

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY¹

IIPA recommends that Taiwan be elevated to the Special 301 Priority Watch List due to the failure to enact and effectively implement comprehensive regulations to control and curtail the illegal manufacture of optical media goods in Taiwan, and the failure of the Taiwan government authorities to shut down known commercial pirates and curtail growing online piracy. For the third straight year, trade losses to the U.S. copyright industries due to piracy grew enormously in 2000, to an estimated \$557.1 million. Piracy rates for most of the copyright industries increased or remained too high.

Despite commendable raiding and seizing of large quantities of pirated product, followed by indictments and several convictions of pirate distributors, these efforts obviously did not have a deterrent effect in 2000, as Taiwan became one of the world's worst pirate exporters of optical media. Worsening developments in 2000 included: the continuation of domestic overproduction of optical media products, including the pirate manufacture of all kinds of CDs and CD-Rs, including audio CDs, VCDs and even DVDs; the failure to enact and enforce adequate laws or regulations controlling optical media plants, including the machinery and the raw materials used to produce pirate copies; the failure of Taiwan authorities to shut down known commercial pirates, including optical media pirates; and the troubling rise of Internet piracy. The Taiwan government should be commended for considering draft amendments to the copyright law intended to implement the WIPO "Internet" treaties; however, the draft fails in crucial respects to meet the standards of the treaties or otherwise to comply with international standards, so Taiwan authorities must revise the draft to ensure that it properly implements the treaties and meets well-established international norms.

ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	30%	20.0	20%	15.0	10%	15.0	10%	17.0	10%	29.0	15%
Sound Recordings / Musical Compositions	60.5	40%	60.0	35% ²	55.0	20%	10.0	12%	8.0	8%	5.0	13%
Business Software Applications* ³	127.3	53%	97.6	54%	112.1	59%	104.6	63%	111.7	72%	115.2	70%
Entertainment Software* ⁴	319.3	90%	115.7	68%	103.2	65%	102.6	65%	109.0	69%	105.4	69%
Books	20.0	NA	21.0	NA	19.0	NA	5.0	NA	5.0	NA	6.0	NA
TOTALS	557.1		314.3		304.3		237.2		250.7		260.6	

¹ For more details on Taiwan's Special 301 history, see IIPA's "History" Appendix to filing.

² The recording industry initially reported 25% piracy levels for 1999; this number was adjusted and reported above.

³ BSA loss numbers for 2000 are preliminary.

⁴ IDSA estimates for 2000 are preliminary.

SELECTED ENFORCEMENT STATISTICS IN TAIWAN

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS			
1999			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	TOTALS
Number of Raids conducted	430	96	526
Number of cases commenced	53	46	99
Number of defendants convicted (including guilty pleas)	25	48	73
Acquittals and Dismissals	4	14	18
Number of Cases Pending	24	49	73
Total number of cases resulting in jail time	24	46	70
Suspended Prison Terms	10	41	51
Maximum 6 months	0	0	0
Over 6 months	2	0	2
Over 1 year	8	41	49
Total Suspended Prison Terms	150 months	804months	
Prison Terms Served (not suspended)	14	7	21
Maximum 6 months	4	2	6
Over 6 months	3	2	5
Over 1 year	7	3	10
Other Penalty Assessed (not suspended)	1 ⁵		1
Total Prison Terms Served (not suspended)	209 months		
Number of cases resulting in criminal fines	8	5	13
Up to \$1,000	1	0	1
\$1,000 to \$5,000	5	0	5
Over \$5,000	2	5	7
Total amount of fines levied (in US \$)	39,696	292,332	332,028

⁵ One case was brought in 1999 against a juvenile offender, involving piracy against motion picture titles. The offender was convicted, but since he was a juvenile, he received as punishment a reprimand and accepted reformatory education by probation officers until the age of 20.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS					
2000					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	283	144	1460	NA	1887
Number of cases commenced	150	39	1343	NA	1532
Number of defendants convicted (including guilty pleas)	69	10	746	1	826
Ratio of convictions to the number of raids conducted	NA	NA	51.1%	NA	NA
Ratio of convictions to the number of indictments	NA	NA	80.7%	NA	NA
Acquittals and Dismissals	4	7	NA	NA	11
Number of Cases Pending	77	42	NA	NA	119
Total number of cases resulting in jail time	57	9	403	1	470
Suspended Prison Terms	18	6	NA	NA	24
Maximum 6 months	3	0	NA	NA	3
Over 6 months	4	0	219 ⁶	NA	223
Over 1 year	11	6	184	NA	201
Total Suspended Prison Terms (in months)	226	216	403	NA	845
Prison Terms Served (not suspended)	39	3	NA	NA	42
Maximum 6 months	7	0	NA	NA	7
Over 6 months	3	3	NA	NA	6
Over 1 year	29	0	NA	NA	29
Other Penalty Assessed (not suspended)	12 ⁷	NA	NA	NA	12
Total Prison Terms Served (not suspended) (in months)	291	NA	NA	NA	291
Number of cases resulting in criminal fines	6	6	25	NA	37
Up to \$1,000	1	0	5	NA	6
\$1,000 to \$5,000	4	1	20	NA	25
Over \$5,000	1	5	NA	NA	6
Total amount of fines levied (in US \$)	23,030	446,667	49,906	NA	519,603

