



September 8, 2008

By E-MAIL to [FR0606@ustr.eop.gov](mailto:FR0606@ustr.eop.gov)

Jennifer Choe Groves

Director for Intellectual Property and Innovation

Office of the U.S. Trade Representative

1724 F Street, N.W.

Washington, D.C. 20508

Re: **Taiwan: Special 301 Out-Of-Cycle Review**  
 IIPA Comments on the Status of Copyright Protection and  
 Enforcement 73 Fed. Reg. 42378 (July 21, 2008)

Dear Ms. Groves:

This submission by the International Intellectual Property Alliance ("IIPA") responds to USTR's request for comments concerning "acts, policies and practices regarding the adequacy and effectiveness of intellectual property protection and enforcement in Taiwan" as part of the Out-of-Cycle review announced by USTR on April 25, 2008.

[http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2008/2008\\_Special\\_301\\_Report/asset\\_upload\\_file193\\_14872.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file193_14872.pdf).

IIPA acknowledges the significant improvements that Taiwan has made over the years to its copyright law and to the improved enforcement of that law. However, our industries continue to face certain fundamental problems in Taiwan. It is critical to our industries that these problems be adequately addressed before we can conclude that Taiwan provides the adequate and effective protection envisioned in the Special 301 provisions of U.S. law. Fortunately, most of these problems are resolvable in the near term. IIPA recommends that Taiwan remain on the Watch List until (a) an acceptable ISP liability law has been adopted, and (b) substantial progress has been made in the effective implementation of the Ministry of Education's ("MOE") October 2007 Action Plan for Protecting IP Rights on School Campuses ("Action Plan") to deter both high levels of Internet piracy on campuses throughout Taiwan over its own government network, TANet and of illegal photocopying of textbooks, academic journals and related materials on campus.

### Interest of the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA's seven members (see below), each represent a significant segment of the U.S. copyright community. These member associations represent over 1,900 companies producing and distributing materials protected by copyright laws throughout the world — all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).



## **Piracy, Copyright Protection and Deterrent Enforcement: Recommendations for Immediate Action**

IIPA and its members have been deeply involved in copyright law and enforcement reform issues in Taiwan since the 1980's. During this period, while piracy rates overall have significantly decreased and the market for copyrighted products has become mature, there has been an ebb and flow of problems that the Taiwan government needed to tackle -- first, piracy of analog product, which was reduced significantly in the '90s; second, optical disk piracy, which drove overall piracy rates to unprecedented levels but was brought under control through effective enforcement through 2004-2005; and third, Internet piracy which has grown significantly (replacing OD piracy) once again driving piracy rates up again, particularly for the recording and motion picture industries, but affecting all copyright industries. Internet piracy joins with the ongoing problem of book and journal piracy as the principal challenges facing Taiwan today, and will be the focus of this submission.

Over the last 30+ years, Taiwan has engaged in significant legal reform, has brought to bear significant resources to fight piracy and has imposed deterrent penalties on commercial infringers in most cases. These measures have been critical to Taiwan's having established a more effective IPR regime during this period. For example, the piracy rate for business software has steadily come down over the years, as a result of these enforcement efforts-- now at 40% of the market, among the lowest rates in Asia. IIPA readily acknowledges this progress. A comprehensive history, review and update of the situation in Taiwan over the years and in 2007 can be found in IIPA's February 8 Special 301 submission. <http://www.iipa.com/rbc/2008/2008SPEC301TAIWAN.pdf>

One challenge now facing Taiwan, and other countries in Asia with growing broadband penetration, is to get Internet piracy under control, through establishing an effective legal infrastructure and an adequate enforcement regime with up-to-date tools and enforcement practices. Taiwan has done a commendable job in providing resources to the fight against Internet piracy but there are overarching problems that remain to be tackled. These problems, when combined with the ongoing presence of book and journal piracy on and around Taiwan's university campuses, warrant maintaining Taiwan on the Watch List until resolved.

1. Taiwan still must create an effective enforcement regime through (a) legislative clarification of the liability of Internet service providers (ISPs) for online infringements, and (b) establishing an expeditious notice and take down system.

