

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



2101 L STREET NW, SUITE 1000 · WASHINGTON, DC 20037 · TEL (202) 833-4198 · FAX (202) 331-3101 · WWW.IIPA.COM · EMAIL: INFO@IIPA.COM

TESTIMONY OF MICHAEL SCHLESINGER INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

PUBLIC HEARING CONCERNING REQUEST FOR COMMENTS ON NEGOTIATING OBJECTIVES WITH RESPECT TO MALAYSIA'S PARTICIPATION IN THE PROPOSED TRANS-PACIFIC PARTNERSHIP TRADE AGREEMENT

FRIDAY, NOVEMBER 19, 2010
BEFORE THE TRADE POLICY STAFF COMMITTEE
WASHINGTON, DC



Good morning. My name is Michael Schlesinger, and I appear here on behalf of the International Intellectual Property Alliance (IIPA) – a coalition of seven member associations each of which represents a significant segment of the U.S. copyright industries.² IIPA appreciates this opportunity to submit its views on the United States' intention to include Malaysia as part of the ongoing negotiations of a Trans-Pacific Partnership (TPP) trade agreement.

IIPA strongly supports the inclusion of Malaysia as part of the ongoing negotiations of a TPP trade agreement. Malaysia's inclusion in the TPP will further the objective of achieving a high-standard, broad-based Asia-Pacific regional agreement.³ In particular, the copyright sector, like other sectors of our economy, could reap significant benefits from a sound and comprehensive TPP that includes Malaysia. These benefits can best be realized if the TPP includes high standards for copyright law reform, concrete deliverables for strengthening enforcement of copyright, and market opening measures. Enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, would greatly benefit the creative and business communities in the U.S. and in the new FTA partners, including Malaysia. With a secure foundation for copyright protection and enforcement in the existing Asian FTA partners, an expansion of these protections to other countries in the region will also clearly contribute to the U.S. job growth, increase in exports, and economic recovery in line with the Administration's goals.

The level of IPR protection contemplated for the TPP should be consistent and co-extensive with the current FTAs between the U.S. and its current FTA partners. Four of the TPP members already have high-standard FTA obligations to the U.S., and under principles of national treatment, they should have no difficulty extending those existing protections to TPP members that are not in a current FTA relationship with the U.S. Key elements of a sound TPP IP chapter should include the following, which draw from the most recent FTAs negotiated and concluded:

- **High standards of protection** that reflect the global consensus on standards embodied in international copyright treaty instruments, such as the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. These obligations include a broad right of reproduction, including protection for temporary copies, the right of making available, protection against circumvention of technological protection measures, and protection against tampering with rights management information. Other key elements include ensuring

² 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 comprises seven trade associations, each representing a significant segment of the U.S. community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world — business software (operating systems, Internet enabling software, browsers, search engines, office productivity software, database management software, green technology enabling software, security software and mobile technologies); entertainment software (interactive games for video game consoles, handheld devices, personal computers, and the Internet); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, recorded music, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals, in both print and electronic media. According to the latest economic reporting by Economists Inc., the core copyright industries represented over 6% of U.S. GDP, over 4% of U.S. employment, and contributed over 22% to total real U.S. economic growth in 2007. See the 2009 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., *Copyright Industries in the U.S. Economy: the 2003 - 2007 Report*, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

³ The initial TPP negotiating partners include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore and Vietnam.

adequate protection for sound recordings and performers in line with the WPPT that result in largely removing any unfair hierarchy which once existed between the protection of works and the protection of related rights; and extending terms of protection for copyright consistent with recent FTAs and in line with the clear international trend.

- **Concrete obligations for strengthening copyright enforcement**, clarifying and confirming protections provided in the TRIPS agreement, and providing for the implementation of “best enforcement practices” that have developed in the years since the TRIPS enforcement text entered into force. These include:
 - measures to address online infringements (the Korea FTA side letter on online enforcement should serve as useful guidance)⁴ and other infringements generally, and specifically including criminal remedies for significant wilful infringements of copyright regardless of whether such acts are undertaken with any direct or indirect motivation of financial gain, as well as willful infringements for purposes of commercial advantage or private financial gain;
 - *ex officio* authority for criminal actions and border measures, and remedies against “in transit” pirated goods;
 - presumptions of copyright ownership and subsistence;
 - statutory damages in civil cases (in Australia, supplementing its system of “additional damages” in case those do not deter infringement);
 - criminal and civil remedies for unlawful circumvention of technological protection measures (TPMs) and violations involving rights management information (RMI);
 - remedies against illegal camcording of motion pictures from movie theaters;
 - remedies against the manufacture or trafficking in devices for the decryption of encrypted cable and satellite signals, the unauthorized decryption of cable and satellite signals and the unauthorized distribution of decrypted signals for commercial advantage;
 - remedies against the unauthorized retransmission of television signals over the Internet;
 - remedies against trafficking in counterfeit labels, packaging and documentation; and
 - remedies against optical disc piracy (Malaysia has some gaps to fill in its legislation).

⁴ See Office of the United States Trade Representative, KORUS FTA, Final Text, *Confirmation Letter (Online Piracy Prevention)*, at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file939_12739.pdf.

- **Other commercially significant obligations** such as:
 - transparency in the drafting of laws and in judicial decisions (we note these as issues of particular importance to us in Malaysia, where IIPA members have experienced lack of transparency in the drafting of amendments to the copyright law and in the dismissal of the Basic Electronics case);
 - the requirement to prevent the unauthorized use of computer software or other copyright materials within government agencies and by government contractors or others who are funded by the government (a significant source of losses in many countries to copyright owners and, in particular, the business software industry);
 - provisions on electronic commerce that prevent the application of customs duties on electronically delivered digital products, assure the nondiscriminatory treatment of digital products, and address the valuation of physically-delivered digital products;
 - market access commitments by TPP partners, including Malaysia, to eliminate barriers that now inhibit U.S. copyright-based companies from investing and doing business in TPP member countries (specific issues in Malaysia include broadcast quotas, investment and/or ownership restrictions on broadcast networks and cable and satellite businesses, and a high entertainment tax for movie theater admissions).

There are additional issues which may be well-suited to address through the TPP negotiations. For example, several of the TPP countries still suffer from physical piracy including mall piracy in which the landlords reap economic benefits while essentially condoning what they know or ought reasonably to know is infringing conduct by their tenants. This is a problem of particular concern in Malaysia. Thus, a provision establishing clear mall owner liability for infringement by tenants would be welcome. In addition, while end-user piracy on a commercial scale must be criminalized under TRIPS, it may be helpful to clarify that “commercial scale” infringement includes both activities that take place without a profit motive (provided that they take place on a scale that is not limited to personal use), such as the sharing of protected materials on the Internet, and commercial activities for direct or indirect commercial advantage, such as the unauthorized use of software by a business.

