

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report on Malaysia to note both the accomplishments and the remaining challenges ahead for the government of Malaysia in the protection of copyright.¹

Executive Summary: The Malaysian government has been responsive to many of IIPA's concerns over the years. Partly in recognition of passage by the Malaysian Parliament of the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987), and noting continued concerns, Malaysia was removed from the Watch List. In its announcement, USTR noted the amendments "include provisions on: preventing the circumvention of technological protection measures; establishing a mechanism for cooperation by Internet service providers (ISPs) against piracy over the Internet; and prohibiting the unauthorized camcording of motion pictures in theaters," and noted that "The United States will continue to work closely with Malaysia to ensure that progress is sustained and to address our remaining areas of concern, including through the Trans-Pacific Partnership negotiations." Malaysia joined the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) effective December 27, 2012, and appeared on the road to effectively address copyright protections in the digital and online environment, except enforcement efforts waned in 2012. The changes in Malaysia are already having a positive commercial effect, including on local copyright-based businesses.²

PRIORITY ACTIONS REQUESTED IN 2013

Legislation, Market Access

- Implement fully the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987), e.g., clarifying coverage of access control technological protection measures (TPMs), as well as other important clarifications.
- Make further changes to create a structure to hold landlords and mall owners liable when they 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.
- 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.

Enforcement

- Address Internet and mobile/handheld device piracy in a more systematic and deterrent manner.
- Address mall and street piracy by ensuring effective enforcement by the Ministry of Domestic Trade, Co-Operative & Consumerism (MDTCC) enforcement division, including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.
- License all legitimate optical disc dealers in all night markets, and close down unlicensed dealers and those who sell pirated materials and unstickered product, including in the night markets.
- Make a renewed push for universities to adopt policies that mandate the use of legitimate copies of books and other copyright materials.

¹For more details on Malaysia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²During the last year, platforms created by the local satellite TV station, ASTRO, began offering pay-per-view of U.S. content companies as well as local Malaysian movies after the movies have run their course in the local cinemas.



- Put greater focus on: 1) addressing enterprise end-user software piracy; 2) implementing a government-led software audit initiative and have these audit reports filed with the Companies Commission of Malaysia and the Enforcement Division; 3) implementing software asset management to drive the use of legal software in the corporate sector; 4) training programs targeted at senior management of companies; and 5) public awareness campaigns to highlight the damages caused by piracy to creativity and innovation and to the growth of the IT industry.
- Enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions leading to deterrent sentences against those who fail to use stickers on pirate product.
- Assign more dedicated judges to the Criminal IP courts, and establish the promised 15 Sessions courts around the country to reduce backlogs and obtain convictions publicized in the media as a form of deterrent.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Malaysia is governed by the Copyright Act, 1987, as last amended by Copyright (Amendment) Act 2010 in December 2011 (in force April 2012). IIPA commends the government for enacting copyright reforms to implement the WCT and WPPT, and to introduce important protections and enforcement remedies, which 1) prohibit the camcording of a motion picture inside a cinema, 2) prohibit the circumvention of TPMs (both the act of circumvention and trafficking and servicing in circumvention technologies, devices, and components), 3) contain key components of a workable notice and takedown system in Malaysia, and 4) provide the possibility of court ordered remedies against rogue websites and repeat infringers in the online environment. Malaysia also joined the WCT and WPPT effective December 27, 2012. These are notable achievements in the area of legal reform. Along with Malaysia's participation in negotiations toward a broad-based regional Trans-Pacific Partnership (TPP) agreement, the signs point to a modernized regime for the protection of creative content in years to come. This said, there remain some important missing ingredients of a fully modernized statute which should be accomplished now, whether through implementing regulations or further technical or minor amendments.³ The following list should be considered non-exhaustive.

- **Coverage of Access Controls:** One issue left unclear by Section 36A of the Copyright Act (the anti-circumvention provisions) is the coverage of access controls, as required by the WCT and WPPT and consistent with international best practices. Access controls are integral as enablers of new business models for the dissemination of creative content. Under the current Malaysian legal framework, it could be argued that both access and copy controls are covered, since 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” [emphasis added]. However, Section 3 defines 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,” a standard that seems to tie the TPM to “infringement” which may not cover all access controls. Since Section 36A stands alone from the definition of TPM in Section 3, there is a possible argument that Section 36A(1)(b) could prohibit the act of circumvention of an access control. It provides, “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. The same reasoning could apply to the trafficking provisions (Section 36A(3)), but this should also be clarified. Since the prohibition on trafficking refers to the “circumvention” 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 would be covered.

