

BRUNEI DARUSSALAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Brunei Darussalam should be placed on the Priority Watch List.

Executive Summary: While having the seventh highest per capita income in the world (purchasing power parity of \$51,600 as of 2007),¹ piracy still dominates this small country, costing the copyright industries virtually the entire market there. Piracy levels remained among the highest in the world in Brunei. Reports indicate that, despite repeated requests by legitimate industry (and the U.S. government) for remedial action, the situation worsened in 2008, with more retail stores engaging in piracy (at least 52 compared with 46 in 2007) and export piracy to Malaysia. Both factory optical discs and "burned" CD-Rs are readily available throughout the country. The government in Brunei has done little in response to the problem despite full knowledge of it. Brunei boasts Internet penetration of more than 46%, thus, the problem of Internet piracy has grown, with service providers doing little to cooperate to ensure people are using legitimate product. The United States has announced that it will negotiate a free trade agreement with Brunei, as part of the Trans-Pacific Strategic Economic Partnership Agreement. To demonstrate its commitment as a good trading partner deserving of the benefits of a free trade agreement with the United States, the government of Brunei Darussalam should take needed steps to ensure that this highly developed and prosperous country can overcome its label as a piracy haven.

Priority Actions Requested in 2009: IIPA requests the government in Brunei to take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

- Have the Commercial Crime Unit (CCU) commence a sweep of the pirate retail markets in Brunei, including *ex officio* and *ex parte*, and develop capacity in a core of officers responsive to industry concerns and complaints lodged by right holders.
- Have the Attorney General's chambers, in conjunction with CCU and Police, develop target cases for court against those engaged in commercially damaging pirate activity.
- Develop a cohesive course of action with cooperation between the Police, Customs, licensing authorities and other government bodies to enable swift and targeted action against pirates.
- Establish effective enforcement practices for the Internet. This should include amendments to the Electronic Transactions Order (2000) to provide for service provider responsibility for copyright infringements and therefore to promote service provider cooperation with right holders to halt illegal activity in the online space.
- Initiate education programs to apprise students and businesses of their obligation to respect intellectual property rights. This should include support from the Ministry of Education for programs in the schools to promote IP awareness.

¹ See *World Factbook*, Brunei, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.

BRUNEI DARUSSALAM				
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2007-2008 ²				
INDUSTRY	2008		2007	
	Loss	Level	Loss	Level
Business Software	NA	NA	NA	85%
Motion Pictures	NA	NA	NA	95%
Records & Music	2.4	100%	2.4	99%
Books	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA
TOTALS	2.4		2.4	

PIRACY CHALLENGES IN BRUNEI DARUSSALAM

Retail Optical Disc Market Virtually 100% Pirate: Pirate optical discs containing music are openly offered for sale in retail outlets. Despite meetings and correspondence between industry and the Attorney General's Chambers and the Royal Brunei Police beginning in June 2008, the number of retail outlets identified selling pirated audio products has grown to 52, up from 46 in 2007. Local (Malay) and international repertoire are widely available in the music stores in Brunei, and as a result, local record companies in Brunei report no revenue – a completely lost market due to piracy and lack of enforcement. For all optical media products, an estimated 75 to 200 retail shops sell pirate product at fixed locations throughout Brunei. The capital, Bandar Seri Begawan, and its metropolitan area, host the largest number of these shops. The Brunei music market is 99.9% pirate – this includes both physical and digital (Internet and mobile music) formats. Recent checks by the Recording Industry of Malaysia (RIM), which also represents American record companies in Brunei, reveal that there are no legitimate RIM members' physical music products available in the Brunei market. The loss to the local industry due to retail piracy alone is estimated at \$1.71 million. In particular, the cities and main towns covered in the survey included Bandar Seri Begawan, Tutong and Kuala Belait. The local Brunei press has recently reported on the growing magnitude of this problem.³

Pirate DVD-Rs and VCDs locally "burned" on recordable discs are ubiquitous. Certain titles have been offered in the same shop in three different formats: cellophane sleeved CD-Rs for B\$3 (approximately US\$2.00), boxed DVD-5s offered for B\$8 (slightly more than US\$5.00) and high-quality deluxe packaged DVD-9s for B\$20 (slightly more than US\$13). Compression technologies have resulted in multiple title DVD compilations (e.g., 4-in-1) becoming more common.

