onerous requirements like statutory declarations *prior* to raids for books (not knowing such books will be found in the raid), failure to raid at the most opportune time (the first two weeks of each school session), lack of sufficient resources or teams to run multiple simultaneous raids, failure to seize photocopy machines used to infringe, and failure to consider a small number of photocopies as infringement. Authorities regularly fail to seize most of the photocopy machines used in the infringing acts, notwithstanding that Section 44(2) of the Copyright Act 1987 provides clearly that “[c]ontrivances used or intended to be used for making infringing copies or capable of being used for the purpose of making infringing copies” are subject to seizure. Authorities have required the photocopier to actually be in use, photocopying a textbook or other reading material for the machine to be subject to seizure. Even then, not all such machines are seized. Authorities have also been reluctant to seize photocopy machines with hard drives or which are connected to computers storing soft copies of scanned textbooks when infringing books are not actually being reproduced at the time of the raid. Questions have also arisen as to whether legitimate books supplied by students as masters to facilitate photocopying are subject to seizure (either a library copy or lecturers’ copy); there is no doubt such “masters” are tools or implements used in the commission of the infringing act and therefore should be subject to seizure.

¹⁶ This compared with 37 criminal end-user raids carried out in 2009, leading to 5 criminal cases, and 30 end-user raids in 2008, leading to 6 criminal cases.

¹⁷ Camcording is particularly damaging in Malaysia because it can fuel rampant online piracy negatively impacting worldwide distribution and prevent the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Malaysian theatrical box-office marketplace.

Where further investigations and prosecutions occur, they remain slow and mired in problems, ranging from lost documents, turnover in personnel handling the cases, late notice of court hearings (i.e., subpoenas are usually served on publishers or its counsel only a few days prior to the hearing date), and a general lack of preparation on the part of the officers handling the cases. In all, publishers would like to see activation of investigations upon the filing of a complaint or *ex officio* based on detection of infringement, the development and implementation of standard operating procedures for book raids, increasing the numbers of prosecutions and success rates with deterrent penalties, and destruction of pirated books seized. It is unfortunate that despite the raids, copy shops simply resume their illegal activities as there is no deterrence in the system. Pirates know that raids rarely progress to prosecution, and where they do, the process is fraught with problems as to be largely ineffective.

Regarding university legalization, MDTCC has been open to suggestions and is willing to work with the local universities in structuring policies and strategies to eradicate piracy on campuses, but apart from periodic distribution of public awareness information there has been little progress in this area. IIPA would like to see the universities take a more active role in legitimizing practices on their campuses, as well as corresponding oversight by the Ministry of Education and Ministry of Higher Education to promote efforts to combat infringing activity occurring at universities and the adoption of copyright policies to use only legitimate materials by students.

Mobile Piracy on the Rise in Malaysia: Infringements over wireless mobile networks is a growing concern in Malaysia. The Malaysian Communications and Multimedia Commission (MCMC) estimates that mobile penetration in Malaysia exceeded 100 percent by the end of 2009.¹⁸ There are more than 30 million mobile subscribers, and recently there has been a major push into 3G services, with around 21% of the total mobile subscriber base being 3G subscribers by end of 2009.¹⁹ In addition to mobile downloads, mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, remains a serious piracy problem for the music and publishing industries in Malaysia. Many fixed locations engage in unlawful uploading/downloading of full tracks and ringtones both wireless and through over-the-counter sales and publishers report some downloading of reference books and dictionaries onto mobile devices.

