

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

MALAYSIA

Special 301 Recommendation: Malaysia should remain on the Watch List.

EXECUTIVE SUMMARY

The government of Malaysia has taken some significant actions to protect intellectual property rights over the past several years, specifically, against those engaged in pirate production, wholesale, retail, and distribution through new technologies such as Internet or mobile devices. The overall reduction of movie piracy in Malaysia resulted in the opening of more cinemas in 2007 and increased revenues in the form of double-digit growth for theatrical businesses, continuing an upward trend seen over the past several years. Meanwhile, for the music industry, the enforcement efforts of the Ministry of Domestic Trade and Consumer Affairs, which included warning letters and raids against pirate retailers in fixed premises, including those engaged in mobile device piracy, has resulted in over 350 dealers turning from pirate to legitimate business. Book publishers have seen some moves within MDTCA toward greater emphasis on tackling illegal photocopying, and cooperated with MDTCA on a number of successful raids near significant universities during 2007. The business software industry continues to enjoy excellent support of the authorities, leading in 2007 with 30 actions investigating end-user piracy of business software involving 53 companies. For Malaysia, this represents the greatest number of raids involving the greatest number of target companies in any year. In October 2007, the entertainment software industry launched an enforcement program with the MPA in Malaysia to address game piracy with the MDTCA in the "Operation Games Attack" initiative aimed at reducing the country's large-scale replication and global export of pirated game product. These efforts have resulted in numerous raids with dozens of arrests, and the seizure of tens of thousands of pirated games.

Notwithstanding these signs of success, more needs to be done to combat all forms of piracy, in order to encourage and reward legitimate copyright owners and foster greater creative activity in Malaysia. The negative effects of piracy in Malaysia are still keenly felt, as the home video business outside Klang Valley has suffered, and legitimate chain outlets such as Speedy in Penang closed its doors in December 2007, while Video Ezy has contemplated doing the same. For the music industry, the number and size of legitimate music retailers in physical goods remains low,¹ and while there has been some increase in legitimate dealers in mobile music, legitimate music industry staff numbers have declined. Despite efforts, book piracy in the academic sector remains a serious concern. In the enforcement area, it is regrettable that there were no enforcement actions against licensed optical disc plants in 2007.

PRIORITY ACTIONS REQUESTED IN 2008

- **Prosecute Significant Cases Against Factory Owners and Chief Architects/Financiers of Piratical Activities, Including Landlords of "Fixed Premises":** 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. The creation of a specialized IP court is a significant achievement. However, in order to provide effective deterrence, successful prosecutions must ensue against key pirate operators such as owners of optical disc factories, those controlling large-scale distribution, and landlords of fixed premises such as shopping centers who control and benefit from piratical activities on their premises. Improvements are needed in post-raid investigations, prosecution methods, and in court efficiencies.

¹ For example, there has been a reduction in the number and size of legitimate music retailers by about 20% nationwide.

- **Curtail the Uncontrolled Piracy Activities at Fixed Premises and in the Night Markets:** Piracy at fixed premises including shopping centers, including the “burning” of illegal content onto recordable discs, and especially uncontrolled piracy activity in night markets, continues to cause immeasurable harm to copyright owners operating in Malaysia. The Ministry of Local Government and Housing, and the Kuala Lumpur City Council (DBKL) and other like local authorities, who are ultimately in charge of licensing night market vendors, have been unresponsive to industry information and leads.
- **Curb Exports of Pirate Entertainment Software and Internet Café Piracy:** While optical disc factory production, now the province of twenty-seven registered plants, and the export of pirate discs, has waned somewhat as a chief piracy concern in Malaysia, the government should place continued emphasis on curbing pirate entertainment software exports. In addition, domestically, Internet cafés continue to provide opportunities to play unauthorized games on standalone machines or even on unauthorized servers; the government has not adequately addressed the Internet café piracy issue to date.
- **Tackle “Mobile” Device Piracy:** Increasing mobile device piracy – in which infringing files are loaded onto mobile devices at fixed locations – is causing significant harm to right holders. While many fixed locations engaged in unlawful uploading/downloading have legalized their practices, many more have not yet done so.
- **Conduct Raids Against Illegal Photocopying Operations; Track Underground Operations:** Publishers remain happy with cooperation from Malaysian authorities, although illegal photocopying, mainly on or around university campuses and increasingly in “underground” facilities, continues to cause harm to the industry.
- **Adopt Anti-Camcording Legislation:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to pirate “dealers” throughout the world and over the Internet. While the Malaysian government and industry have worked hard to curtail this virulent form of piracy in the past year in Malaysia, the government should enact legislation to criminalize illegal camcording of motion pictures to maximize the enforcement tools available.
- **Amend/Modernize Copyright Law, Optical Disc Law (Prohibit “Gouging” of Discs, Allow Inspections Offsite, and at Any Time, Day or Night), and Join WIPO “Internet” Treaties**

For more details on Malaysia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

MALAYSIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007²

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Records & Music	16.0	45%	22.0	45%	38.8	49%	55.5	52%	40.0	45%
Business Software³	149.0	60%	159.0	60%	82.0	60%	73.0	61%	77.0	63%
Entertainment Software⁴	NA	83%	28.0	90%	23.4	91%	12.9	91%	NA	90%
Books	9.0	NA	9.0	NA	10.0	NA	10.0	NA	9.0	NA
Motion Pictures⁵	NA	NA	NA	NA	NA	91%	36.0	50%	38.0	50%
TOTALS	174.0		218.0		154.2		187.4		164.0	

PIRACY UPDATES IN MALAYSIA

Fixed Premises Piracy and Night Market Piracy: Piratical activity, including CD-R and DVD-R burning to order in “fixed premises” such as shopping centers and night markets, remains a major source of losses for copyright companies in Malaysia.⁶ The local industry, with assistance from the Ministry of Domestic Trade and Consumer Affairs (MDTCA), has taken active steps against the sale of pirated physical products in fixed premises by issuing letters and instituting five civil actions against both the landlords and tenants of the fixed premises. MDTCA has stepped up its commitment to eradicate physical piracy from fixed premises by filing the first criminal suit against a landlord for aiding and abetting in the commission of the sale of pirated products by the tenant. All of these cases have essentially been contested (the criminal case remains in the early stages of court hearings), although in a couple of cases, tenants have settled the civil claims. Landlords continue to contest the legality of whether they can be held liable for the illegal and infringing acts of their tenants.