Growing Internet and Mobile Device Piracy: Brunei boasts Internet penetration of 46.2%, as over 176,000 of its nearly 381,000 inhabitants now have Internet access.⁴ With slightly over 11,000 broadband users, major Internet piracy by the populace has slowly emerged. For example, all digital music used in Brunei, including by downloads and ringtones, is to our knowledge entirely illegal. There were more than 400,000 mobile subscribers at the end of 2008 based on estimates provided by the two major cellular communications companies in Brunei. Lost mobile revenue to the music industry, based on an estimated 7.5% of total mobile subscribers purchasing monthly ring back tone subscriptions for 2008, was US\$700,000. RIM also remains unaware of any legal site offering Malay or international repertoire for sale. A new project to provide broadband via underwater cabling will bring greater connectivity in the future.⁵ The Authority for the Info-Communications Technology Industry (AiTi)⁶ should ensure that with the development of broadband comes an increased awareness of the need to enforce rights in the online space. In addition, to date, Brunei Internet service

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Brunei. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Brunei Darussalam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

³ Faez Hani, *Deluge of Pirated DVDs Wipes Out Original Stuff*, Brunei Times, February 2, 2009, at http://www.bt.com.bn/en/home_news/2009/02/02/deluge_of_pirated_dvds_wipes_out_original_stuff.

⁴ See *Internet World Stats*, at <http://www.internetworldstats.com/asia.htm#bn> (information sourced to Brunei's Authority for Info-communications Technology).

⁵ Hadi Dp Mahmud, *Wider Broadband Wireless Access Soon*, The Brunei Times (online), November 25, 2008.

⁶ The Chairman of AiTi is also the Permanent Secretary of the Ministry of Communications, Hj Alaihuddin Pehin Orang Kaya DiGadong Seri Lela Dato Seri Utama Hj Mohd Taha.

providers have not cooperated with right holders, in part likely due to the fact that they are quasi-government entities related to AiTi.

Pirate Exports: Of great concern, RIM discovered from joint operations with Malaysian authorities that pirates in Brunei produce discs for export, transported by road to the towns of Miri and Limbang in Sarawak, Malaysia (on the island of Borneo). Thus, not only is the Bruneian market wholly controlled and operated by infringers, but it also contributes to the availability of pirated products in neighboring markets such as Malaysia.

ENFORCEMENT CHALLENGES IN BRUNEI DARUSSALAM

Lack of Government Will: The government of Brunei has heretofore not succeeded in solving the piracy problem mainly due to the apparent lack of government will to do so. The chief enforcement offices in Brunei, the Royal Brunei Police (principally responsible for enforcement of copyright), the Royal Customs and Excise Department (enforcement jurisdiction over imports and exports), and the Attorney-General's Chambers (jurisdiction to take criminal prosecutions), are all well aware of the piracy situation, and know the names and addresses of the key pirate enterprises. Police can technically take actions *ex officio* as well as *ex parte* under the law but simply choose not to do so. This inaction has resulted in an increase in the number of pirate outlets in Brunei over the past year. All enforcement avenues do not get explored to eradicate piracy from the markets; for example, in addition to the Copyright Ordinance, the authorities could employ the licensing authority laws to revoke licenses of the shops providing pirate materials. Despite assurances of support, the Bruneian authorities have shown a complete unwillingness to undertake criminal enforcement actions even when complaints have been made.⁷ In addition, a plan proposed by the Brunei authorities to persuade shop owners to convert to legitimate product has produced no results.

