

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# MALAYSIA

### EXECUTIVE SUMMARY<sup>1</sup>

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IIPA recommends that Malaysia be maintained on the Special 301 Watch List. However, in order to sustain the progress that Malaysia has made in several important areas of the fight against piracy, and to bring its performance to an acceptable level in the other key areas in which progress is thus far lacking, IIPA urges Malaysian authorities to commit to the following actions:

- Enforcement
  - Create a permanent copyright enforcement unit within the Ministry of Domestic Trade and Consumer Affairs, dedicated solely to this task. The unit must be given sufficient manpower and resources to do this job, and its officers must be properly trained to conduct raids, carry out investigations, and prepare fully documented files for use in prosecutions.
  
- Optical Disc Act
  - Strictly enforce the Optical Disc Act (ODA), particularly with regard to the mandatory use of SID codes. The licenses of optical disc plants which fail to do so or which commit other significant violations of the ODA must have their licenses revoked, regardless of whether the plant has received other operating licenses from other government agencies.
  - In collaboration with industry, implement a comprehensive program of collection and analysis of exemplars from all licensed optical media production facilities, including making any changes to license terms, implementing regulations, or (if necessary) the ODA itself, that are needed to authorize such a program.
  
- Prosecutions
  - Create a unit of legally qualified and adequately trained prosecutors within the Attorney-General's Chambers to prosecute all high profile copyright cases involving the production, distribution and export of copyrighted materials, particularly optical media products, or involving corporate end user piracy of business software.
  - Institute charges of copyright violations within 30 days after full documentation is received from copyright owners.

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<sup>1</sup> For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to filing.

- Appeals
  - Promptly review any copyright case which results in acquittal in the lower court, and institute an appeal in any case in which the court has required live testimony or permitted cross-examination of deponents as to the subsistence or ownership of copyright when those matters are not genuinely at issue. For any acquittal where the decision is made not to appeal, advise the right holders of the decision and the reasons for it within seven days after the acquittal.
  - To promote deterrent sentencing, including full accountability of business and institutional managers and corporate directors for piracy taking place within their organizations, prosecutors should appeal sentences in all cases of pirate production, distribution, or export, or corporate end-user piracy of business software, in which a sentence of imprisonment is not imposed.

IIPA urges USTR to schedule an out-of-cycle review for Malaysia, during which its Special 301 status would be re-examined based on the degree of its fulfillment of these benchmarks.

**MALAYSIA: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 – 2001**

INDUSTRY	2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	80%	41.0	80%	42.0	85%	40.0	80%
Sound Recordings/ Musical Compositions <sup>2</sup>	148.9	70%	15.6	65%	5.0	40%	13.0	70%
Business Software Applications <sup>3</sup>	63.0	62%	75.4	66%	67.8	71%	63.8	73%
Entertainment Software	56.4	93%	NA	98%	164.0	99%	135.2	99%
Books	8.2	NA	8.0	NA	8.0	NA	8.0	NA
<b>TOTALS</b>	<b>316.5</b>		<b>140.0</b>		<b>286.8</b>		<b>260.0</b>	

## OPTICAL MEDIA PIRACY

Beginning in the late 1990s, authorities in China, Hong Kong, and other jurisdictions started to crack down on the pirate production and export of optical media products – including music and video CDs, and CD-ROMs containing entertainment, educational and business software and literary material. As a result, Malaysia became an increasingly attractive destination for the

<sup>2</sup> The estimated piracy level for sound recordings for 2000 represents an adjustment of the 60% figure reported in IIPA's 2001 Special 301 filing. The loss figure for 2001 is an estimate of legitimate sales displaced by piracy. Previous years' loss figures were estimated sales revenue in the pirate market. With the sharp drop in prices for pirate product, this estimation method no longer reflects the losses inflicted by piracy. The piracy loss figure for 2000 has also be adjusted but without changing the estimation method.

<sup>3</sup> BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 filing, BSA's 2000 estimates of \$96.0 million at 66% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

organized criminal enterprises that are suspected to be running optical media factories and distributing their output worldwide.

Malaysian authorities now clearly recognize the scope and seriousness of the optical media piracy problem. They appear to be committed to the fight against it, and in many cases work ably and willingly with affected industries. Since 2000, Malaysia has actively raided pirate optical media production facilities, and is bringing into force a new Optical Disc Act that could provide a vital legal weapon against the pirate syndicates that operate them. But not until raiding and legislating are supplemented by thorough investigating, aggressive prosecuting, and deterrent sentencing will Malaysia be able to turn the corner in this struggle, in which the viability of its hopes to play a leading regional role in electronic commerce are clearly at stake.

## **The Scope of the Problem Remains Unacceptable**

The Malaysian market for copyrighted materials of all kinds remains dominated by piracy. The problem is particularly acute for optical media products, including music and video CDs, DVDs, and CD-ROMs containing entertainment, educational and business software and literary material.

Optical media piracy continues to wreak havoc upon all sectors of the domestic market. Not only is it impossible for legitimate producers to compete against pirates based on price, but pirates also evade censorship laws and offer consumers unexpurgated music and audiovisual products that law-abiding producers are unable to match.