The night markets also remain a sore point due to problematic relationships between industry and the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local authorities. Since August 2007, the local record industry group, Recording Industry of Malaysia (RIM), has filed weekly submissions containing detailed complaints regarding night markets with excessive amounts of music piracy. Nonetheless, the local authorities have not taken effective measures to tackle this rampant availability of pirated music (as well as other illicit items and pornography) in the night markets. On average, the DBKL have been informed of approximately five night markets each night, with between 20 to 25 stalls, selling pirated music. Unfortunately, despite the continuous submission of such information, no actions have been taken by the DBKL enforcement officers.

Pirate Production in Licensed and Unlicensed Plants; Exports of Entertainment Software: Once again in 2007, the number of licensed optical disc plants dropped from 32 in 2006 to 27 as of December 1, 2007. There remain well over 158 production lines, with a capacity to produce 519.1 million discs per year; this does not include 57 DVD and DVD-R lines. The concerns in this area include evidence of a reduction by MDTCA in the number of raids on licensed factories in 2007 as compared to 2006, and the fact that in 2007, MDTCA, incredibly, renewed a suspended license of one manufacturer

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ 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.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ Some fixed location piracy operations have been pushed underground, leading in 2007 to an increase in the number of individuals selling pirated music out of hand luggage at food courts.

despite the fact that several criminal and civil actions have been filed but not concluded against this manufacturer. Other problems include the failure of the government to properly monitor blank CD-R manufacturing plants, and the failure to require such plants to apply SID Codes. Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software still was detected as far away as Paraguay in 2007.

Mobile Device Piracy: With advances in mobile device technology through 2007, mobile device piracy – in which infringing files are loaded onto mobile devices at fixed locations – has increased dramatically in Malaysia. For example, for the music industry, piracy in the form of illegal loading of full tracks and ringtones occurs both over the air through wireless transmissions and through over-the-counter sales. The local record industry group, RIM, worked with MDTCA in 2007 to curtail fixed premises sale of over-the-counter mobile piracy. The problem continues to affect other industries, as publishers report some downloading of reference books and dictionaries onto mobile devices.

Internet Piracy – Downloading: As of 2007, Malaysia hosted almost 15 million Internet users, which represents 60% Internet penetration. Broadband penetration remained relatively low, with just over 1 million broadband subscriptions, according to industry statistics.⁷ Nonetheless, it is no surprise that Internet-based piracy is an increasing threat to legitimate copyright owners, including local Malay artists.⁸ The Business Software Alliance (BSA) noted a significant increase in number of software infringements found on the Internet by its crawler. For example, in 2006 the number of instances of software infringement detected per month was 705. This number jumped to 1,134 per month in 2007, a 61% increase. Publishers have also noted some online piracy, with sites offering scanned copies of books (in PDF form or similar) for download. Local industry reports good cooperation with ISPs and telecommunication companies in dealing with Internet piracy enforcement, with most ISPs taking down sites providing pirate music or movies within 48 hours of industry issuing the notice. The local Motion Picture Association program succeeded in shutting down 18 websites in 2007, 10 of which were terminated by ISPs following receipt of MPA complaints.

Internet Piracy – Internet Cafés: A major problem for several years in Malaysia has involved the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many cases, such premises set up standalone computers loaded with unauthorized or pirated copies of a game. In an increasing number of cases, the cafés used a “client-server” model, in which the unauthorized software is installed at the server level on-site, and the customers’ machines are granted access to the same copy on the server.

In 2007, the industry saw the development of yet a new “scheme” for providing pirate entertainment software at Internet cafés operate. This new “scheme” involves Internet café operators entering into arrangements with third parties that provide access to an off-site server housing or storing the game software. The café’s on-site server is then granted access to the game software on the off-site server (which effectively controls all activity related to the use of the game that is accessed off-site), and in turn, the café’s server permits access to the same software to the many computer machines located

⁷ See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Malaysia, at <http://www.internetworldstats.com/asia.htm#my> (reporting that there were a reported 14,904,000 Internet users as of June 2007, representing a 60.0% penetration rate, per the Malaysian Communications and Multimedia Commission; and 1,106,000 broadband subscribers as of September 30, 2007, per ITU).

⁸ 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.

on-site. The off-site server will typically require the on-site server to authenticate itself, and thus, if the link to the off-site server is severed, all services that may be available to the café's computers through the on-site server will be rendered inoperable. Thus, once the link is broken, the café's computers are effectively wiped of all data or evidence of infringing activity. The proliferation of such methods of evasion complicates post enforcement verification and thus emboldens those refusing to obtain appropriate licenses for video game product. The MDTCA's enforcement and investigative procedures need to adapt to enable its officers to effectively address this new infringing-facilitating technology.

Internet Piracy – Advertising Sites (Hard Goods): Another problem on the Internet in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods. Industry notes good enforcement against such sales of hard goods by stopping and seizing Internet related shipments at the Post Center and through cooperation with the courier companies. In particular, there has been some improvement in the seizure of Internet-related shipments, parcels at entry, and exit points of courier services and the Malaysian Post Office. The number of parcels seized daily is reportedly down from 500 to 800 per day to the current 100 to 300 per day. This decrease can be attributed to close partnership efforts involving the MPA, ESA, and the MDTCA.

Book Piracy: The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses.⁹ Dozens of shops line each campus, and most academic buildings at universities contain shops. Despite regular cooperation between book publishers and Ministry of Domestic Trade and Consumer Affairs (MDTCA) officials, the problem persists, increasingly moving underground. Shops will often set up facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities. Likewise, operators will store stock in vans, for easy delivery and difficult detection by authorities. While MDTCA officials conduct 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 on how to handle raids and which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and on how to protect rights holders from being harassed by the pirates.

Significant unauthorized photocopying takes place at on-campus facilities as well.¹⁰ The universities and educational authorities (Ministry of Higher Education) should become more engaged, especially regarding these practices. While universities have, to date, cooperated with rights holders in distributing copyright protection posters and the like, industry would like to see them take a more active role in legitimizing practices on campuses. The Ministry of Higher Education should encourage universities to ensure campus-based copyshops are not engaging in infringing activity, and both the Ministry and university administrations should take measures to encourage lecturers and students to use legitimate materials.

