

# SINGAPORE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Singapore during 2012 with respect to the issues discussed in this Special Mention report, and urges that USTR heighten its bilateral engagement with Singapore on the following priorities.

**Executive Summary:**<sup>1</sup> While the copyright law and enforcement provisions of Singapore's Free Trade Agreement with the United States, which came into force in 2005, have been largely successful, several significant shortfalls must be addressed. Online piracy continues to threaten Singapore's market for copyright works, especially music, movies, and television programs. The government's response to date remains clearly inadequate, both in terms of its continued refusal to bring public prosecutions of online music pirates, and its failure to bring Internet Service Providers into a cooperative stance with rights holders to combat online piracy. Both these shortfalls also raise serious FTA compliance issues. Singapore also should join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious, and should consider upgrading (to deterrent levels) its criminal penalties for trafficking in circumvention devices and services.

### **ACTIONS THAT THE SINGAPORE GOVERNMENT SHOULD TAKE IN 2012**

- Fulfill its FTA obligations by bringing public prosecutions against significant instances of online music and audiovisual piracy.
- Engage with ISPs to make responsible repeat infringer policies a regular feature of the landscape, and otherwise to encourage cooperation with right holders to combat online piracy.
- Adopt a more aggressive stance in combating sales of pirate music at temporary trade fairs, and improve enforcement against imports of piratical music CDs.
- Adopt legislation specifically outlawing camcording in Singapore cinemas, and facilitate online enforcement by rectifying through legislation the deficiencies identified by Justice Woo in the *Odex* decision.
- Consider increasing criminal penalties for trafficking in circumvention devices and services such as "game copiers" and "mod chips" for game consoles.

### **COPYRIGHT LAW AND ENFORCEMENT ISSUES**

2012 marks seven years since Singapore's landmark Free Trade Agreement with the United States FTA, and specifically since its copyright law and enforcement obligations came into force. For the most part this agreement has been a success for the copyright industries. Unfortunately, in some key areas, the full potential of this pact is far from being achieved. Singapore is also falling behind global anti-piracy trends in at least one other area not directly addressed by the FTA – camcording. IIPA urges the U.S. government to focus its efforts in the following areas during bilateral discussions with Singapore in 2012:

**Active Engagement Needed in Enforcement Against Online Piracy.** The recorded music marketplace in Singapore is under serious stress. Sales of physical product (CDs) is in free fall, with 2010 revenues less than half

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<sup>1</sup>For more details on Singapore's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf> as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



what they were just four years earlier. Many labels, both international and local, as well as the major international music publishers, have drastically cut back their Singapore offices, or ceased operations there altogether. The retail market has been decimated, and wholesale operations no longer exist in Singapore.

Of course, in Singapore more than in almost any other market, access to music online or via mobile device is a key factor in the demise of the hard-goods marketplace, as the household broadband penetration rate has soared from 42% in 2004, to just under 100% in 2008, to an unsurpassed 192% in 2010. Mobile phone penetration levels are similarly elevated (144% in 2010).<sup>2</sup> Unfortunately, the vast majority of that online or mobile access is to infringing material. In this highly connected, technologically savvy city-state, online music piracy is thriving, notably via infringing distribution hubs, illegal streaming sites, and BitTorrents and other peer-to-peer (P2P) file sharing. Online piracy has not only decimated the legitimate hard-goods market; it has also crowded out licensed download services and digital music stores.

The recording industry reports increasing P2P filesharing infringements via Bit Torrent (BT) networks. For example, in August 2011 there were over 500,000 unique visitors from Singapore to the top 10 Bit Torrent sites. Even more noteworthy is the fact that unique visitors from Singapore to the top three BT sites i.e., PirateBay, Torrentz.eu and Isohunt.com, accounted for about 12% of the total internet audience in Singapore. Furthermore, infringing distribution hubs (or cyberlockers) continue to account for a large proportion of online infringement in Singapore. From January through August 2011, over 44,000 links to infringing material stored in cyberlockers were tracked in Singapore by the recording industry. The top 10 cyberlockers were the destination for over 90% of these infringing links, which are causing irreparable damage to the recording industry.

