



April 18, 2006

Via electronic mail ([FR0443@ustr.gov](mailto:FR0443@ustr.gov))

Ms. Gloria Blue  
Executive Secretary, Trade Policy Staff Committee (TPSC)  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: Notice of Intent to Testify at, and Testimony for, a Public Hearing Concerning the Proposed Free Trade Agreement with Malaysia (71 Fed. Reg. 14588, March 22, 2006)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Notice of Public Hearing Concerning Proposed Free Trade Agreement with Malaysia. The request requires persons wishing to testify orally at a hearing that will be held in Washington, DC beginning on May 3, 2006, to provide written notification of their intention, as well as a copy of their testimony, which is attached hereto.

#### **Notice of Request to Testify**

We hereby notify you that the following person wishes to testify orally at this hearing on behalf of the International Intellectual Property Alliance (IIPA):

Michael Schlesinger  
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#### **Summary of Testimony**

The following represents a short summary of the IIPA testimony, as required by the Federal Register notice. IIPA's full testimony follows this summary.

The International Intellectual Property Alliance (IIPA) strongly supports the initiation of negotiations for a Free Trade Agreement (FTA) with Malaysia. The copyright sector, like other sectors of our economy, could reap significant benefits from a sound and comprehensive US-Malaysia FTA. However, these benefits can only be realized if the FTA includes high standards for copyright law reform; concrete deliverables for strengthening enforcement of copyright in Malaysia, including against optical disc pirate production, book piracy and unauthorized photocopying, pirate exports (especially of entertainment software) and other piracy problems.

The FTAs that have previously been negotiated with other trading partners in the Asia-Pacific region provide good starting points for the text that the US should seek to achieve in negotiations with Malaysia. The provisions of these agreements should, however, be refined and expanded to address specific issues where strong FTA provisions are needed to stop optical disc pirate production, stop export piracy from Malaysia, and deal with domestic piracy more effectively,



including strengthening investigations and prosecutions of known key piracy operations in Malaysia. The Malaysia FTA should require full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards, including but not limited to those already embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The agreements with Malaysia must also require it to upgrade its copyright enforcement practices, with the goal to ensure that copyright owners and law enforcement officials have available to them the tools necessary to impose effective, consistent, predictable and deterrent penalties on copyright pirates, including in the Internet environment. The negotiations should also aim to dismantle or significantly reduce the market access barriers and discriminatory practices that keep U.S. copyright holders from full participation in the Malaysian market.

Finally, in addition to the problems noted above, there are some other specific concerns which should be addressed by inclusion of commitments in the FTA itself or in side letters. These include:

- ensuring that the optical disc laws are strengthened to:
  - cover “burning” of copyrighted content of others onto recordable discs
  - outlaw gouging or scouring of discs
  - ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are found (e.g., in transit) or stored
  - reinstate the requirement to include SID Codes on blank optical disc media (CD-R/DVD-R etc.) and make the sale of optical discs without SID code an offense
  - ensure samples (exemplars) are collected from every plant
  - ensure officers are authorized to seize discs in inspections and make arrests
  - allow right holders to participate in inspections and collect evidence
  - allow for forcible entry where entry is obstructed
  - provide for automatic revocation if a plant or agent has violated the law.
- allow right holders to access criminal files and evidence.
- outlaw the use of an audiovisual recording device to transmit or make a copy of a copyright work from the performance in a motion picture exhibition facility.
- improve customs authority and border enforcement measures.
- outlaw the knowing trafficking in counterfeit labels or illicit (unauthorized) labels affixed to, enclosing, or accompanying (or designed to be affixed to, enclose, or accompany) works or sound recordings.
- outlaw false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.
- create specialized IP courts to expeditiously handle copyright cases.

We thank the TPSC for permitting us to testify on this important initiative.

Respectfully submitted,

Michael Schlesinger  
Vice President and Associate General Counsel  
International Intellectual Property Alliance

Attachments: 1 – IIPA Testimony  
2 – IIPA 2006 Special 301 Country Report on Malaysia

**TESTIMONY OF  
MICHAEL SCHLESINGER  
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL  
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

**PUBLIC HEARING CONCERNING  
PROPOSED FREE TRADE AGREEMENT  
WITH MALAYSIA  
WEDNESDAY, MAY 3, 2006  
BEFORE THE TRADE POLICY STAFF COMMITTEE  
IN WASHINGTON, DC**



The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the perspectives of the U.S. copyright industries on negotiations for a Free Trade Agreement (FTA) with Malaysia.

## **1. About IIPA and the Copyright Industries**

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community.<sup>1</sup> These member associations represent 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). Taken as a whole, the “core” copyright industries – those whose primary purpose is to create and/or distribute copyright materials – accounted for an estimated 6 percent of U.S. gross domestic product (\$626.6 billion) and employed 4% of all U.S. workers (5.48 million) in 2002.<sup>2</sup>

IIPA has been actively engaged on behalf of its member associations in the monitoring and development of copyright law and enforcement policy in Malaysia for many years.<sup>3</sup>

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<sup>1</sup> IIPA members include the following associations: Association of American Publishers (AAP), Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).

<sup>2</sup> See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: the 2004 Report*, Economists Incorporated (2004), at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

<sup>3</sup> The eight most recent annual IIPA Special 301 reports on Malaysia are available at <http://www.iipa.com/countryreports.html>, listed under Malaysia.



## **2. Introduction and Summary**

IIPA strongly supports the initiation of negotiations for an FTA with Malaysia. Malaysia is an important trading partner, and many sectors of our economy could reap significant benefits from a sound and comprehensive US-Malaysia FTA. The copyright sector, like other sectors of our economy, could reap significant benefits from a sound and comprehensive US-Malaysia FTA. However, these benefits can only be realized if the FTA includes high standards for copyright law reform; concrete deliverables for strengthening enforcement of copyright in Malaysia, including against optical disc pirate production, book piracy and unauthorized photocopying, pirate exports (especially of entertainment software) and other piracy problems.

The FTAs that have been previously negotiated with other trading partners in the Asia-Pacific region provide good starting points for the text that the US should seek to achieve in negotiations with Malaysia. The provisions of these agreements should, however, be refined and expanded to address specific issues where strong FTA provisions are needed to stop optical disc pirate production, stop export piracy from Malaysia, and deal with domestic piracy more effectively, including strengthening investigations and prosecutions of known key piracy operations in Malaysia.

- Like the previous agreements, the Malaysia FTA should require full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards. Many of these standards are already embodied in international treaty instruments, most recently in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Others are drawn from the clear trends in recent copyright enactments around the world, such as the extension of terms of copyright protection. An FTA with Malaysia should spell out specifically what Malaysia needs to do to bring its laws up to these global minimum standards.
- Strong substantive copyright laws are necessary, but are not by themselves a sufficient basis for conclusion of an FTA. The agreement with Malaysia must also require it to upgrade its copyright enforcement practices, with the goal to ensure that copyright owners and law enforcement officials have available to them the tools necessary to impose effective, consistent, predictable and



deterrent penalties on copyright pirates. Here, too, the previously negotiated FTAs provide a good starting point.

