

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Malaysia remain on the Watch List.¹

Executive Summary: The Government of Malaysia has been responsive to many of IIPA's concerns over the past year. The Malaysian Parliament passed legislation in late 2011 which prohibits the camcording of a motion picture inside a cinema, prohibits the circumvention of TPMs (both the act of circumvention and trafficking and servicing in circumvention technologies, devices, and components), and contains key components of a workable notice and takedown system in Malaysia, as well as the possibility of court ordered remedies against rogue websites and repeat infringers. IIPA congratulates the Malaysian Parliament and Government for making these important changes to strengthen its legal framework to deal with piracy. IIPA also congratulates the Malaysian Communications and Multimedia Commission (MCMC) and the Ministry of Domestic Trade, Co-Operative & Consumerism (MDTCC) for its actions in May 2011 to limit access in Malaysia to several notorious websites (one of which, MegaUpload, was criminally indicted in the United States in January 2012).² Industry also notes an increase in the number of enforcement officers and dedicated prosecutors, and improvements in the efficiency and deterrence of the judicial system.

In order to continue the forward momentum, the amended Copyright Act must now be implemented fully, e.g., clarifying coverage of access control TPMs, as well as other important clarifications. Enforcement steps must be taken to deal with: mall piracy,³ by reinvigorating enforcement by MDTCC's enforcement division; street piracy, by closing down those who sell pirated materials and unstickered product; enterprise end-user software piracy; infringing uses of copyright materials at universities; and other piracy phenomena. There remains a need to expand the specialized criminal IP courts, along with the training of key officers to handle important IP cases, to speed the pace of criminal prosecutions.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Reestablish autonomous enforcement by the MDTCC enforcement division (where officers trained in enforcement make decisions on when and where to conduct enforcement actions), including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.
- License all legitimate optical disc dealers at "night markets," and ban the sales of pirated discs in the night markets.
- Assign more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establish the promised 15 Sessions courts around the country, to reduce backlogs and see convictions meted out and publicized in the media as a form of deterrent.
- Enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions leading to deterrent sentences.
- Make a renewed push for university legalization; specifically, the Ministry of Higher Education should adopt

¹For more details on Malaysia'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>.

²MegaUpload allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The indicted owners amassed huge profits from this activity, all predicated on users massively infringing copyright.

³Holiday Plaza (Johor Bahru), discussed below, was cited by IIPA and the Entertainment Software Association in their filings to the U.S. Trade Representative on "notorious markets." See, e.g., International Intellectual Property Alliance, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (76 Fed. Reg. 50286, August 12, 2011), September 21, 2011, at http://www.iipa.com/pdf/2011_Sep21_IIPA_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf.



appropriate use and copyright policies for implementation by all universities and colleges to ensure that university personnel and students use only legitimate books.

- Implement a government-led software audit initiative to drive the use of legal software in the corporate sector.

Legislation, Market Access

- Evaluate progress toward implementing regulations in Malaysia for the amended Copyright Act to ensure coverage of all technological protection measures (TPMs), including access controls (if necessary, by confirming TPMs cover those technologies, devices, or components that “controls access to a protected work”).
- Impose liabilities on landlords and mall owners who are aware of (or have constructive knowledge of) piracy activities on their premises and continue to allow such illegal activities.
- 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.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- 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. The following provides updates on the piracy and enforcement situation in Malaysia in 2011 and early 2012.