End-User Piracy of Business Software: The willful use of unlicensed or pirate software in the workplace in Malaysia continues to cause losses to Business Software Alliance companies, seriously compromising the businesses of resellers and distributors of genuine software.

Camcorder Piracy: The vast majority of movies that are pirated 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).¹¹ Such camcorder piracy has been a major issue in the past. In 2006, 13 widely

⁹ Publishing representatives are also starting to notice CD-Rs featuring reference and textbooks floating around campus for sale.

¹⁰ 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.

¹¹ The master recordings are sold to illicit "source labs" where they are illegally duplicated, packaged and prepared for sale. As a result of camcorder piracy, many motion pictures also 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

pirated movies were sourced from Malaysian cinemas in 2006. However, due to a Malaysian government crackdown on such piracy in 2007, these instances of Malaysia-sourced piracy ceased. Specifically, from January to November 2007, there were 30 illegal camcording cases, with 32 arrests made in cinemas nationwide. IIPA commends the efforts of the Malaysian government in ensuring that this form of piracy did not cause substantial harm to the motion picture industry in 2007, but notes that continued vigilance will be required to ensure that no harm is caused in 2008. In this regard, an Anti-Camcording Law was proposed specifically to define the act of camcording or recording in cinemas as a strict liability criminal offence. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement. This proposal is still pending at the MDTCA, but apparently has the support of the MDTCA Minister and Deputy Prime Minister.

ENFORCEMENT UPDATES IN MALAYSIA

Industry remains pleased with the effort and resolve demonstrated by the Malaysian government in 2007 to focus and deal with certain key piracy issues, again with some significant results.¹² At the same time, lack of focus on other areas has left them vulnerable to piracy activities, and those engaged in these relatively untouched areas have continued to cause harm to local and foreign right holders. This section will report some raw enforcement data highlighting key enforcement activity in 2007, and then will highlight the areas needing attention (largely tracking the priority action list above).

CHART 1		MALAYSIA: MAJOR OPTICAL DISC FACTORY RAIDS IN 2007
DATE	RAID	SEIZURE
JANUARY 17, 2007	CLANDESTINE FACTORY SELANGOR	6 VCD REPLICATING MACHINE 2 PRINTING MACHINE 2 METALIZING MACHINE 5 POLYCARBONATE BAGS 2600 VCDs 1400 CDs (MUSIC) 1 COMPRESSOR 1 VEHICLE 1 COMPUTER 5 MOULDS
FEBRUARY 3, 2007	LASERMATIC CRYSTAL DISC KUALA LUMPUR	ONE SEALED MACHINE WAS FOUND ON THE PREMISES.
APRIL 11, 2007	CLANDESTINE FACTORY NEGERI SEMBILAN	1 DVD MACHINE
JUNE 11, 2007	CLANDESTINE FACTORY SELANGOR	1 VCD LINES 1 PRINTING MACHINES 1 METALIZING MACHINES 1 DRYER 24,000 VCDs STAMPER 1 COMPRESSOR 1 CHILLER 1 FORKLIFT
JULY 19, 2007	SELANGOR	600 DVD 1 VCD LINE 1 DVD LINE
AUGUST 3, 2007	CLANDESTINE FACTORY SELANGOR	2 DVD LINES 1 VCD LINES 1 OFFSET PRINTING 2 BONDING MACHINE

world during the U.S. theatrical release and well before their international debuts.

¹² See, e.g., *Software and Games Worth RM23m Seized*, New Straits Times, January 30, 2007 (noting a raid of the Endah Parade in Seri Petaling, in which MDTCA confiscated about 225,000 DVDs and CDs containing pirated computer games and other software worth RM23 million (approximately US\$7.1 million) from three shops located on the second floor of the Endah Parade shopping complex).

SEPTEMBER 6, 2007	CLANDESTINE FACTORY SELANGOR	1 DVD LINE 1 OFFSET PRINTER 1 BONDING MACHINE
OCTOBER 10, 2007	CLANDESTINE FACTORY SELANGOR	1 VCD/CD REPLICATING LINE 1 PRINTING MACHINE 15 STAMPERS 200 - SILK SCREEN UNIT. 1 EXPOSURE UNIT 1 DRYER UNIT. 1 COMPRESSOR UNIT. 1 CHILLER UNIT. 1 CRUSHER UNIT
NOVEMBER 20, 2007	CLANDESTINE FACTORY (ON PALM OIL PLANTATION) JOHOR	2 DVD REPLICATING LINE 2 PRINTING MACHINE 6200 DVD MOVIES 4 BAGS OF 750KG POLYCARBONATE
NOVEMBER 23, 2007	CLANDESTINE FACTORY JOHOR	2 VCD LINES 400 MUSIC DISCS 200 STAMPERS 50 SILKSCREENS
NOVEMBER 24, 2007	CLANDESTINE FACTORY JOHOR	1 VCD LINE 1 TRUCK

Enforcement Against Factory Optical Disc Production and Pirate CD-R and DVD-R “Burning” Labs: The government of Malaysia can be commended once again for making further strides in 2007 tackling pirate optical disc production and burning of pirate content onto recordable discs. The number of licensed plants is down to 27, although there remain a number of clandestine plants (and as noted, in 2007 MDTCA renewed a suspended license of one manufacturer, against whom several criminal and civil actions have been filed but not concluded). Several of the illegal unlicensed plants were raided in 2007 (see Chart 1 above). Unfortunately, all factory raids conducted in 2007 were against unlicensed factories and most of these were *ex officio* police raids. It is regrettable that no raids were conducted on licensed factories by the MDTCA during 2007.

One of the most successful operations was dubbed “Operation Double Trouble” since it involved two sniffer dogs, Lucky and Flo, that assisted the Malaysian enforcement team in March to August 2007 in Kuala Lumpur, Johor Bahru, and Penang confirming suspicious targets, identifying hidden compartments and rooms, and otherwise following their noses, leading to seizures of more than 1.6 million discs, 3 DVD replicating machines, 2 VCD replicating machines, 97 CD-R Burners and 30,000 empty CD-Rs. Twenty-six suspects were arrested in the raids. As a result of the success of the dogs, MDTCA has decided to set up its own K-9 Unit within the Enforcement Division, and the Motion Picture Association will be bringing over and donating two newly trained dogs to MDTCA. Other successful enforcement operations included Operation Blackout in which 145 raids were conducted resulting in a total seizure of 106,191 pirated optical discs, 423 DVD-R burners, and the arrest of 110 suspects.