The Malaysian recording industry, for example, reportedly is on the verge of collapse, following a 75 percent drop in revenue in 2000, attributable mostly to piracy.<sup>4</sup> Pirate CDs are widely available throughout the country for about RM5 (US\$1.30), one-third of last year's pirate price. The Recording Industry Association of America (RIAA) estimates that piracy levels for recorded music increased to 70% in 2001, with losses to U.S. industry estimated at US\$148.9 million.<sup>5</sup>

Similar problems afflict the audiovisual sector. Within days after new films are first released for theatrical exhibition in the U.S., and sometimes even before their release, pirate VCD and DVD versions are readily available on the streets of Kuala Lumpur at prices as low as RM5 (US\$1.30) and RM12 (US\$3.20), respectively. Piracy is so prevalent that often two or three different pirate VCD versions of a single popular title, marketed by five to seven competing distributors, can be found on the market. The Motion Picture Association of America (MPAA) estimates that eight of every ten copies of audiovisual product in the market are pirate, with losses estimated at US\$40 million.

Entertainment software companies report a deterioration of the local market, even given the sky-high piracy levels reported in previous years. Pirates seem to be dumping product – both PC games and those for play on consoles – on the local market at prices as much as 95% below legitimate retail. Virtually no legitimate sales can take place in such an environment. According

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<sup>4</sup> "Malaysia's Music Industry at Risk of Collapse from Piracy," Channel News Asia, Sept. 10, 2001.

<sup>5</sup> See footnote 2 supra.

to the Interactive Digital Software Association (IDSA), the piracy rate for entertainment software in Malaysia is 93%, causing estimated losses of US\$56.4 million to U.S. industry.

Although business software companies are also adversely affected by the prevalence of pirate optical media products in the Malaysian retail market, the more damaging piracy problem for this sector in Malaysia is the illegal use of software by end users, such as when a business or other institution that may legitimately acquire one copy of a computer program then makes unauthorized copies of it available for use by its employees throughout the premises or over a network. This is a problem to which the Malaysian authorities have been able to respond more effectively, as discussed below. Nevertheless, the level of business software piracy in Malaysia – estimated by the Business Software Alliance (BSA) at 62% – and the losses inflicted on U.S. companies by piracy – an estimated US\$63 million in 2001 – remain much too high.<sup>6</sup>

At the root of all this market damage is the enormous excess capacity for the production of optical media formats. Much of this excess capacity is devoted to pirate production, largely for export. Officially there are 43 optical disc plants in the country, constituting 109 production lines; but unlicensed underground facilities are also believed to be continuing in operation, and unlicensed plants of substantial size were raided as recently as July 2001. As Malaysian authorities readily acknowledge, the total capacity of these facilities far exceeds the legitimate demand for optical media products, either for domestic production or for authorized export. Indeed, these Malaysian plants remain a primary source for pirate optical media products that are exported all over the world.

Pirate product of all kinds enters Singapore from Malaysia over the causeway connecting the two countries, and forms the basis of the active pirate market in Singapore. But the impact of Malaysian-based piracy is also felt at much greater distances. In fact, the unauthorized output of Malaysian optical media plants has been identified in markets on every inhabited continent. Pirate music CDs from Malaysia have been seized throughout Asia, Latin America, Australia, Europe, and now Africa: Many of the infringing music discs currently flooding the Kenyan market appear to have originated in Malaysia, as have pirate discs seized in Mauritius and Ghana. Malaysia is a major supplier of pirate video CDs and DVDs to Asian destinations via Singapore, and these products have also turned up from South Africa to the U.K. and from New Zealand to the U.S. Malaysia is a leading source of high quality counterfeit business software products, which are shipped via Singapore into the United States and other markets. And with regard to entertainment software in CD-ROM format, Malaysia continues as the world's single leading source of pirate product.

Pirate optical media exports from Malaysia move fast and far. The hit movie "Planet of the Apes" had its theatrical world premiere in Hong Kong on July 26, 2001. That same day, it appeared on the streets in Malaysia in a pirate VCD version. Within days this pirate VCD was available in Beijing (July 30), Shanghai (July 31), and Manila (August 1). By the next week, the pirate VCD could be found in Taiwan (August 3), Indonesia (August 7), and India (August 9). Meanwhile, the pirate DVD version of "Planet of the Apes" made its debut in Malaysia on July 30, four days after theatrical release. Within two days, on August 1, it was available in Shanghai, and in the Thai and Australian markets. The next day (August 2) the pirate DVD was spotted in Beijing. Meanwhile, the film did not have its theatrical debut in Malaysia until August 9. By that time, pirate versions had been on the street for over two weeks and had reached at least nine countries.

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<sup>6</sup> Piracy of books and other published materials in formats other than optical media is discussed below.