Prevalent online piracy in Singapore also injures the audio-visual sector. The Motion Picture Association (MPA) reports that Singapore has the highest incidence of per-capita P2P infringement of motion pictures of any territory in Asia, and that illicit streaming sites located outside Singapore also attract large audiences for pirate performances. MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 3.7 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Singapore.<sup>3</sup>

The response to date of the Singapore government to these depredations can best be described as passive. In the online arena, the music industry has been filing complaints with the Intellectual Property Rights Branch (IPRB) of the Singapore police since 2005. These have led to the issuance of a handful of warning letters from government enforcement agencies, with no action whatever in the vast majority of cases. In fact, the music industry reports that the last public prosecution by Singapore authorities for distributing pirate digital files over the Internet arose from an arrest in 2005 and a conviction in 2006. There have been no prosecutions since then.

The IPRB informed the industry in July 2007 that it would not be taking any action on these complaints and suggested that “collaborative enforcement” was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings. Following a meeting with IPRB in 2007 at which the authorities told the recording industry that it would consider enforcement actions in cases involving a “significant number” of music files, IPRB has never responded to industry requests to specify what level of infringement would qualify as “significant.” In June 2008, the industry lodged formal complaints with IPRB against two pirate websites hosted in Singapore, and provided extensive follow-up information to the authorities. Eight months later, IPRB told the industry that warnings had been issued, and the files were closed. The government has never responded to industry requests for an explanation of why the site operators were not prosecuted. In October 2009, a complaint was filed with IPRB against a forum site hosted in Singapore that featured infringement of music. When the recording industry asked about the status of the case in December 2010, IPRB claimed that they were “looking into the cases,”

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<sup>2</sup>Source: InfoCommunications Development Authority of Singapore (IDA).

<sup>3</sup>For purposes of this study, a major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related online piracy activity (since the study excludes non-major releases, including local titles; other peer-to-peer protocols; and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

but took no action before the site moved to another jurisdiction in February 2011. Other copyright sectors confirm this portrait of governmental passivity in the face of a serious threat from online piracy.

IPRB's consistent refusal to investigate online piracy complaints brought to it by industry, and its consistent direction that industry bring private prosecutions, is particularly disturbing because it marks a return to a practice that the FTA was specifically designed to discourage. Article 16.9.21.b of the FTA provides that "Each Party shall ensure that non-private criminal actions are the primary means by which it ensures the effective enforcement of its criminal law against willful copyright or related rights piracy. In addition, each Party shall ensure that its competent authorities bring criminal actions, as necessary, to act as a deterrent to further infringements." Seven years after the FTA came into force, Singapore's fulfillment of these commitments is open to serious doubt. The experience of the music industry, at least, is that private criminal actions, far from ceding primacy to government prosecutions, is virtually the only path open to it to combat criminal infringements online; and the government's failure to bring criminal actions is a significant part of the explanation for the indisputable fact that online music pirates are simply not being deterred in Singapore. Not only are private prosecutions more expensive, unwieldy and time consuming for copyright owners to pursue; it is much more difficult to investigate or compile evidence without law enforcement assistance, and far harder to achieve deterrent sentencing even if defendants are convicted.

The fight against online piracy is further hobbled by the widespread unresponsiveness of Singapore's Internet service providers (ISPs). The recording industry sends ISPs, on a weekly basis, notices of infringements carried out by their subscribers. ISPs continue to ignore requests from right holders to deal with repeat infringers found on P2P networks. In 2009-2010 alone, some 218 letters were sent, listing 3,787 IP addresses of infringing P2P users. Every six months, industry compiles these reports and identifies to the ISPs the apparent repeat infringers among their subscribers. These notices, and requests for the suspension of the accounts of repeat infringers, have been almost completely ignored. There is no evidence that any notices have been passed on to the infringing subscribers, nor that any ISPs even have a policy to do so. A number of ISPs have even refused to meet with the recording industry to discuss ways to cooperate to deal with digital piracy. The damage inflicted by online music piracy on Singapore's economy and culture, as well as on the interests of U.S. copyright owners, cannot possibly be addressed without cooperation from the ISPs whose facilities and services are being used to carry out infringements; yet that cooperation has been completely lacking.

The entertainment software industry experience with ISPs is similar. The Entertainment Software Association (ESA) in 2010 stopped sending notices to local ISPs regarding infringing activities of their subscribers detected by ESA's monitoring, as ISPs never responded nor gave any indications that they were taking any remedial actions.