While IIPA has long hoped that Malaysia would bloom as a legitimate copyright market, copyright owners continue to face many challenges which it is hoped will improve by virtue of Malaysia's involvement in the TPP negotiations.⁵ Specifically, efforts to lower piracy have been stymied by slowed progress in achieving modern substantive protection (e.g., the failure to fully implement or joined the WCT and WPPT despite being the first country to partially implement the treaties), enforcement concerns (e.g., the need to restore MDTCC as the chief enforcement decision-maker for piracy cases) and market access concerns (e.g., the imposition of investment restrictions for television programming). Joining the TPP negotiation, it is hoped, and the conclusion of a robust IP chapter, will foster greater engagement from the government of

⁵ The previous FTA negotiations between the U.S. and Malaysia, while not resulting in a final agreement, demonstrated that much common ground exists between the two countries on most substantive and enforcement issues.



Malaysia in effectuating good protection of copyright and increased awareness of and engagement in addressing these concerns and others noted in previous IIPA filings.⁶

IIPA thanks the TPSC for this opportunity to testify on the impact of Malaysia joining the TPP negotiation. We look forward to working with the U.S. government negotiators toward the goal of a sound, comprehensive TPP including Malaysia that will produce significant benefits: for our nation's creators; for the millions who go to work every day in the copyright-based industries; and for our economy as a whole. I look forward to answering any questions you may have.

⁶ For a list of enforcement, legislative and market access concerns of the copyright industries in Malaysia, please see International Intellectual Property Alliance (IIPA), *Malaysia*, IIPA 2010 Special 301 Report, February 18, 2010, at <http://www.iipa.com/rbc/2010/2010SPEC301MALAYSIA.pdf>.

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Malaysia should remain on the Watch List,¹ with an Out-Of-Cycle Review (OCR) to monitor the Malaysian government's progress with respect to the following areas of concern for the copyright industries: (1) an increase in source investigations and prosecutions by MDTCC; (2) prompt and precedent-setting adjudications in criminal cases to assist enforcement activity, including in the BASIC Electronics case; (3) implementation of amendments to the hologram requirements under the Trade Descriptions (Original Label) Regulations (2002); (4) reinstatement of MDTCC officers as heads of enforcement in Malaysia and removal of MADS officers; (5) carrying out a formal public consultation with stakeholders regarding proposed amendments to the Copyright Act; and (6) introduction of anti-camcording legislation to Parliament.

Executive Summary: IIPA members have always placed great hope on the promise of development of a strong legitimate copyright market in Malaysia. Malaysia had the distinction of being the first country in the world to partially implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), as far back as 1998. A study carried out by the World Intellectual Property Organization, in conjunction with the Intellectual Property Corporation of Malaysia (MyIPO) in 2007, showed that for the years 2000-2005, creative industries contributed almost 6% to the Malaysian economy, grew at an annual rate averaging more than 11% per year (faster than the rest of the economy) and had faster growth in employment than other sectors (10.7% to 3.3% growth in employment). Notwithstanding these impressive numbers, which demonstrate that copyright is a powerful engine for economic growth in Malaysia, piracy in various forms stunts the further growth of Malaysia's copyright market. While for a time it appeared the situation might improve due to negotiations between the U.S. and Malaysia toward a Free Trade Agreement, those negotiations have stalled.

IIPA members continue to look to the government of Malaysia to assist them in the protection and enforcement of their rights in Malaysia. Members report generally good cooperation with the renamed Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC) and the Malaysian police, as evidenced by several successful actions taken in relation to end-user piracy of business software and a few high-profile raids on physical pirate optical disc and CD-R/DVD-R burning operations. Increased vigilance regarding pirate shipments exported out of Malaysia has also helped curtail the negative effects of Malaysia's piracy problem on foreign markets. Industry reports that Pos Malaysia has MDTCC deploy a twenty-four hour presence at the Pos Malaysia Kuala Lumpur International Airport (KLIA) Export Center and MDTCC has been asked to ensure the Center holds all suspect shipments until MDTCC can inspect them.

Some problems remain, such as the subordinate role of MDTCC's enforcement division to the Malaysian Administrative and Diplomatic Service (MADS), which has taken over enforcement decision-making. Unfortunately, MADS administrative officers are insufficiently experienced in copyright cases, and in many cases have delayed enforcement unnecessarily. MDTCC officers should once again have *ex officio* authority in the handling of enforcement operation functions and should not be slowed by bureaucratic hurdles or rely in every instance on right holders' complaints. Furthermore, MDTCC should be encouraged to pursue a greater number of source or up-the-chain investigations, particularly following successful raids of optical disc production facilities, and to conduct expeditious and adequate prosecutions when charges are pursued. Other issues include MDTCC's lack of enforcement against piracy in the night markets, as well as failure to enforce against those who do not comply with the hologram requirements under the Trade Descriptions (Original Label) Regulations (2002). Due to the failure to enforce the label regulations, IIPA members end up paying for stickers for their genuine products at prices far higher

¹ For more details on Malaysia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



than the market rate. It is hoped that an open tender system for the supply of hologram stickers will reduce the cost to the industry. IIPA is pleased by the establishment of specialized IP courts, but due to an increase in case files by the police and MDTCC, a backlog remains, giving rise to the need for further expansion of the courts (originally there were to be 15 tribunals around the country). IIPA members sit on the recently revived Special Anti-Piracy Taskforce (SAPTF), which met twice in 2009 and will hopefully continue to work through these problems with the government.

On the legislative front, IIPA hopes that the government of Malaysia will quickly publicize and then introduce needed amendments to the now outdated copyright legislation to implement the WCT and WPPT, provide for effective means of enforcement against physical, end-user, mobile device, and online infringements, create the possibility for right holders to elect statutory damages, and foster ISP cooperation in shutting down growing online piracy. IIPA also hopes the government will enforce the current law against camcording a movie in a theater and is pleased that a law to ban camcording has been proposed by MDTCC to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense.