The Motion Picture Association continued to offer a reward scheme in 2007 to encourage informants to provide information on factories.

In early 2008, MFACT orchestrated a major raid against a DVD lab operating out of a shopping mall in DNP Plaza in Johor Bahru.¹³ The enforcement action resulted in the arrest of seven (7) individuals and the seizure of 110,879 video game discs (109,666 DVDs and 1213 CDs for console platforms), and 46 DVD-R burners as well as a blank DVD-R and CD-R discs, two computers and two printers. MFACT also reported that each aspect of the piracy operation, copying/burning, packaging and storing, was carried out at a separate location.

¹³ “RM1mil worth of counterfeit goods seized;” article available at <http://thestar.com.my/news/story.asp?file=/2008/2/4/nation/20080204195049&sec=nation> (last viewed on February 5, 2008)

Enforcement Against Business Software End-User Piracy: Regarding business software end-user piracy, the Business Software Alliance (BSA), working with the MDTCA, was able to conduct a record 32 end-user actions involving 54 companies, and many more retail actions in 2007. BSA'S relationship with the local enforcement authorities, the Enforcement Division (ED) of MDTCA, has been very good with raids being conducted on request. Seizures included over RM531,000 (US\$161,000) worth of computer equipment and about RM3.8 million (US\$1.2 million) worth of suspected pirated BSA member software. The ED regularly initiates its own actions for production, distribution and retail cases, supported by BSA upon request. End-user piracy cases, on the other hand, usually originate from BSA complaints (after thorough investigation) to the ED. MDTCA also delivered warning letters to advise end-users to conduct software audits and ensure that only legal software is being used in the business environment.

Enforcement Against Entertainment Software Piracy: In October 2007, the entertainment software industry launched an anti-piracy program in Malaysia through a first-time partnership with the motion picture industry to reduce the large-scale replication and global export of pirated game product in Malaysia, which remains one of the primary sources of pirated game product in the world. The launch of the entertainment software industry's program was timed to begin with a raid campaign with the MDTCA called "Operation Games Attack." The operation was a great success due to the commitment and dedication of MDTCA, resulting in numerous raids of factories, retail shops, burner labs, and a printing facility, with nearly 35,000 pirated games seized for numerous gaming platforms, including the Nintendo DS, Nintendo Game Boy, Sony PlayStation One and PlayStation 2, Sony PSP, Nintendo Wii, Microsoft XBOX and XBOX 360, personal computers. Pirated game products, both optical discs and game cartridges, were also seized on nearly a daily basis at the Malaysian central mail facility. In addition, the entertainment software industry held numerous trainings with MDTCA to facilitate their detection of pirated game product. These actions provided a strong start to the entertainment software industry's new program and the industry looks forward to continued support from the MDTCA, with the hope that substantial steps will be taken to dismantle large-scale pirate operations through prosecutions and the imposition of deterrent penalties.

Enforcement Against Book Piracy: Following on late 2006 raids (at the beginning of the university term) near Sunway College in Shah Alam, the MDTCA Enforcement Division continued its raids on illegal photocopy facilities in 2007. In January 2007, the Sepang enforcement division raided two outlets in Cyberjaya, one located within the Malaysia Multimedia University campus. This was followed by a March 2007 blitz outside University Putra Malaysia (UPM) at Bangi, with cooperation of the Kajang enforcement division. This raid encompassed five different operations plus a van used to hide stock, and police had to be called in when the operators threatened book publishing representatives. With the start of the high season in June-August 2007 (again, due to the beginning of the academic term), MDTCA conducted raids outside University Tunku Abdul Rahman (UTAR) in Putrajaya, outside Malaysia Multimedia University in Melaka and outside Universiti Sains Malaysia in Penang, altogether seizing thousands of infringing copies and dozens of machines.

Prosecuting Commercial Pirates – Necessary Steps: Two major issues arising out of the significant enforcement work being done in Malaysia remain: 1) the failure to prosecute landlords and commercial pirate operators such as owners of optical disc factories, those controlling large-scale distribution, and landlords of fixed premises such as shopping centers who control and benefit from piratical activities on their premises and 2) lack of successful prosecutions due to inadequate investigative techniques, prosecutorial weaknesses, or lack of efficiency of the courts.

In factory enforcement, many instances have arisen in which factory owners came forward to stop a raid, but instead of arresting the owners, MDTCA arrested the factory workers. The key commercial pirate operators must be targeted to have a deterrent effect.

With regard to post-raid investigations leading to prosecution, the government should focus on three key areas in 2007 to improve results:

- Increase the staffing numbers and resources, and level of training and expertise for investigating officers, so that their investigations lead to arrests, indictments, and ultimately, prosecutions of the right defendants (this must include both consideration of links to other criminal activity and/or gang or organized crime related activity, as well as links to illegal or syndicate activity in other countries,¹⁴ i.e., investigating “up the chain”);¹⁵
- Increase the level of training and expertise of prosecutors, who receive very basic training, but lack the confidence when faced with more aggressive and experienced defense lawyers; and
- Speed up the prosecution of cases to avoid cases becoming stale, defendants absconding, and overall lack of deterrence.

IIPA is heartened that MDTCA has set up a prosecution unit comprising officers to be trained and equipped to deal with complex litigation from criminal actions brought. In December 2006, the team underwent a week long training program in the art of examination of witnesses. From November 19-23, 2007, prosecutors from the Attorney-General’s Chambers and MDTCA prosecutors underwent a training on Internet piracy, which included training in prosecutorial skills through a moot court exercise. Most recently, industry conducted trainings of 28 MDTCA prosecutors and 12 Attorney General’s Chambers Deputy Public Prosecutors. In that training, industry learned that court procedures have further been simplified, and codified in a Copyright Prosecutions Manual (approved by MDTCA and the AG’s Chambers). The local motion picture industry group distributed the Manual to 50 officers and will be distributing it to more officers nationwide once the new procedures are incorporated.