³Three regulations went into force in 2012: 1) *Copyright (Licensing Body) Regulation 2012*, effective June 1, 2012, at <http://malaysianlaw.my/legislation/copyright-licensing-body-regulations-2012-22944.html> (setting forth some basic rules as to the establishment of a copyright licensing body); 2) *Copyright (Voluntary Notification) Regulations 2012*, effective June 1, 2012, at <http://malaysianlaw.my/legislation/copyright-voluntary-notification-regulations-2012-22946.html> (setting forth basic rules regarding voluntary notification and registration practice); and 3) *Copyright (Copyright Tribunal) Regulations 2012*, September 1, 2012, at <http://malaysianlaw.my/legislation/copyright-copyright-tribunal-regulations-2012-23360.html> (dealing with rules related to adjudication of certain permitted licenses under the law). Unfortunately, no regulations regarding addressing ISP liability issues have been issued.

To the extent this 1) was not the intention of the drafters (which according to some within the Malaysian government seems to be the case), and/or 2) cannot be clarified in implementing regulations in an explanatory memorandum, it may be necessary to make a technical amendment to Section 3 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.”

- **Temporary Copy Protection:** Section 13 of the Copyright Act 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 better if this was made explicit in the definition of “reproduction” in Section 3 of the Act. It would be important to clarify in implementing regulations that the Section 13 exception is only operable to the extent it neither conflicts with a normal exploitation of the work nor unreasonably prejudices the legitimate interests of the right holders, consistent with the Berne Convention three-step test (and TRIPS Article 13). It is also important to confirm in implementing regulations 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. It is finally unclear what the term “utilization” encompasses but it appears to be overly broad. It would be important to narrow this concept in implementing regulations.
- **Statutory Damages:** One of the very positive achievements of the recent amendments is that statutory damages are available in the amount of MYR25,000 (around US\$8,100), up to MYR500,000 (US\$162,000). It is important that implementing regulations confirm that, by procedure, the plaintiff is able to elect statutory damages, and that, for example, each sound recording is to be considered “one work” for the purpose of statutory damage awards. A “collective work” is defined in new Section 37(10)(b) of the Copyright Act as “a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole.” It is assumed therefore 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 in implementing regulations.
- **Civil Damages – Innocent Infringer:** Section 37(6) of the amended Copyright Act 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.” We believe this change should be reconsidered in the future, but for the time being, it is important for implementing regulations to confirm that the innocent infringer defense applies 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 applies to remedies for circumventing TPMs, since statutory damages are expressly excluded as a remedy.
- **Service Provider Liability:** The Copyright Act (as amended) now encourages the active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, and includes a court-ordered mechanism to halt online infringements.⁴ The law addresses (in Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services.⁵ It is important for

⁴One provision the amended Act 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.

⁵It 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:

implementing regulations: 1) to explain that “notice” includes either actual knowledge or red flag notice, i.e., that the duties to cooperate are triggered by a compliant notice or if the service provider knows or is aware of facts and circumstances from which the infringement is apparent; 2) to confirm that injunctive or other equitable relief is preserved as to a service provider that does not cooperate; and 3) to require ISPs to have in place a fair and effective termination 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. It is also important to revisit the “48-hour” rule for takedowns, which would be too slow for “pre-release” materials (movies, music, games, software, or published materials not yet available in Malaysia). For such materials at least, and for which the automated takedown technologies exist, takedown timeframes should be immediate or no longer than a couple of hours.

- **Recovery of Costs and Attorneys Fees (a TRIPS requirement):** It would be important to identify provisions in Malaysian law providing for the recovery of costs and attorneys fees, which is a TRIPS requirement.
- **Presumptions:** It is important to confirm that presumptions in the law exist as to copyright subsistence and ownership. Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should create a presumption and the burden of proof of ownership or subsistence should shift to the defendant. Statutory declarations of ownership and subsistence should not be 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.” The “true copy” requirement should be discarded as 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.
- **Term of Protection:** The Copyright Act should be amended to provide a copyright term of “life plus 70” for authors, and 95 years from publication for subject matter for which the term is calculated on the basis of the date of publication. This would comport with the international trend and avoid any trade discrimination against Malaysian authors and creators in the future by avoiding the Rule of the Shorter Term being imposed to shorten Malaysian term overseas. Studies have shown that extending term in line with the international trend leads to greater investment and output in creativity.

