



Asia-Pacific Economic Cooperation

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**2003/AMM/025**  
Agenda Item: V.2

**“Effective Practices for Regulations Related to Optical  
Disc Production”**  
**(Short version: “Effective Practices in OD Enforcement ”)**  
Purpose: Consideration  
Submitted by: United States on behalf of the APEC/IPEG



**Fifteenth APEC Ministerial Meeting**  
**Bangkok, Thailand**  
**17-18 October 2003**

## Executive Summary

### Background Information:

At the 2002 Los Cabos Ministerial, Leaders agreed on a Pathfinder basis to implement important targets to liberalize trade in the digital economy. The Digital Piracy Initiative addresses optical disc piracy, which is a growing problem with the potential to hinder the development of the digital economy.

The “Effective Practices for Regulation of Optical Disc Production” is a strong step forward toward helping economies draft legislation to stem the production, import, export and domestic distribution of pirated optical media, which inflicts great losses on APEC economies. For APEC members afflicted by optical disc pirate production capacity, a regulatory means for supervision of optical media production is simpler and more efficient than civil or criminal measures for addressing copyright violations. Monitoring the import, export and use of optical media equipment also partially addresses regional concerns about trade in infringing goods.

### Expected Deliverables for 2003:

Paper on "Effective Practices for Regulation of Optical Disc Production"

## Recommendations

*Please indicate required actions, decision points (e.g. note, approve, recommend to APEC Ministers)*

It is recommended that AMM:

Endorse the SOM decision to approve the “Effective Practices for Regulation of Optical Disc Production,” and forward the “Optical Disc Production” Paper to the AELM for Leaders' endorsement.

*\*The boxes can expand dependent upon the text. However for conciseness, please ensure that the information does not exceed 1 page. Thank you.*

## Effective Practices for Regulations Related to Optical Disc Production

Optical disc piracy is a growing problem with the potential to hinder the development of the digital economy. The production, import, export and domestic distribution of pirated optical media inflict great losses on APEC economies, which can be felt across all copyright-based companies. For APEC members afflicted by optical disc pirate production capacity, a regulatory means for supervision of optical media production is simpler and more efficient than civil or criminal measures for addressing copyright violations. Monitoring the import, export and use of optical media equipment also partially addresses regional concerns about trade in infringing goods.

Bearing in mind APEC general principles, those APEC members afflicted by optical disc pirate production capacity should swiftly, if they have not already done so, enact legislation and/or regulations governing optical disc production.<sup>1</sup> Provisions should include licensing of facilities, enforcement of licenses, adequate penalties for violations, and controls on export and import of equipment and raw materials, provided that these are consistent with the requirements of domestic laws and due process in APEC members. Many members already have laws and regulations in force or pending, cited below as examples of practices that could be included in effective optical disc regimes.<sup>2</sup>

### A. Licensing Of Facilities

**1) Production Licenses:**<sup>3</sup> To supervise and control the production of optical discs, effective optical disc regimes provide for centralized licensing<sup>4</sup> of the manufacture of optical discs (prerecorded, blank, or recordable) and "production parts" (including "stampers" and "masters"). Licenses should be of limited duration and renewable.<sup>5</sup> The license has various conditions, for example, the licensee must: agree to surprise inspections; obtain and apply "identification code" (SID Code) to optical discs and

<sup>1</sup> The following APEC Member Economies have already recognized the need to or have made commitments to regulate optical disc production in their domestic laws: People's Republic of China; Hong Kong, China; Indonesia; Malaysia; The Philippines; Singapore; Chinese Taipei; and Thailand. Vietnam has expressed interest in enacting optical disc regulations.

<sup>2</sup> People's Republic of China, CIRCULAR NO. 5 (1994) and CIRCULAR ON FURTHER ENHANCING ADMINISTRATION OVER CD REPRODUCTION (1996); Hong Kong, China, PREVENTION OF COPYRIGHT PIRACY ORDINANCE (CHAPTER 544 OF THE LAWS OF HONG KONG), sections 6C(1) and 6D(1) of the Import and Export Ordinance (Chapter 60 of the Laws of Hong Kong) and Regulations 3 & 4, First and Second Schedules of the IMPORT AND EXPORT (GENERAL) REGULATIONS (CHAPTER 60A OF THE LAWS OF HONG KONG); Malaysia, OPTICAL DISCS ACT (2000) and OPTICAL DISCS REGULATIONS (2000); Korea, SOUND RECORDS, VIDEO PRODUCTS AND GAME SOFTWARE ACT (2001); Chinese Taipei, OPTICAL MEDIA MANAGEMENT STATUTE (2001) and REGULATIONS GOVERNING APPLICATION FOR LICENSE AND DECLARATION FOR THE MANUFACTURING OF OPTICAL DISKS (2002). Singapore has committed to regulate optical disc production in the UNITED STATES-SINGAPORE FREE TRADE AGREEMENT (2003) in a "Side Letter." Indonesia's new Copyright Law (LAW OF THE REPUBLIC OF INDONESIA NO. 19 YEAR 2002 REGARDING COPYRIGHT) contains a basic provision regulating optical disc production, and is on the verge of approving a GOVERNMENT REGULATION PLAN OF THE GOVERNMENT OF INDONESIA CONCERNING OPTICAL DISC (draft, 2003). The Philippines and Thailand have draft legislation to regulate optical disc production. The Philippines, AN ACT REGULATING OPTICAL MEDIA, PROVIDING PENALTIES THEREFOR, AND FOR OTHER PURPOSES (Senate Bill, 2003); Thailand, ACT ON PRODUCTION OF CD PRODUCTS, B.E. (draft 2003).