With respect to judicial efficiencies, unfortunately, industry reports that there remains a backlog of criminal cases in the courts, with some cases languishing for several years without being heard. The establishment of IP Courts nationwide to hear copyright cases, a very positive development, will hopefully lead to more deterrent sentencing (see Chart 4 below), and hopefully, speedier disposition of copyright cases, although this has yet to be seen. In addition to steps to speed the processes of the court, the Malaysian government should work to minimize delays in the prosecution process, including organizational restructuring to avoid lost documentation, minimize inconveniences due to personnel transfers, etc. Additionally, most industries advocate that the government should issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment. A further deterrent would be an amendment to the Copyright Act to provide for statutory damages in civil cases. As things stand, claimants are only able to claim losses which have been proven.

CHART 4 MALAYSIA: CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2006-2007						
	BUSINESS SOFTWARE		SOUND RECORDINGS		MOTION PICTURES	
	2006	2007	2006	2007	2006	2007
NUMBER OF RAIDS CONDUCTED	23	32	117	67	2175	2333
NUMBER OF VCDs SEIZED	-		153,000		902632	295164
NUMBER OF DVDs SEIZED	-		20,965	163,000	2166441	2673314
NUMBER OF CD-Rs/DVD-Rs SEIZED	NA			14,200	146644	89116
NUMBER OF INVESTIGATIONS	47	81	117		375	389
NUMBER OF VCD LAB/FACTORY RAIDS	-		9		10	11
NUMBER OF CASES COMMENCED	5	5	117		620	748
NUMBER OF ARRESTS	3	1	38	35	780	1180

¹⁴ For example, in a raid in 2005, six Malaysian individuals were arrested in Nigeria for optical disc piracy offences, and in addition, evidence has emerged in the past few years between syndicates in Malaysia and the United Kingdom, China, South Africa, Indonesia, Pakistan, and the Philippines.

¹⁵ For example, in one raid conducted by MDTCA in Penang on behalf of an entertainment software company, only a few illegal titles were found on location of the raid target, leading to suspicion that the shop had an offsite warehouse. However, post-raid investigation into warehousing of pirate stock has yet to be accomplished. As for a second raid in Penang, the MDTCA officers found no one present, and while it has obtained the company information, no charges have been laid in that case. Further, while raids at small retail establishments do rid the market of illegal product, absent further investigation into the source of these pirated products and corresponding prosecutions, these raids ultimately prove ineffective in addressing the country’s piracy problems. In some cases, though MDTCA might have been quite willing to undertake investigations “up the chain,” they have inevitably been faced with the lack of personnel necessary to mount stakeouts at suspect locations.

NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	3	2	15		59	101
ACQUITTALS AND DISMISSALS	0	1	20		24	9
NUMBER OF CASES PENDING	10	5	83		537	638
NUMBER OF FACTORY CASES PENDING	-	-	31		55	54
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	-	-	7		24	63
SUSPENDED PRISON TERMS	-	-	-		-	-
MAXIMUM 6 MONTHS			3		14	39
OVER 6 MONTHS			3		8	16
OVER 1 YEAR			1		2	8
TOTAL SUSPENDED PRISON TERMS			7		-	-
PRISON TERMS SERVED (NOT SUSPENDED)					24	63
MAXIMUM 6 MONTHS						
OVER 6 MONTHS						
OVER 1 YEAR						
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)						
NUMBER OF CASES RESULTING IN CRIMINAL FINES	3				26	40
UP TO \$1,000			13		5	4
\$1,000 TO \$5,000	1	1	6		18	12
OVER \$5,000	2	1	1		3	24
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	17,000	27,200			27853	385582

Internet Café Enforcement: As described above, unauthorized use of copyright materials – especially entertainment software – in Internet cafés has been major problem for several years in Malaysia. One major entertainment software company has engaged on this issue in 2007, running a “cease and desist” letter and warning campaign, leading to three raids on Internet cafés (two in Perak state and the third in Penang state) suspected of engaging in unauthorized use of their product in mid-2007. Charges have been filed against the three cafés raided, and while trial dates have been scheduled for two of the cases (in late January and late February 2008), the third has yet to be calendared. That company has also engaged in some informational advertising in key newspapers targeted toward educating Internet café owners that unauthorized use of entertainment software is unlawful, and informing them that software companies do offer licenses for such uses and will enforce their rights. To date, one target Internet café has placed public apologies in key newspapers.

Exemplar Program: Beginning in 2006, MDTCA engaged in two comprehensive exemplar collection rounds, with samples collected from licensed facilities (listed below in Chart 3), irrespective of format, and with industry representative participation. However, while Malaysia’s exemplar collection regime is now considered first rate, IIPA remains concerned that facilities licensed to press recordable-only formats, remain exempt under the law from mandatory SID Code. Given the instances of pirate production by recordable-only factories, SID Code standardization is considered the best practice. The following is the list of known plants from which exemplars were collected (through February 2007).

CHART 3 Optical Disc Production Plants and Locations in Malaysia (From Which Exemplars Have Been Collected as of February 2008)		
No.	Name of Plant	Location
1	Multimedia Manufacturing Sdn Bhd.	Selangor
2	Express Audio Industry Sdn Bhd.	Selangor
3	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
4	Digital Data Technologies Sdn Bhd.	Selangor
5	Discatech Multimedia Sdn. Bhd.	Cheras, Kuala Lumpur
6	Elite Digital Technologies Sdn Bhd.	Selangor
7	Jenama Evolusi Sdn Bhd.	Selangor
8	Polinta CD Manufacturer Sdn Bhd.	Selangor
9	Memory Tech Sdn. Bhd.	Selangor
10	GSB Summit CD Manufacture (M) Sdn Bhd.	Cheras, Kuala Lumpur
11	Pioneer Solution Sdn Bhd.	Selangor
12	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
13	BLG Edutainment (M) Sdn Bhd.	Selangor
14	Digital Data Technologies Sdn Bhd.	Selangor

15	Dragon Optical Media Technologies Sdn Bhd.	Selangor
16	IP SoftCom (M) Sdn Bhd.	Penang
17	Jenama Evolusi Sdn Bhd.	Selangor
18	The Phoenix Press Sdn Bhd.	Penang
19	Replitex CD industries Sdn Bhd.	Selangor
20	Union Triumph Sdn Bhd.	Johor
21	Tri-Commercial Sdn Bhd.	Selangor
22	Daxon Technology Sdn Bhd.	Pulau Pinang
23	Dragon Optical Media Technologies Sdn Bhd.	Kuala Lumpur
24	Empayar Canggih	Kuala Lumpur
25	Mutlimedia Commerce Sdn Bhd	Kuala Lumpur