In sum, the landscape of piracy in Malaysia has not changed significantly from that described in past years. There were a few variations in 2001, some positive and some negative. On the plus side, intensive and concentrated enforcement efforts led by the Ministry of Domestic Trade and Consumer Affairs (MDTCA) have proven once again to offer some short-term relief at the retail level. Enforcement campaigns against hot-spots of retail piracy such as Petaling Street in Kuala Lumpur and Holiday Plaza in Johore Baru, just an hour's drive from Singapore, reduced the number of stalls and retail outlets selling pirate VCDs and DVDs. However, these advances proved short-lived, especially in the capital, and other shopping complexes continued a brisk trade in pirate products. In an even more ambitious enforcement initiative last year, a Malaysian Cabinet Order banned all sales of optical media products from open stalls. As this ban rolled out nationwide in September and October some local government authorities became actively involved in enforcement, and availability of pirate product dwindled substantially as numerous open-air markets were cleaned up. Here too, however, the relief proved to be temporary; many pirate stalls are now back in operation and pirate optical media product still remains readily available nationwide.

More disturbingly, Malaysian pirates are beginning to adapt to government enforcement efforts and are employing different distribution channels to avoid detection. As enforcement pressure focuses on stalls and retail outlets, pirates hawk their wares door to door in residential and office buildings. They have also increased use of the Internet as a marketing medium, delivering pirate product to customers via mail or courier service.<sup>7</sup> Pirate syndicates are also beginning to shift production from conventional optical media pressing facilities to more dispersed CD-Recordable operations, including "burn-to-order" facilities. A significant percentage of pirate entertainment software in PC formats is produced in such operations rather than in larger factories. Pirate CD-R discs of music recordings are turning up more frequently in Malaysian night markets. A raid in March 2001 outside Kuala Lumpur disclosed pirate facilities with 75 CD-R burner towers containing 440 individual writers, as well as 15,000 "burned" CD-Rs containing international and local music repertoire. The estimated monthly production capacity of the raided facilities was 1.2 million CD-R discs.

Finally, Malaysia-based pirates seem to be turning not only more nimble, but also more threatening. A number of senior officials, including the MDTCA minister, provincial and municipal government leaders, state legislators, and enforcement officials, have received death threats in the mail, some wrapped around daggers.<sup>8</sup> Paradoxically, this disturbing behavior may be evidence that Malaysia's enforcement efforts are getting closer to bearing fruit. The declining prices for some pirate product could also indicate a market dump by the syndicates as they prepare to leave Malaysia for environments they perceive to be more secure from law enforcement pressure.

### **Optical Disc Act's Potential Is Yet Unrealized**

The year 2001 was a critical period for implementation of Malaysia's Optical Disc Act (ODA), enacted in 2000. The ODA's comprehensive framework for the regulation of optical media production facilities in Malaysia includes a licensing regime, under which these facilities may be inspected without warning for compliance with license conditions. Violations of these conditions may lead not only to license revocation, but also to seizure and forfeiture of the production

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<sup>7</sup> See, e.g., Ng, "Net-based illegal VCD ring busted," *The Star*, Aug. 26, 2001.

<sup>8</sup> Cheesman, "Video Pirates Make Death Threats," *Australian Financial Review*, July 31, 2001, at 10.

equipment and significant fines and jail terms. All plants must employ unique source identification (SID) codes, not only in replication operations but also in the production of masters. Regulations issued to implement the legislation impose record-keeping requirements for the inventory of optical grade polycarbonate (the key raw material for optical disc production), production runs, shipment of finished product, and production orders received, including copyright licenses or other documents relied on for authorization. When the ODA is fully implemented, Malaysia will have in place what should prove to be an effective tool in bringing much greater transparency to the operation of optical media production facilities, and in ensuring that excess production capacity is not devoted to piracy. In short, this law has the potential to provide a cornerstone for a successful enforcement effort against pirate production of optical disc products in, and their export from, Malaysia.

Unfortunately, these benefits are only beginning to be realized, because of the slow implementation schedule contained in Section 57 of the act. The first year of implementation has been hampered by a lack of transparency, mixed signals about compliance deadlines, and some problems with initial inspections under the act. Although the ODA came into force on September 15, 2000, the deadline for applying for a license to operate a production facility was March 15, 2001. Section 57 then provided a further six-month grace period before full compliance with all license conditions could be demanded. In practice, the time taken by Malaysian authorities to act on license applications further relaxed the true deadline. At least three of the 43 facilities ultimately granted licenses did not receive approval until July or August of 2001, five to eight months after their applications were received. These plants were not required to be in compliance until January or February of 2002. At the same time, a deadline of December 15, 2001 for all licensed plants to employ SID codes was announced by MDTCA and widely publicized, although its legal basis is uncertain.<sup>9</sup> The application process lacked transparency. It is unclear how rigorously applications were scrutinized; IIPA is unaware of any applicants being turned down, while it is clear that at least two plants that had been raided and found to be producing pirate product in the recent past were granted licenses anyway, despite pending piracy cases against them. One of these plants (Hong Kong CD Industries) has also retained its license despite the January 2002 confiscation of a vehicle on the factory's premises that contained 25,000 CDs lacking SID codes.