IIPA remains disappointed about issues left out of the law, and notes that these should be marked for future consideration: 1) a provision imposing landlord liability (it is highly unfortunate that a draft provision holding landlords liable for providing premises to tenants who infringe was removed prior to passage);⁶ 2) mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing; 3) a provision to deem infringing, in civil and criminal cases, the “possession and control” of infringing copies; and 4) allow the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.⁷ 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.⁸

(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.

⁶Five known civil actions were 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.

⁷Section 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,

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the Malaysian government should employ more strategically the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.⁹ 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 should also ensure that the prosecution of pirates under either one of these Acts receives sufficient media coverage as a means of deterrence.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could be improved to address the changing situation in Malaysia,¹⁰ 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 source identification (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.

PIRACY UPDATES IN MALAYSIA

Internet and Mobile Device Piracy Worsens in Malaysia: Malaysia boasted 17.7 million Internet users (60.7% of the population) by the end of 2011, according to ITU, with more than 2.1 million fixed broadband connections.¹¹ With more than 36.6 million cellular subscriptions, Malaysia has now well exceeded 100% penetration in the mobile market.¹² Of those, well over 10 million are 3G subscribers and many more are accessing the Internet via their mobile devices.¹³ Faster and more readily available broadband Internet means increasing online infringement of copyright content, including deeplinking sites, cyberlockers, streaming sites, direct downloads (e.g., of mp3s), P2P filesharing, BitTorrent file sharing, auction sites, advertising sites (for hard goods sale or delivery), infringing use of “blog spots” or social networking sites.¹⁴ For example, the local music industry has complained about *jiwang.org* which is massively infringing local Malay repertoire, but the site remains in operation despite repeated complaints to the Malaysian Communications and Multimedia Commission (MCMC). 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

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.

⁹Government 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.

⁹Other 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.

¹⁰Industry reports there are now only about 20 licensed optical disc plants in 2012.

¹¹ International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

¹²International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2011*, at <http://www.itu.int/ITU-D/ict/index.html>, accessed on January 10, 2013.

¹³Malaysian 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/>.

¹⁴Internet-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.

found their way into Malaysia (as well as Hong Kong, Taiwan and Singapore).¹⁵ Piracy over mobile devices has grown in Malaysia, including over mobile phones, tablets, flash drives and other mobile technologies. These devices can either be pre-loaded with illegal content before being sold to customers, or customers can directly download infringing content. Many fixed locations engage in unlawful uploading/downloading of full tracks of music and ringtones, both wireless and through over-the-counter sales. Publishers report some downloading of reference books and dictionaries onto mobile devices. It is estimated that about 1,000 fixed locations nationwide are still selling illegal music.

Hard Goods Piracy Harming Domestic Market: Hard goods piracy continues to harm copyright owners in Malaysia. Such piracy includes distribution of mostly burned-to-order recordable discs (CD-Rs and DVD-Rs) but also some imported factory discs (mainly produced in and imported from China) available at certain retail urban “hot spots” well known to authorities, such as Klang Valley (e.g., in Bangsar, Sri Hartamas, Petaling Jaya, Damansara, Mont Kiara, and Shah Alam), Penang (e.g., Perangin Mall), Johor Bahru (e.g., Holiday Plaza) mostly serving Singapore buyers,¹⁶ and Georgetown, Penang, and Kedah in the north of Malaysia. Retail pirates remain active in several fixed premise locations despite numerous raids. Night market (*pasar malam*) piracy stalls continue to flourish in different locations in Malaysia, have grown beyond the control of the authorities, and there is evidence of organized criminal behavior protecting pirate traders from law enforcement.