COPYRIGHT PIRACY TRENDS AND ENFORCEMENT EFFORTS

Over-Capacity of Pirate Optical Media Production in Taiwan Threatens the Global Market

As reported last year, a growing number of optical media plants in Taiwan now engage in the unauthorized manufacture of optical media products. Most recently, the evidence points to the existence of illegal CD, CD-ROM, console-based videogame (on CD), DVD and VCD manufacture in Taiwan, both in finished products (DVD/VCD) and production facilities (DVD and VCD

⁶ These suspended sentences range in time from one to twelve months, but most were over six months.

⁷ Twelve cases were brought in 2000 against juvenile offenders, involving piracy against motion picture titles. The offenders were all convicted, but since they were juveniles, they received as punishment reprimands and accepted reformatory education by probation officers until the age of 20.

production lines), for domestic consumption as well as for export to other Asian countries such as mainland China, the Philippines and Macau. Two cases related to finished products were detected by Taiwan authorities in September and December 1999 and three cases related to optical disc production lines were detected by mainland Chinese authorities in July, October and November 2000. According to statistics from the Taiwan government, there are now 62 registered optical disc factories in Taiwan (although IIPA knows of three further unregistered plants, and reports indicate that several of those may have ceased operations as of January 2001, possibly bringing the actual number in operation into the 50s). 21 factories have DVD replication facilities. The government also continues to claim that except for CD-R factories, all registered factories in Taiwan carry SID codes on their discs; however, this is inconsistent with the copyright industries' investigations, which indicate that there are at least two registered factories (Li Chuan Optical Disc and Taiwan Disc) that did not have SID codes embossed on their products. In addition to those two registered plants that do not use SID code, IIPA knows of at least four unregistered optical media production facilities that produce copies without SID codes on them.

With respect to VCD/CD/CD-R figures, as noted above, there are at most, 65 registered and underground optical disc factories in operation as of February 2001, with 307 replication lines including 99 DVD lines and 208 VCD/CD lines. Total production capacity of the plants (not including the CD-R capacity) is an astounding 1.854 billion discs per annum, dwarfing any possible legitimate domestic demand (only about 40 million units) for Taiwan's 22 million people. This overwhelming over-capacity for optical media production help drive ever-increasing piracy rates. While for some industries these rates are still low by regional standards, they threaten to return Taiwan to its notorious past as a piracy haven. Console-based videogame piracy levels now stand at greater than 90% across the board (for some platforms, 95%). Piracy levels have risen for most other industry sectors, including video piracy (from 20% in 1999 to 30% in 2000).

It is particularly troubling that so much optical media piracy produced in Taiwan is destined for export. Taiwan is now arguably the world's worst exporter of pirate optical media goods. Taiwan was number one in the value of media seizures by U.S. Customs at the borders in 1999, and continued to rank high in 2000.⁸ Other anecdotes demonstrating this phenomenon are raids of domestic production plants (for example, ten of eighteen raids against optical disc factories uncovered pirate DVD/VCD production), seizures by Taiwan Customs, and seizures in far-away places of Taiwan-made pirate product. Through the end of December 2000, at least 1.5 million, mostly, console-based video game software, had been seized, while motion picture industry representatives, in conducting 283 raids on optical disc piracy and production facilities, had seized 40,227 pirated DVDs (higher than the government-reported number of 27,218) and 79,587 pirated VCDs. The Taiwan government has reported the seizure of 163,375 music CDs, 50,865 CD-ROMs containing business software, 1,426 CDs containing MP3 piracy, 64,451 game cartridges and 51,843 music cassettes. The Taiwan government is proud of its achievement in devoting the limited resources it has to date to obtain these seizures, but these seizure statistics indicate that piracy is out of control in Taiwan, requiring much more effort to achieve deterrence in the market, both as to pirate production and distribution.

In addition to large-scale pirate optical media production, CD-R (recordable) production now dwarfs legitimate domestic demand. Compilations of MP3 audio files, computer programs, console-based games, etc. flood the domestic market in Taiwan. Pirate optical media production continues to decimate legitimate markets in Taiwan and destroy legitimate markets in other regions around the world.

