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Re: Malaysia: 2004 Special 301 “Out-of-Cycle Review”
on Intellectual Property Rights Practices, 69 Fed.
Reg. 60928 (October 13, 2004)

To the Section 301 Committee:

This submission responds to the Committee’s request for comments regarding Malaysia’s “out-of-cycle” review in the 2004 Special 301 process. In sum, we recommend that Malaysia remain on the Watch List.

ABOUT THE IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,300 companies producing and distributing materials protected by copyright laws throughout the world. The copyright-based industries continue to provide major contributions to the U.S. economy, jobs and foreign sales/exports.¹

¹ In October 2004, the IIPA released its latest economic report entitled *Copyright Industries in the U.S. Economy: The 2004 Report*, the tenth such study written by Stephen Siwek of Economists Inc for IIPA. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data shows that in 2002, the U.S. “core” copyright industries¹ accounted for an estimated 6% of U.S. Gross Domestic Product (GDP), or \$626.6 billion and the “total” copyright industries accounted for an estimated 12% of U.S. GDP or \$1.25 trillion. The “core” copyright industries employed 4% of U.S. workers in 2002 or 5.48 million persons. Factoring out the difficult economic year of 2002, between 1997-2001, the “core” copyright industries’ employment grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39% per year). Finally, in 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, motor vehicles, equipment and parts, and aircraft and aircraft parts.



IIPA has taken part in 301 process for years, and in February 2004, filed extensive comments on the copyright industries' views regarding enforcement and legal reform in Malaysia.²

SCOPE OF THIS OUT-OF-CYCLE REVIEW, AND IIPA'S RECOMMENDATION

On May 3, 2004, USTR announced its decision to place Malaysia on the Special 301 Watch List and to conduct an out-of-cycle review in the fall of 2004 to evaluate Malaysia's progress on areas of serious concern, including "the continued high rate of production and export of pirated optical disc media, counterfeiting, ... and lax enforcement."

There has been noted decline in piracy rates on the local market for the motion picture industry and a small decline for the record industry as well, and for the first time the court system has awarded several deterrent sentences on copyright cases. However, exports of pirated motion picture optical discs are again on the increase. The piracy situation for the entertainment software industry, namely, massive production of video game software for export, remains severe and unabated. The industry reports that there continue to be large seizures of Malaysian-sourced pirated entertainment software throughout the world. In addition, the publishing industry continues to experience piracy of books and journals. Given these continuing problems, as well as some systemic enforcement problems, IIPA recommends that Malaysia remain on the Watch List, with continuing U.S. government attention.

UPDATE OF ENFORCEMENT SITUATION IN MALAYSIA

Malaysia remains a significant source of production and export of pirated optical discs (CDs, DVDs, VCDs, CD-ROMs, etc.). As of November 2004, there are 44 known factories producing optical discs, containing 112 production lines, including 14 mastering lines, and 10 producing blank CD-Rs. The estimated capacity of all the plants is a minimum 500 million discs per year – a conservative estimate. The estimated legitimate domestic demand is no more than 50 million discs per year (including movies, games and CD-Rs), so there is a 10 to 1 ratio between the production capacity and legitimate demand, a certain recipe for pirate production for export. The motion picture industry notes that while exports of its products dropped in 2003, this year brought a resurgence of the problem. Malaysia remains the number one producer and exporter of pirated optical disc-based entertainment software in the world.³ Book piracy, primarily in the form of rampant commercial photocopying in and around university campuses, remains a serious problem.

² <http://www.iipa.com/rbc/2004/2004SPEC301MALAYSIA.pdf>

³ There is evidence that exports of pirate copyrighted materials, especially of entertainment software in optical disc form, continue unabated. Such materials reportedly continue to flood the Middle East markets, and have shown up in Latin America, Australia, South Africa, Sweden, Germany and the United Kingdom among other markets.



Enforcement in the first nine months of 2004 has already exceeded enforcement activities for the entire twelve month period in 2003. Through the first 9 months of the year, the motion picture industry reports that there have been 272 investigations and 3354 raids, resulting in a total seizure of 3,764,125 units. In addition, MDTCA has raided 11 factories so far in 2004. Throughout all of 2003, MPA reported 279 investigations and 2758 raids, resulting in 2,819,784 units. The record industry also reports inspections of unlicensed OD production facilities in 2004 leading to seizures of equipment. Closure of retail piracy markets also helped boost revenues of the motion picture and recording industries' legal products in 2004. Industry has seen increased cooperation in 2004 among express delivery services (to curtail the export of pirated materials via such services), resulting in an increase in illegal trafficking through the Malaysia Post. Efforts to combat book piracy have likewise continued, with the Malaysian government showing some willingness to work with publishers to develop awareness campaigns on university campuses. MDTCA has also worked with publishers to run some raids against photocopy shops conducting illegal activity, but these entities are increasingly moving underground, necessitating a change in operation by government personnel.