IP Courts in Malaysia Must Deal Effectively With Backlog and Issue Deterrent Sentences: IIPA applauded the establishment of the first IP courts launched in July 2007 in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. Members report a significant court backlog leading to delays in case adjudication, with some exceptions. At least 175 criminal cases remain pending, many of which were lodged in previous years, and cases from five years ago are only now being disposed of (where no guilty plea is recorded). Of the cases concluded this past year through December 2010, only two jail terms have actually been served and of the twelve known cases resulting in criminal fines, five fines were either under US\$1,000 or between US\$1,000 and US\$5,000.²⁰ IIPA urges the assignment of more dedicated judges to these courts, especially in Kuala Lumpur, and the establishment of the 15 Sessions courts around the country that were promised in 2007. In addition, court processes could be improved, from the activities of police and prosecutors preparing case files for prosecution, to sentencing by the courts. Prosecutors should undergo rigorous training in all aspects of court procedure, in particular criminal procedure, as well as the requirements of the specific law (i.e. the Copyright Act) and use other statutes to effectively diminish the effects of piracy, such as the Anti-Money Laundering Act 2001. For example, under this law, charges which have minor errors may be amended orally or in writing and do not have to be withdrawn and refilled (as has happened in one copyright case, leading to the defendant absconding).

¹⁸ Malaysian Communications and Multimedia Commission, *Penetration Rates at a Glance*, at http://skmm.gov.my/facts_figures/stats/ViewStatistic.asp?cc=45899166&srld=50919742.

¹⁹ *Malaysia - Telecoms, Mobile and Broadband*, Research and Markets, May 2010, at http://www.researchandmarkets.com/reports/991951/malaysia_telecoms_mobile_and_broadband.pdf.

²⁰ In one recent end-user piracy case, the fine was close to the minimum amount permitted by law (RM2,000 per copy, or approximately US\$580) and given that the maximum criminal fine is RM20,000 (approximately US\$6,560) this hardly constitutes a deterrent.

In one remarkable exception, in December 2010, a trader who had been charged with possession of 6,500 copies of pirated music recordings in 2008 was found guilty by the Sessions Court in Putrajaya and faces a fine of RM13 million (US\$4.3 million, equivalent of RM2000 or US\$656 per infringing copy) or a 2 year jail term in default. This huge fine is now pending on appeal to a higher court.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Reform Underway: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2006. Various amendments have strengthened copyright protection over time.²¹ On December 15, 2010, a new Bill proposing amendments to the Copyright Act 1987 was tabled for first reading in the Dewan Rakyat.²² This draft followed a consultation process (which unfortunately proved insufficient and somewhat *ad hoc*) by the Malaysian Intellectual Property Office (MyIPO) in May 2010 and then consideration by the Attorney General's office.²³ IIPA commends the government for moving forward with copyright reform to implement the WCT and WPPT (presumably with the aim to join those treaties), and to introduce important protections²⁴ and enforcement remedies (like a new anti-camcording provision in Section 43A) that will contribute to the adequacy and effectiveness of Malaysia's copyright system and confirm Malaysia's role as a regional leader in the area of protection of the rights of creators. IIPA is nonetheless concerned with some of the proposals. The following are non-exhaustive comments on some of the key features of the draft, including some draft provisions which may require amendment prior to passage to meet the apparent aims of the drafters, full implementation of the WCT and WPPT, and to keep Malaysia in compliance with its international obligations.

- **Technological Protection Measures (TPMs):** The Bill includes amendments to Malaysia's current laws concerning the circumvention of TPMs and the trafficking in circumvention devices or services. In light of Malaysia's participation in the TPP, it is essential that copyright reform efforts are consistent with international best practices as reflected in the WCT and WPPT. Unfortunately, the proposed provisions may fall short of the WIPO Internet Treaties' obligation to ensure coverage of both copy controls and access controls. Draft Section 36A(1) indicates two kinds of TPMs the circumvention of which is prohibited, namely, a TPM "that is used by the owner of the copyright in connection with the exercise of his rights under this Act," and a TPM "that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law." This dual approach to prohibiting circumvention is well understood to include access controls. However, the draft amendment to Section 3 would define a TPM as "any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing of any act that results in an infringement of the copyright in a work." This definition casts doubt on the intended coverage of access controls per se, because the circumvention of an access control does not necessarily result in an infringement of copyright. To ensure that the proposed TPM provisions provide adequate legal protection for access control TPMs, the definition of TPM should be amended to read: "any technology, device or component that, in the normal course of its operation, effectively controls access to a protected work or prevents or limits the doing of any act that results in an infringement of the copyright in a work." [emphasis added]
- **New Browsing Exception Confirms Temporary Copy Protection But Should be Narrowed:** The Bill proposes in Section 13 creating a new exception for "the making of a transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work." This is too broad and it will be difficult to justify it as compatible with the Berne three-step test