Hard Goods Piracy Still Affects Domestic and Export Markets: Hard goods piracy, including distribution of local and imported factory-produced optical discs and “burned” recordable discs (CD-Rs and DVD-Rs), continues to harm copyright owners in Malaysia. Retail pirates remain active in several fixed premise locations in Klang Valley (particularly in Bangsar, Sri Hartamas, Petaling Jaya, and Shah Alam), Penang (Perangin Mall) and Johor Bahru (Holiday Plaza),⁴ despite numerous raids (including *ex officio*) resulting in impressive seizures and good cooperation among enforcement authorities.⁵ Unfortunately, retail shops generally reopen within 48 to 72 hours after a raid evidencing a lack of deterrence. Even where some fixed premise and mall piracy has decreased, it has quickly been replaced by night market piracy stalls, which flourish in different locations in Malaysia.⁶ The reality is that street vendors selling pirated CDs and DVDs at the day and night markets have grown beyond the control of the authorities, and there is evidence of organized criminal behavior protecting pirate traders from law enforcement. IIPA recommends that the markets be opened up by granting trading licenses to all legitimate optical disc dealers at “night markets,” so that the unlicensed illegal traders can be weeded out. Sales of optical discs outdoors (at night markets) were banned in 2001, but this strategy has now backfired, resulting in the legitimate music industry losing 30% of its income and creating a flourishing trade in pirated music which still exists today.

Malaysia remains a producer and supplier of pirate optical discs, including for export markets (e.g., Singapore, Brunei), although industry notes improvements through the Export Center where the number of attempted packages involving pirated discs has fallen over the years, continuing that trend in 2011. While the MDTCC continues to run hundreds of raids regarding physical piracy (the local recording industry reports over 100 raids related to its product in 2011), IIPA had raised concerns in the past about the lack of enforcement against licensed optical disc factories, and as such welcomed news that in January 2010 and again in January 2011, Royal Malaysia Police

⁴Holiday Plaza (Johor Bahru) shopping mall is a three-story structure located directly across the straits from Singapore that is well-known for sales of counterfeit merchandise, software, video games, DVDs and electronics products. Holiday Plaza sellers generate a huge volume of business from Singaporeans who drive across the strait in search of the counterfeit products that are harder to find domestically due to Singapore’s more effective IP enforcement regime. While there have been enforcement actions against pirate sellers, these have not had any lasting impact as the raided venues usually re-open 24-48 hours after the raid.

⁵Over 430,000 pirate DVDs, both burned and replicated, as well as close to 20,000 counterfeit Blu-ray Discs, were seized in 2011.

⁶The 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 purview over the night markets.

raided licensed optical disc replicating factories engaged in the production of infringing DVDs containing movies and entertainment software files. These raids resulted in the seizure of thousands of infringing DVDs, and in the 2010 raid, the authorities estimated that the facility was capable of producing more than 17.5 million pirated optical discs per year. The 2011 case remains under investigation.

Internet Piracy Addressed Through Unprecedented Actions Against Rogue Sites: Malaysia had nearly 17.5 million Internet users by the middle of 2011, including 5 million broadband users, 2.5 million wireless broadband users, and 10 million 3G subscribers.⁷ Faster and more readily available broadband Internet means increasing online infringement of all copyright content has been detected, including direct infringing downloads from websites, illicit peer-to-peer (P2P) filesharing (a major issue for the music and motion picture industries), 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.⁸ In 2011, Malaysia placed 26th in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.⁹ One new and troubling development reported is the emergence of “media boxes” sold in the physical markets. These boxes can be plugged directly to TVs, and facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are believed to be manufactured and sold in China, but have also found their way into Malaysia (as well as Taiwan and Singapore).

In 2011, there were a number of websites found to be hosted within local Malaysian networks supplying pirated product but many of these have been taken down as a result of complaints being lodged by right holders.¹⁰ In May 2011, the Malaysian Communications and Multimedia Commission (MCMC), under Section 263(2) of *The Communications and Multimedia Act CMA 1998*, took the unprecedented action of disabling access to many notorious piracy websites (including MegaUpload, the owners of which were criminally indicted in the United States in January 2012).¹¹ ISP cooperation in Malaysia improved largely as a result of increased Malaysian Government involvement. IIPA still believes a primary impediment to more effective enforcement in the online space may be the lack of adequate personnel devoted to investigating and addressing Internet piracy. MDTCC reportedly only had four officers responsible for Internet piracy and their main role was to compile information on self-help actions taken by right holders. An additional four officers at least who are trained in IT and enforcement are essential to take swift and effective action against Internet piracy. The MDTCC needs to play an active part in combating Internet piracy which is increasing in Malaysia.