In past submissions, IIPA has noted that Taiwan's law was unclear on the scope of liability of ISPs for various kinds of online infringement. Having in place such a proper legal regime will ensure that ISPs, whose cooperation in the fight against online piracy is essential to ensure adequate protection for copyrighted materials, will have the proper incentives to work with right holders. These incentives would ensure that the online environment is a safe place for the distribution of legitimate copyright works -- to the benefit of right holders **and** service providers, and of course Taiwan's economic development as a whole.



The Taiwan Intellectual Property Office (TIPO) has sought to provide such a regime through recommending the adoption by the Legislative Yuan of ISP liability legislation. That legislation has sought to clarify the liability of ISPs, provide “safe harbors” from such liability for certain functions performed by ISPs, and provide an expeditious “notice and takedown” mechanism that would assist in obviating the need for costly litigation to deal with rapidly increasing online infringements.

Over the last year or so, TIPO has been engaged in an open process of consulting with the affected parties and has prepared a number of drafts for consideration. At the end of 2007, the USG and the IIPA believed that TIPO was very close to having fashioned such a regime and all were optimistic that a Bill would be finalized with some minor changes and presented to the EY and LY in the early spring. Having passed a P2P bill in June of 2007, this last specific legislative task was close to being accomplished. However, ISPs were not satisfied with this draft and prevailed upon the government to make changes to the bill, which, while correcting some ambiguities, raised a number of questions and significantly weakened protection and reduced the incentives of ISPs to work with right holders to stem growing online piracy.

We now understand that the July 2008 TIPO draft has been slightly modified again and was submitted to the Executive Yuan (EY) on August 27, 2008. Some improvements (discussed below) were made, but questions and serious deficiencies remain.

a. Specific provisions on secondary liability need to be restored to an amended Article 88 of the Copyright Law:

The Bill sent to the EY and the regulations accompanying them provide safe harbors in certain cases for ISPs providing “connection,” “caching,” “information storage” (at the request of the user) and “search” services/functions. They also provide a “notice and takedown” system, broadly consistent with the model set out in the U.S. DMCA and also employed by many other countries. A January version of the bill, in amendments to Article 88, contained provisions on both direct and indirect liability of ISPs. A July draft removed them, and these amendments no longer appear in the Bill sent to the EY. IIPA urges the EY to restore these provisions. Taiwan authorities now suggest that Articles 28, 185 and 188 of the Civil Code provide for such standards of secondary liability and thus there is no need for these amendments to Article 88. The authorities have not, however, provided an explanation, as far as IIPA knows, of how these civil code provisions provide the necessary clarity on when ISPs will be held liable and when not. Such clarity will ensure that ISPs cooperate in keeping the Internet as free as possible of infringing content. If the Articles cited above do provide norms on secondary liability adequate to the online environment, then, at a very minimum, it must be made clear that they apply to ISPs.

b. The Bill would appear to deny safe harbors to an ISP only if it had “actual knowledge” of an infringement, rather than if it “knew or should have known” that such infringement existed.

The July draft appears to have been amended to clarify that ISPs do not benefit from the safe harbors if they have “actual knowledge” of infringements acquired other than through a right holder



notice. Article 90undecies has been modified to now provide that the safe harbors apply only if the service provider responds expeditiously to take down notices, or “upon obtaining knowledge of suspected infringement by the user, acts in good faith belief to remove, or disable access to, the allegedly infringing content or related information.” This is an important improvement. The July draft appeared to give an ISP the benefit of a safe harbor even when it acquired knowledge of an infringement other than through a right holder notice. Providing a blanket exemption to ISPs who knew about an infringement but refused to take any action puts the entire burden on the right holder and absolves the ISP of liability it should rightfully bear when it knows of an infringement and simply ignores it.

The Bill appears to remain deficient, however, in that it allows an ISP to turn a “blind eye” to any “red flag” information which it has from which it is readily apparent that infringement exists. The DMCA language denies the benefit of a safe harbor when an ISP is “aware of facts or circumstances from which infringing activity is apparent.” The January draft, in the former Article 90quinquies, took care of this with language denying the safe harbors so long as the ISP did “not have knowledge that the...activity is infringing or that infringing activity is apparent.” This “should have known” element was eliminated in the July draft and was apparently not restored in the Bill sent to the EY.

