

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

SINGAPORE

IIPA urges USTR to monitor developments in Singapore in 2008 with regard to the issues identified in this Special Mention filing.

COPYRIGHT LAW AND RELATED ISSUES

Implementation of FTA Provisions re Digital Audio Transmissions: On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, with the goal of bringing the country's law into compliance with the copyright-related provisions of the U.S.–Singapore Free Trade Agreement. Unfortunately, the treatment of certain non-interactive digital audio transmissions in the amendment places Singapore in violation of its FTA obligations.

Article 16.4(2)(a) of the FTA provides in pertinent part:

Each Party shall provide to authors, performers, producers of phonograms and their successors in interest the exclusive right to authorize or prohibit the communication to the public of their works, performances, or phonograms, by wire or wireless means, including the making available to the public of their works, performances, and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Notwithstanding paragraph 10, a Party may provide limitations or exceptions to this right in the case of performers and producers of phonograms for analog or digital free over-the-air terrestrial broadcasting and, further, a Party may provide limitations with respect to other non-interactive transmissions, in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.

While the FTA permits Singapore to provide limitations with respect to non-interactive transmissions, it does so only “in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.”

Section 107B of the Singapore Copyright Act exceeds the allowable discretion under the FTA by wholly exempting from protection certain non-interactive transmissions—notably, simultaneous retransmissions of a broadcast signal (so-called simulcasting). This exemption does not apply to a special case, most certainly conflicts with the normal exploitation of a sound recording, and prejudices the interests of the right holders. Interestingly, some of the principal beneficiaries of this gap in protection are state-owned entities, such as MediaCorp, owned by Temasek Holdings, the Singapore Government's investment arm. MediaCorp relies on this provision to simulcast its radio broadcasts over the Internet to audiences all over the world, and refuses to obtain the multi-territory license for simulcasting. This FTA-incompatible provision must be quickly addressed by Singapore.

Deterrent penalties for business end-user piracy: The Copyright (Amendment) Act also brought into force criminal penalties for willful infringement of copyright for commercial advantage (Section 136(3A)). This provision was intended to provide a criminal remedy for the most damaging business software infringement problem in Singapore, the willful use of unlicensed software applications in the workplace. At the time of enactment, IIPA questioned whether the maximum penalties provided for violation of Section 136(3A) were sufficient to meet Singapore's obligation under Article 16.9.21.a of the FTA to provide deterrent penalties. The results in the first completed prosecution of a business end-user pirate under this section confirms these apprehensions: although it was undisputed that the defendant was using over 50 unlicensed copies of programs with a retail value of over S\$78,000 (US\$55,000), under the law the maximum fine that could be imposed was only S\$40,000 (US\$28,000).¹ Clearly, the authorized criminal penalty fell far short of deterrent levels. Singapore should be urged to review this issue and to increase the authorized penalties for violation of Section 136(3A) so that they are more consistent with those for comparable offenses and so that they deliver the deterrence required by the FTA.²

Parallel Imports: Since Singapore's law does not protect against parallel imports, there has been an influx into Singapore of pirated product masquerading as legitimate imports, especially pirated music imports from China, which are sold in small retail outlets and makeshift stalls in public housing estates. Because of police reluctance to accord priority to such infringement, industry must resort to expensive and lengthy civil litigation in order to keep such pirate music products out of the market. These lawsuits are hampered by the requirement to prove that the retailer had the requisite knowledge that the discs were infringing, as well as the onus of proving infringement. Legislative proposals to shift the burden of proof in these cases were not included in the 2005 amendments. Last year, the recording industry proposed that a short window period be provided to protect against parallel imports of new releases, but the government rejected this idea. If Singapore persists in refusing to provide an exclusive right to authorize imports, it should at least act to reverse the burdens of proving knowledge in cases involving import piracy.

PIRACY AND ENFORCEMENT UPDATE IN SINGAPORE

Optical Disc Piracy: In 2005, the police raided three optical disc plants, all involved in the export of pirated music and movie products seized in South Africa, among other countries. Despite evidence of piracy, state prosecutors did not charge the plants, but instead issued written warnings. (The authorities also have yet to prosecute the exporter.) Furthermore, after declining to prosecute the plants criminally, the authorities also refused to grant recording industry representatives access to records seized from the plants (including production records), thus frustrating the ability of right holders to seek civil redress and damages for the massive infringements that occurred. Ironically, recording industry investigators were responsible for gathering most of the evidence upon which the plant raids were conducted in the first place. There are now fresh indications that one of the factories previously implicated in the supply of

¹ In fact, because the defendant had pled guilty, the fine actually imposed in this case (PP v. PDM International Pte Ltd.) was only S\$30,000.

² For example, most other criminal copyright violations are punishable in Singapore by fines of up to S\$10,000 per infringing copy or S\$100,000, whichever is higher. See Sections 136(1) and 136(2). Penalties for trademark counterfeiting are at comparable levels.

pirate materials to Africa, has once again been involved in the supply of pirate discs, this time to Europe.