Singapore's government has a responsibility to contribute to solving this problem. It pledged in its FTA with the United States to "provide ... legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials." FTA, Article 16.9.22.a. Since no cooperation is occurring, any incentives the government is offering are manifestly inadequate. More specifically, the FTA clearly exhibits a policy to encourage ISPs to "adopt and reasonably to implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers." Article 16.9.22.b.vi.A of the FTA makes such adoption and implementation a prerequisite for any ISP seeking to limit the scope of remedies available against it for infringements taking place on its network, including infringements as to which the ISP's liability arises only from its role in transmitting, routing or providing connections, or engaging in associated intermediate and transient storage. See Article 16.9.22.b.i.A. On paper, Singapore implemented this obligation in Rule 8 of the Copyright (Network Services Provider) Regulations 2005, requiring providers to implement repeat infringer policies. The fact that no Singapore ISP has even been willing to confirm publicly that they have adopted any such policies, much less implemented them, raises significant issues of FTA compliance.

IIPA urges USTR to press Singapore's government to step up to these problems. There are many steps, both formal and informal, that the government could take to encourage ISPs operating within its jurisdiction to begin

to cooperate with right holders as the FTA specifically directs. Cooperation must include, but should not be limited to, forwarding to subscribers any notices received from right holders regarding specific infringements detected, as well as making responsible repeat infringer policies a regular feature of the ISP marketplace in Singapore. Whether this is achieved through adoption and active enforcement of reasonable contractual terms of service for provision of Internet access, or whether it takes the form of a required “graduated response” program with appropriate due process safeguards before suspension or termination of user accounts, Singapore must move beyond the status quo if it is to make any headway against this well-entrenched and pervasive problem.<sup>4</sup>

As a further obstacle to enforcement against online infringement, Singapore law still makes no provision for agents or authorized representatives acting on behalf of copyright owners to apply for pre-trial discovery in order to identify online copyright infringers. This legislative deficiency, as measured against Singapore’s obligations under the FTA, was observed by Justice Woo Bih Li in the March 2008 *Odex* decision.<sup>5</sup> Primary or subsidiary legislation needs to be enacted to fix this problem.

**Limited progress against Hard Goods Piracy of Music, Movies and TV Programming.** What remains of the legitimate market for music CDs has had to contend with pirate product, generally imported in counterfeit form from China under the guise of original parallel import products. These pirate products are usually sold from stalls at temporary trade fairs around Singapore. Because the fairs generally last only 3-5 days, it is expensive and cumbersome for right holders to file legal actions against the operators. While other avenues are being explored, it is notable that there has been very little support from the police for cracking down on these sales. Not a single raid was run by IPRB against pirate music product in 2011, down from 3 the previous year. The recording industry filed five new complaints involving four makeshift stalls selling pirated music products at Chinese New Year trade fairs and one retail stall on January 20, 2011. However, IPRB has responded that the industry should consider a “collaborative approach,” i.e., private prosecution, as the targets do not represent “the upper echelons of the syndicate.”<sup>6</sup>

MPA reports that Sim Lim Square remains an active market for pre-loaded media players (containing unauthorized copies of films and TV shows) and “dongle” devices that provide delivery of Internet streaming services. Approximately 5-10 different types are being sold in Sim Lim Square. These small Internet-accessible black boxes with USB and HDMI access ports connect directly to the television which is then routed to a variety of infringing online sites (typically Chinese) containing movies, TV shows, sports programming, etc. They sell for about S\$200 (US\$156) and are marketed as an “alternative to expensive monthly cable television bills.”

Finally, with regard to hard goods piracy of recorded music, the prevalence in the market of pirate product imported from China masquerading as legal parallel imports justifies a review of Singapore’s policies and practices in this area. In cases involving such importation, Singapore should reconsider its refusal to impose the burden of proof on the defendant to establish that the articles in question were legitimately made in the country of origin. (At a minimum, it should amend its Declaration for Censorship Submission forms to require applicants to indicate (in the form of a statutory declaration) the source of such acquisition, as industry has previously requested.) As it now stands, the law requires the plaintiff (or the prosecutor) to prove a negative – that the article was not made with the authority of the copyright owner anywhere in the world – as well as proving the defendant’s knowledge of the article’s piratical nature. This makes enforcement against piratical imports practically impossible. Singapore should also make more active use of its existing authority to detain shipments of suspected infringing CDs *ex officio*. While this authority is sometimes used with respect to items such as counterfeit alcoholic beverages or tobacco products, it is almost never invoked to enforce copyright protections against importation of pirate CDs.