Despite the extended deadlines for compliance, MDTCA officials began inspections of licensed plants in September 2001, and reportedly some 30 inspections have been carried out. While these inspections turned up some instances of noncompliance which the plants were given two weeks to rectify, MDTCA inspectors lack the technical expertise to conduct a full investigation. For instance, inspectors were asked to obtain sample discs from each plant inspected, so that they could be tested in industry forensic labs to see if they could be correlated with pirate product seized overseas. However, MDTCA issued no protocol for the collection of these samples, so the inspectors collected damaged discs in some cases that were not suitable for forensic analysis. Additionally, the inspectors refused to turn over most of the sample discs to industry for analysis, and MDTCA itself lacks the laboratory facilities for conducting the analysis. While Malaysian authorities should be encouraged to step up their program of surprise inspections of all plants licensed under ODA, they must also exercise the authority ODA provides to require (as a condition of licensure) that plants provide sample discs at regular intervals, and to share these discs (and those collected during inspections) with industry investigators for forensic analysis. Indeed, including industry experts on the inspection teams would greatly facilitate the sample collection process. If

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<sup>9</sup> Suffian, "Dec. 15 Deadline for Zip [sic] Codes on Discs," *New Straits Times*, Sept. 6, 2001, at 6.

such inclusion is not already authorized by the ODA or its implementing regulations, then appropriate regulatory changes should be made as soon as possible.

Recently, MDTCA announced that it would station enforcement officers within the plants themselves for an indefinite period.<sup>10</sup> While this move could help to reduce noncompliance with license obligations, it is no substitute for devoting a sufficient number of well-trained inspectors to ODA enforcement and directing them to cooperate closely with industry enforcement experts in conducting inspections and analyzing the results.

The optical media production plants currently licensed include some 109 production lines. This is far more than can possibly be devoted to the legitimate production of optical media products for the domestic market or for licensed export. Not only does this counsel vigilance to prevent the licensed production capacity from being diverted to piratical purposes, it also dictates that no further licenses should be issued. Malaysian authorities have candidly acknowledged this well documented problem of overcapacity, and have apparently issued no further licenses since last summer. This policy should be formalized, and any pending license applications should be denied. The concern is particularly acute with respect to DVD production capacity. Despite an almost total lack of legitimate production orders for this format in Malaysia, five DVD production lines have reportedly been licensed, and applications are reportedly pending for an additional 10 or so production lines. These applications should be rejected forthwith.

It is still far too early to determine whether the Optical Disc Act will realize its potential in the fight against optical media piracy in Malaysia. As described below, Malaysian authorities have moved swiftly against unlicensed plants in the first few months after the application deadline passed; such enforcement efforts must be sustained. With regard to licensed plants, the enforcement record so far is less encouraging, as described below, but enforcement under the ODA itself has not yet begun. If this commendable legislation is to achieve its full potential in the fight against copyright piracy, it must be vigorously enforced, and violations must trigger deterrent penalties that will put pirates out of business and discourage others from following in their footsteps.

### **Factory Raids**

Even before the Optical Disc Act takes full effect, Malaysian authorities continue to use other laws to conduct raids against pirate optical media plants. The level of raiding activity in 2001 did not equal the track record of 2000, but did include at least five significant operations. In most of the 2001 raids, MDTCA and/or police officials not only confiscated pirate product, but seized and removed equipment and replication lines. This newly adopted enforcement tactic deserves particular commendation, since depriving pirate syndicates of the use of their production equipment is a powerful tool in discouraging them from further operations in Malaysia. In this regard, the July 5, 2001 raid conducted by censorship authorities against a facility in Batu Caves, Selangor, stands out as a disturbing exception. Although some 4,000 pirate VCDs were confiscated (including 450 copies of the current hit, "Pearl Harbor"), no arrests were made, no equipment was seized, and the plant is reported to be in full operation again. Furthermore, although the raided plant reportedly had been issued a license under the ODA, authorities have never responded to industry calls for the license to be revoked or suspended. This case demonstrates ongoing problems of lack of coordination among enforcement agencies in Malaysia.

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<sup>10</sup> "Enforcement officers at CD factories to wipe out piracy," The Star Online, January 28, 2002.

The fruits of these raids underscore the scope of the optical media piracy problem. In most of these factory raids, authorities seized not only pirate product, but also “stampers,” the masters from which tens of thousands of further unauthorized copies can be produced, either at the same plant or at another facility overseas. A plant raided in Serendah on March 28, 2001 turned out to be a new facility that had been in operation only three months, and whose capacity was in the process of being expanded. This evidence contradicts the reports that pirate syndicates are beginning to abandon Malaysia in favor of other, more compliant territories.

MDTCA should be commended for carrying out these factory raids and making these seizures, and such enforcement efforts should be continued and stepped up. But the ultimate effectiveness of these efforts remains to be seen; surely they have not yet put much of a dent in the prevalence of pirate product in the Malaysian market or in the thriving pirate export trade. MDTCA seems to regard a raid as the culmination of an investigation, and rarely follows up on any investigative leads identified during raids. This reluctance virtually guarantees that if anyone is held responsible for the operations of pirate optical media plants, it will be low-level operatives and not the criminal masterminds who finance, direct and control these facilities. Finally, as with nearly all other copyright enforcement efforts in Malaysia, none of these impressive raids has yet resulted in a criminal conviction of those responsible, much less in deterrent sentencing of anyone involved in a pirate syndicate.