<sup>3</sup> People's Republic of China Circular, §§ 1-2; Hong Kong, China Chapter 544 § 3(1); Malaysia Act, Part III (esp. § 4); Philippine Bill, § 12.

<sup>4</sup> Commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) can be subject to registration to ensure that unregistered commercial conduct is punishable.

<sup>5</sup> Current or pending regulations providing for renewable licenses of three-years duration include: Hong Kong, China Chapter 544 §§ 6(1), 7; Indonesia draft, article 8(1); Malaysia Act, §§ 6(3), 14; Philippine Bill, § 13.

production parts; keep required records; produce discs only at a licensed premises;<sup>6</sup> and take measures to verify that customers have authorization of the relevant intellectual property right holders.<sup>7</sup>

*Comment: Hong Kong's implementation of license requirements, followed by strict enforcement, has curtailed production of piratical optical discs.*

**2) Application of "Identification Code":**<sup>8</sup> To facilitate matching particular optical discs with particular plants, effective optical disc regimes require manufacturing equipment to be adapted to,<sup>9</sup> and optical disc moulds to, apply the source identification codes ("SID Codes") jointly developed by the International Federation of the Recording Industry and Philips International B.V., and to cause each disc and production part to be marked with SID Codes. To avoid fraud with respect to or forgery of SID Codes, other provisions prohibit the unlawful manipulation of SID Codes (e.g., the making, possessing or adapting a mould without the appropriate SID Code; the altering, gouging or scouring of a SID Code on or from a mould or any disc).<sup>10</sup>

*Comment: Malaysia's implementation is relatively comprehensive with respect to requiring the use of SID Code and outlawing fraudulent uses or forgery of identification codes. Singapore has committed to have provisions on the usage of identification codes.*

**3) Licensee Record-Keeping Requirements:**<sup>11</sup> To ensure that optical disc production licensees follow the law, and to promote transparency, effective optical disc regimes require optical disc production licensees to keep records regarding, for example, any transfer of machinery or raw materials (including information about the quantity of raw materials), quantities of discs produced, orders received, orders fulfilled, and exemplars of each optical disc title manufactured.

*Comment: Malaysia requires licensees to keep manufacturing records at their factories as well as submit monthly production reports to the relevant authority. Singapore has committed to require licensees to keep various important records.*

## **B. Enforcement Of Licenses**

**1) Denial,<sup>12</sup> Suspension,<sup>13</sup> or Revocation of a License:**<sup>14</sup> To avoid optical disc production that violates the law, effective optical disc regimes ensure that a competent

<sup>6</sup> Hong Kong, China Chapter 544 § 4(1); Malaysia Act, § 5; Philippine Bill, § 15(b) (grounds for revocation of license); Chinese Taipei Law, article 9; Singapore Side Letter, § 2(a)(ii).

<sup>7</sup> Hong Kong, China Chapter 544 § 5(2), HK Gazette G.N. 3431 of 1998 and N.N. 4328 of 2002; Indonesia draft, article 6(1)(b) and (2)(b).

<sup>8</sup> Hong Kong, China Chapter 544 § 15 and Notice On Marking Standards, as published in HK Gazette G.N. 3432 of 1998 and G.N. 4329 of 2002; Indonesia draft, article 3(c); Malaysia Act, § 19 (only as to "optical discs"); Philippine Bill, § 16; Chinese Taipei Law, § 10 (as to "prerecorded optical discs"), 11 (as to "stampers"); Singapore Side Letter, § 2(c)(ii).

<sup>9</sup> Hong Kong, China Notice, *ibid*, paragraph a; Philippine Bill, Schedule 2, S. 2(e); Singapore Side Letter, § 2(c)(ii).

<sup>10</sup> Hong Kong, China Chapter 544 § 22 (criminalizing the actions specified in this subsection); Malaysia Act, § 21; Chinese Taipei Law, § 10, clauses 2 and 3.