Priority Actions Requested in 2010: Following on the above discussion, IIPA requests that the government of Malaysia take the following actions which would have the greatest short-term commercial benefits for copyright owners:

Enforcement

- Return to MDTCC enforcement officers the autonomous authority to raid, and remove MADS officers as a bureaucratic hurdle to effective enforcement; streamline reporting requirements to MADS officers so they will not unnecessarily inhibit effective enforcement by MDTCC.
- Establish more IP courts or panels to deal with the rapid filing of copyright cases in courts, which has exacerbated the bottleneck of cases.
- Instruct the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL) and other like local councils, who are in charge of licensing night market vendors, to curtail the uncontrolled piracy activities at night markets, shopping centers, and other fixed premises.
- Ensure that the Trade Descriptions (Original Label) Regulations (2002) are amended and fully enforced against retailers selling optical discs of all content (including entertainment software) without the requisite holograms issued by the MDTCC, including, of course, pirated optical disc product.
- Curb pirate entertainment software exports, and unlicensed use of games in Internet cafés.
- Make a renewed push for university legalization, and specifically, get the Ministry of Higher Education to start a campaign toward legalizing textbook "adoption" practices.
- Reduce adjudicatory delays that hinder expeditious and adequate prosecutions.
- Take significant enforcement action against detected piratical production in licensed optical disc plants.

Legislation

- Swiftly publicize for comment and then seek adoption of legislation to modernize the copyright law, including full implementation of the WCT and WPPT, and join those treaties.
- Adopt or amend legislation to enable right holders to elect statutory damages.
- Fully enforce the current law prohibiting recording devices from being used to record movies, and pass a law to ban camcording which would specifically define the act of camcording or recording in cinemas as a strict liability criminal offense.
- Adopt legislation to combat Internet piracy, *inter alia*, by ensuring that the law properly covers indirect infringements such as knowingly facilitating infringement, and promotes Internet service provider responsibility, including statutory notice and takedown and effective and fair mechanisms to deal with all forms of Internet piracy expeditiously, including P2P file sharing and repeat infringers.
- 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;² to allow inspections at any location and at any time, day or night; and 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.

PIRACY AND ENFORCEMENT CHALLENGES IN MALAYSIA

The following recounts some of the many piracy phenomena harming copyright owners in Malaysia,³ any notable changes in such phenomena, enforcement developments, and remaining enforcement and copyright piracy challenges.

Malaysian Authorities Need to Address Enforcement Concerns: The following are a few of the enforcement needs to be addressed in 2010 by the Malaysian government.

- **Reestablish Autonomous Enforcement by MDTCC’s Enforcement Division, Including *Ex Officio* and Without MADS Interference:**⁴ The most recent reports indicate that in meetings in 2009, the Secretary General of MDTCC committed that for established rights owners such as IIPA members, raid approvals would be provided by MADS within 24 hours. In practice, while approvals for raids are more easily obtained than in 2008, they can take up to a week to occur, sometimes due to unnecessary hurdles being imposed. For example, copyright owners have been required to submit full sets of documentation (for example, proof of ownership of each title) upon the filing of a complaint. In other cases, enforcement officers are unavailable to conduct raids due to other priorities. IIPA strongly urges the government to remove MADS officers from the copyright enforcement side of MDTCC’s functions which would enable rights owners to work directly with the state and district enforcement teams of MDTCC as had been the case for the past 20 years.

As a result of the problems experienced in 2008 and 2009, the former MDTCA’s statistics indicated a drop in the number of cases launched by the government (e.g., just 668 in 2008, leading to seizures of only 1,837,946 pirate units). The local recording industry group, as an example, lodged 951 complaints via an online facility on the then-MDTCA website relating to hard goods piracy during the second half of 2008, but only one quarter of them have even received a response from the Malaysian government. The criminal raid data for 2009 is way down, with the Motion Picture Association reporting 187 raids, the record industry reporting 67 raids, and the Business Software Alliance (BSA) reporting 37 end-user raids. Seizures numbered over one million pieces.

- **Pursue a Greater Number of Source Investigations and Prosecutions:** The industries would like to see investigations up-the-chain to the source of distribution in Malaysia. As it stands, too many cases end with the raid on the downstream distributor. As an example of this, the entertainment software industry reports that between January 1, 2009, and November 30, 2009, MDTCC anecdotally raided 3 factories, 3 burner labs, 7 distributors/storage labs, and 10 retailers, and seized 206,575 pirated videogames and 5 replicating lines (including one capable of producing more than 2.5 million pirated optical discs annually). While these MDTCC

² These changes to Malaysia’s optical disc regulations are important since factory and market raids continue to reveal physical piracy, including gouged discs of games, movies, etc., and since physical piracy remains prevalent especially outside the major cities in Malaysia.

³ Copyright owners in Malaysia continue to experience losses due to piracy. For example, losses due to business software piracy increased from US\$184 million in 2008 to US\$192.1 million in 2009, an increase for the third straight year. The piracy level for business software remained steady at 59%, right below the regional average. The record industry experienced physical piracy losses of US\$23.5 million in 2009 with a 60% piracy level (unchanged from 2008). Significant losses are also attributable to online piracy, mainly using P2P services, with losses in the millions. The methodology used by these IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA’s 2009 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Malaysia. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

⁴ As IIPA reported in the 2009 Special 301 report, many bureaucratic problems hindered enforcement in 2008. For example, simple retail piracy raid requests, which easily would have been run within a few hours of lodging a complaint as recently as 2006, were taking in excess of a month for mere approval in some cases, or in other cases, resulted in no response at all or outright rejections.

raids on facilities that housed piratical product are commendable, they are undermined by MDTCC's reluctance to pursue source investigations up-the-chain after the initial raid. In order to achieve maximum deterrence, MDTCC must use evidence collected during raids that reveals connections to syndicate operations to aggressively pursue source investigations and prosecutions.