Update on Basic Electronics: IIPA has previously reported a particularly vexing case involving a notorious pirate operation that is believed to span Malaysia, Thailand and Singapore. After extensive investigation and persistent urging by an Entertainment Software Association member company, in 2004, the MDTCA raided the retail store and warehouse of BASIC Electronics (M) Sdn. Bhd. where more than 880,000 pirated entertainment software discs were seized. This case languished for nearly two years, during which only one rights holder was asked to verify a small subset of the seized game product. Charges were finally entered against the defendants in October 2006, only after much urging from the rights holders and the U.S. government. Unfortunately, the charges were based on the less than 1,000 discs verified and do not accurately reflect the scope or nature of the infringing conduct or piracy operation involved. However, in a positive turn of events, Malaysian enforcement authorities in early 2007 advised that they were committed to advancing the BASIC prosecution expeditiously and invited support from additional game industry members. The members did so by completing a full inventory of the illegal game discs that had been seized so that the charges could be amended appropriately. Unfortunately, the charges have not been amended despite trial dates being set. Trial was tentatively set for April 2007, then postponed to January 21-22, 2008, then postponed again, with no future date set. Given the scale of this pirate operation, these continuous postponements are disappointing and only serve to embolden the defendants. Malaysian enforcement authorities must stay committed to the expeditious prosecution of this case and aggressively push for deterrent penalties.

Kuala Lumpur Burner Lab Raid and Investigation: With support from the content industries, including the entertainment software industry, the MDTCA raided a clandestine disc-burning lab located in a three-bedroom condominium in Kuala Lumpur on June 13, 2007, and seized 12 computers and 90 burners, nearly 50,000 pirated optical discs containing games, movie and business software, 7200 blank optical discs, a number of stampers, and various documents and other items. The condominium was vacant during the raid and therefore no arrests were made at the time. The evidence seized indicated that the burner lab may be run by the same syndicate linked to an earlier burner raid. While we understand that MDTCA plans to investigate all leads involving this possible syndicate connection with the goal of prosecution, little information has been disclosed with respect to progress on this front. We hope MDTCA is pressing forward with these efforts given the importance of curbing source-based piracy originating in Malaysia.

TRAINING AND PUBLIC AWARENESS

The copyright industries, once again, demonstrated their resolve and commitment to assist the government of Malaysia through participation, organization, and devotion of resources to various trainings and public awareness activities throughout 2007. For example, the business software, music, and motion picture industries were all engaged on a year-round basis, and the entertainment software industry engaged in similar efforts immediately upon the launch of its Malaysian anti-piracy program in October 2007. The music industry, for example, participated in government-initiated training programs, but also conducted on-going training and mock trials for MDTCA officers and prosecutors, particularly as their cases came up for hearings. The BSA engaged in a nationwide educational and enforcement campaign on corporate end-user software piracy, launched by the Minister of Domestic Trade and Consumer Affairs in July 2007. This campaign has aimed at raising awareness to the general public of the serious repercussions of using pirated software in the business environment.

Chart 5 Representative List of Copyright Industry Trainings 2007

Program Dates	Program Title (or description if no title)	Program Location	Synopsis (topic of training, number of attendees)	Program Sponsor(s)	Training Recipients
April 10, 2007	Illegal Camcording In Cinemas	GSC One Utama, Kuala Lumpur	MPA's Program Manager exposed participant to the new methods/trends/ technology used by pirates to record the latest movies in cinemas using camcorders and were briefed on steps to take when they detect camcording piracy.	MPA & GSC	30 attendees including local studio (UIP) representative, MDTCAs officers, GSC Cinema Managers and Assistant Managers nationwide including GSC General Manager and other senior management from GSC Headquarters.
March 2007	Software Piracy Issues		Enforcement and software piracy prosecution seminar with MDTCAs officers organized by a BSA member company	BSA	MDTCAs officers.
May 15, 2007	Illegal Camcording In Cinemas	Cathay Cineplexes, Cineleisure Damansara, The Curve, Kuala Lumpur	See April 10 training.	MPA & Cathay	35 attendees including local studio (UIP, Twentieth Century Fox & Buena Vista Tristar) representatives, MDTCAs officers, Cinema Managers and Assistant Managers nationwide including General Manager and other senior management from Cathay Headquarters.
June 12, 2007	Movie Piracy - Copyright Holders' Perspective: Source of Illegal Contents	Training College at Police Academy	MPA's Program Manager introduced MPA and its activities in Malaysia to the newly appointed Inspectors, Chief Inspectors and Assistant Superintendent of the Police. An introduction on the basic understanding of movie piracy with special attention given to illegal camcording in cinemas.	Police	35 Police officers from rank Inspector and above. These are the officers that the police officer at the Police Station would contact upon receiving report on illegal camcording activities.
June 28, 2007	Illegal Camcording In Cinema	TGV KLCC, Kuala Lumpur	See April 10 training.	MPA & TGV	20 attendees including local studio (Fox) representative, and TGV Cinema Managers.
October 30, 2007	ESA Training Seminar and prosecution training	Eastin Hotel, Petaling Jaya	ESA representative trained MDTCAs officers on various types of pirated games available in Malaysian market. They were also briefed on how to spot the differences between original and pirated versions of DVD games. In the afternoon, the head of prosecution from MDTCAs conducted trainings for officers on prosecutions in copyright piracy cases.	MPA & ESA	44 attendees including MDTCAs officers and MPA staff.
November 20, 2007	Intellectual Property Prosecution Course for the Deputy Public Attorney	ILKAP (the Malaysian government's legal training center), Bangi	A "Prosecution Course" was given to Deputy Public Attorneys to train them in prosecuting court cases effectively, and attended by MDTCAs officers as well. BSA was invited to speak on software and internet piracy issues. MPA helped to organize the seminar in securing speakers from Hong Kong and New Zealand. The recording industry also participated in this course.	Judicial & Legal Training Institute (ILKAP)	32 participants excluding speakers from MPA, MDTCAs, BSA and RIM. Mr. Ben Ho from HK Customs and Peter Pilley from New Zealand Police gave presentations and also facilitate most of the sessions
December 4-6, 2007	WIPO Seminar on WCT and WPPT	Kuala Lumpur	WIPO Asia-Pacific Regional Seminar on Issues Related to the Implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).	WIPO, MyIPO	Participants from 13 Asia regional governments (the governments of Bhutan, Brunei, Cambodia, Laos, Malaysia (the host), Myanmar, Nepal, Pakistan, Korea, Sri Lanka, Thailand, and Vietnam were in attendance. In addition, Mike Keplinger and Jorgen Blomqvist of WIPO, along with the Deputy Minister of Domestic Trade and Consumer Affairs Dato' Veerasingam A/L Suppiah, led off the proceedings.
December 2007	Software Enforcement and IT Seminar		Enforcement and IT seminar with MDTCAs officers organized by a BSA member company.	BSA Member Company	