### **Enforcement Resources Must Be Augmented**

The preceding narrative re-emphasizes that Malaysian enforcement authorities, particularly within the MDTCA, are ready, willing, and able participants in the fight against optical media piracy. In 2001, as in 2000, MDTCA officials at all levels remained actively engaged in anti-piracy activities, and generally responsive to the concerns of industry regarding strategy and tactics in this effort. However, it has become increasingly clear that MDTCA, as presently organized, lacks the resources and manpower to carry out the kind of sustained and intensive anti-piracy operations that are needed to bring fundamental change to the piracy picture in Malaysia. This shortfall is becoming increasingly acute as MDTCA takes on critical new licensing and inspection responsibilities under the ODA, while continuing to shoulder the bulk of enforcement responsibilities. If Malaysia is to succeed in turning the corner in the fight against optical media piracy, MDTCA needs more help than it is now getting.

There are 720 MDTCA enforcement officers nationwide. Anti-piracy enforcement is only one of their many responsibilities, which include the enforcement of a number of labeling, weights and measures, and other consumer protection statutes. Thus, at holiday seasons when there is a particularly rich environment of retail piracy targets, MDTCA agents are often engaged in other duties. Consequently, copyright enforcement tends to be sporadic rather than sustained. The decision to station MDTCA officers at each licensed optical media production facility is a further stress on the enforcement agency's resources. There is evidence that the manpower devoted to anti-piracy activities, at least on the retail level, is declining. For instance, in the past, two MDTCA officers were permanently assigned to respond to requests for anti-piracy raids from the recording industry. Now these two officers are available only twice a week. The ability to move promptly against pirates is compromised accordingly. Some other copyright industry sectors have even less access to MDTCA enforcement resources. Unfortunately, other enforcement agencies such as the police, censorship authorities and local governments also appear to be reducing their manpower commitments to anti-piracy enforcement.

A number of solutions to this enforcement shortfall deserve serious consideration. First, MDTCA should establish an enforcement team of officers dedicated exclusively to copyright piracy and ODA matters, as it has long done for other statutes under its enforcement jurisdiction. Second, as the demands on MDTCA under the ODA increase, other agencies must shoulder more of the anti-piracy load. Besides national enforcement agencies, reliable and experienced local authorities should be given joint responsibility and tasked to handle more of the retail level enforcement operations. National enforcement agencies should be encouraged to carry out operations on a cross-border basis to minimize the risk of corruption and local favoritism. Third, as discussed below, MDTCA should be relieved of some of the burden of prosecuting piracy cases, in favor of better qualified prosecutors from the Attorney General's Chambers. Finally, it seems obvious that MDTCA simply needs more and better trained manpower in order for it to achieve more significant results in the fight against copyright piracy.

One initiative which MDTCA has supported over the years is the campaign against end user piracy of business software applications. BSA works closely with the MDTCA enforcement division, and jointly carried out five successful raids against corporate end-user pirates in Kuala Lumpur, Penang and Kuching in 2001. The MDTCA has cooperated closely with industry, maintains good lines of communication with the private sector, and has consistently demonstrated a willingness to seek the industry's views. In 2001, building on the successful Crackdown 2000 campaign, this cooperation resulted in a successful anti-piracy awareness and software legalization campaign in Penang, which included the sending of about 30,000 general warning letters from the MDTCA Enforcement Division and the delivery of 130 specific warning notices to companies, in addition to MDTCA newspaper advertisements, and random checks of offices nationwide. Nevertheless, MDTCA assistance simply scratches the surface of the widespread problem of end-user business software piracy. The Malaysian government needs to recognize its responsibility to allocate sufficient resources to MDTCA for this critical enforcement task. MDTCA must also be more proactive in undertaking enforcement against high profile company directors for end-user piracy within their organizations. There also needs to be an increased focus on end-user software piracy through awareness campaigns to supplement enforcement activities.

Despite these shortcomings, in tackling the problem of end-user business software piracy, the Malaysian government has shown over the years that it is willing to devote resources to joint industry-government programs, and has achieved some positive results. By contrast, in the campaign against the production, distribution and export of pirate optical media products, there is a growing mismatch between the responsibilities allocated to MDTCA and the resources and manpower available to it to fulfill these responsibilities. This mismatch must be corrected as soon as possible.

### **Bottlenecks in the Criminal Justice System Must Be Addressed Now**

Despite all the raids and seizures, none of the enforcement activity carried out over the past year, either at the retail or the factory level, has had much of an impact on Malaysia's pervasive optical media piracy problem. The main reason for this failure is that raiding has almost never been followed up by active prosecutions, much less with the imposition of deterrent penalties on violators. This is the fundamental flaw in Malaysia's anti-piracy effort, compromising all its progress on other fronts, and Malaysian authorities have barely begun to address it.