- Finally, U.S. copyright holders face other obstacles to full and non-discriminatory access to the Malaysian market. The negotiations should aim to dismantle or significantly reduce these market access barriers and discriminatory practices.

Before turning to some of the specific issues that should be addressed in a sound and comprehensive FTA with Malaysia, a word about copyright piracy in Malaysia is required. One of the principal barriers to full access of U.S. copyright holders to the Malaysian market has been pervasive and persistent copyright piracy. This remains true today. The current piracy situation in Malaysia is comprehensively surveyed in the report IIPA filed in February 2006 in the Special 301 process. That report is attached to this submission. It is clear from the 2006 Special 301 report that, while some progress has been made in fighting copyright piracy (e.g., optical disc piracy), much more remains to be done in the battle against optical disc piracy, book piracy and in other areas. Virtually all sectors of the copyright industry suffer high levels of piracy in Malaysia, with the record and motion picture and book publishing industries hovering at close to 50% piracy, business software at 60% piracy, and entertainment software at a staggering 91% piracy – meaning only one out of every 10 copies of entertainment software emanating from or sold in Malaysia is legal. The losses inflicted on U.S. copyright holders remain very serious.

The Special 301 report highlights the copyright, piracy, and enforcement problems in particular sectors, notably:

- Continuing pirate optical disc production;
- Continuing pirate exports, especially of entertainment software;
- Rising Internet piracy, in the form of P2P file-sharing and Internet cafés facilitating online infringements;
- Massive illegal photocopying in and around university campuses;
- Unlicensed use of software in the workplace;
- Lack of prosecutions of factory owners compared with numbers of plant raids run;
- Nexus between piracy and organized crime;



- Copyright and optical disc laws in need of updating;
- Lack of forensic testing in commercial scale factory or piracy cases.

These specific issues, and the ones that I will mention now, should all be kept clearly in view as the U.S. Government embarks on its FTA negotiations with Malaysia, and provisions should be considered for inclusion in the FTA itself or in side letters that are specifically targeted at addressing these issues and all of the following.

### **3. Copyright Law Reforms**

The US-Malaysia FTA dealing with substantive copyright law must address the following key issues:

- **Right of reproduction and protection for temporary copies.** In the networked digital environment which is becoming more prevalent in Malaysia (from October 2004 to September 2005, the number of broadband lines in Malaysia increased by 61.6%, placing it in the top ten in the world in terms of growth), the making and use of temporary copies is becoming a means by which copyright works of many kinds are exploited and consumed by the public. The current Malaysia Copyright Act contains a reproduction right that does not clearly spell out that the exclusive right of reproduction extends to temporary copies, such as those made in the Random Access Memory of a personal computer. To comply with its obligations under the Berne Convention and the WTO TRIPS Agreement, and in recognition of the ever-increasing economic importance of temporary copies, the FTA should require Malaysia to provide such protection.
- **Technological protection measures.** The WIPO Internet Treaties proceed from the premise that use of technological measures is a critical element in the successful exploitation of copyright works in the digital environment, and that thus these measures must receive adequate and effective legal protections. Current Malaysian law does not fully meet the standards of the Treaties, since its law simply reproduces the treaty language. The FTA should ensure adequate protection for TPMs consistent with earlier FTAs. Provisions must be included which implement these obligations on making illegal the act of circumvention of technological protection measures that effectively control access to



copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights. Furthermore, devices, services, and components, that facilitate the circumvention of measures that right holders use to protect their works (whether or not the act involved is infringing) and such devices etc. that directly protect against infringement must be covered. Furthermore, any exceptions to these requirements must be carefully and narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions as the treaties require. Violations must be independent of infringement and subject to both civil and criminal remedies.

- **Extension of term of copyright protection.** Recent enactments in territories ranging from the European Union to Japan, and including Australia, Singapore, and, of course, the United States, and recent commitments by other countries, mark an unmistakable trend toward extension of the term of copyright protection, which now exceeds (or is soon to exceed) the Berne/TRIPS minima for some or all categories of protected subject matter in more than 80 countries. Malaysia should agree in the FTA to protect works for the life of the author plus 70 years, or 95 years from publication in the case of sound recordings, cinematographic works, works whose author is a legal entity, and other works whose term is measured from publication.
- **Right of communication to the public and the “making available” right.** Copyright holders must have the exclusive right to authorize or prohibit the communication to the public of their works, including performances and phonograms, by wire or wireless means, including their “making available” to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. An “interactive” exclusive right is critical. The Copyright Act of Malaysia provides a verbatim reproduction of the WIPO treaties text; more must be spelled out to ensure that copyright owners in sound recordings (in particular) enjoy full exclusive rights to all means of digital dissemination of sound recordings to the public — such as webcasting, streaming and digital broadcasting.
- **Right of distribution.** Copyright holders must have the exclusive right to authorize the distribution to the public of the original and copies of their works, including performances and phonograms, through sale or other transfer of ownership, as provided in the WIPO Internet Treaties, WCT Article 6 and



WPPT Article 8. Furthermore, Malaysia must also fully implement its rental rights obligations under TRIPS Article 11.

- **Right of importation.** Copyright holders must have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the right holder.
- **“Anti-Bootlegging” provisions: unfixed performances.** Performers must have the right to authorize or prohibit (a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (b) the fixation of their unfixed performances.
- **Protection for encrypted program-carrying satellite signals.** Criminal and civil liability must be afforded for encrypted program-carrying satellite signals which have been decoded without the authorization of the lawful distributor of the signal.
- **National treatment.** The principle of full national treatment, without exception or derogation, must be the norm in this FTA.
- **Government legalization of software (and other copyrighted materials), plus protection against use of public computers and networks for copyright infringement.** The FTA must contain an obligation of Malaysia to issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software; such instruments must actively regulate the acquisition and management of software for such government use. Furthermore, this obligation should be extended to other works as well, including mandating the use of original textbooks at educational institutions. Finally, these orders and decrees must obligate Malaysia to adopt provisions ensuring that its government agencies and other institutions containing publicly-controlled computers, computer systems or networks are not used in ways that infringe, or facilitate the infringement of, all copyrighted materials.



- **“Simultaneous” publication with respect to performers and producers of phonograms.** A performance or phonogram should be considered first published when it is published within 30 days of its original publication.
- **No formalities for all works including for performers and producers of phonograms.** The enjoyment and exercise of all rights provided for in the Free Trade Agreement should not be subject to any formality.
- **Protection of rights management information.** Adequate and effective legal remedies must be afforded to protect rights management information from unauthorized alteration and removal, consistent with the WIPO Internet Treaties. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of protected materials.
- **Contractual rights.** Any person acquiring or holding any economic rights must be able to freely and separately transfer such rights by contract. Any person acquiring or holding any such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, must be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights. All rights, including rights of communication, must not be subject to mandatory collective administration.
- **Narrow exceptions to protection.** Limitations or exceptions to exclusive rights must be expressly limited to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, as provided in Berne, TRIPS and the WIPO treaties.
- **Retroactivity provisions.** The provisions of Article 18 of the Berne Convention (and Articles 9.1 and 14.6 of the TRIPS Agreement) should be applied strictly to the subject matter, rights and obligations provided for in the FTA.