- **Enforce Trade Descriptions (Original Label) Regulations (2002) As Amended:** IIPA members have long raised concerns over the label program instituted in Malaysia, including concerns over possible fraudulent use of holograms and the cost to legitimate right holders complying with such measures. While right holders have done their best to comply with the Regulations, the government has not done its part to enforce them against manufacturers or retailers who with impunity make or sell products, including entertainment software, without the requisite holograms. In a recent informal survey, over 50% of games found in Malaysian markets did not have the requisite holograms, which is a violation of the law. Both the businesses manufacturing the games as well as those distributing such products should be made responsible for such violations. IIPA was surprised to learn that MDTCC's position is that the Regulations were intended to "assist consumers" in discerning legitimate from pirate product, but apparently did not provide MDTCC with the authority to take administrative actions against violations, either among manufacturers or distributors. IIPA understands and commends MDTCC for undertaking an amendment process of the Regulations to ensure that such enforcement can be taken. IIPA had understood that the amended Regulations would be in force by January 1, 2010, although this date has now been pushed back to February 15, 2010, when the amended Regulations were to have published in the official gazette. MDTCC has indicated the Regulations will be enforced immediately. This would be a welcome development, and IIPA looks forward to the commencement of earnest enforcement of the Regulations against manufacturers and distributors of product without labels.
- **Need to Expand IP Courts in Malaysia to Deal Effectively with Backlog and Issue Deterrent Sentencing:** IIPA applauded the establishment of the first IP courts that were launched in July 2007 in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. As in IIPA's 2009 filing, members continue to report a significant court backlog, leading to delays in case adjudication. Of the over 100 criminal cases commenced in 2009 against mainly physical piracy (with a few against business software end-user piracy), most remain pending. The industries report at least 175 criminal cases currently pending, many of which were lodged in previous years. Of those, only two jail terms actually served were noted, and of the 12 cases that we know of resulting in criminal fines being imposed, five of the fines were either under US\$1,000 or between US\$1,000 and US\$5,000. In one recent end-user piracy case, the fine was close to the minimum amount permitted by law (RM2,000 per copy, or approximately US\$580) and given that the maximum criminal fine is RM20,000 (approximately US\$5,850) this hardly constitutes a deterrent. One problem stems from the number of copyright cases now being presented, which is overwhelming the courts, leading to a backlog of court cases on IP matters. IIPA urges the urgent assignment of more dedicated judges to these courts, especially in Kuala Lumpur, and the establishment of the 15 Sessions courts around the country that were promised in 2007. Then, significant cases should be brought against those engaged in end-user piracy of business software, optical disc factory owners, mobile device pirate operations, illegal photocopying operations, chief pirate Internet websites, and chief financiers of piracy, including landlords of fixed premises. Deterrent sentences should be sought, employing the expertise that should now exist in the new IP courts.

Basic Electronics Case: One casualty of the systemic problems described above with the courts in Malaysia has been the case against a notorious pirate operation – BASIC Electronics (M) Sdn. Bhd. Basic Electronics is believed to span Malaysia, Thailand, and Singapore, with exports worldwide of pirated PC games. The entertainment software industry has patiently awaited progress on this case for the last six years. A raid in 2004 yielded more than 880,000 pirated entertainment software discs. Several years later, and after procedural missteps (e.g., the charges finally entered in October 2006 were based on less than 1,000 discs that were verified) and repeated postponements, the case still awaits final adjudication. Disappointingly, it was MDTCC (then MDTCA) that secured one of the continuances in 2008, without notifying industry even after it had previously assured industry that

it did not foresee any further postponements and would press for trial to proceed without delay. Industry requested a formal explanation from officials regarding the circumstances of the postponement but did not receive a response. During 2009, the case was postponed two more times when called to trial in April and August. This case is currently on its eighth set of trial dates and is scheduled for trial March 12 and 13, 2010.

ODVD Case: Another example involves a civil litigation brought by a Motion Picture Association of America member company against ODVD, a local licensed factory that is alleged to have produced illegal copies of its film. The case, initiated in 2003, only received a first hearing in November 2008. The civil judgment awarded to the plaintiff in December 2008 following the defendant's failure to appear at trial was set aside by another judge, forcing the plaintiff to retry the case in January 2010 and incur additional costs and expense (including the production of two overseas witnesses). Meanwhile, ODVD was granted a new license in 2007 to operate its factory, although to date there is no evidence it is back in service and they claim to have wound down operations. The criminal prosecution also remains pending.

End-User Piracy of Business Software Harms Software Companies and Stunts IT Growth in Malaysia: The willful use of unlicensed or pirate software in the workplace in Malaysia and the installation in new computers of pirated software (hard-disk loading) continue to cause significant losses to the business software industry, seriously compromising resellers and distributors of genuine software, and stunting the growth of the IT sector in Malaysia. The PC software piracy rate has remained essentially flat for the past several years at almost 60%, however, losses due to piracy have grown over time mainly due to the increasing size of the market. The 60% piracy level is just slightly below the median software piracy rate for the region (which was 61% in 2008). BSA, working with MDTCC, continues to conduct end-user raids, totaling 37 criminal end-user software piracy raids in 2009, leading to 5 criminal cases brought to the courts.⁵ MDTCC regularly leads press conferences on the raids, and BSA meets regularly with MDTCC to review past results and plan for future effective actions.

The situation in Malaysia regarding software piracy shows some improvement over previous years, although the piracy problems remain a huge concern and enforcement challenges abound. The Malaysian government understands the link between better intellectual property rights protection and benefits to the Malaysian economy. A January 2008 study done 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.

BSA has excellent working relationships with the MDTCC, which grew stronger in 2009 under the leadership of the new Minister, Y.B. Dato' Sri Ismail Sabri Bin Yaakob. Problems remain the continued lack of *ex officio* authority for MDTCC officers, which if provided would lead to more effective or at least swifter enforcement actions. In addition, court processes could be improved, starting from the activities of police and prosecutors preparing case files for prosecution, up to sentencing by the courts. As noted above, problems at the courts include the backlog being created by an increasing number of case files being submitted, and the lack of deterrence, including in cases involving end-user software piracy.

Hard Goods Piracy Remains A Serious Problem in Malaysia: Due to declining enforcement actions in 2008 and 2009, hard goods piracy, including distribution of factory-produced optical discs and "burned" recordable discs (CD-Rs and DVD-Rs) has reemerged in Malaysia. In particular, night market piracy stalls flourish in Malaysia notwithstanding significant information supplied to the government of Malaysia on a continual basis. There are many night markets operating in different locations every night. Over a one week period, industry representatives visited at random 22 locations (each location is a night market operating independently with 50 to 200 stalls). From the 22

⁵ In the 2008 IIPA Special 301 report on Malaysia, BSA reported that 6 criminal cases were commenced out of 30 end-user raids, and reported that 116 cases remained pending in the courts.

locations, a total of 289 stalls (independent street vendors) were found to be selling pirated CDs, VCDs and DVDs. These figures reflect the seriousness of piracy at night markets in Kuala Lumpur.

As a result, the legitimate market for copyright materials continues to deteriorate. In several fixed premise locations in Klang Valley (particularly in Bangsar, Sg Wang, Petaling Jaya, and Shah Alam), Penang (Perangin Mall) and Johor Bahru (Holiday Plaza), pirates openly sell illegal products. The chief hurdle to enforcement against physical fixed premises and night market piracy over the past year was the decision by the then-MDTCA that they would not take enforcement without a complaint. While MDTCC is now apparently prepared to reverse course on this complaint requirement (and while the music industry reports faster response times to complaints lodged and enforcement requests and that in the month of December 2009, there have been more proactive raids), the damage caused by the previous shift is already done, resulting in a massive uptick in street piracy throughout the country in 2008 and 2009.