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<sup>4</sup>It is worth noting that Singapore’s two biggest ISPs, at a public symposium at the National University of Singapore in December 2011, voiced support for extending existing government site-blocking authority to cover off-shore rogue sites and pirate networks that consume inordinate bandwidth. Perhaps this will be a harbinger of increased cooperation in the future.

<sup>5</sup>*Odex Pte Ltd v. Pacific Internet Ltd* [2008] SGHC 35 (see paragraphs 31-37 of the decision).

<sup>6</sup>An unsatisfactory outcome was obtained from a 2010 case that targeted two shops and kiosks selling hard disks pre-loaded with karaoke videos. On appeal, the High Court ruled that the 24 hard disks, comprising over 8400 copies of infringing recordings, should be treated as only 24 “articles” for sentencing purposes, vacated the custodial sentence imposed at trial, and ordered the defendant to be fined S\$96,000 (US\$77,000), or about S\$11.38 (US\$9.10) per infringing work.

**Outlawing Camcording.** Although a number of Asian jurisdictions have joined the global trend toward outlawing the unauthorized camcording of feature films in cinemas, Singapore has not yet done so. While the problem moderated in 2011, past activity demonstrates the need for Singapore to take legislative action in this area. A specific criminal provision against camcording has proven to be a critical anti-piracy tool in many countries that have adopted it. Singapore should follow suit.

**Deterring Trafficking in Circumvention Devices and Services.** ESA reports that Singapore's government continues to have an excellent record of cooperation and partnership with the entertainment software industry on enforcement efforts against retail outlets for pirate games in hard copy format, which have driven this form of piracy down to low levels, and on educational initiatives aimed at increasing the public's awareness of the importance of protecting copyright. There is, however, a persistent concern with respect to the sale of circumvention devices, which enable the play of pirated games on consoles. Although Singapore police have undertaken some high-profile raids on targets engaged in the distribution of large quantities of circumvention devices, the eventual lenient sentences and penalties imposed on most defendants undermines efforts at curtailing the trade in circumvention devices.

In light of reductions in the availability of hard copy pirated entertainment software, the continued prevalence of modified consoles and circumvention devices in Singapore strongly suggests that existing legal sanctions are insufficient to create deterrence. Under Section 261C of the Copyright Act, the maximum penalty for trafficking in circumvention devices – two years' imprisonment or a fine of S\$20,000 (US\$16,000) – is far less than the penalties for the sale of pirate games – S\$10,000 per article up to S\$100,000 and/or imprisonment up to five years. Furthermore, since the fine authorized under Section 261C does not vary based on the number of circumvention devices, a high-volume distributor is exposed to the same maximum fine as a low-level distributor. The problem is further exacerbated by the Court's reluctance to impose meaningful sentences against defendants charged with selling circumvention devices or modified game consoles. Yet the sale and supply of modified consoles and circumvention devices inflicts far greater damage to the market than the sale and supply of pirate games. The buyer or user of a modified game console, or of game copier cards, may stop buying legitimate software altogether, instead downloading pirated games from the Internet to meet his or her needs, thereby fostering multiple acts of infringement.

Singapore should re-examine the current penalties for criminal violations of its technological protection measures provisions and consider revising them to bring them in line with the penalties for criminal copyright infringement. Moreover, judges should be encouraged to impose sufficiently stern criminal sentences to serve as a deterrent to future sales of circumvention devices.

## **MARKET ACCESS ISSUES**

In August 2011, Singapore's Media Development Authority implemented the March 2010 amendments to its Code of Practice for Market Conduct in the Provision of Mass Media Service, which, in effect, unilaterally abolished exclusive licenses of content for subscription television programming. While MPA appreciates that some modifications in these so-called "cross carriage" rules were made in response to its concerns, it continues to believe the amendments were unjustified by market conditions, and represent an inappropriate governmental intervention into private contractual arrangements that may stifle further innovation in the packaging and delivery of new content to Singapore consumers. IIPA urges the U.S. government to monitor further developments closely, particularly with regard to the incorporation of the cross-carriage/ "must offer" approach in Singapore's Next Generation Interactive Media Services initiative (Project NIMS).