COPYRIGHT AND RELATED LAWS

Copyright Law in Need of Further Revision: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments¹⁶ strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$6,200) for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy, e.g., Section 50A gives MDTCA officials the ability to carry out arrests for copyright piracy on an *ex officio* basis.¹⁷ The 2003 amendments did not make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall.¹⁸

IIPA has for several years recommended changes to the Malaysian Copyright Act to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (including by full implementation of TPMs and expressly protecting temporary copies), and joining these treaties to provide adequate protection of copyright in the online age.¹⁹ The government should make other changes consistent with international standards or practice (e.g., term extension to "life plus 70" and 95 years from publication for films and sound recordings etc.). 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 (see discussion of this issue below). Other changes should be made to Section 42 (discussed in greater detail below), and to Section 52 to clarify that evidence gathered in a criminal raid in Malaysia may be used by right holders in mounting civil cases. The law should also provide for statutory (pre-established) damages so that right holders who have difficulty proving the exact numbers of copies or the exact scope of piracy will still be able to obtain adequate damages to compensate for their losses.

IIPA understands that the government of Malaysia is in the process of preparing copyright law amendments that would aim to more fully implement the WCT and WPPT. At a seminar in December, MDTCA officials indicated that they would be taking steps to further implement the WCT and WPPT, and intend for Malaysia to join the WCT and WPPT in 2008. The intention alone does not foreclose the possibility that other agencies will not block accession legislation, but these statements give some rise for hope. Through discussions with the various government officials present, the government will principally be looking at the issues of "making available" right (and overlapping rights within the current Act) and legislating with more specificity provisions related to the prohibition on circumvention of technological protection measures. IIPA welcomes any opportunity to consult on and review the draft.

¹⁶ The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

¹⁷ These changes address in part the issue raised by IIPA in past filings about the need to deem piracy a "public crime," and while the amendments did not go quite that far, they did in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*.

¹⁸ The 2003 amendments did not make other changes which were necessary either for Malaysia to comply with international standards, or to improve the workings of the enforcement system. They did not, for example:

- Impose mandatory minimum jail sentences for piracy;
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright;
- Provide for stronger damages in civil copyright cases by providing for statutory damages in civil cases. Statutory damages will act as a strong deterrent to pirates who benefit greatly from infringing acts but are only required to pay a minimum sum for actual losses that the plaintiff is able to prove. Statutory damages could be staggered on a tiered system so that first time infringers pay sizeable but comparatively smaller sums as statutory damages while repeat infringers pay much larger sums.
- Permit disclosure by enforcement authorities to copyright owners of evidence;
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.

Please see the 2003 Special 301 report on Malaysia, at the website <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

¹⁹ Malaysia amended its copyright act in 1997 to partially implement the WCT and WPPT, including the recognition of a broad exclusive right of "communication to the public" including the right to make works available on demand (for instance, via the Internet). However, other treaty requirements, such as prohibiting the circumvention of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. In addition, the law should be clarified as to the protection of temporary copies under the reproduction right. IIPA also suggests that provisions dealing with secondary liability be adopted, such that Internet Service Providers (ISPs) will have incentives to cooperate with right holders in defeating online piracy. At least the "aiding and abetting" standard should be adopted so that service providers do not condone piracy on their services.

IIPA understands that a law, which would ban camcording has been proposed by MDTCA to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in theater, without concern for establishing the subsistence of copyright, ownership or infringement of the copyrighted work being recorded. This proposal is reportedly still pending at MDTCA, but it is hoped that this bill could move independent of other copyright legislation.

Amend Section 42 to Resolve "Affidavit" Problem, and Provide Presumptions: Section 42 of the Malaysian Copyright Act has proved problematic in practice, leaving statutory declarations of ownership and subsistence vulnerable to technical challenges by defendants. Section 42 must be modified to afford rights holders with presumptions of subsistence of copyright and ownership in practice.²⁰ IIPA notes that "presumptions" of ownership are required under Malaysia's current TRIPS obligations, and "presumptions" of ownership and subsistence would be important requirements of an IPR chapter in the USMFTA. While recognizing that the "affidavit" provision of Section 42 does not fully substitute for these presumptions, if the government wishes, it can reinterpret Section 42 so that it is consistent with the presumptions; at present, the way Section 42 is interpreted and implemented in practice, calls into serious question Malaysia's compliance with its current international obligations.

Amend Section 52 to Confirm that Evidence from Criminal Raids May be Used in Civil Cases: On August 8, 2006, the Malaysian Court of Appeals dismissed the appeal by ODVD Manufacturer Sdn Bhd's against a High Court decision that allowed copyright holders to file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.²¹ This case appears to confirm that right holders have the right to file civil actions based on information gathered in criminal cases. Section 52's non-disclosure provision has been used in the past to deny rights holders of necessary information to bring a civil case, so IIPA urges the government to amend the law to ensure that defendants or unknowing officers or officers of the court do not employ it against rights holders again.

Provide for Mall Landlord Liability: IIPA understands that a criminal action has been filed against a landlord of a fixed premises for permitting its tenant to use the premises to sell pirated music. This matter is still proceeding through the court at an early stage of the hearings. Industry understands that MDTCA is completing investigations with a view of charging another landlord for aiding and abetting pirate tenants. To the extent this case will extend or clarify mall owners' liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes this will reap long-term, positive benefits in the fight against piracy in Malaysia. IIPA understands that the government intends to file further mall owner actions. We support these actions, and also urge the Malaysian government to create a specific offense for a landlord to permit its premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to: 1) ensure that manufacturers or factory owners should not be allowed to import machinery without a

²⁰ For example, right holders have noted, among other problems, that Section 42, while not expressly requiring the maker of an affidavit (of copyright ownership or subsistence) to be present, has been applied to require presence in practice, since defendants have claimed they have a right to cross-examine the maker of the affidavit. In addition, 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"). Finally, 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).