²¹ The 2003 amendments, for example, strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$6,560) for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy. For example, Section 50A gives MDTCC officials the ability to carry out arrests for copyright piracy on an *ex officio* basis, which needs to be reinstated. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

²² Steven Patrick, *New Law to End Illegal Downloading of Music and Movies*, The Star, November 27, 2010, at http://www.malaysianbar.org.my/legal/general_news/new_law_to_end_illegal_downloading_of_music_and_movies.html.

²³ IIPA submitted comments to MyIPO and the AG's office.

²⁴ Examples of additional measures of note include TRIPS-compatible protection for "compilations of data," and WCT/WPPT protections against the unlawful use of rights management information.

(and therefore TRIPS). An exception in the online environment for transient reproduction may be acceptable if it is confirmed that such is a lawful use and from a lawful source (i.e., is caused by one who, by way of the authorization of the copyright owner or by operation of law is entitled to make that transmission), is part of an otherwise lawful transmission in a network between third parties by an intermediary, and has no independent economic significance.²⁵ A safeguard should also be considered to ensure that such copy entails the automatic deletion without enabling the retrieval of the work for any purpose other than to perceive it. The Malaysia provision as drafted contains none of these safeguards. The term “utilization” must also be struck as overly broad. The provision must be reconsidered and redrafted with the above considerations in mind in order not to collide with Malaysia’s international obligations. One positive feature of a more narrowly crafted “transient” reproduction exception is that it will confirm the coverage otherwise in Malaysia of temporary copies under the reproduction right, although this should be made explicit in the definition of “reproduction” in Section 3 of the Act.

- **Statutory Damages:** IIPA commends the Malaysian Government for introducing statutory damages, in the amount of MYR25,000 (US\$8,195) with a maximum of MYR500,000 (US\$164,900). Statutory damages act as a strong deterrent. It remains unclear whether, by procedure, the plaintiff will be able to elect statutory damages (this is not expressly stated, rather, the provision indicates “the court may grant” the relief). Allowing a plaintiff to elect statutory damages anytime before final judgment would be preferable, since the plaintiff has the burden of proving the scope of infringement and may be in the best position to know whether statutory damages will be a suitable alternative to actual damages (it also avoids the potential pitfall of a judge imposing statutory damages when in fact actual damages would be higher). Further, we note with concern that statutory damages may not be awarded in cases involving trafficking in circumvention devices, and that collective works²⁶ are to be considered “one work” for the purpose of statutory damage awards.
- **Civil Damages – Innocent Infringer:** The Bill introduces (in newly amended Section 37(6)) an “innocent infringer” provision which denies actual damages (but not profits or statutory damages) to one who “at the time of the infringement or commission of the prohibited act the defendant was not aware, and had no reasonable grounds for suspecting, that the act was an infringement of the copyright or prohibited under section 36a or 36b.” We urge the drafters to reconsider this subsection. Copyright infringement should remain a strict liability tort in Malaysia to ensure that there is an “effective” remedy available for infringement as required by the TRIPS Agreement. By contrast, the U.S. “innocent infringement” mitigation lowers (but does not eliminate) statutory damages, not actual damages, and then, only when the “*infringer sustains the burden of proving, and the court finds*” that the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. Finally, and not insignificantly, this innocent infringer provision means remedies against unlawful circumvention under the Bill will almost certainly be inadequate – i.e., in a TPMs trafficking case, one violating the trafficking provision who could somehow demonstrate no knowledge or constructive knowledge would have practically no remedy imposed against it (since statutory damages are already carved out of the remedies available for illegal trafficking in circumvention devices).
- **Anti-Camcording:** IIPA applauds the Malaysian Government for introducing in draft Section 43A a new anti-camcording provision. This new strict liability offense against one who “operates an audiovisual recording device in a screening room to record any film in whole or in part,” and the separate offense for an “attempt” to do the same, will be extremely helpful in the fight against this harmful form of piracy in Malaysia. IIPA also proposes that it be an offense to further reproduce, distribute, communicate to the public, or transmit recordings of a film under Section 43A(1). A similar prohibition was in the previous draft.