<sup>11</sup> Hong Kong, China Chapter 544 §§ 5(2) and 17 (1)(d) – (e), HK Gazette paragraph 3 of G.N. 3431 of 1998 and G.N. 4328 of 2002; Malaysia Act, § 17 (general requirement); Singapore Side Letter, §2(d); *see also* Chinese Taipei Law, article 8 and Regulations, articles 5, 11 (as to "prerecorded optical disks"), 7, 12 (as to "blank optical disks"); Thailand draft, § 10(3).

<sup>12</sup> Hong Kong, China Chapter 544 §§ 11, 12; Malaysia Act, § 7; Korea Act § 39; Philippine Bill, § 14; Chinese Taipei Law, § 5.

<sup>13</sup> People's Republic of China Circular, § 3; Indonesia draft, article 21 (suspension for obstruction of inspection); Malaysia Act, § 10(1)(b) (being charged of commission of an offence can lead to revocation of the license); Korea Act § 39; Philippines Bill, § 15.

authority can deny, suspend, or revoke a license for various wrongful acts (e.g., any violation of the optical disc regime), or for violating any conditions of the license (e.g., furnishing of false or misleading information in the application process) or any provision of the law (e.g., for copyright or trademark infringement).

*Comment: Malaysia's implementation provides a relatively comprehensive list of grounds for denial or revocation of a license. Chinese Taipei's implementation provides some grounds for denial or revocation of a license.*

**2) Inspection Authority:**<sup>15</sup> To effectively enforce the optical disc regime, license or registration requirements should provide that competent authorities are able to conduct surprise inspections, pursuant to domestic laws, without notice,<sup>16</sup> at any time of day or night,<sup>17</sup> to obtain exemplars,<sup>18</sup> and to examine licensed or registered premises. Competent authorities may seize, seal, remove, or detain equipment, optical discs, records, or other evidence of violations during inspections.<sup>19</sup> Effective laws also prohibit the obstruction of inspections;<sup>20</sup> provide for the possibility of forcible entry where entry is refused;<sup>21</sup> and allow right holder organizations to assist in inspections at the discretion of the competent authorities.<sup>22</sup>

*Comment: The Philippine Bill and the Indonesia draft will allow for surprise inspections. Hong Kong's implementation provides relatively comprehensive inspection provisions. Both Hong Kong's and Malaysia's implementations provide for forcible entry. Korea's Standing Inspection Teams (SITs) have authority to conduct investigations online.<sup>23</sup>*

**3) Search and Seizure Authority:**<sup>24</sup> To effectively enforce the optical disc regime, competent authorities are able to enter and search any premises, pursuant to domestic laws and the requirements of due process, whether licensed or unlicensed, and to seize, seal, remove, or detain equipment, optical discs, raw materials, records, or other evidence;<sup>25</sup> with the possibility of forcible entry where entry is refused.

*Comment: Hong Kong's and Malaysia's implementations, and the Philippine Bill provide for search and seizure authority. Forcible entry is an important element when rogue optical disc plant owners/managers refuse or delay entry in order to dispose of evidence or escape.*

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<sup>14</sup> Hong Kong, China Chapter 544 §§ 12-13; Malaysia Act, § 10 (1)(c) (conviction leads to revocation); Philippine Bill, § 15; Chinese Taipei Law, §§ 7 (material falsehoods in application), 17 (SID Code violations).

<sup>15</sup> Hong Kong, China Chap. 544 § 17; Indonesia draft, articles 15-17; Malaysia Act, §§ 35-37; Philippine Bill, § 9(5); Singapore Side Letter, § 2(e); Chinese Taipei Law, article 13, cl. 2; Thailand draft, §§ 17-19.

<sup>16</sup> Hong Kong, China Chapter 544 § 17; See Malaysia Act, § 37; Philippine Bill, § 9(5); Singapore Side Letter, § 2(e).

<sup>17</sup> Indonesia draft, article 16; Philippine Bill, § 11(d).

<sup>18</sup> Singapore Side Letter, § 2(g); Hong Kong, China Chapter 544 § 17(1)(f).

<sup>19</sup> Hong Kong, China Chapter 544 §§17(1) and 34; Malaysia Act, § 46; Singapore Side Letter, § 2(e).

<sup>20</sup> Hong Kong, China Chapter 544 §§ 17(2) and 33A; Indonesia draft, article 21; Malaysia Act, § 32; Chinese Taipei Law, article 13, clause 2.

<sup>21</sup> Hong Kong, China Chapter 544 § 17(3); Malaysia Act, § 38(1).

<sup>22</sup> Indonesia draft, article 15(5).

<sup>23</sup> Korea Act § 42.