⁸ The category of "media" as defined by U.S. Customs includes motion pictures on tape, laser disc, VC and DVD, interactive and computer software on CD-ROM, CD-R, and/or floppy disc; and music on CD or tape.

Taiwan Must Enact and Enforce Adequate Laws and/or Regulations Controlling Optical Media Plants, Equipment and Raw Materials

The problem of export pirate optical media production and export demands a comprehensive solution. Taiwan must put into place effective measures to defeat optical media piracy by enacting and implementing regulations to control optical media plants, equipment and raw materials. Such comprehensive regulations will not only provide the needed tools, but, if implemented correctly, should permit Taiwan to tackle the problem while preserving precious governmental resources to devote to other problems with the copyright system.⁹ The regulations must include a licensing system to provide transparency in the movement of optical media manufacturing equipment, raw materials used in the manufacture of pirate CDs, pirate masters, and stampers. Once the regulations are in place, authorities need the power to enforce them, including by verifying copyright authorization for production runs, and inspecting to ensure that the Commodity Labeling Law's (CLL) provision mandating use of SID code is being complied with (similar to the Optical Disc Factory Inspection Unit in the Intellectual Property Investigation Bureau of Hong Kong Customs).¹⁰ Comprehensive regulations would permit authorities to perform surprise raids on unauthorized, unlicensed, or otherwise non-compliant plants, to seize non-compliant equipment and raw materials, as well as the output of those machines, and to shut down for good those plants that do not comply with the license provisions. Rather than devote enormous and precious resources to enforcement, a comprehensive set of optical media regulations would actually free up resources to fight piracy in other ways.

IIPA noted in last year's report that many plant-owners in Taiwan signed a voluntary "pledge" in February 1999, promising not to engage in piracy or take orders from known pirates. However, this voluntary pledge only had little effect, and has been ignored by at least three of the plants that signed it (Friendly CD Tek – raided on January 27, 2000; Nine Friends – raided in November 1999; and Digi Gold, the raid against which is discussed below).

The Failure of Taiwan Authorities to Use the Copyright Law (or Other Laws or Regulations) to Shut Down Known Commercial Pirates Immediately

It is inexplicable that Taiwan authorities have not demonstrated the will to raid all known commercial pirates immediately, seizing all pirated copies, as well as materials and implements used in the production of piracy. Examples abound, including the disturbing multiple raids against the same optical media plant (Digi Gold)¹¹ during 2000, with the cooperation of three different police groups. The Digi Gold raids each initially resulted in seizures of pirated copies and the sealing of optical media equipment (after the first two raids), but yielded no follow-up actions (such as prosecutions). Most alarmingly, the plant re-opened for massive pirate production within days of

⁹ It also remains critically important that the Taiwan government retain its system to verify copyright authorization/SID code for the export of VCDs and DVDs, even if Taiwan does adopt comprehensive optical disc legislation.

¹⁰ The Commodity Inspection Law (CIL) authorizes officers from the Bureau of Commodity Inspection and Quarantine (BCIQ) to inspect plants for compliance with the Commodity Labeling Law (CLL). However, many optical discs with or without falsified SID codes were found in the market throughout the year. According to IFPI's figures, at least 650,000 pieces of Taiwan-made pirated optical discs were seized from the local market.

¹¹ Digi Gold, is one of the few optical disc manufacturers in Taiwan that has the full range of production capabilities, from mastering to replication to printing. It has a daily production capacity of 30 DVD/VCD stampers, 60,000 VCDs and 30,000 DVDs. It is estimated that the annual production of the plant running at full capacity would be 10,800 DVD/VCD stampers, 21.6 million VCDs and 10.8 million DVDs.

each raid (including the wanton removal of the seals).¹² No charges of infringement have been filed; the factory manager has only been charged with removal of the seal (a penalty which carries a maximum fine of NT\$90,000 (approximately US\$2,750) or a jail term of not more than one year). In addition, while the law permits the authorities to seize and destroy (or render unfit for use) the equipment, they have failed to do so, claiming they have no storage facility, and claiming (without foundation) that they could be held liable if the seizure does not lead to a conviction.

The Taiwan government's response to complaints about the handling of this case has been unacceptable. The Intellectual Property Office (IPO) has indicated that the Digi Gold case is under scrutiny through an inter-agency process, and Taiwan Judicial branch representatives have also promised to pay special attention to the case. Officials have also reportedly said that the Digi Gold case is "unique", complicated by the fact that the police "do not know how to seal optical production machinery." In fact, the Digi Gold case is not unique and the problem of commercial piracy in Taiwan will not be solved by isolating the case or subjecting it to special scrutiny. Rather, the problem in the Digi Gold case is symptomatic of a systemic failure in Taiwan to enforce against optical media piracy.¹³ The very failure of enforcement authorities to quickly dispose of the Digi Gold case (without the need for inter-agency scrutiny, special attention, or special training of police in "sealing" techniques) is a particularly damning example of how badly Taiwan is handling the problem of optical media pirate production.