Notwithstanding these positive results, the optical discs plants continue to use cunning means to escape enforcement.⁴ For example, plants are escaping enforcement by using false documentation. Industry has been frustrated by the inability to track and pursue manufacturers and exporters of entertainment software due to false exporter documentation. Pirate exporters are known to hire others to ship pirate entertainment software out of Malaysia using false names and addresses. Pirates also go to extreme measures to physically hide piracy. In one recent action, in which an inspection was obstructed leading to loss of evidence, one unusual find was a long pipe connecting the factory to an adjacent building. It turns out the pipe connecting the two premises, which looked like a drainage culvert, was actually a PVC tunnel about 8-10 inches wide that had been used to transport pirate product from the factory into the second premises for packing.

Other raids, while successful in yielding huge numbers of seized discs (recent raids reported resulted in seizure of more than 1 million discs), have not resulted to date in the leaders of these organized criminal operations being prosecuted. Rather, arrests of "fall guys" or low-level store front clerks designed to allow the "kingpins" to continue to escape prosecution and pursue their illegal activities are the norm. It is vitally important that in order to have a deterrent effect, successful prosecution be brought against the masterminds behind this exceedingly harmful commercial activity.

In 2004, some cases have resulted in the Malaysian courts returning deterrent sentences. For example,

- 1/16/2004: Accused found guilty (attempted export smuggling of 4 film reels) and sentenced to fine of RM 10,000 or 6 months imprisonment.

⁴ Plant operators now have messengers who remove the "masters" from the premises once a run has been completed. Thus, even where raids are conducted, the evidence has been spirited away to other premises.



- 1/2004: Accused pled guilty (possession of 4 units at an unnumbered stall) and sentenced to fine of RM 8000 or 6 months imprisonment.
- 3/2004: Accused pled guilty (possession of 3 units) and sentenced to fine of RM 12,000 or 15 months imprisonment. Defendant unable to pay and thus imprisoned.
- 4/15/2004: Accused pled guilty (possession and selling of 2 units at an unnumbered stall) and sentenced to fine of RM 4000 or 4 months imprisonment.
- 4/16/2004: Accused pled guilty (possession of 22 units not for personal use) and sentenced to fine of RM 44,000 or 4 months imprisonment.
- 5/27/2004: Accused found guilty (possession and selling of 20 units) sentenced to 16 months imprisonment.
- 6/4/2004: Accused found guilty (possession of 22 units) sentenced to 12 months imprisonment.

In addition, the Attorney General's office is handling prosecution of some of the big factory cases (in which massive pirate production was found). Most cases continue to be handled by MDTCA regional officers; additional legal training for these officers is still needed to build skills and improve these prosecutions. Meanwhile, hundreds of piracy cases across all copyright sectors remain pending in the Malaysian court system. Long delays and procedural hurdles are still common in these copyright cases. MDTCA officers are pressured into settling many cases under other laws (Trade Descriptions Act, etc.).

The business software industry reports that they have received good cooperation from the Malaysian government (MDTCA), which has sent direct mailers to companies urging them to use legal software. MDTCA fully supported industry's request for an intensified enforcement campaign that led to 14 end-user raids between July and September, and also conducted some visits to companies to check on their compliance with software licensing requirements. They also recently lent public support to an industry-hosted software asset management seminar. Nonetheless, MDCTA was unable to secure a conviction in a contested end-user case earlier this year. To date there has never been a conviction against an end-user pirate of business software who contested the case in court.

Among other barriers to legitimate trade in copyrighted products in Malaysia, the hologram sticker program remains costly and burdensome. The filmed entertainment industry also faces censorship (or so-called "B-Certificate") stickers that sell for RM 1.00 apiece and are required for most home video product sold in Malaysia. This, plus the RM 0.20 holograms represent significant cost requirements imposed by the government.

The Malaysian Government (MDTCA) is reportedly considering creating a court dedicated specifically to intellectual property cases. We would view this as a positive step and would hope that such a court's handling of copyright (and other IP) cases would result in fewer procedural hurdles, faster dockets, and more deterrence in the system.