Book and Journal Piracy Continues to Harm Educational Sector: Rampant unauthorized photocopying on and around university campuses continues to cause harm to publishers in Malaysia. Pirates print 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 keep stocks of copies or if they do, it is kept at various locations offsite to avoid detection. Other activities making piracy harder to detect include setting up shop facilities in gated residential areas, where a private security guard can warn pirates of incoming authorities. Piracy of books online is

⁷ Malaysian Wireless, *Malaysia: 17.5 Million Internet Users, 5 Million on Broadband, 10 Million on 3G*, June 15, 2011, at <http://www.malaysianwireless.com/2011/06/malaysia-broadband-3g-users/>.

⁸Internet-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 film production sector is limited in its ability to shift to technology-enabled new business practices that help to speed product to market. Thus it is critical that countries establish legal frameworks to address online piracy expeditiously.

⁹ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹⁰The local recording industry reports, for example, anecdotal evidence indicating an 80% takedown rate (47 of 59 notices), with 12 remaining problem sites.

¹¹The sites for which access was disabled included [warez-bb.org](http://www.warez-bb.org), [thepiratebay.org](http://www.thepiratebay.org), [movie2k.to](http://www.movie2k.to), [megavideo.com](http://www.megavideo.com), [putlocker.com](http://www.putlocker.com), [depositfiles.com](http://www.depositfiles.com), [duckload.com](http://www.duckload.com), [fileserve.com](http://www.fileserve.com), [filetube.com](http://www.filetube.com), and [megaupload.com](http://www.megaupload.com). The ripple effect of the development in the U.S. was that several more of the sites chosen for enforcement action by the Malaysian Government, and listed here, were reportedly in the process of shuttering or significantly altering their illegal business practices.

also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

Problems in enforcement against book piracy have included lack of standard procedures, onerous requirements like statutory declarations *prior* to raids for books, not timing the raid during the first two weeks of each school session, lack of sufficient resources or teams to run multiple simultaneous raids, and requiring the photocopying machines to be in actual use for illegal photocopying at the time of raid as a prerequisite for seizure of pirate materials and the machines. The industry continued to raise these issues with MDTCC, which has responded by drawing up standard operating procedures to address book piracy raids. Regarding university legalization, MDTCC has been open to suggestions and is willing to work with the Ministry of Higher Education and local universities in structuring policies and strategies to eradicate piracy on campuses, but apart from periodic awareness raising campaigns of IP rights in general (including distribution of public awareness information) there has been little progress in this area. The universities should take an active role in legitimizing practices on their campuses, including adopting and implementing appropriate use and copyright policies to ensure that all university personnel and students use only original or legitimate copies of textbooks and other published reading materials. Furthermore, the Ministry of Education and Ministry of Higher Education should undertake system-wide efforts to promote the importance of copyright protection and encourage university administrators to address infringing activity occurring on their campus. In 2011, the Association of American Publishers (AAP), in cooperation with MDTCC, hosted an anti-book piracy dialogue with several university representatives in Kuala Lumpur. The event was a positive first step towards greater dialogue on how publishers, university administrators and law enforcement can work collaboratively towards more effectively curtailing unauthorized photocopying activities.

Authorities Continue to Tackle Enterprise End-User Software Piracy Problem: The willful use of unlicensed or under licensed software in the workplace in Malaysia and the installation in new computers of pirated software (hard-disk loading) continue to cause losses to the business software industry.¹² Reducing piracy would bring benefits to Malaysia in terms of added growth, tax revenues, and jobs.¹³ The Business Software Alliance (BSA) has excellent working relationships with the MDTCC. BSA and its members, working with MDTCC, carried out nearly 70 corporate end-user raids (up from 40 in 2010) which are now under criminal investigation, to be filed in court subsequent to the investigation.