The failure to enforce against optical media piracy is just one of many recurrent enforcement problems in Taiwan. The following is a non-exhaustive list of some of the actions the Taiwan government must take to indicate its willingness to tackle the piracy problems there:

- Raids on unauthorized optical media plants must commence immediately, with seizures of infringing copies and machinery, followed by prosecutions, resulting in criminal penalties meted out on the pirates.¹⁴

¹² In September 1999, Taiwan Customs officials in Keelung seized 54,000 pirated DVDs and 67,900 pirated VCDs stored in a container waiting to be exported to Hong Kong. Another shipment of 225,000 pirated DVDs, this time in a boat off the coast of Fujian, China, was seized in December 1999 by the same port authorities. Intelligence gathered from these seizures raised probable cause that Digi Gold was involved in the pirate production, and Digi Gold was raided by the Aviation Police on January 14, 2000. The raid led to the seizure of 24 stampers and the sealing of two DVD replication lines, three VCD replication lines and one mastering line. Digi Gold was raided the second time by the Hsinchu Police (local constabulary) on March 10, 2000, leading to the seizure of 33 stampers, 36 VCDs, 3,000 DVDs, 30,000 pornographic VCDs, 557 CDs and 3,540 CD-ROMs. The authorities sealed off one mastering line, two DVD replication lines, three VCD replication lines, one offset printing machine and one silk screen printing machine. The Second Security Police conducted a countrywide enforcement operation from October 2-4, 2000, targeting eleven replication facilities, packaging facilities and distribution centers. Based on investigations conducted in the past several months and intelligence gathered from a recent raid in Macau, Digi Gold was one of the plants raided.

¹³ The recent Chungtek case in October 2000 is indicative of a more systematic problem. Chungtek was engaged in embossing fake mold codes on the pirate discs. But this piratical activity, which could have been detected and eradicated easily if comprehensive optical media regulations governed, was not detected until industry representatives convinced the Second Security Police to raid the factory on October 2, 2000.

¹⁴ Part of an adequate optical media regime would include allocating proper powers to conduct regular and "surprise" checks on CD plants. Such authority could be given to the Industrial Development Bureau (IDB) under the Ministry of Economic Affairs (MOEA), which is currently in charge of managing production equipment of optical disks. The enforcement bodies should also be given the authority to raid and seize manufacturing equipment as well as infringing products, unfinished or finished. In November 1999, the plant "Nine Friends" was raided for using another plant's SID code, and on January 30, 2000, the prosecutor confirmed that the case had been forwarded to the court to set a hearing date; however, no date has been set after the passage of over one year, and no reason has been given by prosecutors for the delay.

- All factory pirates must be deemed as “vocational” copyright infringers, which will allow prosecutions without the need for a complaint from a copyright owner. In addition, there should be mandatory forfeiture of any equipment used for infringement.
- The existing administrative prohibition on export of video product that would be illegal in the destination country should apply to optical media product, especially sound recordings. (A huge volume of unauthorized CDs of Latin repertoire is currently being manufactured in Taiwan and then shipped to Latin markets, where all of it is illegal).¹⁵
- A *permanent* enforcement body must be established,¹⁶ perhaps headed by a special prosecutor, to carry out sustained, island-wide enforcement, including against illegal *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations of MP3 audio files, and of computer programs and games, in the domestic market. This permanent enforcement body or task force should take sustained action at the retail, distribution and manufacturing levels until criminal enterprises can be rooted out. This task force should be mandated to make a significant impact on optical disc piracy over the next year by undertaking a series of sustained actions against key markets. The task force should carry out market sweeps in major cities at least once a month to keep the pressure up. IIPA is pleased that the previous government had established a “K Plan” and that the current government had in late 2000 indicated its intent to start up enforcement again, but is disturbed that such a force has never been adequately resourced to do its job.
- The government must address the distribution of pirate CD-Rs on school and college campuses by students acting on their own or on behalf of criminal gangs. Ideally, over the course of the next year, this task force would seize hundreds of thousands of CD-ROMs and CD-Rs, and hundreds of machines.
- Copyright piracy should be made a “public crime.” This would substantially expand Taiwan authorities’ ability to tackle the problem. More serious acts of commercial piracy should be classified as “organized crime”, subjecting criminals engaging in such behavior to stricter penalties and granting the police broader investigatory powers.
- Concerted and coordinated efforts by many Taiwan government agencies are needed to combat organized criminal activity, including white-collar criminal activities. For example, pirate companies engage in elusive behavior (e.g., name and address changes, convoluted paper trails of piratical and investment activities in “Greater China” and in Latin America,

