

BRUNEI DARUSSALAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Brunei has the eighth highest per capita income in the world (purchasing power parity of \$51,600 as of 2011, and higher than the United States),² but unfortunately the country still hosts dozens of retail outlets offering for sale pirated movies, music and software on optical discs. The music industry celebrated the cleaning up of the retail market in 2009 and brought several test cases. Unfortunately, music piracy has re-emerged and the test cases have not been resolved. Further, with an Internet population estimated at over 80 percent (according to the World Bank), the problem of Internet piracy has grown with illicit P2P filesharing (and other forms of online piracy) becoming more prevalent. Service providers have been doing little to cooperate with right holders to ensure people are using legitimate product, while the absence of any enforcement or legal framework compounds 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 known license agreements in place for such digital music exploitation. IIPA requests that the market be cleared of pirate product to facilitate a legitimate copyright marketplace.

PRIORITY ACTIONS REQUESTED IN 2012

- Set up an IP office that takes responsibility for the piracy situation in Brunei, since currently, there is no Bruneian Government agency that is formally accountable.
- 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 under the Miscellaneous Licences Act (Chapter 127 – Act No. 6 of 1979) that all retailers commit not to deal with pirated optical discs or infringing digital music. The Bruneian Government should have the authority to terminate a trading license based on an 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).
- Amend the current Copyright Order 2000 to provide for more deterrent penalties, and amend the Anti-Money Laundering Act (Cap 209) so that copyright offenses fall within its ambit.
- Encourage the cellular communications and Internet service provider companies to take steps to address copyright infringement taking place on their platforms and networks.
- Establish fair and effective enforcement practices for the Internet, including amendments to the Electronic Transactions Order (2000), to promote service provider cooperation with right holders to address cases of online infringement.
- Initiate education programs to apprise students and businesses of their obligation to respect intellectual property rights, including support from the Ministry of Education for programs in the schools to promote IP awareness.

¹For more details on Brunei’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²See *World Factbook, Brunei*, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.



PIRACY AND ENFORCEMENT UPDATES IN BRUNEI DARUSSALAM

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. While the physical piracy rate for music is relatively low at 30%, other piracy levels are near 100%, and in 2010, 66% of PC software piracy was unlicensed, while the commercial value of unlicensed software attributable to U.S. vendors in Brunei was US\$10 million in 2010 (up from US\$8 million in 2009).³ The following provides updates and new issues that arose throughout 2011 and early 2012.

Retail Piracy: Piracy in Brunei was virtually 100% just a couple of years ago, but 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, piracy has returned to Brunei.⁵ A Survey by the Recording Industry of Malaysia (RIM) in October 2011 revealed that there were about 50 retail outlets offering for sale pirated movies, music and software in the form of DVDs, VCDs and CDs. Pirated music optical discs are once again openly being offered for sale in retail outlets. As noted, some raids in 2009 led to test cases, and three more raids were conducted in 2010 based on complaints from the music industry, but to date, only one of those cases has been filed in court. The Brunei Court is unfortunately quite slow in hearing copyright cases, and reports indicate that hearings in straightforward piracy retailer cases begun in 2010 still have not been resolved. The major problem is the intermittent scheduling (the Court only hears witnesses for two to three hours per day on average).

Enforcement Hurdles: Certain factors hinder the positive development in cases brought subsequent to raids.

- There is no provision in Bruneian court procedure for affidavit evidence to be accepted in the Court, and thus, copyright owners are being asked to travel to Brunei to provide evidence and testimony in person, even in cases of small pirate retailers.
- Statutory declarations are similarly not admissible.
- The penalty structure is extremely low (both in terms of imprisonment and fines), so even in successful cases, there will be no deterrent effect.
- There are no provisions for statutory damages.
- Bruneian Police have no powers of warrantless arrest even in cases of commission of the crime in the presence of the officer.
- The Customs Authorities refuse to act on *ex officio* basis.
- The authorities are not willing to terminate the trading license of pirate retailer based on complaint from right holders.

Now that right holders for music have set up, effective 2011, a local organization "BRUCOP Pte. Ltd." to assist the competent authorities, it is hoped this will ease the negative effects of some of these hurdles, but in any event, they should be dismantled so that Bruneian authorities can effectively enforce against piracy and protect copyright owners.

³BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Brunei was 66% (down from 67% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$10 million (up from US\$8 million in 2009). These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁴The 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).

⁵Despite recent 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: More than 85% of Bruneians use the Internet in Brunei (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 downloads and ringtones. As of 2010, the estimated mobile penetration was well over 100 percent, at 430,000 mobile subscriptions.⁷ The Bruneian Government should ensure that with the development of broadband comes an increased awareness of the need to protect copyright in the online space. To date, Brunei Internet service providers have not cooperated with music 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.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect 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 and the WIPO Performances and Phonograms Treaty), 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 in 2010 would have provided the Attorney General's Chambers with *ex officio* authority, but it is believed this legislation has stalled. The copyright laws should also be updated to provide, *inter alia*:

- statutory damages (e.g., US\$500 or more per infringing copy),
- landlord liability,
- heavier criminal fines and penalties,
- modernized provisions regarding the sufficiency of affidavits or statutory declarations in court,
- presumptions of subsistence and ownership in line with international treaties and best practices, and
- term extension to 70 years from the life of the author, or 95 years for sound recordings or other works calculated on the basis of publication.

The maximum criminal penalty under the current Copyright Order is two years imprisonment or a B\$5,000 (US\$3,800) fine, or both. In addition, an amendment should be made to the Anti-Money Laundering Act (Cap 209) so that copyright offenses fall within its ambit, since committing a predicate offense under has a deterrent maximum sentence of five years imprisonment.

Measures to Address Internet Piracy: Brunei's laws do not adequately address online infringement, whether hosted or non-hosted. 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

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

⁷Amir 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. 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.

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 more accountable for infringements transmitted over their networks where they have actual knowledge that infringement is taking place, or are aware of facts or circumstances from which the infringing conduct is apparent, and they fail to act responsibly. The law should also provide mechanisms to foster cooperation, including notice-and-takedown, and effective and fair mechanisms with respect to repeat infringer policies and non-hosted infringements.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, the United States Trade Representative formally notified Congress of President Obama’s intention to negotiate with Trans-Pacific Partnership (TPP) countries with the objective of shaping a high-standard, broad-based regional agreement.⁸ On November 12, 2011, the Leaders of the nine Trans-Pacific Partnership countries⁹ announced the achievement of the broad outlines of an agreement, and negotiations are proceeding with a goal toward completion sometime in 2012. 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.¹⁰ In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners and drawing upon other FTAs,¹¹ 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. 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 the piracy issue and that it will support a strong substantive and enforcement IP chapter in the TPP.

⁸See 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>.

⁹The nine TPP negotiating countries are Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States –

¹⁰International 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).

¹¹We note that President Obama signed the Korea-U.S. (KORUS) free trade agreement on October 21, 2011, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.