#### **4. Copyright Enforcement**

Effective copyright enforcement must remain a high priority and be a key element of the U.S.-Malaysia Free Trade Agreement. The FTA proposals illustrate the kind of measures which will, once implemented at the national level, simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies. The FTA chapter on Intellectual Property should enable right holders to specifically measure whether the requirements to address enforcement challenges encountered have been properly and effectively implemented, adopted and executed. It therefore follows that any proposals provided should expressly provide, where necessary, for specific obligations and measures in enforcement of copyright to ensure that Malaysia meets its obligations both in implementation and execution. The health and effectiveness of the entire IP system depends heavily upon legislative framework, vigorous enforcement, successful prosecution and deterrent sentences imposed. A holistic and pragmatic approach as well as the adoption of best practices in dealing with enforcement of intellectual property are necessary keys for the FTA to be the “gold standard” of U.S. trade and investment agreements.

The following is a non-exhaustive list of key enforcement issues that should be included in the U.S.-Malaysia FTA:

- **Provide deterrent levels of criminal penalties and remedies (including copyright infringements as “serious” offenses and as predicate offenses under organized crime provisions).** The FTA must include provisions requiring imprisonment and monetary fines for copyright piracy “on a commercial scale” and that includes infringements causing commercial harm even if not done for-profit., as is the case with many infringements on the Internet. To be “deterrent,” copyright offenses should be treated as serious offenses, and penalties should be consistent with those accorded to other serious crimes. Furthermore, the FTA text must encourage Malaysia to treat copyright offenses as predicate offenses under organized crime provisions of penal codes. Key performance indicators of a successful IP environment will then be measured based on the number of successful prosecutions and deterrent sentences imposed, and not merely on the number of raids conducted.<sup>4</sup>

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<sup>4</sup> The FTA must provide for streamlining in conducting searches and seizures, evidence gathering, and maintaining proper chains of evidence, from collection to storage to tendering the evidence collected during court proceedings.

Prosecutions should be conducted by legally qualified prosecutors. At present, Whilst substantial resources have been invested in conducting numerous enforcement actions which resulted in many of these cases being registered in courts, one of the challenges encountered is that very few criminal cases are prosecuted by Deputy Public Prosecutors (DPP) from the Attorney General's Chambers (AGC) who are legally qualified and trained prosecutors. Lack of legally qualified and experienced prosecutors in conducting the trial have resulted in such cases being discharged or dismissed summarily for various reasons, including grounds of technicality. The FTA must specifically include provisions requiring IP cases to be prosecuted by the DPP from the AGC or alternatively to create an internal prosecution unit within the Ministry of Domestic Trade and Consumer Affairs, staffed by legally qualified prosecutors seconded from AGC, not with "prosecutors" who develop their prosecuting skills in an ad hoc and trial-and-error manner or by attending periodic courses on prosecution.

- **Provide adequate civil damages for copyright infringement, including pre-established (statutory) damages.** The FTA chapter should provide that damages actually imposed act as a deterrent and remove any gain to the infringer. To ensure deterrent civil damages, a system of pre-established damages (also known as statutory damages) must be adopted, set at levels sufficiently high to achieve the deterrence objective..
- **Ensure *ex officio* actions in criminal cases.** Malaysia's enforcement authorities must be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder. This would allow authorities (such as police, inspectors, administrative officials, and prosecutors) to initiate actions on their own initiative – an essential component of an anti-piracy campaign aimed to "retake" the streets and remove infringing product.

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Raiding procedures such as seizure of implements involved in piracy, involvement and identification of right holders, requirements of listing of titles on complaints are often unevenly applied at the raiding officer level. Authorities should take measures at the highest levels to ensure that raiding officers clearly understand obligations to seize implements used for piracy (including commercial photocopy machines and all their components, optical disc replicators, CD-R burners, and the like) and seize all blatantly infringing product found on the premises, whether listed in the complaint or not. Furthermore, raiding officers must not require right holders cooperating with authorities at the scene to identify infringing product to provide copies of their national identification cards to defendants, as this opens right holders to threats of abuse and hinders public/private cooperation in raiding. The industry is committed to working closely with enforcement authorities to enable them to establish standard operating procedures in conducting investigations as well as enhancing their prosecutorial skills and techniques.



Furthermore, this would facilitate effective after-hours raiding, an essential component of adequate enforcement efforts.

- **Ensure *ex officio* authority for customs officials.** Customs authorities must be primarily responsible for preventing infringing products from entering or exiting Malaysia's territory. They must be able to initiate border measures *ex officio*, without the need for a formal complaint by a private party or association or the right holder. Border measures must be applicable to goods in transit and to goods destined for export. Border measures should also be strengthened to, among other things:
  - avoid cases in which applications for suspension of suspected infringing goods are rejected based on unreasonable requests for specific information from right holders;
  - ensure that importers of suspected pirate goods cannot take possession by posting a bond;
  - ensure that Customs authorities are notified immediately when an application for suspension of suspected infringing copyright goods is accepted (applicable when the authority reviewing the application, as in Malaysia, is not Customs itself);
  - ensure that right holders can get information upon request about the names and addresses of the consignor, the importer, and the consignee, the exporter, the manufacturer and of the quantity of the goods in question and the country of export; and
  - allow Customs authorities to seize circumvention devices, as is now provided for in U.S. law.
- **Provide for civil *ex parte* search orders to be granted in an expeditious manner and without unnecessary costs.** Malaysia must strictly implement its TRIPS Article 50 obligations. In civil cases, searches and seizures conducted *inaudita altera parte* must be statutorily implemented and requests should be acted upon and executed within a short period of time. Any security or bonding obligations must not result in unreasonably deterring recourse to these procedures.
- **Extend civil and criminal remedies to cover violations of the technological protection measures and rights management information obligations.** All available remedies and enforcement procedures applicable to copyright

infringement must apply to the obligations dealing with the circumvention of technological protection measures (TPMs) and with rights management information (RMI). Further negotiations are needed to clarify the relationship between the TPM and RMI obligations and their corresponding enforcement provisions.