¹⁵ Government Information Office (GIO) is currently tasked with approving all exports of VCD/DVDs if there are 200 or more discs in a given shipment. GIO is supposed to check for the SID code and copyright authorization. The shipments may originate from optical disc factories or from distributors. Either way, shipments of 200 or more VCD/DVDs need GIO approval. IIPA understands that the Intellectual Property Office (IPO) is planning to take over the administration of this system in January 2001. The implementation of this changeover should be carefully monitored to ensure its effectiveness.

¹⁶ The “K Plan” to assemble a police task force to combat piracy was initiated in January 2000 by the Intellectual Property Office (IPO), as part of Taiwan’s due diligence efforts for Special 301. The Ministry of Economic Affairs assigned a 200-person police corps from the Ministry of the Interior for this crackdown. This police corps (*Bao Er*) is usually responsible for security at state-owned companies. The task force ceased operations at the end of June 2000 when the new government came into power, but was reinstated in September 2000 after industry representatives urged President Chen to take action against piracy. Unfortunately, actions under this plan ceased in December 2000, due mainly to lack of manpower. In mid-March 2000, *Bao Er* also focused on illegal business software in a series of market sweeps in four major cities island-wide. There was good press coverage on this crackdown by the government.

etc.) and sometimes even violent behavior¹⁷. IIPA urges pressure on Taiwan government officials to coordinate among government ministries that specialize in copyright and white-collar crime to improve the government's ability to keep track of evasive efforts of pirates. Taiwan authorities are also encouraged to identify the training needs which must be filled in order to enhance their ability to investigate and pursue sophisticated criminal networks engaged in cross-border pirate operations, so that foreign governments, international organizations and industry can cooperate to help fill those needs.

- Taiwan must enhance the legal tools available to crack down on the burgeoning cross-border trade in pirated products.¹⁸ Such enhancements must include serious efforts by Taiwan to control pirate imports and exports at the borders. Hong Kong, for example, has recognized that its law must have some extraterritorial reach if it is to fulfill its TRIPS obligation to combat "copyright piracy on a commercial scale." Accordingly, it enacted new criminal offenses aimed at authorizing enforcement in Hong Kong against pirate networks whose operations cross the territory's border. Taiwan should consider the approach taken in Hong Kong to fashion legislation against cross-straits piracy. IIPA is particularly troubled by the fact that, since April 2000, Taiwan Customs has ceased referring suspected pirate exports of music CDs to recording industry representatives in Taiwan for verification.
- Taiwan authorities must eradicate illegal photocopying and publishing of academic textbooks at universities. This is most prevalent in Taipei and other major cities, including around prestigious campuses such as the National University in Hsin-Chu. In 1999, six copy shops were found copying textbooks, and three were raided. In particular, recent investigations have shown that students and businesses engage in high-volume infringing activities. Local photocopy shops actively carry out photocopying and binding services mainly for students and teachers at schools and universities. On one positive note, the publishing industry reports a conviction of a pirate engaged in commercial piracy of books. Prosecutors had previously refused to bring a case against a well-documented commercial book pirate, but finally brought the case in 2000, although the result was a disappointing seven-month sentence, suspended for an unreasonably long three years.
- The police, the Ministry of Justice Investigation Bureau (MJIB), and the Prosecutor's Office must adequately follow up and prosecute pirate retailers and night market vendors where warranted. There are reportedly 200 night-market vendors regularly selling both pirated and counterfeit products throughout Taiwan. For the sound recording/music industry, between January and August 1999, 44 cases against night-market vendors were lodged. Thirty-nine cases (involving 40 defendants) were prosecuted, with 27 cases resulting in convictions, and one case resulting in an acquittal. Motion picture industry representatives conducted 104 raids in 2000 against street vendors in the night markets; 63 raids were

¹⁷ In 1999, several incidents in which industry representatives were the victims of violent attacks were documented; in the course of 2000, there were numerous incidents involving damage to industry representatives' property.