Book and Journal Piracy Continues to Harm U.S. Publishers: Rampant unauthorized photocopying on and around university campuses continues to cause harm to publishers in Malaysia. Pirates print, photocopy, or “clone,” meaning they print-on-demand directly from high-quality soft-copy scans of physical books, which are then printed on high-quality paper and include high-quality covers, making detection and identification of infringement more difficult. Very few copy shops keep stocks of unauthorized copies on hand. In many instances, the copy shops have been the subject of previous enforcement actions by the MDTCC but due to the lack of follow-on actions by law enforcement and the lack of any deterrence, the shops simply re-engage in the illegal production or printing of unauthorized copies. Publishers continue to actively enforce their rights in the market and appreciate the assistance of MDTCC. However, there continue to be enforcement practice inconsistencies among MDTCC offices. For instance, some offices will seize the photocopying machines in a shop where unauthorized copies of books (whether fully or partially assembled) are found, while others simply leave the machines allowing the shop operators to continue their infringing activities unimpaired. 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 also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

End-User Software Piracy and Hard-Disk Loading in Malaysia: The software industry reports a continued, but slowly declining rate of piracy in Malaysia. For 2011, the software piracy rate was 55%, representing a commercial value of unlicensed software of \$657 million.¹⁷ This includes the use of unlicensed or under licensed software in the workplace in Malaysia and the installation in new computers of pirated software, so-called hard-disk loading. Reducing piracy would bring benefits to Malaysia in terms of added growth, tax revenues, and jobs.¹⁸ BSA I

¹⁵Media boxes found to facilitate accessing to infringing contents include AsiaBox and TVBox.

¹⁶Holiday 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 pirated or counterfeit products that are hard to find in Singapore due to Singapore’s more effective IP enforcement regime.

¹⁷BSA I The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Malaysia was 55%, representing a commercial value of unlicensed software of well over US\$657 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

¹⁸A 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.

The Software Alliance has consistently reported excellent working relationships with the MDTCC. In 2012, the MDTCC assisted BSA and its members in conducting 53 corporate end-user actions. While the value of the infringing software found from these raids was around US\$2.9 million, it is worth noting that the majority of companies raided were found to be under-licensed as opposed to having no licenses at all, an improvement from what BSA had found in previous years and early signs of deeper awareness of IPR issues in the software space. However, there remain many companies that still use pirated software who believe raids will never happen to them given that they have not yet been subject to one. It is therefore crucial for Malaysia to develop new strategies to tackle piracy in these “hard core” companies. Strategies such as making mandatory software audits a part of yearly annual financial report filing would likely create an impact in the corporate sector that would significantly reduce software piracy.

Hard-disk loading is often overlooked because it is a B2C deal between the computer vendor and its customer. However, the impact of this form of piracy has far-reaching effects on the legality and security of computers belonging to corporate buyers, and even government agencies and consumers, since the security of the software is often compromised. Malaysia needs to address this issue seriously with IT malls, computer vendors and computer makers to ensure only computers installed with genuine software are distributed and sold. In view of the security risks associated with pirated software and the rampant issue of hard disk loading, we urge the Malaysian government to conduct internal software audits to ensure they have not fallen prey to software pirates themselves and are using only licensed software. The software industry believes some government agencies continue to use unlicensed software in the course of their work and wants to work closely with the government to resolve this problem.

ENFORCEMENT UPDATES IN MALAYSIA

Downturn in Online Enforcement: In contrast to 2011, in which MCMC disabled access to many notorious piracy websites,¹⁹ and in which a number of other websites found to be hosted within local Malaysian networks supplying pirated product were taken down as a result of complaints being lodged by right holders, in 2012, almost all positive action against online piracy halted. In part this development is due to a public backlash accusing the Malaysian government of over-regulating the Internet, making them wary of taking similar actions against other rogue websites as well as putting up new conditions for addressing sites that are hosted locally. In part, we understand that the cessation of activities is due to the upcoming General Election. Either way, the takedown rate for locally hosted websites worsened in 2012, with one industry reporting only one site voluntarily shutting down after being notified, and the recording industry reporting a 69% takedown rate (39 out of 49 websites). Further, while the Copyright Act is now in force with new ISP provisions, unfortunately, the IP Office of Malaysia (MyIPO), which is responsible for the operation of the ISP provisions, has yet to finalize an operational process between right holders and ISPs. In the absence of clear rules, the inability to obtain information about a website’s owner is a primary enforcement impediment for addressing Internet piracy in Malaysia. The Malaysian government has agreed to organize a first meeting between right owners and ISPs in the month of March 2013 to seek to resolve these issues.

Still No Resolution of Night Market Piracy: As has been noted in many previous IIPA reports, the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local councils and authorities, are ultimately in charge of licensing night market vendors. They, working with MDTCC, have not succeeded in eradicating piracy therein. IIPA recommends that the market situation be altered by granting trading licenses to all legitimate optical disc dealers at “night markets,” which would weed out unlicensed illegal traders.