²⁵ See, e.g., European Union, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Official Journal L 167, June 26, 2001, Art. 5.1, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

²⁶ A “collective work” is then defined in new Section 37(10)(b) as “a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole.” It is assumed that individual sound recordings would each be regarded as “one work” notwithstanding that they also may be assembled into albums, but this could be usefully clarified.

- **Service Provider Liability:** The Bill encourages the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As currently drafted, the Bill addresses (in new Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services. Around the world, and in Malaysia, the role of intermediaries in the chain of distribution of copyright materials is of increasing importance.²⁷ Legislative approaches to dealing with ISPs' roles and liability rules should foster ISP cooperation in shutting down growing online piracy, and should be crafted, *inter alia*, to 1) avoid blanket immunities for intermediaries from copyright liability, 2) preserve injunctive relief, 3) provide effective and expeditious notice and takedown/counter-notification, and 4) require adoption by ISPs of a repeat infringer policy.²⁸ The Bill, while imposing a 48-hour rule for takedown upon notice (we recommend 24 hours as a more suitable timeframe to preserve the effectiveness of the measure), does not accomplish the aims set out above in 1, 2, and 4. Certain changes could ensure a workable approach by which creators and intermediaries work together in the online space to foster a healthy environment for electronic commerce.²⁹ We strongly encourage the U.S. to engage with the Government of Malaysia, in line with IIPA's noted concerns, to address these points.

The Bill also unfortunately left out certain key provisions in previous iterations, most notably, the provision on landlord liability³⁰ which regrettably was removed after lobbying by landlords, and no further consultation with other stakeholders. Other issues that are not covered by the draft amendments include:

- The possibility of recovery of costs and attorneys fees.
- Mandatory minimum jail sentences for piracy.
- Presumptions in the law as to copyright ownership or subsistence of copyright. Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should be properly

²⁷ It is noteworthy that the Malaysia-Japan Economic Partnership Agreement, which was signed by both Prime Ministers on 13 December 2005 in Kuala Lumpur and came into force on 13 July 2006, contains in Article 122 (2), the following obligation by which Malaysia is now bound:

Each Country shall provide for appropriate measures concerning limitations on liability for service providers:

(a) in case where a service provider provides a necessary deterrent to the transmission of information through telecommunication systems or networks controlled or operated by the service provider which it believes to be the infringement of copyright or related rights; and

(b) in case where the infringement of copyright or related rights occurs by the transmission of information through telecommunication systems or networks controlled or operated by a service provider and where the service provider is technically unable to deter the transmission or has difficulty in finding the infringement of copyright or related rights.

²⁸ One provision the new law does propose is authorizing a court to order a service to disable access to an online location situated outside Malaysia or to terminate an account in cases where infringing material provided via "Transmission, routing and provision of connections," has been identified to come from such online location or location of account.

²⁹ As IIPA has noted on previous occasions, the service provider provisions should be reconsidered to avoid the following pitfalls, among others:

- The Bill 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. The current Bill does not accomplish this.
- The Bill 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 essentially to 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 anyone should be able to file a notice. This is not accomplished in the Bill.
- The Bill should provide for expeditious takedown of infringing activity by service providers in the case of a notice. The "48 hours" requirement is reasonable, but there is, for example, no 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).
- The Bill should contain a provision for ISPs to have in place a fair and effective policy for repeat infringers, and it is reasonable also to consider denying safe harbors to those service providers who fail to implement such a policy. The Bill does not accomplish this.
- The Bill could contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