¹⁸ One success story involving cross-border piracy was the infringement finding by the Taiwan High Court on May 25, 2000, ruling that Chung Ti Technology Co. must pay Microsoft Corp. NT\$242.32 million (US\$7.87 million) for pirating Windows 95 and other software. The court said Chung Ti had exported infringing Microsoft products and made illegal profits. However, even this case indicates the inefficiencies of seeking judicial redress for copyright infringement. It took more than four years to reach a decision in the case, which began with a 1996 police raid of Chung Ti's warehouse in Taipei, yielding 58,000 copies of pirated English software, including 30,000 copies of Windows 95 and 28,000 copies of Office 4.3. The compensation awarded is the highest amount a local company has ever been fined for infringing intellectual property rights. In a separate case, Chung Ti's owner Hu Chung-lin was sentenced to two years in jail, plus a fine of NT\$400,000 (US\$12,900) for copyright infringement.

successful (11 of them involving 500 or more pirate optical discs), resulting in total seizures of 25,019 pirated VCD/DVD.

- Enforcement authorities must act to defeat unauthorized public performances of copyrighted movies in "MTVs" (minitheaters) and late at night on cable systems (especially in the rural areas). More enforcement is needed in rural areas, at night and on weekends and holidays, when unauthorized product is more likely to be used by MTVs. Some restaurants also use movies to attract clients.
- The Taiwan government should delegate authority (perhaps to an agency within the Ministry of Economic Affairs) to conduct regular inspections of all computer shops/stores to detect and seize computers in which "hard disk loading piracy has occurred" (this is the loading of unauthorized copies of software onto the hard drives of computers that are then given away "for free" when sold).

All these recommendations for actions to make inroads into devastating piratical activity in Taiwan were made in IIPA's report in early 2000. It is discouraging that so little has been accomplished in the intervening year to address these well documented and long-standing problems.

The Troubling Rise of Internet Piracy

The problem of the distribution of pirate works in the Internet environment is a growing phenomenon in Taiwan, and will devastate legitimate copyright owners unless Taiwan authorities begin to address it immediately. The growing Internet distribution from schools of pirate recordings (including MP3's), videogames in all formats, business software and motion pictures (back-to-back copies of VCDs, CD-Rs or even DVDs) is disturbing, and must be addressed by the Ministry of Education as well as law enforcement authorities. CD-R sales over the Internet and downloads from hack-sites located in Taiwan are on the rise. The videogame industry reports, for example, that up to 30% of all videogame piracy may be Internet-related (both CD on-demand burning and downloading from websites such as "WAREZ" sites). These piracy rackets are being run by organized groups located in Taiwan but also elsewhere in Greater China, such as Hong Kong, making it more difficult for Taiwan authorities to tackle the problem. These groups are now increasingly turning to a model based on e-mail harvesting/spam/Internet burning. Taiwan authorities must devise techniques that will be effective in monitoring and enforcing against such activities (whether related to piracy or other crimes). Meanwhile, as noted below, ISPs refuse to shut down pirate sites, and have refused thus far to cooperate with copyright owners seeking to enforce their legitimate rights.

Raiding activity in Taiwan regarding cyber-crime has concentrated on pornography. However, the Taiwan government, beginning to recognize the magnitude of the problem, has begun taking actions against the distribution of *Ta-Bu-Tieh* (compilation) CDs as well as pirated VCDs and DVDs through online marketing, with some encouraging results in 2000. For example, through the end of December 2000, the motion picture industry had conducted 41 raids against pirates selling infringing copies via the Internet, resulting in the seizure of 29,616 pirated VCD/DVD and the arrest of 44 pirates. These raids were conducted by the Telecommunications Police, the Criminal Investigation Bureau and the local police. Prosecutions followed, resulting in nine convictions. Two defendants were imprisoned immediately for nine months and 14 months, respectively, and seven defendants were given suspended sentences with jail times ranging from seven to 20 months, and probation periods ranging from two to four years. Similar campaigns on a national level were conducted against pirate websites in March 2000, resulting in seizures and arrests. Most of the pirate websites identified in this set of raids offered Windows 2000 Chinese

version after it was officially released on March 7, 2000. IIPA looks to the Taiwan government to sustain such raiding and the subsequent prosecutions, and commends the government for having mobilized the various agencies and investigative bureaus to work together to begin tackling this problem.

Meanwhile, MP3 piracy is thriving, particularly in schools, and shows no signs of decreasing, despite some legal actions taken in the past couple of years. Illicit Websites located on Taiwan college and university campus servers make illegal files available for downloading, or the operators of illicit websites will copy the files onto blank CD-Rs and sell them. The resulting pirate CD-Rs sometimes include up to ten albums worth of songs (100 to 120 titles), and sell for less than US\$5. While these CD-Rs were originally distributed only within colleges, they are now showing up in night markets. Of the 30 cases filed in 1999 by the recording industry in Taiwan with the Criminal Investigation Bureau of the Ministry of Interior, 21 have been prosecuted, resulting in 15 convictions (involving 19 defendants); of the 13 cases filed in 1998, six have been prosecuted, resulting in four convictions (involving five defendants); and all five cases filed in 1997 were prosecuted, resulting in four convictions (involving 5 defendants).