TIPO’s explanation for this deletion is that ISPs are not in a position to determine whether an act was infringing and that a right holder argument that an ISP was aware of facts which would point to infringement could cause “unnecessary controversy.” Not only has this broader standard not created “unnecessary controversy” in other countries, but such standard would not require a determination of whether there was infringement as a legal matter. It would merely require an ISP to act in “good faith” (Article 90undecies) upon knowledge that they became aware of, and not ignore obvious instances of infringement over their facilities. As noted, other countries (including China) have adopted this broader standard which ensures that ISPs cannot ignore even obvious situations where infringement occurs.

While this reading of the intent of the Bill seems correct, the changes to Article 90undecies refer to “knowledge of suspected infringement,” to the ISPs “good faith” and Article 90novies reads “does not have knowledge that the searched or linked information may be infringing.” This language seems to be indicative of a standard much closer to the one IIPA recommends. This should be confirmed before the Bill becomes law.

c. Actions with respect to repeat infringers in the P2P environment

We commend TIPO for requiring in its July draft that “connection” ISPs (“mere conduit” functions) forward right holder notices to its customers. This is a necessary first step in deterring illegal P2P filesharing. It should, however, be followed by a tiered system of warnings culminating in termination of accounts. IIPA notes that TIPO appears to have changed the language in Article 90sexies from the July draft which would have required only the forwarding of the notices and nothing more. The revised language is not the height of clarity but could be read to ensure that these ISPs remain obligated to go further to implement provisions in contracts with users that accounts be terminated. Again, this interpretation should be clarified, or the Bill amended, before it becomes law.



d. Standard for right holder liability for notices containing inadvertent and non-material errors

IIPA has been concerned that right holders would be deterred from filing notices because they would be held liable for even inadvertent and non-material errors. Article 90duodecies and draft regulation Article 4.6 would impose liability in the case of “any misrepresentation” in a notice. IIPA believes that liability should result only for knowing, material errors. The provision in 17 U.S.C. §512(f) of the U.S. Copyright Act establishes liability only where the errors are knowing and material and is a model that has worked well over many years.

Taiwan should make these further amendments and clarifications before it adopts its ISP liability Bill.

2. Taiwan’s MOE, with TIPO assistance, has not made sufficient progress in implementing its “Action Plan” on deterring infringements on university campuses

Piracy on Taiwan’s university campuses, both through high levels of illegal filesharing over MOE’s own intranet, TANet, whose use it is in a position to control, and through serious instances of commercial photocopying of textbooks and related materials on such campuses, remains a major deficiency in Taiwan’s system of IPR protection. The MOE’s October 2007 “Action Plan” was a welcome first step but implementation of some of its important provisions – measures that would significantly reduce piracy – have been insufficiently implemented. The next two or three months must involve a concentrated effort to implement those actions and share the details of the implementation plans with right holders.

a. TANet

Illegal filesharing over MOE’s TANet remains rife. MOE, with TIPO’s involvement and assistance, should take the following specific actions:

- MOE must be subject to the full set of remedies and liabilities that apply to other ISPs in Taiwan. If necessary this should be clarified in the law or in regulations. In particular, MOE should be required to follow the Bill’s notice and takedown procedures and to expeditiously forward notices from right holders about filesharing infringements to the students involved. It should require, not simply encourage, all universities to suspend/terminate accounts of students that have been identified as repeat infringers.
- MOE should devote sufficient manpower resources to implement these procedures with respect to TANet infringements including reporting actions to right holders.
- MOE should notify right holders promptly and regularly that it has forwarded notices and that it has suspended/terminated accounts of repeat infringers.
- The Action plan requires a daily cap on network traffic for learning areas and student dorms and SOPs for managing that traffic. Right holders have received some information about such plans but little about their actual implementation. MOE should work with right holders to enforce these caps, monitor bandwidth use and severely limit such use when infringements are discovered.