Specifically with respect to the night markets, the 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 taken little or no actions whatsoever in respect of the availability of pirated music, movies, and other copyright materials at night markets. The local industries have supplied voluminous information to the authorities about shopping center and night market piracy over the past two years. Yet, the markets remain open for business. Regarding piracy at shopping malls, there is some positive news, in that the new Minister has announced an interest in exploring landlord liability which would effectively help curtail such activity in Malaysia.

Mobile Device Piracy on the Rise in Malaysia: Mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, is one of the most serious piracy problems for the music and publishing industries in Malaysia. Mobile penetration in Malaysia has exploded over the past several years; the Malaysian Communications and Multimedia Commission (MCMC) estimates that there is now 100% (actually 106%) mobile penetration in Malaysia by the end of 2009.⁶ While many fixed locations previously engaging in unlawful uploading/downloading have legalized their practices, many more have not yet done so. For example, for the music industry, piracy in the form of illegal loading of full tracks and ringtones occurs both over the air through wireless transmissions and through over-the-counter sales. The problem affects other industries as well, for example, publishers report some downloading of reference books and dictionaries onto mobile devices.

Camcorder Piracy Causes Massive Losses to Film Producers: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie 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). These copies are then distributed to pirate "dealers" throughout the world and over the Internet. Since 2006, there have been 48 arrests of people caught in the act of illegally camcording movies in Malaysia, in many cases involving local Malay films. The Copyright Act, 1987, contains Section 41(1)(g) which prohibits recording devices from being used to record a movie, and under which cinema exhibitors can prohibit/seize and detain the suspects by making a citizen arrest and then subject them to a minimum fine of RM4,000, approximately US\$1,170, for each offense and/or imprisonment up to 10 years. Unfortunately the enforcement authorities are presently of the opinion that in order to prosecute a suspect under Section 41(1)(g), the suspect must have successfully completed camcording the entire movie; there has been only one prosecution under this provision. IIPA encourages the government to fully enforce this provision which does not require the recording of an entire movie to constitute copyright infringement, and also expeditiously develop a standalone legislative solution to make the use of an audiovisual recording equipment in a movie theater to record a film off the screen a strict liability offense.

Internet Café Server-Based Piracy Remains an Issue of Concern: A major problem for several years in Malaysia involves the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many

⁶ Malaysian Communications and Multimedia Commission, *Penetration Rates at a Glance*, at http://skmm.gov.my/facts_figures/stats/ViewStatistic.asp?cc=45899166&srid=50919742.

cases, such premises set up standalone computers loaded with unauthorized or pirated copies of a game. The cafés then shifted to a “client-server” model, in which the unauthorized software is installed at the server level on-site, and the customers’ machines are granted access to the same copy on the server. In recent years, the industry has seen the development of a new “scheme,” involving Internet café operators entering into arrangements with third parties that provide access to an off-site server hosting or storing the game software. The café’s on-site server is then granted access to the game software on the off-site server (which effectively controls all activity related to the use of the game at the cafés), and in turn, the café’s server permits access to the same software to the many computer machines located on-site. The off-site server will typically require the on-site server to authenticate itself, and thus, if the link to the off-site server is severed, all services that may be available to the café’s computers through the on-site server will be rendered inoperable. Thus, once the link is broken, the café’s computers are effectively wiped of all data or evidence of infringing activity. The proliferation of such methods of evasion complicates post enforcement verification and thus emboldens those refusing to obtain appropriate licenses for video game product used in such commercial settings.

Production of Optical Discs for Export From Malaysia Still Detected: Malaysia remains a producer and supplier of pirate optical discs, including for export. Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software was detected in 2009. The problem of pirate movie and music exports, once a major issue in Malaysia, has been mitigated by the presence of industry and MDTCC representatives who are stationed in Kuala Lumpur International Airport to monitor and stop such exports. The Entertainment Software Association’s joint anti-piracy program with the local Motion Picture Association entered its third year in 2009. The program’s aim remains the reduction of large-scale replication and global export of pirated game product from Malaysia, which remains one of the primary sources of exports of pirated game product.

Book Piracy Negatively Affected in 2009 by MDTCC Slowdown: The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. Unfortunately, as enforcement actions/raids are not consistently carried out by law enforcement, the scale of illegal photocopying activities remains a problem. Copy shops in and around universities are raided occasionally, but continue their activities following the raid as they know that law enforcement follow-up or prosecution of perpetrators is generally unlikely to occur. Some changes in recent years in the pirates’ methods cause publishers further concern, since pirates can now save soft copy scans of textbooks onto computers or portable hard drives and directly print the books from their computers, thus making detection and identification of infringement more difficult. Other attempts to make piracy harder to detect include the setting up of shop facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities, or storing pirate stock in vans for easy delivery and difficult detection by authorities. Photocopy shops no longer keep stocks of photocopied books on hand due to digital technology. Shops are increasingly keeping unauthorized copies at various locations, making detection difficult. Certain areas within Klang Valley have worsened, including Subang Jaya campuses, Universiti Putra Malaysia (UPM), University of Malaya (UM) and TAR College.

Local counsel reports that in early 2009, then-MDTCA officials were interfering with raid targets that previously would have been open-and-shut piracy cases on copy shops. There continues to be no uniform approach to the pre-requisites for conducting raids. Some Ministry officers continue to impose prohibitive conditions such as requiring publishers to submit statutory declarations as proof of ownership in advance for each title in a given raid (a hurdle which is virtually impossible to meet since one cannot precisely know which titles will be found in a raid). Where prosecutions actually occur, they remain slow and mired in problems (ranging from lost documents, turn over in personnel handling the cases, and a general lack of preparation on the part of the officers handling the cases). While MDTCC has been open to suggestions and is willing to work with the local universities in structuring policies and strategies to eradicate piracy on campuses, the universities themselves have to date been reluctant to get involved, apart from periodic distribution of public awareness information. IIPA would like to see the universities take a more active role in legitimizing practices on their campuses, as well as corresponding oversight by the Ministry of Education and Ministry of Higher Education to promote efforts to combat infringing activity occurring at universities and the adoption of appropriate copyright policies.