The disheartening statistics mirror those reported in prior years. In some respects they are worsening. In 2000, MDTCA asked the recording industry to submit documentation in 67% of the cases arising from raids, indicating that criminal charges were under consideration in those 94 cases. In the first nine months of 2001, documentation was requested in 177 cases, but this represented only 62% of the 284 raids carried out. More disturbingly, prosecutions were actually initiated in only four of these 284 MDTCA cases. In the 31 raids carried out by the police, not a single criminal prosecution had been initiated as of September 20, 2001. While these statistics may not account for all cases – some could have been disposed of with nominal fines under labeling laws before industry documentation was even requested – they are fully consistent with the longer term trends. Indeed, of 400 music piracy cases under consideration for prosecution since 1997, only 20 resulted in charges and only four of these have been concluded. The number of piracy convictions over the past decade can be counted on the fingers of one hand. Again, there may have been guilty pleas and nominal fines in some additional cases, but enforcement officials do not keep right holders apprised of case progress and the status of many prosecutions is simply unknown. MPAA's report is similar, if slightly more encouraging; only four of the 28 raids it initiated in 2001 have been brought to court.

Retail pirates have come to rely on the endemic delays in the Malaysian courts. In the overwhelming majority of cases, vendors remain free to ply their trade for many months before being called to court. Any contested case routinely takes at least three years to come to trial. In the end, any punishment imposed against retail pirates is for labeling violations under the Trade Descriptions Act, which brings only a nominal fine. Under these circumstances, the pirate syndicates in charge of optical media piracy in Malaysia seem fully prepared to treat the loss of inventory in raids, and the occasional administrative fine imposed under price control or labeling laws, as an acceptable cost of doing business.

Unfortunately, even in more consequential cases, if prosecutions were brought, there is little basis for optimism that the Malaysian court system would process them promptly, or that deterrent penalties would be imposed on convicted pirates at the end of the process. The judicial system has never been able to deliver these results, even before the onslaught of optical media piracy began in Malaysia a few years ago. The verdict rendered in June 2001 in a case arising from one of the early raids on a pirate optical media plant – in December 1997 – exemplifies the problem. In this high profile case, 2,500 pirate CDs and VCDs were seized on the premises of Hong Kong CD Industries in Selangor. Three and one-half years later, the defendant's sentence was based on 300 pirate music CDs and 700 illegal VCDs. For these 1000 illegal copies, the fine imposed was only RM 100,000 (US\$26,300). Additionally, all seized machinery was returned to the defendant so that the pirate plant could resume operation. No one was sent to jail. While the government did appeal for a tougher sentence (that appeal is still pending), the outcome in the trial court falls far short of deterrence.<sup>11</sup>

At least the Hong Kong CD case ultimately was concluded. That cannot be said about the vast majority of the most serious cases, those arising from raids against illegal CD plants. None of the raids that have occurred since March 2001 has yet resulted in the filing of any charges.<sup>12</sup>

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<sup>11</sup> As noted above, Hong Kong CD was also issued a production license under the ODA despite the pendency of this prosecution.

<sup>12</sup> Nor has any prosecution resulted from the March 2001 raid, described above, on the massive CD-R production facilities outside the capital.

Indeed, cases arising from factory raids that took place in 1998 have not yet come to trial. In many of these cases, production equipment seized at the time of the raid has been returned, and, as noted above, at least two of these defendants were issued licenses under the ODA to produce optical media products, even though the piracy cases against them remain pending.

Bottlenecks plague the entire criminal justice process in Malaysia. After a raid is carried out, MDTCA investigators or police must prepare the case before charges can be filed. The vast majority of copyright cases are stalled at this point in the process; they fall to the very bottom of the huge investigative docket assigned to these overburdened officials.

The processing path for piracy cases in Malaysia is bifurcated, depending upon whether the police or MDTCA conducted the raid giving rise to the charges. The MDTCA pathway is hopelessly backlogged. An internal directive gives state offices of the MDTCA 21 days to present the case to the Attorney General's Chambers for consent to proceed with a prosecution. This deadline is almost never met. Even in cases in which this consent is obtained, the case is then turned over to a MDTCA prosecuting officer. These officials are not legally trained; in some cases they are simply investigating officers or office administrators who have been assigned to this duty. MDTCA prosecuting officers generally lack the skills to handle complex legal questions, a fact that is well known to defendants and their counsel. Accordingly, MDTCA officers are under considerable pressure to resolve piracy cases under price control or labeling statutes, which avoids complex legal issues but which results in purely nominal penalties. Cases originated by the police may fare better because they are handled by prosecutors in the Attorney-General's Chambers who have law degrees. Even here, long delays are the norm, and only a tiny minority of cases (3 out of 64, by the recording industry's reckoning, between January 2000 and September 2001) result in formal charges.

Any case that survives this gauntlet, and which can weather a succession of additional delays in the judicial process, is ultimately brought before a court which is almost always unfamiliar with the copyright law. Here the MDTCA-prosecuted cases are once again disadvantaged. For example, under a recent amendment to Section 42 of the Copyright Act, prosecutors may employ an affidavit procedure to prove the subsistence and ownership of copyright in a piracy case, thus dispensing with the need for live testimony and cross-examination on this generally indisputable issue. However, many judges ignore the statute and allow defendants to insist on live testimony and cross-examination of the party submitting the affidavit, thus defeating the purpose of the amendment. Untrained MDTCA prosecutors are in no position to stop this manhandling of the copyright law. Nor are they effective in persuading judges of the need to impose deterrent sentences, even in the handful of cases which actually proceed to that stage. Finally, cases prosecuted by MDTCA are almost never appealed because the prosecuting officers lack the expertise to do so.