New Law Will Help Combat Illegal Camcording: IIPA commends the Malaysian Government for passing legislation creating a strict liability offense against one who “operates [or attempts to operate] an audiovisual recording device in a screening room to record any film in whole or in part.” This legal framework will be extremely helpful in addressing the activity of illegal camcording – in which 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).¹⁴ These illegally “cammed” copies are then distributed to pirate “dealers” throughout the world and over the Internet. More than 90% of newly released movies that illegally end up on the Internet and in street markets around the world originate from illegal recordings made in cinemas. The illegal upload to the Internet triggers an avalanche of illegal downloads that can significantly impact a film’s performance at the box office and throughout its distribution cycle.

¹²BSA’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 Malaysia was 56% (encouragingly, down from 58% in 2010), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$303 million. 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>.

¹³A 2008 study conducted 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.

¹⁴Camcording 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.

The Government of Malaysia had done an admirable job addressing this problem. There were 63 interdictions from 2006 through 2011. On February 24, 2011, MDTCC arrested a 34 year-old man responsible for brokering the sale of large amounts of camcorded content from around the world. The arrest was the conclusion of a complex cross-border investigation and operation which required the joint efforts of a number of agencies and organizations in various countries, including Malaysia. The case remains with MDTCC prosecutors. The new law will only strengthen the hand of the authorities in controlling this damaging activity in Malaysia.

Mobile Device Piracy: Mobile penetration well exceeds 100% in Malaysia (estimated by MCMC at 30 million users as of the end of 2009),¹⁵ and broadband has reportedly reached 10 million people. As a result, mobile device piracy, in which infringing files are loaded onto mobile devices at the point of sale, has become and 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. There are increasing numbers of services also offering illegal mobile downloads of content. It is estimated that about 1,000 fixed locations nationwide are still selling illegal music.

Criminal IP Courts Should Be Expanded: IIPA recommends assigning more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establishing the promised 15 Sessions courts around the country, to reduce backlogs and see convictions meted out and publicized in the media as a form of deterrent. 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 the judicial system has made vast improvements in the past three years and has become more efficient, partially clearing the backlog of cases. As one case example, 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\$660 per infringing copy) or a two-year jail term in default. The sentence was appealed. Continuous efforts are now needed to avoid backlogs and strengthen deterrence. Industry reports at least 175 criminal cases remain pending, many of which were lodged in previous years. In addition, most cases still reportedly result in low criminal fines. In one recent case involving unauthorized use of software in a business (end-user piracy), the fine was close to the minimum amount permitted by law, RM2,000 (US\$660) per copy, and given that the maximum criminal fine is RM20,000 (US\$6,600) this hardly constitutes a deterrent. The opening of new courts and assigning more judges to hear copyright cases will, it is hoped, solve the backlog problem and lead to more deterrent sentences in 2012.

Stickering Program Must be Fully Enforced Against Pirated Product and Not Create a Barrier to Legitimate Trade: The Trade Description (Original Label) Order 2002 has been in force since January 2003 (implementing Section 11 of the Trade Descriptions Act 1972 as amended). The Order imposed a hologram sticker requirement on all copies of works on optical discs (VCDs, DVDs, CD-ROMs, LDs, MDs), including imported discs distributed in Malaysia, whether manufactured locally or abroad. IIPA has noted in the past its general misgivings about mandatory labeling schemes, raising concerns such as added distribution costs and costs to consumers, and potential fraud. One benefit that could accrue to right holders is the seizure of non-stickered pirated product on the basis of the law. Right holders have done their best to comply with the Order, but notes that while pirates do not (a recent informal survey revealed that over 50% of games found in Malaysian markets did not have the requisite labels), the sticker requirement is not enforced against such violators. In 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued (effective May 7, 2010) by MDTCC, enhancing their hand against those who are not using the stickers. Specifically, the Order makes it a crime to, among other things, supply an optical disc without a requisite label, and presumably enables MDTCC to authorize administrative actions against violators, whether manufacturers or distributors. IIPA calls upon the Malaysian Government to fully enforce the 2010 Order against pirates who continue to evade the sticker requirement.

¹⁵ Malaysian Communications and Multimedia Commission, *Penetration Rates at a Glance*, at http://skmm.gov.my/facts_figures/stats/ViewStatistic.asp?cc=45899166&srId=50919742.