Internet Piracy Increases in Part Due to Greater Internet and Broadband Penetration: As of the end of 2009, Malaysia had almost 17 million Internet users, which represents more than 66% Internet penetration, and ranking 22nd in the world.⁷ Broadband penetration continued to grow, with statistics showing 1.4 million broadband subscribers (almost all DSL technologies, however) by the end of the third quarter 2009, an increase of roughly 200,000 subscribers in one year.⁸

As a result of these developments, it can be no surprise that Internet piracy, whether direct downloads from websites, P2P file sharing, deep links, advertising sites (for hard goods sale or delivery), MP3 download sites, "blog spots," social networking sites, or cyber lockers, is causing increasing harm to legitimate copyright owners' businesses in Malaysia. Music piracy from Internet sources remains prevalent.⁹ The record industry estimates that 25% of losses due to music piracy in Malaysia (US\$8.6 million) are Internet-based, and that 99 out of 100 copies on the Internet in Malaysia are infringing (99%). Pirate business software on the Internet is primarily available through peer-to-peer file sharing services. Publishers have also noted some online piracy, with sites offering scanned copies of books (in PDF or a similar format) for download.¹⁰

Online piracy is an increasing problem for the entertainment software industry in Malaysia, with BitTorrent being the most popular platform for illegal file sharing. The Entertainment Software Association estimates 75,763 completed downloads of select ESA members' entertainment software by Internet users in Malaysia during only the month of December 2009, placing Malaysia in the top 10% of nations in terms of infringing downloads per capita during this period.¹¹ Breakdowns by ISP show that Telekom Malaysia Borhard subscribers account for approximately 79% of the infringing downloads of ESA members' software in Malaysia – more than 59,000 downloads during this one month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads. The Motion Picture Association of America is primarily concerned with P2P piracy (about 1 million instances per month) and ISPs hosting linking sites. A continuing problem in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods.

Enforcement of copyright in the Internet environment remains one of the major challenges to copyright owners worldwide, not just in Malaysia. With regard to infringing sites, the industry's experience in Malaysia is that most (but not all) are cooperative and take down infringing material within 48 hours of receipt of a notice. Some service providers are reportedly tracking P2P users and taking steps to make it more difficult for those engaging in massive file sharing to continue doing so. During 2009, 29 websites containing motion picture piracy online were taken down by ISPs and web host services. The local music and recording industry group reports an 82% takedown rate, with 50 takedowns out of 56 notices sent. The group also reported statistics which detail the growing size and scope of the Internet piracy problem. It reported almost 5,000 links to cyberlockers containing allegedly infringing files, as well as 166 links on YouTube and 4 pre-release links (i.e., links to pirate recordings of records not yet released in the commercial market). Pre-release piracy in particular can destroy the entire market for that product.

Informal and voluntary takedowns by service providers and of websites have thus far been more successful than those initiated pursuant to Section 263 of the Communications and Multimedia Act of 1998 with notices sent by

⁷ CIA, World Factbook, *Malaysia*, at <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>.

⁸ Fiona Vanier, *World Broadband Statistics Q3 2009*, PointTopic Ltd, at http://point-topic.com/login.php?comp_id=102217&red=/operatorSource/dslreports/World%20Broadband%20Statistics%20Q3%202009.pdf. The Malaysian Communications and Multimedia Commission, at http://www.skmm.gov.my/facts_figures/stats/index.asp, claims that by the third quarter 2009 the household broadband penetration exceeded 27%.

⁹ One local Malay artist, *Mawi*, noted as early as 2006, "A simple search on the Internet reveals that the whole content of Mawi's first solo album[, "Mawi...Yang Tercinta" is] available for download. All you need is a registration with the portal and a stable Internet connection to get free Mawi tracks saved onto the hard disk." Siti Syameen Md Khalili, *Mawi Versus Pirates*, *New Straits Times*, February 2, 2006.

¹⁰ Sites particularly noted include piradius.net and eastgate.net.my.

¹¹ This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

the Malaysian Communications and Multimedia Commissions (MCMC) based on information given to them by the MDTCC.¹² The reasons for this include a lack of knowledge with regard to Internet piracy and a lack of urgency on the part of the enforcement authorities. For example, it has been reported that the MDTCC Internet Investigation and Forensic Unit commences an often lengthy investigation process upon receiving a complaint. The Unit reportedly writes to the MCMC which technically is supposed to issue notices and work with ISPs to ensure that piracy in respect of the site complained of ceases. MCMC, as the body issuing licenses to ISPs, is best positioned to ensure that ISPs take appropriate action against infringers, but unfortunately, MCMC has taken an approach that appears to right holders as protective of the ISPs. IIPA and members call upon the government to assist in working out solutions to protect the rights of copyright owners and foster cooperation among major ISPs in Malaysia. While ISPs prefer to wait for proposed legislation than voluntarily deal with the issue through negotiation, both must occur. In the continued absence of specific ISP legislation, MCMC should become a stronger presence in the fight against Internet piracy, and in particular, must help enforce the provisions of the Communications and Multimedia Act.¹³

Malaysian Authorities Capitalize on Good Industry Cooperation to Achieve Positive Results in Raids on CD and DVD Production Facilities: There remain dozens of optical disc production plants in Malaysia,¹⁴ with capacity to produce hundreds of millions of discs per year, and dozens of other facilities that produce blank CD-Rs and DVD-Rs. IIPA remains concerned about the high production capacity, which easily dwarfs legitimate demand in Malaysia, the cessation of raids on licensed factories, and the lack of coverage under the Optical Disc Act of plants that produce recordable discs. However, in 2009, the industries experienced excellent cooperation against large-scale pirate production facilities. The following are a few anecdotal examples of good industry/government cooperative efforts leading to effective raids on large-scale pirate manufacture/distribution:

- March 2009: Authorities shut down an unlicensed replicating facility in Sungai Buloh, Selangor, seizing three DVD replicating lines, one printing machine and 800 kilograms of polycarbonate used in the manufacture of optical discs. A hidden door camouflaged as a wardrobe cabinet concealed the entrance to a secret room in which the equipment was located and replicating six local Malay movie titles at the time of the raid. Four suspects on the premises during the raid were taken into custody. Conservatively, the factory lines were capable of manufacturing more than 10 million pirated optical discs per year, generating potential illegal revenues of more than US\$27 million. An estimated 5,000 pirated DVDs fresh off the production lines were in boxes ready for delivery, including MPAA member company titles *Valkyrie*, *Australia*, and *Body of Lies*. Preliminary investigations revealed that these pirate DVDs were headed for Johor, the Malaysian state south of Kuala Lumpur and just next to Singapore, for onward shipment out of the country.
- April 2009: The Royal Malaysian Police raided commercial premises in the industrial zone of Seri Kembangan in Selangor following intelligence about illegal CD production. On entering the secured premises, police discovered a CD replication line producing copies of a recent Warner Music release, *Tak Hilang Cinta* by veteran local artist Jamal Abdillah, as well as a printing machine (both of which were seized). During the search, four men were arrested and a total of 17,900 pressed discs were seized, including 1,200 copies of *Tak Hilang Cinta*. Two of those arrested appeared in court charged with offences under the Copyright Act 1987 and the Optical Discs Act 2000, while the other two, who were foreign nationals in the country illegally, were handed over to immigration authorities.