None of these problems is at all new, but the Malaysian government's failure to address them can no longer be tolerated when it puts at risk the future of the entire campaign against optical media piracy. Nor is it impossible for the Malaysian court system to surmount them; indeed, there are some isolated examples to the contrary. For instance, in the only prosecution to date arising from a factory raid carried out during 2001, the charges involving the Pyramic Point plant in Penang were filed on March 23, one day after completed documentation was received from the Motion Picture Association, and less than two months after the raid occurred. The case was then processed efficiently at the trial level and an appeal was promptly docketed and is

scheduled to be heard in February 2002. Malaysian authorities should strive to make such prompt processing the norm and not the (rare) exception.

Bottlenecks in BSA cases are also a problem. No end-user business software piracy case arising in the past five years has been successfully resolved in the Malaysian courts other than by a plea of guilty. The lack of competent and well trained prosecutors exposes these cases to delays. Nevertheless, there have also been some bright spots. Well trained prosecutors are being assigned to more end-user software piracy cases. In one particular end user case dating back to a raid in 1997, the MDTCA has actively pursued the prosecution with prosecutors trained by BSA. The case, which began in 2001, is still in the courts though a result is anticipated by this summer. In addition, in May 2001 a Malaysian court handed down the toughest sentence yet in an end-user software piracy case, including a fine amounting to RM5000 (US\$1300) per infringing copy. Still, BSA cases are far from immune to the delays and other problems plaguing other piracy cases. Prosecutions remain pending in 8 of 10 corporate end user piracy cases brought in 2000–2001. One of the cases disposed of this year was initiated in 1995, and resulted in a fine of only RM500 (US\$130) per infringing copy. Another pending case from 1997 is still unresolved, and in cases arising from raids as long ago as 1998, formal charges have not yet been filed. The pending criminal case against a company director for end-user business software infringements occurring in the company has not yet been resolved.

Clearly the systemic problems plaguing the Malaysian prosecutorial and court systems call for a systemic solution. IIPA calls for immediate adoption of at least the following reforms:

- A specialized unit of qualified and trained Public Prosecutors within the Attorney General's Chambers should handle all copyright piracy cases, or at least all those involving production, wholesaling, warehousing, or high-volume retailing of pirate optical media product, or corporate end-user piracy of business software. This unit should be assigned all such cases, whether arising from MDTCA or police raids.
- Both MDTCA and the Attorney General should issue directives to their respective prosecution teams requiring all copyright piracy cases to be filed in court within four weeks of the receipt of complete documentation from rights owners. Prosecution teams should be held accountable for failure to meet this deadline.
- A directive should be issued to the specialized copyright prosecuting unit, requiring them to bring section 42 procedures to the attention of all courts, and to appeal all cases in which courts require live testimony or permit cross-examination of deponents where the subsistence or ownership of copyright is not genuinely in issue.
- Prosecutors should be further instructed to appeal any case in which insufficient penalties have been imposed. The instruction should contain a numerical guideline for different types of piracy cases, which at a minimum should be set at RM 5000 per infringing copy in cases involving unlawful production of optical media products, as well as a jail term of less than six months in such cases.
- Company directors should be charged as a matter of course for end-user business software piracy within their organizations. Prosecutors should be instructed to seek sentences of imprisonment in such cases and to appeal them when such sentences are not imposed.
- Immediate consideration should be given to establishing a specialized intellectual property court, or otherwise ensuring that significant piracy cases are assigned only

to judges who are properly trained and experienced in handling such cases. Malaysia's ASEAN neighbor Thailand has had considerable success in using a specialized court to resolve seemingly intractable problems similar to those Malaysia has long experienced, including huge case backlogs. This model, among others, should be studied to see how it could most expeditiously be adapted for the Malaysian legal environment.

Optical media piracy will continue to flourish in Malaysia, despite the government's vigorous efforts to suppress it, until the crimes committed by the syndicates and their operatives are efficiently, swiftly, consistently, and publicly punished. This means that a significant number of prosecutions of substantial participants in the criminal enterprise – including replicators, distributors, exporters and the largest retailers – must be commenced promptly after raiding; that the cases must be processed fairly and expeditiously; and that deterrent sentences, including jail terms, must be imposed upon those found guilty. Corporate end-user software piracy must be prosecuted and punished with similar efficiency and deterrent effect in order to make significant progress against this problem as well. The quantity and quality of prosecutions of optical media pirates and corporate end-use pirates of business software, measured by these criteria, should be the predominant factor in Malaysia's ultimate placement in the Special 301 hierarchy.<sup>13</sup> The concrete steps outlined above must be put in place promptly as a token of Malaysia's commitment to solve this problem.

## **Export**

One of the most injurious characteristics of Malaysian optical media piracy is that the criminal syndicates operating there are producing primarily, or at least substantially, for export, not just for the domestic Malaysian market. No legal attack on these production facilities will succeed overnight, and consequently Malaysian authorities must act much more aggressively to interdict the exports which are leaving Malaysia in huge volumes, including shipments originating in overnight courier facilities.