Another abiding problem has been the unresponsiveness of the government to industry attempts at communication and cooperation. In 2008, the Attorney General's Chambers took four months to acknowledge receipt of RIM's complaints against specific piracy targets. Pursuant to advice from the government of Brunei, RIM issued warning letters to all known pirate outlets, with copies to the Attorney General's Chambers. However, there has been no response from the Attorney General's Chambers or the Police regarding these warning letters. Letters sent to the Brunei government by fax or email (with the local music industry contact person and particulars clearly stated) regularly receive delayed responses – it is commonplace for the government of Brunei to respond by regular air mail more than a month after receipt of an industry complaint sent by fax or e-mail. Industry remains hopeful, however, that the channels of communication can remain open and should be sped up significantly for an improved relationship of greater mutual cooperation. Past cooperative efforts between industry and the Police and Attorney General's Office toward joint raids against identified targets were effectively compromised by unduly excessive delays and the suspected leaks of information to the targets, all of whom were either closed or cleared of pirate product by the time the warrants were put into effect.

On a brighter note, in September 2008, cooperative efforts between industry, the Police and the Attorney General's Chambers brought about the first ever raid against corporate end-user piracy in Brunei. While the raid was apparently successful, there has yet to be any announcement regarding prosecution of the alleged offenders. IIPA looks forward to appropriate follow-up in this case.

Government Role in Piracy: There are allegations that the pirate syndicates which own and run pirate retail outlets have links or close ties with the government of Brunei, further complicating enforcement efforts. The compromised raids noted above create a possible inference that such issues are at play, and IIPA believes any such issues that exist must be overcome to successfully defeat piracy in the country. In the Internet environment as well, it appears that Internet service providers believe that they are well-situated and need not cooperate with right holders. At the same time, to the

⁷ The Attorney General, Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli, has claimed that "sufficient resources have been allocated to combat piracy, in the enactment of appropriate laws and the provisions of dedicated officers in the police force and customs to meet current needs," but that since "few copyright holders are present in Brunei Darussalam," there are "evidential and procedural problems to relevant enforcement agencies and prosecutors wishing to initiate appropriate action." See Hadi DP Mahmud, *Piracy: AG Explains Weak Enforcement*, Brunei Times, March 19, 2008, at http://www.bt.com.bn/en/home_news/2008/03/19/piracy_ag_explains_weak_enforcement. Industry may not be permanently present in Brunei, but has on many occasions indicated a willingness to be there for the AG for purposes of assisting with evidence and procedure as needed to bring prosecutions.

extent illegal actors are willing to legitimize their business practices and go legitimate, industry supports such efforts, and the government's position should be to require legalization of all copyright practices or face stern enforcement.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect May 2000. The Ordinance provides the necessary tools to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The Ordinance also addresses key Internet issues (such as those in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), like temporary copies, a WIPO treaties-compatible definition of "communication to the public" including an interactive "making available" right, and prohibitions against trafficking in devices which circumvent technological protection measures (TPMs), although the TPM provisions do not fully implement the WCT and WPPT requirements.

Brunei has a content review law administered by the Board of Review which empowers the Board with *ex officio* authority to impose severe penalties against anyone who issues a theatrical film or work intended for public performance without authorization of the Board. The law, however, is presently limited to films (and other works/performances) that are intended for public exhibition and does not presently extend to home video products.

Trans-Pacific Free Trade Agreement (TransPac FTA) Negotiation Launched: In late September 2008, U.S. Trade Representative Susan C. Schwab and Ministers of the Trans-Pacific Strategic Economic Partnership Agreement (known as the P-4 Agreement), including Brunei Darussalam, Chile, New Zealand, and Singapore, announced the launch of negotiations for the United States to join the comprehensive Trans-Pacific Strategic Economic Partnership Agreement.⁸ In November, Peruvian media reported that Peru and Australia announced their intention to join in the Trans-Pac FTA negotiation, and Vietnam has reportedly also expressed an interest in joining.⁹ The Ministers agreed to hold the first round of Trans-Pac FTA in March 2009. In March 2008, the U.S. began limited negotiations with the P-4 partners on the outstanding Financial Services and Investment chapters. Opportunities will arise to introduce intellectual property standards similar to those included in the free trade agreements (FTAs) negotiated between the United States and several trading partners, including (among the group) Singapore, Chile, Australia, and Peru. IIPA supports this process and hopes that the government of Brunei (as well as that of New Zealand) will be prepared to negotiate FTA standards on intellectual property similar to those in force in Singapore, Chile, Australia, and Peru. IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