- **Award fees and costs.** Awarding legal fees and costs to the injured party is also critical to the deterrence that is required by TRIPS.
- **Information requirement.** Malaysia must be able to order the infringer to provide any information regarding other persons involved in the infringement and the suspected distribution channels.
- **Provide presumptions of ownership and subsistence.** To speed up the civil justice system by making it easier for right holders and judges to bring cases to conclusion, the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work (including a performance or phonogram) in the usual manner must, in the absence of proof to the contrary, must be presumed to be such designated right holder as such. It must also be presumed that the copyright subsists in such subject matter, in the absence of proof to the contrary. Such presumptions should also pertain in criminal cases. Section 42 of the Malaysian Copyright Act has proved problematic in practice, leaving statutory declarations of ownership and subsistence too vulnerable to technical challenges by defendants. Section 42 must be modified to afford right holders with these presumptions in practice.<sup>5</sup>
- **Provide domain name registrant contact data.** Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient for effectively enforcing against copyright piracy in the online environment. The FTA must require Malaysia to take steps to ensure that the country code domain registries under its control provide this public access, such

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<sup>5</sup> For example, right holders have noted, among other problems, that 1) Section 42, while not expressly requiring the maker of an affidavit (of copyright ownership or subsistence) to be present, has been applied to require this in practice, since defendants have claimed they have a right to cross-examine the maker of the affidavit; 2) Section 42 should not contain the wording “at the time specified therein” since it creates confusion (it should suffice to say “copyright subsisted and continues to subsist at all material times”); and 3) the “true copy” requirement is overly burdensome (e.g., a right holder in a motion picture should not be required to produce the bulky film print, or the right holder in books should not be required to produce copies of all the books involved in a particular case).

as by bringing its registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.

- **Provide for effective liability in cases of secondary infringement generally and, particularly for Internet service providers.** It is critical that Internet service providers, other intermediaries, and anyone who aids and abets in infringements carry appropriate liability (including expeditious remedies to prevent infringements and criminal and civil remedies). This is particularly important in the case of infringements being carried out over the electronic networks of service providers. Limitations on remedies available against service providers who promptly take down infringing material must be narrowly crafted and ensure that cooperation between service providers and right holders is preserved. Robust notice and takedown procedures must be spelled out, be simple and expeditious and exist without the need for judicial intervention. These procedures should include e-mail notifications, and a speedy and simple procedure through which right holders can obtain identifying information about service provider subscribers who commit online infringements. Section 36(1) of the Malaysian Copyright Act makes infringing anyone who “causes any other person to do” an act not authorized under copyright. This language is potentially broad enough to establish secondary liability as a general matter, and from this, the limitations on remedies available against service providers make sense. It may be that there is a gap in secondary liability in Article 41 of the Criminal Code (“any person who instigates, conspires or intentionally or substantially aids in the commission of an offence” is criminally liable as an abettor). In other words, Section 41 appears to provide for narrower scope of liability than the Section 36(1) “causes” language; preferably, the Criminal Code should be amended to either directly incorporate the infringements from the Copyright Act, or should be amended to comport with the Copyright Act (e.g., by adding the “causes any other person to do”).

## **5. Market Access**

Although several of the issues identified above have direct market access implications, the USG should also seek in the FTA to eliminate other non-copyright market access barriers faced by U.S. copyright industries in the Malaysian market. These include, but are not limited to:



- **Broadcast quota.** Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during “prime time” hours of 8:30 to 9:30 p.m. This discriminatory treatment should be challenged in the FTA negotiations and should ultimately be eased or lifted.
- **Investment Restrictions.** Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. This discriminatory treatment should be challenged in the FTA negotiations and should ultimately be eased or lifted.
- **Proposed Levy Could Violate National Treatment.** In October 2005, Malaysia’s Culture, Arts and Heritage Minister, Datuk Seri Dr. Rais Yatim, was quoted in several newspapers supporting the idea of introducing a levy to be assessed against all imported films distributed in Malaysia. The imposition of such a levy would place Malaysia at a competitive disadvantage with respect to other markets in the region, may result in a reduction in the importation of films into Malaysia, and may violate Malaysia’s WTO obligations to extend full national treatment to foreign rights owners. It should be made clear that an FTA will not be concluded with Malaysia if it chooses to impose such a levy.
- **Hologram Sticker Program Does Not Deter Piracy.** In January 2003, the Ministry of Domestic Trade and Consumer Affairs implemented the Trade Description (Original Label) Order 2002 of the Trade Descriptions Act 1972 (Act 82), requiring the affixation of “originality stickers” on audio, audiovisual, and other optical media distributed in Malaysia (e.g., for entertainment software, on the product’s jewel case, beneath the shrinkwrap). However, certain deficiencies in the scheme have emerged at this point, including: the lack of an adequate computer system to process the tedious application requirements and resultant delays in issuing stickers; serious compromises including stickers being issued to pirates (including pirate importers); and stickers being issued to unauthorized distributors. The hologram program should be abolished since it adds an additional bureaucratic layer and increases

distribution costs (and costs to consumers).<sup>6</sup> The Malaysian Government should agree to refine the system to properly rectify all deficiencies, or should abolish it altogether.

## **6. Other Concerns Specific to Malaysia**

In addition to the problems just noted, there are some other specific concerns which should be addressed by inclusion of commitments in the U.S.-Malaysia FTA itself or in side letters. The US-Malaysia FTA must address the following issues:

- **Optical disc piracy.** In an FTA with Malaysia, the Malaysian government must agree to strengthen its optical disc laws and regulations (in a side letter) to:
  - cover “burning” of copyrighted content of others onto recordable discs
  - outlaw gouging or scouring of discs
  - ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are found (e.g., in transit) or stored
  - make the sale of optical discs without SID code an offense
  - ensure samples (exemplars) are collected from every plant
  - ensure officers are authorized to seize discs in inspections and make arrests
  - allow right holders to participate in inspections and collect evidence
  - allow for forcible entry where entry is obstructed
  - provide for automatic revocation if a plant or agent has violated the law.
- **False documentation/declarations in trade, import, or export of suspected infringing goods.** One very serious problem in Malaysia is false documentation in outgoing exports, as well as incoming imports and goods traded in Malaysia. An FTA with Malaysia must outlaw false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.

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<sup>6</sup> The motion picture industry has noted that the cost of a hologram sticker constitutes 2%+ of the distributors' wholesale price. This is very high considering the present depressed market conditions prevailing in the film and video market. The RM0.20 charged for a hologram sticker is much higher than the RM0.05 charged by the Ministry of Health for similar holograms of equal quality that are affixed to pharmaceutical products, or the RM0.05 charged by Customs for cigarette and liquor products.