¹² *Communications and Multimedia Act, 1998*, at http://www.commonlii.org/my/legis/consol_act/cama1998289/. Section 263 of the CMA requires a service provider to "use his best endeavor to prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia," and "assist the Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia."

¹³ *Id.*

¹⁴ Our understanding is that there are anywhere between 26 and 31 licensed factories which altogether comprise 63 VCD lines capable of producing 220.5 million discs per year, 5 DVD lines capable of producing 17.5 million discs per year, and as many as 8 CD-R lines capable of producing as many as 28 million discs annually.

- May 2009: MDTCC's K9 unit engaged in a successful operation to shut down six warehouses storing pirated movie and videogame DVDs and software CD-ROMs in the Malaysian state of Johor which were destined for export to Singapore. Paddy, the Labrador trained to detect optical discs and donated by the Motion Picture Association to the Malaysian Government in 2008, accompanied the raiding parties to four locations at the Holiday Plaza, Johor Bahru (a short ride away across the Causeway linking Malaysia to Singapore), resulting in seizure of a total of 19,000 copies of videogames, software and movies. Post-raid investigations revealed that two of the targets were actively involved in exporting pirated DVDs to Singapore, and uncovered packages with e-mail orders from two websites which became the subject of follow up investigations. The case is still pending although the website is inoperable. On the following day, another raid on two additional targets revealed a large warehouse of pirated movie DVDs leading to seizure of over 6,000 discs and a delivery point for pirated DVDs to Singapore with another 4,000 pirate discs. Recent titles such as "*Terminator Salvation*", "*Night at the Museum: Battle of the Smithsonian*," "*Angels & Demons*" and "*Star Trek*" as well as the latest Malay movie titles were among the 10,000 titles seized. IIPA is pleased that Paddy and the K9 Unit were employed in these raids, since they had not been used as much at the airports for detecting pirate CDs and DVDs. IIPA advocates for Paddy to be regularly deployed (as opposed to intermittently as is currently the case) at POS Malaysia KLIA Export Center to detect pirate shipments and exports of copyright products.
- July 2009: Malaysian police from the Commercial Crime Division of the Royal Malaysian Police raided a house in the Kuala Lumpur district of Pandan Indah, discovering over 170,000 pirate CDs, including more than 10,000 counterfeit Michael Jackson albums. Three people caught packing the pirate CDs into plastic covers were arrested during the raid. Initial investigations reveal that the pirate operation was shipping counterfeit CDs to distributors elsewhere in Kuala Lumpur and across Malaysia. Evidence of disc gouging (in which the source identification code on factory-produced discs is wiped off the disc) was detected by the local music industry that assisted authorities in the raid. Two foreign workers were charged in court and a hearing date was set for January 12, 2010.
- August 2009: A team of 15 enforcement officers from MDTCC assisted by industry raided an unlicensed replicating facility in Balakong, Selangor, seizing one DVD replicating line, an offset printer and a metalizing and bonding machine. A group of dogs were guarding the premises, the entrance of which was equipped with closed circuit TVs. On entering the premises, the raiding party found the machines in operation but no one on the factory floor. The enforcement team seized an estimated 2,000 pirated DVDs of 4-in-1 movies, TV series' and games in spindles of 100 discs ready for delivery. Recent titles among them include *Transformers: Revenge of the Fallen*, *Watchmen* and *Race to Witch Mountain*. Silk screens of the titles such as *Night at the Museum 2*, *Land of the Lost*, and *Public Enemies* and more than 100 boxes of DVD casings were also found on the premises. Conservatively, the factory line was capable of manufacturing more than 3.5 million pirated optical discs annually, potentially generating illegal revenues in excess of US\$9 million.

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the government of Malaysia through participation, organization, and devotion of resources to trainings and public awareness activities in 2009. The Motion Picture Association of America's local group engaged in training activities, conducting 35 trainings for investigation officers from the Malaysian Police on copyright investigations and prosecutions. It also conducted trainings for 25 theater staff representatives in Kuala Lumpur on camcording theft. The local music and recording industry group participated in trainings and seminars in 2009 related to Internet piracy for enforcement officers. Specifically, three courses on Internet/forensic investigations were conducted with the MDTCC in November 2009 for 100 officers at 3 venues: Penang, Johor Bahru and Miri, Sarawak. Officers were given information and training on the role of ISPs by the music and movie industries. In addition, the local music and record industry group maintains a close advisory relationship with prosecutors in music piracy cases, with hands-on training and advice as the cases are filed in court and prosecuted. The Entertainment Software Association has provided training programs for the

MDTCC, directly and through local counsel, on both an as-needed basis and as part of larger training initiatives. The Business Software Alliance's continued participation in the Ops Sikap Tulen (Original Attitude), which MDTCC started in July 2007 and continued to gain traction in 2008 and 2009. The aim of the campaign was to cultivate a lifestyle that includes respect for intellectual property rights and to change behavior and mindsets to use only original and licensed software.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law in Need of Modernizing Revisions, Including Full Implementation of the WIPO Treaties (WCT and WPPT): Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments¹⁵ strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$5,850) for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy. For example, Section 50A gives MDTCC officials the ability to carry out arrests for copyright piracy on an *ex officio* basis, which needs to be reinstated in 2010.

Regarding the enforcement of copyright, the 2003 amendments unfortunately did not go far enough to make changes necessary to fully meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall. They did not, for example:

- Impose mandatory minimum jail sentences for piracy.
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright. Specifically, Section 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.
- Provide for stronger damages in civil copyright cases by providing an option for statutory damages in civil cases. Statutory damages will act as a strong deterrent to pirates who benefit greatly from infringing acts but are only required to pay a minimum sum for actual losses that the plaintiff is able to prove. Statutory damages could be staggered on a tiered system so that first time infringers pay sizeable but comparatively smaller sums as statutory damages while repeat infringers pay much larger sums. As of yet, it does not appear statutory damages have been included in the most recent draft copyright law amendments (which have not been made available to IIPA). This should be included as an important element of the amendments.
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.

