

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Malaysia's copyright system has seen enormous progress in the past several years. Once a hub for the manufacture of pirate optical discs for export, Malaysia no longer fuels global copyright piracy. However, the strong demand for pirated goods still results in harm to copyright-based businesses in Malaysia. With the migration of business models to online and mobile platforms, the Malaysian Government must keep pace through adequate devotion of resources, training, and redirection of its enforcement efforts to properly target and speed investigations and prosecutions against both online and mobile services, as well as traditional forms of piracy. Malaysia's participation in the Trans-Pacific Partnership (TPP) negotiation will help it enjoy access to many of the world's leading trading partners, while ensuring that it agrees to strong IP standards.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Continue to address Internet, mobile, smart phone, and tablet piracy in a systematic and deterrent manner.
- Urge universities to adopt policies mandating the use of legitimate copies of books and other copyright materials.
- License all legitimate dealers in malls and night markets, and close down unlicensed dealers and those who sell pirated materials, unstickered product, and media boxes, including in the night markets.
- Reduce unlicensed software use by enterprises, implement a government-led software audit initiative, implement and promote the adoption of effective software asset management (SAM) processes, train senior management of companies, and conduct public awareness campaigns to highlight the harms caused by software piracy.
- 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 that are publicized in the media as a form of deterrent.

Legislation

- Implement a measure 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.
- Make other changes to the Copyright Act to further strengthen copyright protection, consistent with this filing.
- Amend the optical disc laws to ensure that source identification (SID) code applies to recordable discs; prohibit "gouging" of SID code; allow inspections any time or place; and make other needed changes.
- Clarify ISP provisions in the Copyright Act in respect of: 1) notice and takedown of infringing content ("red flag knowledge"); and 2) fair and effective measures to address access to infringing websites, and having in place a termination policy for repeat infringers.

Market Access

- Resolve market access barriers, including: lifting broadcast quotas; cutting cinema entertainment taxes; easing foreign ownership restrictions in cinema and television businesses; and refraining from imposing discriminatory content review fees, import fees, and additional Goods and Services Tax (GST) on top of entertainment taxes.

¹For more details on Malaysia's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Malaysia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA

Prior IIPA reports on Malaysia contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.²

Internet, Mobile, Smart Phone, Tablet Piracy Require Appropriate Enforcement Response: Malaysia's Internet and broadband capacity has grown and improved significantly, now boasting an estimated 19.2 million Internet users (65.8% of the population), according to ITU, and including 3.9 million Internet "natives."³ Malaysia now has 2.5 million broadband subscribers (with many more using those subscriptions). The equally impressive number is the 41.3 million mobile subscriptions, representing well over 100% mobile penetration. Faster and more readily available broadband Internet creates many opportunities for right holders to launch legitimate services for computer, mobile device, smart phone, and tablet users. Unfortunately, a largely Internet-literate population also means huge challenges for addressing Internet piracy or piracy that caters to users of these devices.⁴

The Ministry of Domestic Trade, Cooperatives and Consumerism (MDTCC) and the Royal Malaysian Police (RMP) have been active in 2013 in dealing with Malaysian nationals involved in online piracy. For example, in March 2013, officers from the cyber crime unit of the RMP arrested a 27-year-old man for hosting links to illegal downloads of *Skyfall*, *Life of Pi*, *Jack Reacher*, *Argo*, and more, on the popular local message board and filesharing site, *SYOK.org*. The site, which boasted hundreds of thousands of registered users (according to the website's Facebook page), went down soon after the arrest, as the arrested man was also believed to be the operator.⁵ In June 2013, MDTCC conducted an operation dubbed "Ops Skyfall" and raided a premises in Kubang Kerian, Kelantan where they suspected *Jiawang.org* was operating. The site was notorious for massively infringing local Malay repertoire. The site was immediately taken down.⁶ MDTCC continues monitoring more than 30 other suspect websites, and has taken action against five additional websites.

These cases and some additional actions reported against websites built on infringement demonstrate the willingness of the Malaysian authorities to take positive actions against Internet piracy. IIPA strongly urges the Malaysian Government to continue such activities, focused on websites built upon providing access to infringing content, and to actively include ISPs in the discussion to find means of mutual cooperation in eradicating online piracy in all its forms from the Malaysian market. Industry dialogues to that end are believed to have started at the end of 2013, and it is crucial that the various stakeholders find meaningful solutions, in particular in respect to notice and takedown procedures and measures to fairly and effectively halt non-hosted infringements. There are reportedly no MOUs in place with ISPs to date. IIPA is pleased that in June 2013, the MDTCC Minister reactivated the Special Anti-Piracy Task Force (SAPTF), with four sub-committees planned to address specific issues, including a digital piracy subcommittee headed by the Malaysian Communications and Multimedia Commission (MCMC).⁷

More Action Required to Legalize Educational Use of Published Materials: Previous IIPA reports have documented rampant unauthorized photocopying on and around university campuses causing harm to publishers in Malaysia. In 2013, MDTCC once again demonstrated good cooperation and responsiveness to publishers' requests

²See, e.g., IIPA, *Malaysia*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301MALAYSIA.PDF>.