- **Provision of criminal files and evidence to right holders.** The current practice in Malaysia is that enforcement officers engaged in criminal enforcement will not share the results of raids with right holders. This hinders right holders' abilities to bring civil actions to redress infringements. The authorities should agree as part of an FTA to allow right holders to access criminal files and evidence.
- **Camcording piracy.** Existing copyright laws in Malaysia have not been used and may not be adequate to combat the "act" of using a camcorder to reproduce a cinematographic film. An FTA with Malaysia should include language requiring outlaw (with criminal remedies/procedures available) the use of an audiovisual recording device to transmit or make a copy of a copyright work from its performance in a motion picture exhibition facility; remedies should include forfeiture and destruction of all unauthorized copies of motion pictures or other copyright audiovisual works, or parts thereof, and any audiovisual recording devices or other equipment used in connection with the offense.
- **Use of counterfeit or illicit (unauthorized) labels.** The FTA with Malaysia should outlaw the knowing trafficking in counterfeit labels or illicit (unauthorized) labels affixed to, enclosing, or accompanying (or designed to be affixed to, enclose, or accompany) works, sound recordings, or product documentation or packaging. In other words, the FTA should be updated to reflect the U.S. law as amended in 2004.
- **Specialized IP Courts.** The Government of Malaysia has already announced its intention to introduce specialized IP courts. In line with the FTA requirement that Malaysia provide deterrent levels of remedies, including criminal penalties, the Government of Malaysia should commit to introduce such courts through the FTA process by a reasonable date certain. Such establishment of specialized IP Courts would address the substantial backlog of cases and significant delays in criminal cases currently encountered. The FTA should also include language regarding sentencing guidelines to avoid non-deterrent sentences being imposed and sentencing disparity.

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IIPA thanks the TPSC for this opportunity to present its views. We look forward to working with the U.S. government negotiators toward the goal of a sound, comprehensive Free Trade Agreement with Malaysia that will produce significant benefits for our nation's creators, other workers in the copyright industries, and our economy as a whole.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### MALAYSIA

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** Malaysia should be maintained on the Watch List, and an out-of-cycle review should be conducted to evaluate whether the Government of Malaysia has taken steps sufficient to monitor and significantly decrease pirate production in licensed as well as unlicensed facilities; reduce the number of pirate exports, with special focus on entertainment software; and adequately enforce against piracy for the domestic market, including book piracy in the form of illegal commercial photocopying.

#### **Priority Actions Requested in 2006:**

- **Close Licensed (and Unlicensed) Facilities Engaged in Piracy, and Bring “Recordable” Plants into the Fold:** Pirate optical disc production continues in licensed as well as unlicensed factories. The Government has done a good job shutting down plants engaged in piracy, but must do more against licensed facilities known and suspected to be doing so. Plants found to be engaged in pirate production or mastering must not be given second chances. Finally, plants producing “recordable” discs or extending “recordable” facilities must provide exemplar discs and otherwise be subject to the optical disc laws. Inspections must continue, including off-hours and off-site inspections, since stamper, masters and other evidence are sometimes removed prior to the raids. The Ministry of Domestic Trade and Consumer Affairs (MDTCA) must allow for more extensive use of forensic testing.
- **Continue to Increase Seizures of Pirate Exports at the Border, Focusing on Entertainment Software:** The Malaysian Government indicates that it doubled seizures of pirate product destined for export in 2005, to over 700,000 discs. If true, this is a worthy accomplishment, but more must be done, especially since the entertainment software industry reports no improvement for their industry. The Government must continue to aggressively intercept pirated products/materials at the borders (KLIA, Penang, Johor Port, etc.), with special focus on eradicating export of pirate entertainment software. It must also enhance monitoring of exports, and take measures to address problems of false documentation, a regular occurrence in exports originating from Malaysia. The Government should maintain cooperation with Malaysia Airlines Cargo, purchase more x-ray scanners and like equipment, and establish a government reward scheme for targeting export syndicates.
- **Tackle Internet-Based Piracy:** Internet piracy, in the form of P2P file-sharing and Internet cafés facilitating online infringements, is on the rise. The Government should take broader action to address Internet piracy, including expediting drafting/consideration of copyright law amendments to enhance and facilitate online enforcement. Piracy at Internet cafés continues to be problematic; the Government should conduct more inspections for copyright (and other license) compliance, and shut down those establishments found to be engaged in illegal activities.
- **Stop Illegal Photocopying:** The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. The MDTCA has been cooperative, but officers lack training needed to effectively handle raids, decide on seizures,

track and act against underground operations, and protect right holders (who were being asked to give copies of their national ID cards to infringers).

- **Take Stronger Steps to Deter End-User Piracy of Business Software:** Unlicensed use of software in the workplace causes the greatest revenue losses to the business software industry. The MDTCA conducted 12 end-user raids in 2005, representing only a small fraction of the number of companies using pirated or unlicensed software. Thus, there is little deterrence against this highly damaging activity in Malaysia. The Government needs to do more.
- **Prosecute More Cases, Including Factory Cases; Establish Specialized IP Courts and Special IP Unit of Prosecutors:** In general, there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts in Malaysia (e.g., against distribution warehouses, factories, pirate photocopy shops, etc.). MDTCA appears to understand the problem, and has indicated a desire to commence a Special Intellectual Property Court in 2006, which it is hoped would greatly ease the burdens imposed on right holders due to current court delays and other difficulties. The MDTCA has already established a specialized prosecution unit (although the number of deployed officers needs to be substantially enhanced) and the Attorney-General's Chambers has dedicated officers to handle IP crimes. However, what is needed is a specialized legal academy, allowing staff in both the MDTCA and Attorney-General's Chambers to be properly trained in IP prosecution. The Government should additionally issue sentencing guidelines to ensure imposition of deterrent sentencing.
- **Address Organized Crime/Use All Available Forensic Techniques:** The Government has never adequately addressed the linkage between piracy and organized crime. In addition, despite the availability of sophisticated forensic techniques, the Government has been reluctant to use forensics except in some straightforward kinds of cases (smaller retail cases). Such forensics should be used in all cases, especially optical disc factory cases and cases involving large seizures of pirated products at retail locations, where forensics can identify the source of production. IIPA recommends the re-establishment of the Special Copyright Task Force to ensure proper resource allocation to tackle all forms of piracy, including coordinating the fight against organized crime and factory piracy.
- **Amend/Modernize Copyright Law, Optical Disc Law:** The Malaysian Government should modernize its Copyright Act, including fully implementing the WCT and WPPT (the WIPO "Internet" Treaties), and joining these treaties to provide adequate protection of copyright. Legislative changes should also facilitate enforcement in the digital environment, including, *inter alia*, by extending and/or clarifying mall owners' liability for the rampant trade of pirated products that still occurs within many commercial buildings. The Optical Media Act is also in need of modernization to address the changing situation in Malaysia, including, *inter alia*, the need to (1) prohibit the gouging of SID code from discs; (2) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; and 3) prohibit the unauthorized "burning" of content onto recordable discs. The Government must be discouraged from adopting levies against foreign films (such as those proposed by the Minister for Culture, Arts and Heritage) that would violate Malaysia's WTO obligations. Finally, the Government should pass anti-camcording legislation making the possession and/or use of recording equipment and devices in movie theaters a crime (theft of film prints is also a problem and, if not already dealt with in the law, should be prohibited).
- **Allow Right Holders to Access Criminal Files to Initiate Legal Actions Against Infringers:** The Copyright Act is interpreted in a way that impedes the ability of injured right holders to take civil actions based on evidence seized by MDTCA, even in raids run pursuant to complaints by rights holders and undertaken with the support of right holders'

representatives. It is vital that the law on this point be clarified in a way that allows right holders access to, and examination of, evidence which in many cases will be critical to support a civil claim.