IIPA hoped for positive results from the Ministry of Education's (MOE) agreement (after intense industry pressure) to conduct monthly checks to monitor Internet servers of educational institutions, starting in November 2000, and to check websites containing infringing works upon receiving information from industry regarding such websites. Unfortunately, no information from the Taiwan government is forthcoming, even after the recording industry provided the Ministry with detailed information of illegal MP3 web sites in Taiwanese colleges and universities. As of January 2001, there were still 14 web sites located on nine schools' servers providing illegal MP3 files for download or linking to other web sites containing illegal MP3 files. IIPA continues to call upon various government agencies, including the Computer Crime Prevention Center, the Advisory Coordination Committee and the Criminal Investigation Bureau of the Ministry of Interior, to coordinate a joint effort to enforce against all forms of Internet piracy, including MP3 piracy. The Ministry of Education sent a letter dated December 13, 2000 (similar to one it sent dated November 8, 1999) to educational bureaus, county and municipal governments, and educational institutions, directing them to regularly inspect their websites and computer classrooms in order to delete any illegal software and to strengthen awareness of intellectual property rights, anti-piracy and procurement of legal software. However, no statistics or other information relating to Internet piracy in educational settings has been forthcoming from the Taiwan government. While IIPA remains appreciative of the Ministry of Education's December 2000 letter, it hopes that the Ministry will be steadfast in ensuring that the letter's directive is carried forward in a meaningful and transparent way.

Unfortunately, laws regarding Internet service providers (ISPs) are ambiguous and inadequate. Industry has had difficulties getting ISPs to cooperate with its investigations against Internet piracy. The Taiwan government should immediately enact regulations providing incentives to ISPs to cooperate with copyright owners investigating piracy on the Internet, or have ISPs adopt a code of ethics achieving the same result. IIPA notes that the recently-formed Taiwan Intellectual Property Alliance (TIPA) (with core members from the motion picture, recording, and software industries)¹⁹ got assurances from the Ministry of Telecommunications and Transportation (MOTT)

¹⁹ Though not the primary focus of this report, IIPA member associations are active in pushing intellectual property rights policy with, and in providing technical assistance and training for, the Taiwan government. In one training seminar held in October 2000, the Minister of Justice, President of the Judicial Yuan and Director of the American Institute of Taiwan (AIT) kicked off the first-ever inter-agency intellectual property rights training for judges, prosecutors and officials from Customs, Board of Foreign Trade, the National Police Administration, and other agencies. The training from October 30-November 8, 2000 was a two day rolling seminar for seven small groups and featured speakers from the U.S. government.

that it would arrange a meeting between ISPs and TIPA in February 2001 to discuss a code of conduct for ISPs.²⁰ IIPA is pleased to see the Taiwan government back such an approach; this will be needed to get Taiwan ISPs and Internet auction sites to adopt such a code. IIPA also recognizes some recent efforts of the National Police Administration to forge stronger cooperation with top ISPs in enforcement matters.

However, as discussed below, IIPA is deeply disappointed with initial draft copyright amendments that include provisions that fail both to preserve appropriate incentives for service providers to cooperate with right holders and to avoid a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation. Without substantial rethinking, Taiwan's proposed draft on the liability of service providers will take Taiwan away from full compliance with its coming WTO/TRIPS and Berne obligations, and will make it that much more difficult for Taiwan to effectively enforce against growing Internet piracy.

Procedural Hurdles That Result In Ineffective Enforcement Of Copyright

Several procedural hurdles continue to make it more difficult for right holders to enforce their rights and bring cases in the courts. One alarming development (the transfer of power to issue search warrants from prosecutors to the courts) potentially could be devastating to the copyright industries' enforcement efforts in Taiwan. The following highlight some of the difficulties right holders face in Taiwan due to procedural hurdles:

- **Transfer of Power for Issuance of Search Warrants from Prosecutors to Courts.** The Legislative Yuan has reportedly passed an amendment transferring the power to issue search warrants from prosecutors to the courts effective on July 1, 2001. This development potentially could devastate the copyright industries' enforcement efforts in Taiwan. The system prior to the amendment worked well (although increased instances of denials of search warrants in 2000 did raise some concerns), because prosecutors could issue warrants immediately upon request and were familiar with the timing needs and operational difficulties encountered during raids by enforcement authorities. Under the new law, all applications are reportedly to be reviewed and approved by a judge, resulting in slow-downs in obtaining warrants, and potentially, loss of evidence. It is a practical reality that judges hearing requests for warrants are less experienced than prosecutors in terms of the technicalities of a raid, and it is feared that judges will, for example, impose new burdens on copyright owners seeking search warrants. The new law will especially harm cases involving pirate wholesalers or warehouses; evidence which moves in a matter of days will be lost if warrants take weeks or over a month to issue. Any kind of tip-off or suspicion of a raid would lead to massive disposal by the suspect of the evidence prior to the raid. If this shift results in courts not issuing search warrants to run copyright enforcement actions with the speed and efficiency of the current system, it will have a devastating effect on the copyright industries' enforcement programs in Taiwan. IIPA will be monitoring this situation closely over the coming months, and looks to the courts to permit copyright owners to carry out expedient and effective searches (including *ex parte* civil searches which must be available under TRIPS) under this new procedure.