In September 2005, a seizure at the Trendisc Technology plant involved 400,000 pirated movie VCDs, most of them dubbed in French, and intended for export to Africa. While the individuals involved were prosecuted and sentenced to jail in March 2006, the fine imposed against Trendisc itself in September 2006 amounted to only S\$54,000 (about US\$35,000).

Optical disc piracy cases, especially those of this magnitude and importance, should be prosecuted vigorously, and deterrent sentences should be imposed. The authorities, including the Attorney General's Chambers, should provide better cooperation with right holders to provide access to evidence essential to support potential civil claims.

Book Piracy: U.S. book publishing companies continue to suffer from illegal commercial photocopying. A few stores, located in the Queensway shopping center and well-known to the industry and to authorities, have become blatant repeat offenders, despite another round of raids in 2007. The industry needs more support from the Singapore Police in tackling the problems created by these sophisticated syndicates. Specifically, IIPA would like to see the same model of police-initiated raids that has been successful in tackling optical disc operations in the past employed to combat book piracy, including the use of police investigative powers to bring the syndicate owners to prosecution.

IIPA applauds efforts by the Intellectual Property Office of Singapore (IPOS) in its campaigns to increase awareness of the importance of copyright among students. Campaigns such as the iperckidz program in the schools can only serve the country well. Despite this effort, and some efforts made at the university level, students continue to display attitudes of disrespect for copyright protection. IPOS and the Ministry of Education need to continue to play an active role in addressing this problem and promoting cooperative efforts with university administrations to discourage use of infringing materials by students in classrooms.

Music Piracy: Broadband penetration in Singapore is among the highest in Asia, and online music piracy is a serious and growing problem. Because of inaction by the Intellectual Property Rights Branch (IPRB) and a lack of cooperation from Internet Service Providers (ISPs), the problem threatens to worsen.

File sharing of infringing copies of music files via P2P services is on the rise in Singapore, especially using Gnutella clients such as Bearshare and Limewire. Although the IPRB took stern action against two file sharers who were sentenced to imprisonment in 2006, they have since refused to take further action despite complaints filed by the industry. In 2005, the recording industry filed complaints and provided evidence of infringing file sharing activities against 33 individuals. The IPRB informed the recording industry around May 2007 that it had prosecuted none of these infringers, but had merely given warnings to seven of them. No information was given about the fate of the other 26. In October 2006, the recording industry filed 25 additional complaints with IPRB against infringers who were uploading music files illegally. The IPRB informed the industry in July 2007 that it would not be taking any action and suggested that "Collaborative Enforcement" was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings.

In Singapore, it is difficult to obtain information on infringing subscribers from the ISPs, who insist on a court order before releasing any information. Because this entails a lengthy and

expensive process, it raises questions of compliance with the FTA, which calls for Singapore to provide an “expeditious” mechanism for right holders to use. The recent case of *Odex et al vs. Pacific Internet* raises another FTA issue; it held that only the copyright holders or their exclusive licensees are entitled to file such proceedings, but the FTA contemplates enforcement by associations of right holders as well.

The ISPs in Singapore do not assist the rights holders in their fight against internet piracy. In 2007, the local record industry association sent notices to 7 ISPs informing them of infringing file sharing activities conducted by 554 subscribers, requesting that a warning be sent to the subscriber or that the accounts be terminated. All of the ISPs took the stance that they were not obliged to assist the rights holders. The largest ISP, SingNet, which was sent notices of infringing activities pertaining to 478 subscribers, has refused to even meet the industry representatives.

The government should take proactive steps to curb rising online music piracy by taking enforcement actions and by considering legislation which will compel ISPs to take some responsibility in the fight against infringing activities on their networks.

In the offline environment, the recording industry is frustrated by the reluctance of the IPRB to take enforcement action against retail piracy of physical product (CDs), even in cases where evidence of pirate sales is strong. As recently as October 2007, the IPRB refused to take action, stating that they would only act in cases that involve syndicates or that they classify as complex.

Entertainment Software: Entertainment software companies remain very satisfied with the record of the Singapore Government on enforcement for their products, particularly with the efforts of the local police.³ The Government continues to have an excellent record of cooperation and partnership with the entertainment software industry on educational initiatives aimed at increasing the public's awareness of the importance of protection of copyright in interactive games. There is, however, a rising concern with respect to the sale of circumvention devices, which facilitate the play of pirated games on consoles. Enforcement actions conducted by the entertainment software industry have only met with limited success. As the sale of such devices is illegal under the anti-circumvention provisions of the Copyright Act, the Singapore police should be encouraged to conduct enforcement actions and pursue prosecutions against retailers and distributors of such devices. Increased police actions and prosecutions, with corresponding media coverage, would serve as a deterrent to the proliferation of such devices.

Other Observations: Apart from the problems noted above, IIPA is pleased with the government's response in certain other areas. Singapore continues to boast among the lowest piracy rates in all of Asia. Effective enforcement at the border (where shipments of pirate product from Malaysia continue), and responsiveness to complaints of business end-user piracy, have contributed to this outcome. Aside from the problem of business end-user piracy prosecutions discussed above, criminal copyright cases (including those involving distribution of pirate software) have generally resulted in the imposition of penalties and sentences that have acted as significant deterrents.

³ There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.