For more details on Malaysia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html> for more detailed discussion of the situation in Malaysia, particularly as to what is needed legislatively.

<b>MALAYSIA</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2001-2005<sup>7</sup></b>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	38.8	49%	55.5	52%	40.0	45%	110.2	70%	148.9	70%
Business Software <sup>8</sup>	75.1	60%	73.0	61%	77.0	63%	79.2	68%	75.0	70%
Entertainment Software <sup>9</sup>	23.4	91%	12.9	91%	NA	90%	NA	NA	56.4	93%
Books	10.0	NA	10.0	NA	9.0	NA	8.3	NA	8.2	NA
Motion Pictures <sup>10</sup>	NA	NA	36.0	50%	38.0	50%	42.0	75%	40.0	80%
<b>TOTALS<sup>11</sup></b>	<b>147.3+</b>		<b>187.4</b>		<b>164.0</b>		<b>239.7</b>		<b>328.5</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA**

**Pirate Production Continues in Licensed and Unlicensed Plants, Despite Government Efforts:** Malaysian optical disc manufacturers, both underground and licensed, continue to press infringing discs for domestic and international consumption. There are 38 licensed factories and an unknown number of underground factories (at least three, for a total of 41 known plants). The licensed factories alone contain enough production lines to produce over 300 million discs per year. This disc production over-capacity presents enormous challenges to the Malaysian Government, both in terms of saturation of the domestic market by pirate product, but, more damaging, massive export piracy.

The Government of Malaysia made further strides in 2005 tackling pirate optical disc production in underground factories, resulting in decreases in the numbers of pirate music and motion picture discs produced in Malaysia for export. However, the entertainment software industry notes that pirate exports of its products have not decreased. Unfortunately,

<sup>7</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>8</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. 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. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>9</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

<sup>10</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>11</sup> Total losses due to piracy of records & music, business software, entertainment software, and books remained virtually the same at \$151.4 million in 2004 to \$147.3 million in 2005.

notwithstanding the closure of five licensed factories in 2005, several licensed facilities known to have engaged in pirate production continue to operate with impunity.<sup>12</sup> These known entities must be a focus of attention for the Malaysian Government in 2006. The Malaysian Government has reported that in 2005, MDTCA successfully shut down seven factories, and industry is aware of five license revocations. In the factory raids, as in previous years, MDTCA has successfully seized equipment including machinery used in the pirate production.<sup>13</sup> Significantly, in March 2005, the first successful raid was carried out on an unlicensed mastering factory, the culmination of a four-year investigation into Malaysia's largest pirate audio manufacturing and distribution syndicate. However, industry has since been informed that pressure from elements within the Prime Minister's office are pushing to have the facility's equipment returned and a license issued. If this is the case it would mark a low point in MDTCA's enforcement action and Government/industry efforts to promote and support the legitimate manufacturing industry. In addition, only three licensed plants have been charged for any offense since January 2004.<sup>14</sup> Of particular concern are the Pioneer Solution and Universal Fitlink plants, which have seen no inspections to date despite numerous complaints. The failure to prosecute plant owners in all cases, and especially, any signs of backsliding with respect to Malaysia's largest pirate audio manufacturing and distribution syndicate, contribute to a continued lack of deterrence against this damaging form of piracy.

It is also essential in 2006 that MDTCA ensures that any plants which indicate that they are producing on "recordable" discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand recordable production, be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided for production (even recordable-only plants). Evidence has emerged regarding pirate pre-recorded production at such plants (e.g., MDTCA inspected a licensed recordable plant, H.I.Edar, in February 2004, finding 13 film stampers and 4,000 pressed titles). Reportedly, on January 17, 2006, MDTCA raided another recordable-only facility, resulting in clear evidence of content bearing pirate disc production. Standardized exemplar collection from all optical disc manufacturing facilities, irrespective of format, is needed.

**Pirate Exports of Entertainment Software Still a Problem, Despite Increased Seizures for Other Industries:** Pirate entertainment software products continue to be exported out of Malaysia at a furious pace, notwithstanding Government reports that MDTCA had seized double the number of discs destined for export in 2005 than in the previous year – over 700,000 discs.<sup>15</sup> As MDTCA itself indicates, "[t]he bigger haul was due to the effort of a special enforcement unit set up in April last year, to focus specifically on pirated films and music destined for export to other countries." MDTCA's statement is tellingly silent on seizures of

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<sup>12</sup> The recording industry reports that its forensic lab in London has matched pirate product against 15 licensed Malaysian plants (including separate premises owned by the same company) with criminal complaints lodged against 12 since 2002.

<sup>13</sup> For example, in seven successful raids the record industry participated in against unlicensed pirate optical disc factories (as well as one mastering factory) from January to April 2005, a total of six CD/VCD lines and three DVD lines were seized, as well as one mastering line.

<sup>14</sup> Optical Disc Tech (MDTCA ref ACO1/04[NS]), H.I.Edar (ACO1/04[KAJ]), and Multimedia Commerce (AHC45/04[KKB]).

<sup>15</sup> Ministry of Domestic Trade and Consumer Affairs (MDTCA) enforcement officers indicated that in 2005, they had seized 702,369 CDs and VCDs destined for export (worth RM5.88 million) (US\$1.6 million), more than double the cache seized in 2004. Deborah Loh, *Crackdown on VCD Piracy Showing Results*, New Straits Times, February 4, 2006 (quoting MDTCA Director-General of Enforcement, Datuk Abdullah Nawawi Mohamed). See also *More Pirated Discs Being Exported*, The Star Online, at <http://thestar.com.my/news/story.asp?file=/2006/2/5/nation/13299803&sec=nation> (indicating that the latest major seizure took place on January 26, 2006 at KL International Airport involving 24,000 pirate DVDs destined for export to the United Arab Emirates and Jordan).

pirate entertainment software destined for export. Malaysian sourced pirated entertainment software continues to be shipped from Malaysia literally all over the world, to neighboring markets (e.g., Thailand, the Philippines and New Zealand); Europe (Belgium and Germany); the Middle East; South Africa and elsewhere in Africa; Latin America; and even the United States.<sup>16</sup> Thus, the Government must redouble its efforts in 2006 to significantly reduce pirate entertainment software exports.

**Book Piracy:** The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. Dozens of shops line each campus, and most academic buildings at universities contain shops. Despite regular cooperation between book publishers and MDTCA, the problem has gone largely unchecked, especially at on-campus facilities.<sup>17</sup> Furthermore, as the off-campus shops have gone underground, the problem has become harder to detect. Shops will often set up facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities. While MDTCA is well-intentioned (taking raids against commercial photocopy centers near university campuses, especially in the Klang Valley), they need training on how to track and deal with such underground operations, including consistent instructions from superiors to MDTCA officers on how to handle raids, decide to seize, and protect right holders (who, e.g., are inappropriately being asked to provide copies of their national ID cards to the targets of raids). Other structural difficulties include that there have been no *ex officio* actions taken to combat book piracy, and MDTCA has not, to date, conducted raids at night (although we are hopeful that ongoing talks with industry on this issue will result in night raids in the near future). In addition, the universities and educational authorities (Ministry of Education) must become more engaged, especially regarding practices of on-campus facilities.