Electronic Transactions Ordinance Should be Amended to Foster Service Provider Responsibility: The Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under Section 10 of the Order, "A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material." Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a "written law or by a court to remove, block or deny access to any material." The Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to make service providers responsible for infringements transmitted over their networks where they fail to act responsibly and should also provide mechanisms to foster cooperation including notice-and-takedown.

TRAINING AND PUBLIC AWARENESS

Several training activities were carried out in 2008 to build capacity in Brunei government officials on the issue of piracy, and to raise awareness about the severity of the problem:

⁸ United States Trade Representative, *Trans-Pacific Strategic Economic Partners and United States Launch FTA Negotiations*, September 22, 2008, at http://www.ustr.gov/Document_Library/Press_Releases/2008/September/Trans-Pacific_Partners_United_States_Launch_FTA_Negotiations.html.

⁹ U.S., *Peru, Australia to Join TransPac Free Trade Talks*, November 22, 2008, at http://news.xinhuanet.com/english/2008-11/22/content_10394641.htm. See also *Trans-Pacific FTA: Australia, Peru, Vietnam Want to Join the Mega Trade Pact*, ASEAN Affairs.com, September 24, 2008, at http://www.aseanaffairs.com/page/trans_pacific_fta_australia_peru_vietnam_want_to_join_the_mega_trade_pact.

- On June 7, 2008, the United States government sponsored a training session in Brunei at the Kyoto Theatre of the Royal Customs and Excise Department. Participants from the government of Brunei included the Acting Controller of Customs and Excise, and nearly 50 officers from the Attorney General's Chambers, the Royal Brunei Police Force, the Ministry of Communications, the Ministry of Health, the Ministry of Foreign Affairs and Trade, and the Royal Customs and Excise Department. Local music industry representatives participated as well, covering topics such as border measures, how to identify pirate product, and how to run a successful enforcement action in Brunei.
- On June 24, 2008, the Business Software Alliance conducted a training entitled "Business Optimisation with Good Governance and Staying Compliant with Software Asset Management," in cooperation with the Attorney General's Chambers, the Authority for Info-Communications Technology Industry (AiTi), the Ministry of Communications, the Royal Brunei Police Force and the Brunei Darussalam International Chambers of Commerce and Industry. At the conference, a BSA representative disclosed that 66% of all software used on Brunei PCs is pirate, with the industry hardest hit by small and medium sized businesses that use unlicensed software, and consumers and resellers who engage in "hard disk loading."
- The "Commonwealth" judicial system in Brunei opened its "Legal Year" in March 2008 with a ceremony in the capital, Bandar Seri Begawan, at which the Attorney General "encouraged right holders in the sultanate to use border enforcement measures to deter imports on infringing materials," but at which many advocated for more educational programs and public awareness programs.¹⁰
- An informal website poll conducted by The Brunei Times in November 2008 revealed that a majority of Bruneians (78% of respondents) believe strict enforcement and more public awareness is needed in the country to fight piracy.¹¹ The poll also revealed that most respondents believe there is a moral dimension to piracy in Brunei, and equate it with theft, which they believe is wrong and should be eradicated.

¹⁰ Hadi DP Mahmud, *Border Enforcement to Fight Piracy in Intellectual Properties*, The Brunei Times, March 24, 2008, at http://www.bt.com.bn/en/home_news/2008/03/24/border_enforcement_to_fight_piracy_in_intellectual_properties.

¹¹ *Locals Call for Measures to Curb Piracy in Brunei*, The Brunei Times, December 2, 2008, at <http://www.fmprc.gov.cn/ce/cebn/eng/wlxw/1524563.htm> (e.g., "[p]iracy, said many locals, can erode the country's status from a place of natural beauty to one that sells cheap DVDs")