³⁰ Five known civil actions have been filed against landlords for copyright infringement liability of tenants' use of their premises to sell pirated materials, and the government in 2007 lodged the first-ever criminal complaint against a landlord for the same. The civil cases filed by the music industry have either been settled or are progressing through the court system, with various interlocutory applications having been filed. The prosecution of the criminal case has not progressed. The head of MDTCC had made public statements that the Copyright Act would be amended so that action can be taken against owners of business premises who allow their tenants to carry out illegal activity. It is therefore highly unfortunate that this draft provision was removed from the earlier draft.

interpreted such that the burden of proof shifts to the defendant. As necessary, Section 42 should be amended to afford right holders with presumptions of subsistence of copyright and ownership in practice and expressly indicate the burden of proof (on the defendant) to ensure that statutory declarations of ownership and subsistence are not vulnerable to technical challenges by defendants. Specifically, 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, in accordance with a High Court ruling that holds that such appearances are unnecessary and contrary to the spirit and intention of Section 42. "Presumptions" of ownership are required under Malaysia's current TRIPS obligations.

- Deem infringing, in civil cases, the "possession and control" of infringing copies.
- Provide term extension to "life plus 70," and 95 years from publication for films and sound recordings, etc.
- Amend Section 52 such that copyright holders may file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies. Facts adduced in a criminal prosecution should be deemed admitted as evidence in any subsequent civil action. The MDTCC and Attorney General's Chambers continue to apply a narrow interpretation of Section 52, and as a result, in a number of recent cases, the music industry's requests to make "mirror copies" of digital works seized, to enable the industry to initiate civil cases, have been rejected by the Ministry.
- Issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

Trade Descriptions (Optical Disc Label) Order 2010: Effective May 7, 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued by the Minister of Domestic Trade, Co-Operatives and Consumerism (MDTCC), making it a crime to, among other things, supply an optical disc without a requisite label, and presumably enabling MDTCC to authorize administrative actions against violators, whether manufacturers or distributors. IIPA members have long raised concerns over the label program instituted in Malaysia, including concerns over possible fraudulent use of holograms and the cost to legitimate right holders complying with such measures. Right holders have done their best to comply with the Regulations. However, for example, in a recent informal survey, over 50% of games found in Malaysian markets did not have the requisite labels. MDTCC has indicated to industry that the Regulations would be enforced immediately.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could 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 MDTCC, and that MDTCC should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID Codes 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 based 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, are fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants.

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the Government of Malaysia should employ the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.³¹

³¹ Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, should also be brought to bear in piracy cases to address the organized crime/IP nexus in Malaysia.

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.³² Negotiations are proceeding apace with an aggressive schedule with 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 goods and services.³³ 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 including Malaysia will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration's goals. The level of IPR protection for the TPP should be consistent and co-extensive with the FTAs between the U.S. and its current FTA partners. On November 10, 2010, IIPA filed prepared and detailed testimony, which it delivered on November 19, 2010,³⁴ strongly supporting Malaysia's participation in the TPP.

MARKET ACCESS AND RELATED ISSUES

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 significantly limit the expansion of the television sector in Malaysia, and should be eased or lifted.

Lift Cinema Entertainment Tax: The entertainment tax for theater admissions, at 20% of the gross ticket price, is among the highest in the region and limits the growth of the theatrical industry by artificially increasing box office prices.

Lift Foreign Ownership Restrictions: Foreign investment in terrestrial broadcast networks is strictly prohibited. The government imposes a 20% limit on foreign investment in cable and satellite operations through licensing agreements. These restrictions should be lifted.

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 2010. The Motion Picture Association of America's local group engaged in training activities, conducting trainings focused on Internet piracy and forensics (physical and online) trainings; such training activities will continue into 2011. In 2010, four trainings were provided for MDTCC, totaling 100 attendees. Three of the seminars focused on "Understanding the Optical Disc Act and Internet Forensics" (in February, June, and July) and one focused on "the Fight Against Piracy" (in July).

³² 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>.

³³ 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).

³⁴ International Intellectual Property Alliance, *"Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement"*, 75 Fed. Reg. 64778 (October 20, 2010).