**End-User Piracy:** The unauthorized use of copyrighted software in businesses — end-user piracy — is an increasing global problem, including in Malaysia, and causes the greatest losses to that industry. In 2005, MDTCA conducted the most end-user raids for a single calendar year, conducting 12 end user criminal raids and 8 retail raids by the end of October 2005. In the course of the raids, 125 computers were seized (with an estimated value of RM375,000 – US\$100,540), along with the discovery of more than 41,000 copies of suspected pirated and unlicensed software worth an estimated RM98.6 million (US\$26.4 million). In addition, 2005 saw the first-ever criminal end-user conviction in a contested case that went through a full trial (detailed further below). However, the conviction is now on appeal, a process that often takes a year or more. The software piracy rate in 2005 of 60% remains well above the Asia Pacific rate of 53% and significantly higher than the world average of 35%.

**Internet Piracy:** Given that from October 2004 to September 2005, the number of broadband lines in Malaysia increased by 61.6%, placing it in the top ten in the world in terms of growth,<sup>18</sup> it is no surprise that Internet-based piracy is an increasing threat to legitimate

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<sup>16</sup> U.S. Customs, on the other hand, has noted some seizures of pirate entertainment software product sourced from Malaysia being transshipped through in Alaska. In late 2005, U.S. Customs & Border Protection apprehended a shipment of 1,400 pirated entertainment software on DVDs (with the SID codes etched out) from Malaysia at the Anchorage Federal Express Facility, destined for Paraguay. It is believed that the shipper information provided was false.

<sup>17</sup> Not only have pirate photocopy centers infiltrated campuses, but the problem is being perpetuated through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for the photocopying. Institutions of higher learning should be monitored closely to ensure that these practices are not tolerated.

<sup>18</sup> Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. No other country in Southeast Asia grew by such a large margin.

copyright owners, including local Malay artists.<sup>19</sup> In 2004, 2,176 online software infringements were traced to Malaysian ISPs; this number skyrocketed to 6,537 in the first 10 months of 2005. Internet cafés are also known to facilitate illegal activities or use unlicensed software. Piracy at Internet cafés continues to be problematic for the entertainment software industry. The MDTCA has been reluctant to run raids against such cafés and often asks that companies resolve such matters through private contracts/licensing.<sup>20</sup>

**Domestic Retail Piracy (Optical Disc):** Domestic retail piracy involving sales of mainly optical discs has been a longstanding problem in Malaysia, but in the past two years, MDTCA has done a better job driving retail piracy underground. Significant raiding continued in 2005.<sup>21</sup> Nonetheless, industry continues to note the harm caused by retail piracy, e.g., many legitimate retail outlets for home video products have closed, with commensurate loss of jobs. In addition, for the first time in many years, the record industry reports significant numbers of copies of pirate CDs being imported into Malaysia from China. Enforcement against fixed retail premises will need to be stepped up and amendments to legislation extending and/or clarifying criminal liability to mall owners (who condone the flagrant open sale of pirated optical discs by their tenants) need to be introduced. Finally, prosecutions leading to deterrent sentences actually imposed are few and far between. For example, in October 2004, an entertainment software company initiated a raid at the retail premises of a suspected producer, exporter and local distributor of pirate entertainment software products. The raid resulted in the seizure of nearly 800,000 pirate entertainment software discs, but to date, there has been no progress towards initiating prosecution against this notorious pirate. Prosecutions must occur in this case and others like it to create deterrence and drive piracy from Malaysia.

**Camcorder Piracy:** The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the US theatrical release and well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the

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<sup>19</sup> Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006 (describing that top-selling musical act Mawi cannot thrive in “the piracy-infested local music scene where CD copies go as low as RM10 for three pieces and free Internet downloads are easily available at a few clicks.” The article notes record sales of 170,000 copies and 120,000 copies for two of the band’s efforts, though notes that

this is only a small percentage of the real sale. The Domestic Trade and Consumer Affairs Ministry recently reported that the raids in Sarawak revealed that 95 per cent of Mawi’s albums sold throughout the State were actually pirated copies. A simple search on the Internet reveals that the whole content of Mawi’s first solo album ... are available for download. All you need is a registration with the portal and a stable Internet connection to get free Mawi tracks saved onto the hard disk.

<sup>20</sup> MDTCA insists that “cease and desist” letters be sent (even though they are largely ignored by the café operator) before they even considering raiding the premises.

<sup>21</sup> The Government reported that in 2005, MDTCA officers conducted 37,296 raids, resulting in the seizure of 4.7 million discs worth RM100.8 million (US\$27 million). They also arrested 710 distributors and sellers. The motion picture industry reports that during 2005, there were 1,123 raids against sales of pirate VCDs and DVDs (473 criminal copyright cases initiated), 75 raids against pirate DVD and VCD distributors (18 criminal copyright cases initiated), 8 actions involving Internet piracy (1 criminal copyright case initiated), and 526 raids involving pirate product for export (2 criminal copyright cases initiated).

unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in Malaysia, this may already amount to a violation of the copyright law, existing copyright laws have not been used and may not be adequate to combat the “act” of using a camcorder to reproduce a cinematographic film. We urge the Government of Malaysia to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

**Organized Crime/Need for Complex Investigation:** There can be little doubt of the involvement of organized crime in Malaysian piracy operations, whether by this term we mean large-scale illegal commercial operation or an operation that involves many individuals conspiring to engage in many different criminal ventures. It has also been clear for years that anti-piracy work, either from the industry side or the Government side, is fraught with danger.<sup>22</sup> Malaysian authorities continue to be reluctant to thoroughly investigate links between piracy and organized crime. This must change if the Government is to begin to adequately address its piracy problem and to successfully remove these syndicate-run operations (such as those that control the large-scale production and export of pirated entertainment software products) from the country.

A related point is the continuing reluctance of Malaysian authorities to make use of the forensic capabilities available to them. While MDTCA supports the industry’s forensic programs in Malaysia where infringing product is found on site in the course of a raid or inspection, MDTCA had not until recently (September 2005) submitted samples from sizeable seizures to the Government Chemist to identify the manufacturing source. Industry has been assured by the new Director of Intellectual Property that this is now being done, which is a positive sign. Some dynamic middle managers in MDTCA appear enthusiastic to take on more sophisticated investigative operations to target major pirates. One act that might help the Government to prioritize and allocate resources to tackle piracy, including organized piracy, most effectively would be the re-establishment of the Special Copyright Task Force to take on these coordinating responsibilities.