MAJOR STEPS TO BE TAKEN (Note: This list is intended as a non-exhaustive blueprint for improvements in a number of areas, including the scope of this OCR)

Need for Reinvigorated Enforcement in Last Quarter 2004

- Ramp up efforts to eradicate optical disc pirate production through:
 - More frequent inspections and more surprise factory raids, similar to levels achieved in enforcement campaign of 2003.
 - More frequent collection of exemplars from factories to facilitate future investigation and evidence matching.
 - Supply of disc samples drawn from seizures for forensic examination to identify the source.
 - Consider increasing the government reward scheme for targeting export syndicates.
 - Stepped-up collection of intelligence by MDTCA on production/export syndicates and appropriate follow-up prosecution and enforcement (not prosecutions of low level clerks).
- Reinvigorate enforcement efforts against retail piracy, Internet café piracy, and book piracy, tackling all these types of piracy in the same coordinated and sustained manner as that employed against optical disc piracy in 2003.
- Engage university administrations and appropriate educational ministries in the formulation of policies designed to combat use of illegal materials on campus, including prohibition of illegal photocopying by commercial or non-profit entities, students and lecturers on university campuses.
- Take stronger enforcement measures at the borders (KLIA, Penang Airport and other control points) to stop the outflow of pirated materials, including by engaging Malaysia Post and have them cooperate with the Government and right holders to eradicate pirate exports, and instructing Malaysian Customs to monitor exports and take measures to address the problem of false documentation of exporter and export product information.
 - The Government should consider launching specific reward scheme targeting export of pirate optical discs.
 - The Government must constantly review manpower requirements and recommend additional manpower where appropriate to tackle export problem, and must purchase necessary equipment to help detect illegal shipment, e.g., x-ray scanners.
- Thoroughly investigate links between piracy and organized crime, including persons and organizations outside of Malaysia that exercise control over pirate operations within Malaysia.

Court Cases (Prosecutions)

- Establish specialized IP courts and assign all piracy cases to prosecutors and judges trained and experienced in copyright.
- Create a unit of legally qualified, adequately trained prosecutors within the Attorney-General's Chambers to prosecute high profile copyright cases, including cases against organized criminal enterprises.

- Use all legal means to investigate and prosecute organized crimes to go after the key pirates and key pirate establishments.
- Adhere to the 2003 directive from the Chief Justice of Malaysia's Supreme Court to judges to treat copyright cases as "priority cases" and not to postpone cases for frivolous reasons.
- Issue directive on the need to impose deterrent sentencing on infringers.
- Prosecute high-profile cases against non-compliant or unlicensed optical disc plants, charging factory owners as well as directors/other principal officers personally for offenses, with full investigations of links to other crimes where applicable, for example, money laundering offenses, offenses involving illegal business practices, etc.
- Secure convictions against businesses and business owners/managers/directors engaged in replicating pirated optical discs, corporations using unauthorized software, and other commercial pirates (e.g., photocopy shops making illegal copies).
- Institute charges of copyright violations for non-arrest cases within 30 days after full documentation is received from copyright owners; speed up processes toward convictions.
- Decrease or ease documentary requirements imposed on right holders.
- Issue and enforce sentencing guidelines, with systematic reviews of acquittals and inadequate sentences, and disclosure of reasons if any are not appealed.
- Ensure that all cases taken on appeal have a prosecutor assigned to avoid stagnation in the court process.

Copyright Law and Related Issues

- Begin process of drafting legislation to further elaborate on 1997 legislation which was intended to implement the WIPO treaties (including by full implementation of TPMs, expressly protecting temporary copies) and make other changes consistent with international standards or practice (e.g., term extension).
- Modernize optical disc statute to 1) cover "burning" of copyrighted content of others onto recordable discs; and 2) ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are stored, and close other loopholes which allow pirates to continue to operate optical disc pirate production outside the boundary of the current OD law.
- Join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Public Relations/Awareness

- Publicize cases and seizures, including those destined for export, regarding pirate optical discs, through press conferences and interviews.
- Launch public campaigns to educate the public about protection of intellectual property rights, e.g., organizing exhibitions, seminars, concerts, premier release of films and variety shows.
- Periodical release of copyright articles in the media.



- Continue to issue strong statements against piracy and stating that all offenders will be criminally prosecuted.

CONCLUSION

IIPA appreciates the opportunity to provide our views on Malaysia. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement in Malaysia and worldwide.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Michael Schlesinger'.

Michael Schlesinger
IIPA