<sup>24</sup> Hong Kong, China Chapter 544 §§ 18 and 19; Malaysia Act, §§ 38-39; Korea Act §§ 42, 51; Philippine Bill, § 9(6).

<sup>25</sup> Hong Kong, China Chapter 544 §§ 18 and 19; Malaysia Act, § 46; Philippine Bill, § 9(6).

**4) Government Record-Keeping Requirements:**<sup>26</sup> To promote greater transparency in both the optical disc regime and its enforcement, economies with effective optical disc regimes maintain and make available for inspection records of actions including, for example, production licenses, import/export licenses and identification codes granted (or revoked or suspended where applicable), and inspection actions.

*Comment: Hong Kong's and Malaysia's implementations include a government register, while the Philippines' and Singapore's implementations will provide for such. Maintaining records of inspections is important to cooperating in enforcement with victims of unlawful optical disc production.*

### C. Adequate Penalties For Violations

**1) Criminal/Administrative Penalties for Violations:**<sup>27</sup> In order to provide a proper deterrent to the illegal manufacture of optical discs or associated activities, an effective optical disc regime makes key offenses punishable as crimes. Key offences include: manufacturing or duplicating discs or production parts without a license or registration or contrary to the terms of a license or registration; exporting discs, or importing/exporting production parts, raw materials, or machinery without a license or contrary to the terms of a license; forging license documents; manufacturing/producing discs at a place other than the licensed or registered premises; and failing to apply the required allocated Identification Code. Penalties include fines and imprisonment, with officers or other individuals in charge (e.g., managers, owners, directors, etc.) held liable for corporate acts.<sup>28</sup> Articles seized in an inspection or search are subject to forfeiture and destruction.<sup>29</sup> Convicted infringers maybe prohibited from engaging in business for a specific period of time.<sup>30</sup>

*Comment: All current optical disc regimes impose criminal penalties (or, e.g., in the case of the People's Republic of China, include strict administrative fines and closure and seizure of plants, which has had a deterrent effect). The Philippine Bill will, as in Hong Kong and Malaysia, hold responsible individuals of a company (e.g., directors, owners, managers) responsible for the acts of employees of the company.*

**2) Plant/Premises Closure:** An effective optical disc regime provides that a plant or other premises may be closed in case of serious violations, for example, when there is: conviction of a person or entity associated with the license/registration, under the optical disc law, or other intellectual property law; continued manufacture in the plant/premises when the license has lapsed or has been revoked; etc.<sup>31</sup>

*Comment: The People's Republic of China effectively closed many tens of illegal optical disc manufacturers in the late 1990s. Malaysia closed nine illegal optical disc plants, eliminating 21 production lines, between 2001 and July 2003.*

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<sup>26</sup> Hong Kong, China Chapter 544§ 31; Malaysia Act, § 16 and Regulations, § 18 (register of manufacturers of optical discs); Philippine Bill, § 9(13); Singapore Side Letter, § 2(b).

<sup>27</sup> Hong Kong, China Chapter 544 §§ 21-23; Indonesia Copyright Law, article 72(9) and draft, articles 18-20; Malaysia Act, §§ 26-29, 33; Philippine Bill, §§ 18-19; Singapore Side Letter, § 2(g); Chinese Taipei Law, articles 15-23.

<sup>28</sup> Hong Kong, China Chapter 544 § 36B; Malaysia Act, § 30-31, 33; Philippine Bill, § 19, clause 3.

<sup>29</sup> Hong Kong, China Chapter 544 §§ 34-35; Malaysia Act, § 46.

<sup>30</sup> Korea Act § 29.

<sup>31</sup> Hong Kong, China Chapter 544 § 18(5)-(8) provides for closure as a temporary measure to facilitate preservation of evidence.

#### D. Controls On Export And Import

**Licensing of Import/Export:**<sup>32</sup> To track movement of and quantity of equipment/raw materials, effective optical disc regimes provide for centralized licensing of the export of optical discs, and the import/export of production parts ("stampers" and "masters"), raw materials,<sup>33</sup> and manufacturing equipment. These requirements take the form of an "automatic" licensing regime (i.e., such licenses are not denied) so they are consistent with WTO requirements.

*Comment: The People's Republic of China's import/export provisions were implemented in the late 1990s and resulted in 1) shutting down factories importing equipment without authorization and 2) stopping the flow of further equipment into China. Thailand's 2001 draft contains a reporting requirement with respect to raw materials used to produce optical discs.*

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<sup>32</sup> People's Republic of China Circular; Hong Kong, China Import/Export Regulations (amending §6F(1)(a) of the Import and Export Ordinance (Chapter 60), prohibiting the import of all optical disc mastering and replication equipment without a license).

<sup>33</sup> Indonesia draft, article 4(b); Thailand draft, § 16.