In addition, the government of Malaysia needs to adopt amendments to fully implement the WCT and WPPT and make other modernizing changes. The Malaysian government has apparently indicated that the draft

¹⁵ The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

amendments are being finalized, but the draft has not been released for public consultation. Included in the amendments should be the following:

- Full implementation of protections against the circumvention of technological protection measures (TPMs) and the trafficking in circumvention devices or services.
- Express protection for temporary copies.
- Term extension to “life plus 70,” and 95 years from publication for films and sound recordings etc.
- Extend and/or confirm shopping complex owner liability for the trade of pirated products that still occurs within many commercial buildings. A couple of years ago, five known civil actions 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. The prosecution of the criminal case has not progressed much. However, the Minister of Domestic Trade, Co-Operatives and Consumerism has made a number of public statements that the Malaysian Copyright Act is being amended so that action can be taken under the Copyright Act against owners of business premises who allow their tenants to carry out illegal activity; IIPA urges that this be a specific criminal offense for a landlord who permits the premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products. To the extent the law extends mall owner liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes this amendment will reap long-term, positive benefits in the fight against piracy in Malaysia. IIPA understands that the government intends to file further mall owner actions. IIPA supports these actions.
- Amend Section 52 in line with the August 8, 2006 Malaysia Court of Appeals dismissal of an appeal by ODVD Manufacturer Sdn Bhd’s, such that copyright holders may file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies. Facts adduced in a criminal prosecution should be deemed 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.
- Issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

Effective and Fair Mechanisms to Deal with Online Infringements and Foster Internet Service Provider Accountability Needed: IIPA understands now that the proposed copyright amendments will include provisions dealing with the liability of Internet Service Providers (ISPs) for Internet-based infringements occurring over their services.¹⁶ Over the past year, the government, including MyIPO, and stake holders (both right holders and

¹⁶ It 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:

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.

ISPs), have discussed and commented back and forth on the requirements for such legislation. It is absolutely necessary, if an acceptable approach is to be achieved, that the Malaysian government broker be neutral in the least, with an understanding of the important right holder interests involved, and without a bias toward protecting ISPs from taking any responsibility for online infringement.

It should be recalled in this context that the Communications and Multimedia Act (1998), while not setting forth with specificity the mechanisms needed to combat online piracy, states the important principle that network facilities should not be used to break the laws of Malaysia, and even imposes responsibilities on ISPs to “use ... best endeavor[s] to prevent” their services from being used to break the law, and to “assist the Commission or other authority as far as reasonably necessary” to prevent anyone from breaking the laws of Malaysia, including the copyright laws. This language set an extremely helpful framework for any copyright-specific discussion, and should form the basis for going forward with ISP liability legislation specific to copyright infringement.

Specifically, any draft put forward on service provider issues in the copyright context should avoid the following pitfalls, among others:

- Any draft should not provide blanket immunity from liability for ISPs for infringements occurring on their networks or through their services, but can limit monetary damages as long as it preserves injunctive or other equitable relief.
- Any draft should provide incentives to ISPs to cooperate with right holders, by, e.g., providing for independent copyright infringement liability if a service provider knows, or has reason to know, that infringements are occurring over the service/network. Any approach that shields a service provider from liability even in these circumstances allows it essentially to turn a blind eye to infringements. Notice should be one acceptable method, but not the only method, for making a service provider aware of infringement, and anyone should be able to file a notice.
- Any draft should provide for expeditious takedown of infringing activity by service providers in the case of a notice. A “48 hours” requirement is reasonable, as is a requirement that any pre-release material be taken down “immediately.” (Pre-release material comprises movies, music, games, software, or published materials that have not appeared in the market yet). We understand some ISPs have proposed “14 days” for takedowns. Such a long period, which for some copyright works comprises a substantial portion if not all of their commercial window for sales, is totally unacceptable.
- Any draft should contain a counter-notification mechanism, so that one who has had material taken down may file such a counter-notification in order to get the material put back.
- Any draft should contain a provision for ISPs to have in place a fair and effective policy for repeat infringers, and it is reasonable also to consider denying safe harbors to those service providers who fail to implement such a policy.
- Any draft could contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

MDTCC Proposal for Strict Liability for Illegal Camcording Should be Adopted: IIPA welcomes the decision by the government to address illegal camcording, but given the current state of the law (the enforcement authorities are presently of the opinion that in order to prosecute a suspect under Section 41(1)(g), the suspect must have successfully completed camcording the entire movie), a standalone legislative solution is desperately needed. A

Thus, the government of Malaysia is already obliged to provide adequate measures to provide “a necessary deterrent” to infringing transmissions, and should be encouraged to take such an approach in any legislation to be proposed.

MyIPO working committee is considering a strict liability proposal for illegal camcording that would specifically define the act of camcording or recording in cinemas as a strict liability criminal offense. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in a theater without having to establish the ownership or subsistence of copyright in the recorded film, a substantial taking, or other elements, and without the need of a formal complaint. Among the committee's discussion items is whether the proposed legislation should take the form of a standalone law or whether it should instead be included as an amendment to the copyright law. One benefit of making the law entirely standalone would be to obviate the necessity to establish the subsistence and ownership of copyright and to prove the act of infringement of a work being recorded. IIPA fully supports MyIPO's efforts in this regard.

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; and 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. Exemplars from all such plants/lines must be provided, even from recordable-only plants. These and other changes noted in previous submissions are important to continue providing an effective remedy against optical disc piracy in Malaysia.

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the government of Malaysia should be encouraged to enforce anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong's Organized and Serious Crimes Ordinance (OSCO), which allows Hong Kong authorities: (1) to employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia. IIPA understands that Malaysia has enacted the Anti-Money Laundering and Anti-Terrorism Financing Act of 2001 (AMLATFA), which includes these provisions. Copyright infringement is one of the specific offenses listed in the schedule of "serious offenses" for AMLATFA, and also included are attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLATFA, the government has been slow to use it in copyright infringement matters.

FREE TRADE AGREEMENT

The United States and Malaysia initiated negotiations on a Free Trade Agreement (FTA) in June 2006, and while for a time, solid progress was made in the negotiations. USTR now indicates that "some significant challenges remain," and while also indicating that the United States and Malaysia are "currently planning for technical discussions on a variety of topics, including intellectual property rights, services, and investment," the negotiations have slowed.

MARKET ACCESS AND RELATED ISSUES

The Malaysian government has not taken seriously, and indeed, does not view as urgent, dealing with certain market access barriers raised by IIPA and the copyright industries over the years. IIPA views these issues as potentially quite serious, and would urge the government to deal with them forthwith. IIPA understands that at least

local music broadcasters have sat down with the local music industry to discuss ways of going forward on reasonable commercial terms, and it is hoped those discussions can resolve the issues raised below with respect to music broadcasting.

Lift Broadcast Quotas and Investment Restrictions: Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during "prime time" hours of 8:30 to 9:30 p.m. Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. These restrictions significantly limit the expansion of the television sector in Malaysia, and should be eased or lifted. The Market should determine programming allocations.

Lift Cinema Entertainment Tax: The entertainment tax for theater admissions, at 20% 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.

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