³Malaysia's youth ranked fourth in the world in "digital natives" according to ITU's report, *Measuring the Information Society 2013*.

⁴Several notorious sites (i.e., those recommended to USTR by IIPA as "notorious markets" for piracy in October 2013) are among the top sites accessed in Malaysia, and some websites, such as *8share* (the 109th most accessed website in Malaysia) (which appears to be a reward system for uploading files that are then downloaded by others, similar to the *MegaUpload* model) have a direct nexus to Malaysia.

⁵Patrick Brzeski, *Malaysian Police Crack Down on Movie Piracy Site*, The Hollywood Reporter, March 8, 2013, at <http://www.hollywoodreporter.com/news/malaysian-police-crack-down-piracy-426841>.

⁶Lucas Lao, *Illegal Music Download Website www.jiawang.org Shut Down*, June 20, 2013, LowYat.net, at <http://www.lowyat.net/2013/06/illegal-music-download-website-www-jawang-org-shut-down/>.

⁷The SAPTF comprises high level representation from various Malaysian Government agencies and industry. Priority actions include consideration of enhanced education campaigns, closer collaboration between the Malaysian Government and industry on high profile cases, and improvements in the process for addressing websites whose business models are built on copyright infringement. This is a very promising partnership and development that should help to expand legitimate opportunities for Malaysian and U.S. creators alike.

for raids. Unfortunately, raids have not usually resulted in prosecutions, thus minimizing any possible deterrent effect. IIPA is pleased the MCMC has been helpful in locating and identifying scanned copies of textbooks saved in electronic devices seized in raids, and has produced detailed reports to be used in court as evidence. In 2014, in addition to prosecutions to create deterrence, the Malaysian Government should mandate that universities adopt policies requiring the use of legitimate copies of books and other copyright materials by all those in the university community.

Mall and Night Market Piracy Require Anti-Piracy and Licensing Approach: Hard goods piracy continues to harm copyright owners in Malaysia. Retail urban “hot spots” and night markets offer mostly burned-to-order recordable discs (pirate Blu-ray, DVDs, VCDs, CD-Rs, DVD-Rs); some imported factory-manufactured discs (mainly produced in China); “media boxes”;⁸ and mobile devices, smart phones, tablets, and flash drives pre-loaded, or loaded to order with all kinds of pirate material.⁹ Hard disk loading still occurs in many shopping malls, especially in IT malls, where vendors load hard drives with massive amounts of infringing software and other content. MDTCC is carrying out raids, including *ex officio*, to address such piracy activities. However, the shops are not deterred, simply re-opening within 24 to 48 hours after being raided. To address retail piracy, IIPA urges the Malaysian Government to adopt a measure to impose landlord liability. Pending adoption of such a measure, all legitimate dealers in malls and night markets should be licensed, and unlicensed dealers should immediately be closed down. This is a matter which the Malaysian Government should attend to with urgency.

Continued Vigilance Needed to Legalize Use of Software in Enterprises, Government: The software industry reports a slowly declining rate of piracy in Malaysia, although it notes higher piracy levels outside the main business regions due to lack of attention on the issue and fewer complaints lodged.¹⁰ BSA ran 60 criminal end-user raids and 1 civil end-user raid in 2013, up from 53 actions in 2012. Most of the companies recently raided are under-licensed as opposed to having no licenses at all, which is a positive sign of increasing copyright awareness. It is believed that the public sector is also highly under-licensed, although lack of statistics and transparency has hampered efforts to confirm this. In 2014, IIPA recommends implementing mandatory annual software audits of enterprises and Malaysian Government agencies, with results filed with the Companies Commission of Malaysia and the Enforcement Division of MDTCC. In addition, IIPA recommends implementing software asset management (SAM) protocols to drive the use of legal software in the corporate sector; training programs targeting senior management of companies; and public awareness campaigns to highlight the damage caused by piracy to creativity and innovation and to the growth of the IT industry.

Case Backlog Shows Desirability for More Specialized IP Courts As Promised: Some industry sectors report continued case backlogs, while noting the situation in the courts has improved somewhat in recent years. Most of the backlog is attributable to the lack of resources for investigations and prosecutions (although there has been greater activity in taking cases since Deputy Public Prosecutors from the Attorney General Chambers became involved). Some industries report the filing or charging of cases in court occurs, if at all, only with extreme delays. In addition, fines are usually the minimum MYR2,000 (US\$600) for first offenders, with no jail term, which is hardly a deterrent. Court orders for closure of plants, retail outlets, and the like are extremely rare. Criminal procedures can sometimes be effective (see above discussion of *SYOK.org* case, which remains pending), due to the deterrent nature of arrest itself. In addition to the assignment of dedicated prosecutors as noted above, IIPA urges the

⁸“Media box” (set-top device) piracy involves the sale and servicing in devices: 1) that directly connect to foreign sites to infringe copyright; 2) that include a hard disk to store illegally downloaded contents; and 3) that have an SD card which helps novices connect with foreign sites.