Internet Café Server-Based Piracy Remains an Issue of Concern: A major problem for several years in Malaysia has involved 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 had 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 would be granted access to the same copy on the server.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Amendments Enacted: On December 22, 2011, the Government of Malaysia passed the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987). IIPA commends the government for moving forward with copyright reforms to implement the WCT and WPPT (presumably with the aim to join those treaties), and to introduce important protections 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. The following are some observations about the new law and considerations for implementing regulations to come, which can clarify some issues left unsettled in the amendments.

- **Technological Protection Measures (TPMs):** The amendments prohibit both the circumvention of TPMs and the trafficking in circumvention technologies, devices and services, in new Section 36A, and provides remedies against those who violate the law. One issue left unclear by the amendments is coverage of both access controls as well as copy controls, consistent with international best practices as reflected in the WCT and WPPT. It appears that the drafters intended to cover both. Section 36A(1)(a) covers any TPM “that is used by the owner of the copyright in connection with the exercise of his rights under this Act,” and Section 36A(1)(b) covers any TPM “that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law” is covered. 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.” Since Section 36A stands alone from the definition of TPM in Section 3, arguably Section 36A(1)(b) can work to prohibit the act of circumvention of an access control, since “no person shall circumvent, or cause or authorize any other person to circumvent, the technological protection measure ... that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law,” language that is well understood to cover access controls. IIPA seeks clarification on this point. The same reasoning could apply to the trafficking provisions, but this should also be clarified. Since the prohibition on trafficking refers to the “circumvention” (Section 36A(3)) of a TPM, and to the extent this refers back to the act of circumvention as defined in Section 36A(1)(b), then arguably access controls are covered. To the extent this cannot be clarified in implementing regulations or explanatory memoranda, it may be necessary to make a technical amendment to the Section 3 definition of a TPM, to include “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 Exception Confirms Temporary Copy Protection But Should be Narrowed:** It has long been understood that Malaysian law covers temporary reproductions, and Section 13 has been amended to create 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 amendment confirms coverage in Malaysia of temporary copies under the reproduction right, although in the future, it would be best if this was made explicit in the definition of “reproduction” in Section 3 of the Act. It must be clarified in implementing regulations that the Section 13 exception is only operable to the extent it does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holders, consistent with the Berne three-step test (and TRIPS Article 13). Implementing regulations should also therefore confirm that the exception only applies to the extent such viewing, listening or utilization 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, has no independent economic significance, and is automatically deleted without enabling the retrieval of the work for any purpose other than to perceive it.¹⁶ The term “utilization” should also be further explained in implementing regulations.

- **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). Implementing regulations should confirm that, by procedure, the plaintiff will be able to elect statutory damages, and that sound recordings are to be considered “one work” for the purpose of statutory damage awards.¹⁷
- **Civil Damages – Innocent Infringer:** Amended Section 37(6) provides 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.” While this change should be reconsidered in future amendments, in the least, implementing regulations should apply 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. This is particularly important as it applied to remedies for circumventing TPMs, since statutory damages are excluded as a remedy.
- **Anti-Camcording:** IIPA applauds the Malaysian Government for introducing in 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. Implementing regulations could make clear that it is also cognizable if someone, after “record[ing],” attempts to make an onward distribution, communication to the public, or transmission of such recordings.
- **Service Provider Liability:** The new law encourages the active cooperation of Internet service providers (ISPs) with right holders to prevent the use of networks for the commission of infringing acts, and includes a court-ordered mechanism to deal with rogue websites and halt online infringements.¹⁸ The law addresses (in new Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services.¹⁹ Questions remain as to the operation of the law, for example, whether red-flag knowledge is the equivalent of notice,²⁰ whether injunctive relief against a service provider is maintained,²¹ and whether the

¹⁶See, 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://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

¹⁷A “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.

¹⁸One 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 “[t]ransmission, routing and provision of connections,” has been identified to come from such online location or location of account.

¹⁹It is noteworthy that the Malaysia-Japan Economic Partnership Agreement, which was signed by both Prim 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.

²⁰The implementing regulations should explain that “notice” is also defined to include red flag notice, i.e., that the service provider knows, or is aware of facts and circumstances from which the infringement is apparent.