Seizure of pirate optical media exports and the arrest of leading pirate exporters should be a top priority for enforcement officials in Malaysia. If new regulations need to be issued to implement this priority, that should be done as soon as possible. U.S. government training resources should be made available to customs officers; the private sector stands ready to offer training as well. Malaysian officials should also respond promptly to investigate seizures of pirate product originating in Malaysia, of which they are notified by customs officials in other countries, including the U.S.

## **Conclusion**

Optical media piracy remains a plague that closes Malaysia's market to most legitimate trade in copyrighted materials and that blights the country's international reputation. With the coming into force of the new Optical Disc Act, most of the legal tools needed to combat this plague are now in place. It is enforcement – vigorous and sustained enforcement of copyright, censorship, licensing, revenue and customs laws – that is now urgently needed. This must be backed up by

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<sup>13</sup> The problems of judicial bottlenecks and the absence of deterrent sentencing have also undermined enforcement against book pirates, as discussed below, and similar solutions are required in order to make progress in this sector.

courts that process cases expeditiously and that demonstrate their willingness to impose deterrent sentences on commercial optical media pirates. Only in this way can Malaysia effectively suppress this organized criminal activity, which tarnishes the country's image of leadership in the development of the global electronic commerce marketplace.

## **BOOK PIRACY CONTINUES UNABATED**

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Aside from the widespread piracy of reference material and other literary works in optical media formats, as described above, U.S. book publishers face continued illegal photocopying of college textbooks, computer-related books, and scientific/technical/medical (STM) texts in and around universities in Malaysia. The problem is compounded by the fact that university officials condone the illegal activity.

The same problems that optical media piracy cases encounter in Malaysian courts also face book piracy cases: unwarranted delays and extremely low fines. Although successful book piracy raids against piracy of U.S. books were carried out in 1997, 1998 and 1999, there has been no court action on any of them yet. No new book piracy convictions were reported in 2001, and the results obtained in the previous year (in cases arising from raids in 1996) fell far short of the level of penalties needed to deter a pirate commercial photocopying operation. Similarly, some prosecutions arising from raids against book pirates dating back to June 1996 have not yet been resolved, and the Association of American Publishers (AAP) reports that prosecutions have not even been initiated in any of the three raids against book pirates conducted in Gelugor, Penang in 1998. In those cases that do result in prosecutions, courts should permit the introduction of a photo-ready copy of a pirated book, rather than the original book itself, as evidence in infringement cases, and should avoid unnecessary demands for testimony to prove copyright ownership and subsistence when those questions are not genuinely put in issue.

Unfortunately, Malaysian enforcement authorities have not been as responsive to enforcement requests from publishers as they have been in the optical media environment. In the only raid carried out in 2001 against illegal copy shops, MDTCA officers raided only six of the 12 targets identified by industry investigators. However, they did confiscate photocopying equipment used for piratical purposes.

AAP estimates that book piracy in Malaysia accounted for \$8.2 million of losses to U.S. publishers in 2001.

## **COPYRIGHT LAW REFORM**

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Spurred by a desire to enhance the attractiveness of its Multimedia Supercorridor to high-tech investments, Malaysia took a number of steps in the late 1990s toward updating its copyright laws to meet the challenges of the Internet era; but since then, its modernization efforts seem to have stalled. On April 1, 1999, amendments to the Copyright Act adopted two years earlier were brought into force. These amendments implement in Malaysian law some of the standards contained in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), such as recognizing that the copyright owner's exclusive right of communication to

the public embraces the right to make works available on demand (as via the Internet). However, other treaty requirements, such as the protection of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. As a country seeking to play a leadership role in the global electronic marketplace, Malaysia should ratify both treaties immediately, and should complete work on statutory amendments to fully implement all aspects of both treaties as soon as possible. These goals are especially urgent now that the WCT and WPPT are coming into force and thus are assuming the status of international minimum standards for the e-commerce environment.

Section 41 of the Malaysian Copyright Act authorizes punishments that, if consistently applied, could be sufficient to deter commercial copyright piracy (fines of RM 10,000 [US\$2600] per infringing copy, and/or five years' imprisonment, with a doubling for repeat offenders). However, these punishments are never imposed at anything close to a deterrent level. To solve this problem, Malaysia should consider amending the law to provide minimum sentencing levels. Any alternative means of achieving this objective, such as through the issuance of enforceable sentencing guidelines, should also be explored.

Legislation enacted in 2000 removed one legal roadblock in the path of effective prosecutions against copyright piracy. As noted above, Section 42 of the Copyright Act was amended to clarify that affidavits from local agents of the copyright owner are sufficient to establish prima facie the subsistence and ownership of copyright; however, in those rare instances in which it has been tested in an actual prosecution, some judges have ignored it. A case in which Section 42 was properly applied by the trial court to ease the documentary and testimonial burden of proving an infringement case involving an Indian film is now before the High Court on appeal. The outcome of that appeal, expected this year, could determine whether it is necessary to enact a further amendment to achieve the purpose of the 2000 legislation.