⁹In IIPA’s 2013 submission on “Notorious Markets,” IIPA singled out Petaling Street, Chinatown, and Holiday Plaza (Kuala Lumpur, Johor Bahru). See *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, October 25, 2013, at http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf. The motion picture industry notes the areas with the most concentrated problems as Klang Valley and in particular the areas of Petaling Jaya, Sri Hartamas, Mont Kiara, Bangsar, Cheras and Damansara. In other parts of Malaysia, Penang and Johor Bahru are reported as having the most problems with hard goods piracy.

¹⁰BSA estimates the software piracy rate in Malaysia at 55% in 2011, with the value of unlicensed software at US\$657 million. Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

Malaysian Government to assign more dedicated judges to the criminal IP courts, and to establish the promised 15 Sessions courts (with IP specialists) around the country to reduce backlogs and obtain convictions that will be publicized in the media as a form of deterrence. In addition, IIPA urges continuous judicial reform and training efforts to sensitize the judiciary as well as prosecutors on the serious nature of IP infringements.

COPYRIGHT LAW AND RELATED ISSUES

Further Copyright Reforms Could Be Effective to Curb Piracy: Copyright protection in Malaysia is governed by the Copyright Act, 1987, as last amended by Copyright (Amendment) Act 2010 in December 2011 (in force March 2012). IIPA provided detailed commentary on the Act in its 2013 Special 301 report on Malaysia.¹¹ The Optical Media Act and related regulations govern the manufacture of optical discs. The Malaysian Government should further strengthen the laws by:

- making possession of pirated goods an offense;
- holding 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;
- confirming legal protections for “access” control technological protection measures;
- removing the “innocent infringer” provision from the law, or at least, confirming that it 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;¹²
- ensuring that:
 - ISP provisions apply in cases of “red flag” notice (facts or circumstances from which infringing activity is apparent);
 - injunctive or other equitable relief remains available against a service provider that does not cooperate; and
 - ISPs have in place a fair and effective termination policy for repeat infringers, and service providers who fail to inform their customers and implement such a policy would not be eligible for the safe harbors provided;
 - fair and effective measures exist to address access to websites built on infringement.
- ensuring the availability of recovering right holder costs, as required by, and attorney fees, as authorized by, the TRIPS Agreement;
- providing a copyright term of “life plus 70” for authors, and 95 years from publication;
- providing mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing;
- allowing the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies
- amending the optical disc laws to: 1) ensure that source identification (SID) code requirements apply to recordable discs; 2) prohibit “gouging” of SID code from discs; and 3) allow inspections at any place and time.

MARKET ACCESS AND RELATED ISSUES

The Malaysian Government should ease market access restrictions that not only hinder businesses (Malaysian and foreign) from operating in Malaysia but also exacerbate the piracy problems in the country. Specifically, the Government should: 1) lift broadcast quotas, currently requiring stations in Malaysia to devote 70% to 80% of terrestrial airtime to local Malaysian programming, and banning them from broadcasting foreign programming during “prime time” hours of 8:30 to 9:30 p.m.; 2) reduce cinema entertainment taxes, currently 25% of the gross ticket price; and 3) ease or eliminate foreign ownership restrictions, since foreign investment in terrestrial

¹¹Unauthorized camcording of movies from theaters was outlawed in Malaysia. The motion picture industry reports two detections of unauthorized camcording in 2014, consisting of audio copies made of major motion pictures. Deterrent remedies need to be applied against those engaging in these illegal acts.

¹²This change is particularly important as it applies to remedies for circumventing TPMs, since statutory damages are expressly excluded as a remedy.

broadcast networks is strictly prohibited and the Malaysian Government imposes a 20% limit on foreign investment in cable and satellite operations through licensing agreements. In addition: 1) the Film Control Division that oversees the Malaysian Censorship Board should refrain from increasing censorship fees and charging them in a discriminatory manner against foreign right holders; 2) the National Film Development Corporation Malaysia (FINAS) should refrain from charging foreign motion picture distributors a FINAS fee, since films are now able to be duplicated locally (in September 2013, FINAS argued that these locally replicated and electronically transmitted materials would have to pay the FINAS fee, which we believe is impermissible under the governing statute); and 3) the Malaysian Government should refrain from imposing an additional 6% GST on top of the already unreasonable entertainment tax.