²¹The implementing regulations should confirm that injunctive or other equitable relief is preserved.

law requires adoption by ISPs of a repeat infringer policy.²² These should be addressed in implementing regulations. The law imposes a 48-hour rule for takedown upon notice. Implementing regulations should clarify that in the case of pre-release material (movies, music, games, software, or published materials not yet available in Malaysia), takedown timeframes should be immediate or in any case no longer than two hours.

Other Copyright Law Issues: IIPA notes the following as some remaining issues which were not taken up in this round of amendments but should be marked for future consideration: 1) a provision imposing landlord liability (it is highly unfortunate that a draft provision providing that landlords would be liable for providing premises to tenants who infringe was removed from the earlier draft);²³ 2) recovery of costs and attorneys fees (a TRIPS requirement); 3) mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing; 4) presumptions in the law as to copyright ownership or subsistence of copyright without unduly burdensome requirements;²⁴ 5) a provision to deem infringing, in civil and criminal cases, the “possession and control” of infringing copies; 6) providing copyright term extension to “life plus 70,” and 95 years from publication for films and sound recordings; and 7) allow the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.²⁵ 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.²⁶

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; 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; and 7) exemplars from all such plants/lines must be provided, even from recordable-only plants.

²²The implementing regulations should require ISPs to have in place a fair and effective policy for repeat infringers, and to indicate that service providers who fail to inform their customers and implement such a policy would not be eligible for the safe harbors provided.

²³Five 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 successfully by the landlords. In one case, the music industry failed in its appeal to the Court of Appeal against the High Court Judge's decision to strike out the industry's case against the landlord. The Court of Appeal did not agree that a duty of care could exist where landlords knowingly permitted and profited from their pirate tenants. They were unwilling to consider “duty of care” beyond the traditional boundaries. The music industry is considering an appeal to the Federal Court (highest court). 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.

²⁴Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should be properly 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.

²⁵Section 52 of the Copyright Act should be amended such that facts adduced or gathered during a criminal investigation or prosecution may be 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.

²⁶*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.

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the Government of Malaysia should employ more strategically the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.²⁷ While no public information is available, it is believed that the Malaysian Government has taken some action against persistent or known pirates under the Anti-Money Laundering Act. The Government of Malaysia should also ensure that the prosecution of pirates under either one of these Acts receives sufficient media coverage as a means of deterrence.

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.²⁸ 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, 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.²⁹ Enhancement of copyright standards and enforcement consistent and co-extensive 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 current Administration's goals.³⁰ On November 10, 2010, IIPA filed prepared and detailed testimony, which it delivered on November 19, 2010,³¹ 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 terrestrial airtime to local Malaysian programming. Broadcast stations are also banned from broadcasting foreign programming during "prime time" hours of 8:30 to 9:30 p.m. 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 25% 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. The Malaysian Government has made no attempt to reduce this tax for the past several years.

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

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the Malaysian Government through participation, organization, and devotion of resources to trainings and public awareness

²⁷Other 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.

²⁸ See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/pressreleases/2009/december/trans-pacific-partnership-announcement>.

²⁹International 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).

³⁰We 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.

³¹International 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).

activities in 2011. The Motion Picture Association of America's local group engaged in training activities, conducting trainings focused on Internet investigations (to MCMC, MDTCC, Prosecutors, and the Royal Malaysia Police), anti-camcording operations (provided to cinema staffs, the Royal Malaysia Police, and MDTCC). IIPA members would like to see greater focus and attention on 1) police, prosecutors, and judges handling criminal IPR cases; 2) public awareness educational activities to highlight the harms of piracy to local creative development, innovation and the IT industry; 3) public awareness and training programs targeted at directors and senior management of companies on legal copyright usage, including usage of software, e.g., by enlisting the support of the Kuala Lumpur Stock Exchange and the Companies Commission of Malaysia; and 4) encouraging and/or compelling companies to conduct yearly software audits to ensure legal compliance and work with audit firms to provide software audit services nationwide.