²¹ In September 2002, Malaysia's Ministry of Domestic Trade & Consumer Affairs (MDTCA) raided ODVD Manufacturer Sdn. Bhd., a licensed VCD replicating factory, and seized 1,670 suspected pirate optical discs, some of which were infringing Motion Picture Association (MPA) member company titles. Based on information obtained during the September 2002 raid, Columbia Pictures Industries, Inc., owner of the copyright of the movie *Stuart Little 2*, initiated a civil action against ODVD Manufacturer Sdn Bhd. ODVD Manufacturer Sdn. Bhd. applied to the High Court to dismiss Columbia Pictures' claim on the grounds that the civil action was initiated based on information obtained by the MDTCA during the criminal raid. ODVD Manufacturer Sdn. Bhd. argued that it was illegal for the MDTCA to have divulged information gathered during the raid. The High Court dismissed the application by ODVD Manufacturer Sdn. Bhd., and ODVD Manufacturer Sdn. Bhd. appealed to the Court of Appeal.

valid license from MDTCA, and that MDTCA should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID code from discs; 3) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; 4) prohibit the unauthorized burning of content onto recordable discs; 5) specifically empower the authorities to shut down factories bases solely on positive forensic examination reports; and 6) ensure that any plants, which indicate that they are producing “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand production to recordable discs be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants. See also the other important improvements sought in the free trade agreement negotiation.

Enact Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the government of Malaysia should be encouraged to adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong’s Organized and Serious Crimes Ordinance (OSCO), which allows Hong Kong authorities: (1) to employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia.²²

FREE TRADE AGREEMENT

While Trade Promotion Authority (TPA) – otherwise known as “fast track” authority – lapsed on June 30, 2007, the U.S. and Malaysian governments continue to negotiate with each other regarding a possible free trade agreement.²³ The U.S.-Malaysia FTA must include a robust chapter on intellectual property rights, including full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards. These include, but are not limited to, those already embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), the requirement that Malaysia 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, and the 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.

Key FTA issues include the following:

- extending term of protection to life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years.
- obtaining commitment by the Malaysian government to immediately join (and implement) the WIPO Internet treaties, the WCT and WPPT.
- ensuring that use of software in the government is legalized (and that appropriate software asset management is employed), and that government networks are not being used for illegal uses of copyright materials, including over peer-to-peer file sharing (P2P) networks or services.

²² Malaysia has the Anti-Money Laundering Act of 2001(AMLA) of which infringement of copyright is a scheduled offense under the definition of “serious offenses”, and includes attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLA, the government has been slow to use it in copyright infringement matters.

²³ See The Office of the United States Trade Representative, United States, Malaysia Announce Intention to Negotiate Free Trade Agreement, at http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_Malaysia_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html (on March 8, 2006, the United States announced its intention to enter into negotiations toward an FTA with the government of Malaysia).

- ensuring that the problem of Pay TV piracy – signal theft – does not become a major source of trade losses to U.S. owners of broadcast content, by including an exclusive broadcast right, the right to control against the unauthorized decryption of encrypted program-carrying signals (as well as to stop the manufacture or distribution of devices used to decrypt), and in addition, a prohibition against onward distribution of signals without authorization (re-broadcast or re-transmission).
- outlawing 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.
- improving customs authority and border enforcement measures.
- outlawing 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.
- outlawing false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.
- ensuring that the optical disc regulations in force in Malaysia are fully compliant with the specific concerns outlined immediately below.

Optical Disc Side Letter: 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 that samples (exemplars) are collected from every plant.
- allow right holders to participate in inspections and collect evidence.
- ensure that officers are authorized to seize discs in inspections and make arrests.
- allow right holders to participate in inspections and collect evidence.
- allow for inspections at any time, day or night.
- allow for forcible entry where entry is obstructed.
- provide for automatic revocation if a plant or agent has violated the law, including if the plant is caught illegally replicating discs (finished or recordable).

- provide that illegal discs found at any factory or licensed premises are presumed to have been replicated by the manufacturer in question.

MARKET ACCESS

Prohibition on Game Play in Internet Cafés: Ironically, while IIPA notes in this report that unauthorized use of entertainment software in Internet cafés is a growing problem, IIPA has also learned that the Ministry of Housing and Local Government issued a Circular dated October 5, 2007, which apparently instructs local municipalities to advise Internet cafés of certain restricted and prohibited activities, which may have the detrimental effect of prohibiting even licensed uses of entertainment software. While IIPA has not reviewed this Circular, contacts at the Multimedia Development Corporation (MDEC) have informed industry that several local city councils have sent letters to local Internet cafés advising them of certain restricted and prohibited activities. These include Ipoh City Council, Shah Alam City Council, and other city councils in Johor State. The city council letters are concerning because they set out purported prohibitions against offering “video games which are consoles based” and “computer games with elements of pornography and gambling” in Internet cafés. With respect to computer games, while the intent seems to be to curtail the viewing of “pornography and gambling” in the Internet cafés, and not “Video Games” in and of themselves, the letters are reportedly unclear in making the distinction and the definitions are rather vague. The result of these letters is that some Internet cafés, concerned about violating what may be viewed as a ban on all computer games in their spaces, are refusing to license all entertainment software in their establishments. However, those same Internet cafés continue to use unlicensed software. To the extent the policy as implemented is impeding efforts to license legitimate game play in Internet cafés, or to the extent the policy as implemented is keeping games out of Internet cafés altogether, IIPA views the issue as one of market access that needs to be addressed by MDEC and the local city councils with urgency.

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.

Restriction on Foreign Advertising: Malaysia allows only locally-produced advertisements to be aired on terrestrial broadcast channels. Foreign advertisements must therefore be replaced with locally-made advertisements before programs can air. This restriction, which both has a protectionist underpinning, and impedes on right owners’ abilities to freely contract and pursue commercial opportunities in the Malaysian market, should be lifted.