**Courts’ Response to Piracy/Need for Specialized IP Court:** Malaysia’s court system, whose ruling bodies seem out of step with the more forward thinking government departments, remains incapable of processing court hearings in a timely, logical and ordered manner. Until this bottle neck is addressed, the Malaysian Government will continue to fight an uphill battle to successfully combat piracy. Notwithstanding this over-arching problem, the year 2005 saw a couple of breakthrough events in the courts. Constant pressure led to most criminal end-user software piracy cases being brought to court shortly after the raids in 2005. This is a very encouraging development. The MDTCA also achieved its first-ever criminal end-user conviction in a contested case that went through a full trial,<sup>23</sup> resulting in a sentence of a fine of RM120,000 (US\$32,174) or six months’ jail per charge for directors in default of payment of the fine, for possession of 15 infringing copies of software, other than for private and domestic use.<sup>24</sup> For the recording industry, court cases are proceeding well only for retail cases where arrests are made during raids. Other cases, however, languish in an essentially broken court system. There remains a significant divergence between the number of raids being carried out

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<sup>22</sup> In a raid run recently on an Internet café by a representative for an entertainment software company, the owner and the supervisor of the café became agitated and verbally and physically abusive, tossing computers on the floor in the presence of the police. They also took photos of the industry representative with their cell phones and cameras and threatened to distribute the photos to other cafés.

<sup>23</sup> The defendant, Sarawak-based Alom Industries Sdn Bhd, is currently appealing the conviction.

<sup>24</sup> Though many of the criminal end user cases have reached the courts, many still remain in the investigation phase, including some cases over two years old. In addition, cases in the courts can still take many years to reach resolution.

and the number of cases being processed through the courts. In addition, a number of appeal cases lodged by the prosecution against acquittals, some dating back to 2003, have never been concluded.<sup>25</sup> The MDTCA Minister appears to understand and has announced that he hopes to have a pilot specialized IP Court in Kuala Lumpur by 2006.<sup>26</sup> IIPA supports this initiative.

**Right Holders Not Permitted to Access Criminal Files to Initiating Legal Actions Against Infringers:** The Copyright Act is interpreted in a way that impedes the ability of injured right holders to take civil actions based on evidence seized by MDTCA, even in raids run pursuant to complaints by rights holders and undertaken with the support of right holders' representatives. In particular, right holders have been refused access to evidence seized by local authorities on the argument that such access would violate a non-disclosure provision in the Act.<sup>27</sup> Application of the non-disclosure provision to refuse access to evidence prevents right holders from being able to initiate civil actions for their injury. This creates an impossible enforcement situation in cases when the authorities fail to take criminal actions against the infringer but nevertheless refuse to allow access to evidence for use in civil actions.

**Hologram Sticker Program Does Not Deter Piracy:** The hologram stickering program remains an unreasonable burden on industry. This program requires that the sticker be affixed inside the shrink-wrap packaging of discs. Since entertainment software products are not domestically produced but imported into Malaysia, when imported legitimate products arrive in the country, they have to be re-packaged to accommodate the hologram stickers, adding unnecessary costs and delays. The sticker program is also subject to abuse if stickers are issued to pirates.

## **TRAINING AND PUBLIC AWARENESS**

The Malaysian Government has generally been receptive to training opportunities and technical assistance for its enforcement authorities. As noted, a key issue in Malaysia is developing a cadre of trained prosecutors and a specialized IP court with judges sufficiently familiar with copyright law as well as the links between copyright and organized crime to be ready to mete out deterrent sentences. In addition, before a case even reaches court, it would be highly useful to provide training to MDTCA staff (and others involved in investigations) to deal with all the "post-raid" investigative procedures. The record industry is considering such a training for 2006.

The MDTCA has been very supportive of initiatives by the business software sector to publicize the need to respect software copyright. In April 2005 the Deputy Minister for the MDTCA announced the launch of the *Ops Tulen 2005 Korporat* program at a press conference, after which the campaign (and raiding discussed above) against end-user software piracy commenced. In addition, most of the criminal end-user software piracy raids discussed were publicized by the local heads of the MDTCA at press conferences irrespective of where the raid was conducted. The MDTCA also co-sponsored a number of "Software Asset Management"

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<sup>25</sup> It has also been reported that cases, once filed, do not move forward, as officers are transferred, etc.

<sup>26</sup> Izatun Shari, *Special court to hear IP cases*, The Star, September 13, 2005.

<sup>27</sup> A series of raids by the recording industry and MDTCA in 2005 uncovered distribution centers, offices and replicators used by a known syndicate distributing suspected pirate products throughout Southeast Asia. Over one million discs and large quantities of documents and other evidence were seized. While industry wished to bring a civil action, MDTCA, citing Section 52 of the Copyright Act (dealing with the disclosure of information obtained pursuant to the Act) would not provide industry with access to the materials recovered from the raids. MDTCA has further opined, after consulting with the Attorney General's office, that such information would not be provided in other cases as well. This makes civil litigation with respect to these matters extremely difficult if not impossible.

(SAM) seminars with the Business Software Alliance (BSA) across Malaysia, including places such as Penang, Kota Kinabalu, Kuala Lumpur, and Johor, targeting CEOs, business owners, financial managers, IT managers and auditors. The MDTCA also sent out around 10,000 letters to businesses urging them to use licensed software programs and to join the BSA's voluntary software audit program. This support from the MDTCA resulted in a very favorable response from the business community.

The MDTCA has also been generally supportive of industry initiatives to boost the standard of IP prosecution in Malaysia. For example, from November 25 to 27, 2005, the Motion Picture Association and the MDTCA jointly organized a "Copyright Enforcement and Prosecution" seminar at Genting Highlands which was attended by 28 MDTCA prosecutors nationwide, five Senior Deputy Public Prosecutors from the Attorney-General's Chambers, the Senior Assistant Parliamentary Draftsman, the Head of the Commercial Crimes Division, and MPA's local counsel. The seminar allowed participants the opportunity to discuss and share their court experiences directly with senior prosecutors from the Attorney-General's Chambers.

## **MARKET ACCESS**

**Broadcast Quotas and Investment Restrictions Hamper Legitimate Right Holders:** Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during "prime time" hours of 8:30 to 9:30 p.m. Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. These restrictions are extremely damaging and highly prejudicial to U.S. copyright owners in program content, and should be eased or lifted.

**Proposed Levy Could Violate National Treatment:** The Malaysian Government also maintains several other regulatory requirements in the audiovisual sector that effectively combine to impede the growth of the film and home video industries and has announced the possible imposition of further restrictions on foreign products. In October 2005, Malaysia's Culture, Arts and Heritage Minister, Datuk Seri Dr. Rais Yatim, was quoted in several newspapers supporting the idea of introducing a levy to be assessed against all imported films distributed in Malaysia. The Minister stated that the proposal was specifically for the purpose of assisting the development of the local film industry. While the extent of the proposal remains unclear, audiovisual distributors and exhibitors remain concerned that the imposition of such a levy would place Malaysia at a competitive disadvantage with respect to other markets in the region, may result in a reduction in the importation of films into Malaysia, and may violate Malaysia's WTO obligations to extend full national treatment to foreign rights owners.