- MOE should meet as soon as possible with right holders to design and create a monitoring and enforcement plan that would implement specifically the overall commitments in the “Action Plan.” Such meeting should be on a regular basis, not on the twice-per-year basis originally announced.

b. On-Campus Photocopying

While the focus in this submission is on “on-campus” illegal photocopying, Taiwan must maintain continued pressure on off-campus photocopy shops that engage in copying of academic books, journals and the like. Police must work closely with the Taiwan Book Publishers Association (TBPA), which represents both local and U.S. publishers, to continue raids against these illegal operations, most immediately in September and October when the semester begins and books are in high demand. Enforcement efforts have in some cases pushed such illegal copying to on-campus copy shops that lease space from the universities. Taiwan must make further specific progress in the area of on-campus compliance during the OCR exercise, and we reiterate that—given the start of term in September and October—the opportunities for immediate and concerted action abound. Specific immediate actions should include:

- *A Monitoring System Designed to Implement Terms of the Action Plan:* MOE must design and implement—also requiring universities to implement—a monitoring system aimed at investigating instances of on-campus reproduction, distribution and use of infringing materials. MOE should condition appropriate amounts of government funding for universities on satisfactory implementation of the monitoring system. This monitoring system should have, at a minimum, the following components:
  - A team charged with regularly monitoring on-campus photocopy shops, both during and apart from business hours, to ensure compliance with the lease terms on illegal activity that all will have signed;
  - A system whereby publishers can report instances of suspected widespread use of illegal materials to MOE or universities, leading to immediate inspection;
  - A deterrent system of consequences for students using illegal materials on campus that goes beyond verbal warnings and may include measures such as suspension.
- *Cooperation for On-Campus Enforcement Actions:* Law enforcement personnel should respond expeditiously to all right holder complaints about potential piracy at both on- and off-campus photocopy facilities, and MOE must require universities to cooperate with law enforcement personnel who wish to conduct enforcement on campuses.
- *Clarification of Role of Professors and Lecturers:* MOE should take steps immediately to mandate that universities educate and encourage professors and lecturers to take an active role in preventing use of illegal materials by students on campus. Professors and lecturers should be provided with written notices to distribute to students and required to combine such distribution with repeated verbal warnings to students who continue to use photocopied materials in university classes. Professors and lecturers should also be instructed not to condone use of illegal materials, through provision of sample books or through any other measures, and should not allow coordination of commercial photocopying during or immediately surrounding class time. Implementation of these instructions should be required for professors and lecturers to receive satisfactory evaluations from the university.



- *Report on Status of Campus Vendor Leases:* At present, it is unclear how many on-campus copy shops have signed leases with clauses that require them to refrain from illegal photocopying activities, and how those clauses have been implemented. Taiwan should report to right holders the mechanisms it is employing to ensure that all contracts contain such provisions, and the anticipated timeframe for 100% compliance. Taiwan should also report to right holders any actions that have been taken under such clauses to date, and should promptly report any actions taken in the future.

In all of this, the goals of the right holders are clear—to bring meaning to the terms of the October 2007 Action Plan. Again, the plan is a good start, but it does not deter illegal photocopying if it is not properly implemented, if its terms are too vague to have meaning and if its subjects are not adequately monitored for compliance. MOE needs to take steps, in cooperation with the intellectual property and law enforcement authorities, to ensure that Taiwan's universities take their potential status as piracy havens seriously, and are proactive in bringing about a reduction in the illegal activities that have taken refuge on their campuses.

## Conclusion

The above actions can be taken in the near term and will significantly improve the enforcement environment in Taiwan. We acknowledge and appreciate the excellent response that IIPA and IIPA members have received from the Taiwan government, particularly in recent years. Because of this progress, IIPA has continued to press here in the U.S. for our own government to commence negotiations on a much needed Free Trade Agreement (FTA) with Taiwan. We look forward to working with the new government in all these areas. If Taiwan were to adequately address the issues raised above in the near term and provide continuing assurances and evidence that the overall enforcement climate will not wane, IIPA would be in a position to recommend that Taiwan be taken off the Watch List. Until then, however, Taiwan should remain on the List.

Respectfully submitted,

Eric H. Smith  
International Intellectual property Alliance