MDTCC/Prosecutors’ Standard Procedures Needed; More Proactive Police Assistance Would be Helpful: The industries note very good cooperation of the MDTCC Enforcement Division (ED). Some report that MADs officers continue impeding MDTCC enforcement functions, but generally this appears to be to a lesser effect. Some industries report continued difficulties in MDTCC enforcement practices. For example, the publishing industry

¹⁹The sites for which access was disabled included *warez-bb.org*, *thepiratebay.org*, *movie2k.to*, *megavideo.com*, *putlocker.com*, *depositfiles.com*, *duckload.com*, *fileserve.com*, *filetube.com*, and *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.

reports that MDTCC officers lack standard procedures for enforcement investigations; however, drafting of such procedures is in the works. Other problems include requiring statutory declarations prior to book piracy raids, failing to time raids during the first two weeks of each school session, failing to run simultaneous raids, and requiring that photocopying machines be in actual use for illegal photocopying at the time of raid as a prerequisite for seizure of pirate materials and the machines. Others note problems in investigative issues, particularly when there are complicating factors, such as tracking down infringers, dealing with forensic evidence, dealing with evidence of online piracy or identifying online pirate operations, or following the chain of evidence of organized crime or other criminal involvement. Similar issues exist when cases are then brought forward to the prosecutor's office for criminal consideration. Industry also reports that in 2012, the Malaysian Police, notably the Commercial Crime Division, has largely ceased anti-piracy activities except in major cases involving optical disc plants and major distributors, leaving MDTCC as the principal enforcer. They reportedly believe copyright matters are not police priorities.

Very Little Done to Legalize Publications at Schools/Universities: In 2011, U.S. publishers, in cooperation with MDTCC, hosted an anti-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. MDTCC has expressed open willingness 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 general awareness-raising campaigns of IP rights (including distribution of public awareness information) and at one point, MDTCC officer visits speaking on the importance of copyright at university campus orientation events, 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.

Enforce Stickers Program (Being Mindful of Costs to Legitimate Right Holders): 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. One benefit that could accrue to right holders is the seizure of non-stickered pirated product on the basis of the law.²⁰ In 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued (effective May 7, 2010) by MDTCC, enhancing their hand against those 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. The Malaysian government should fully enforce the 2010 Order against pirates who continue to evade the sticker requirement.

MARKET ACCESS AND RELATED ISSUES

Mandatory Filming Scheme Hurts Local Film Industry: In April 2012, the local National Film Development Corporation (FINAS) introduced a mandatory requirement for cinemas to screen two local movies per week. The measure backfired, as the local movie industry suffered a box office decline despite more local films having been released in 2012 than in 2011. The mandatory filming scheme did not help. In the end, mandatory filming schemes such as the one employed in Malaysia in 2012 will fail. Rather, market forces should be allowed to determine the success of movies in the Malaysian market henceforth.

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.

²⁰Right holders have done their best to comply with the Order, incurring the additional costs associated with stickering legitimate product.

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.

TRANS-PACIFIC PARTNERSHIP (TPP)

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, begun in 2009.²¹ 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.²² 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 continued economic stabilization in line with the Administration's goals.²³ On November 10, 2010, IIPA filed detailed testimony, which it delivered on November 19, 2010,²⁴ strongly supporting Malaysia's participation in the TPP.

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the Malaysian government with training activities and copyright awareness in 2012. The local motion picture industry helped develop an educational video on how movies are made that was produced locally and featured local artists and people from the local industry to talk about the various jobs that are performed in creating a film. The industry is working with the Ministry of Education to get DVDs to 2,500 schools in Malaysia. The local Motion Picture Association undertook over 15 anti-camcording training sessions for cinema staff operators involving more than 400 cinema employees in total during 2012. In addition, in October 2012, the local industry participated in a "Training Workshop on The Identification of Counterfeit and Pirated Product" for 40 attendees including Royal Malaysia Customs Officers, MDTCC Officers, the Executive Director of the IPR Business Partnership, and senior counsel for major brand protection companies and major brands. The training provided intelligence on how to identify counterfeit or pirated product in both the physical and online markets.

²¹ 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>. In 2012, Canada and Mexico joined the TPP negotiations, bringing the total number of countries to eleven, including in addition Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam.

²²International 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). See also 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).

²³We note that the Korea-U.S. Free Trade Agreement went into effect on March 15, 2012, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

²⁴International 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).