²⁰ On November 3, 2000, the National Police Administration hosted a conference with the top 26 Taiwan ISPs on how to strengthen Internet piracy enforcement and cooperation. TIPA participated to show its support for the policies of the National Police Administration. It was acknowledged at this event that Internet crime/piracy is a serious problem and that cooperation of ISPs is key to enforcement work by the Police. The Police requested comments from ISPs on such issues as keeping a log file for a minimum of three months, identifying users' information, and streamlining the exchange of documents/information between ISPs and the Police.

- Powers of Attorney (POAs) in Court Cases.** In years past, judges, prosecutors or defendants challenged POAs granted to right holders' court representatives because the documents were not signed by the CEO of the right-holder company, were not consularized, were not translated into Chinese, were too old (more than six months), or because the Chinese translation was not signed by the CEO. In some of these cases, the failure to meet these burdensome procedural hurdles (which run contrary to general international practice and U.S. law) led to the dismissal of open-and-shut cases against blatant pirates. Two recent Supreme Court cases, in February 1999, and in January 2000, demonstrated progress toward resolving these problems, as the courts held that the validity of a POA is to be determined in accordance with the law of the country from which the POA holder comes. In the most recent case, the court determined that according to Article 6 of the "Treaty of Friendship, Commerce and Navigation with the Accompanying Protocol" between the U.S. and Taiwan, the authority and qualification of a person to represent a U.S. corporation in a litigation proceeding shall be determined by the laws applicable in the U.S. While these cases must be deemed "precedential" by the Supreme Judicial Yuan in order to have any binding effect on lower courts, reports indicate that instances of judges and prosecutors challenging foreign POAs waned in 2000. Nonetheless, courts are still requiring that POAs be legalized and consularized (only notarization should be required), thus imposing burdensome requirements and costs on right holders to exercise and enforce their rights in Taiwan. We also continue to receive reports that several prosecutors and judges have insisted that the chairman of the foreign company participating in the case personally sign the complaint and the POA authorizing the industry representative to initiate the case. The Supreme Judicial Yuan should act quickly to make its decisions in 1999 and 2000 precedential, so that this problem can be solved throughout Taiwan.
- Powers of Attorney (POAs) in Raids.** A separate but related problem for the recording industry and others involves the ad hoc requirements imposed by police involved in raids on distributors and warehouses of massive numbers of pirated copies of copyrighted works (many intended for export). In some instances, police require POAs from copyright owners for every work seized, and other onerous proof requirements in order for the authorities to seize suspected pirate goods. The effectiveness of such raids necessarily depends on the authorities seizing all suspected pirated copies as well as materials and implements used in the infringement, applying presumptions of ownership in line with international practice.
- All Products Infringing Copyright Should be Seized in Raids.** One console-based video game software maker reports that Taiwan authorities sometimes fail to seize games containing pirate 'initialization code' (the copyright for which is owned by the maker of the consoles). If Taiwan authorities find pirate CDs containing games with illegally copied initialization code, those should be seized, whether or not the copyright in the game itself is owned by the maker of the console or not. It is totally unreasonable to require all right holders in the software to participate in the raid. Taiwan authorities must not leave in the hands of the pirates software found in raids that include pirate initialization code.
- Tip-Offs of Pirates Must Cease.** IIPA continues to be concerned by prosecutorial decisions in some reported cases (though fewer than in 1999, apparently) to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. This practice violates Article 228 of the Criminal Procedure Code, which discourages the issuance of such summonses.

Legalized Use by Governments, Businesses and Schools of Copyrighted Materials/Goods

Once a problem mainly for the business software industry, all the copyright industries increasingly are concerned about the unauthorized use of copies of copyrighted works in businesses and by the government. The Taiwan government must become more active in ensuring that businesses are using copyrighted works legally, and must take specific actions, many of which have been promised but not carried through, to ensure that its own agencies are using legal copies of copyrighted works.

IIPA appreciates that the Intellectual Property Office sent out a letter dated October 30 to the Chinese National Federation of Industries (CNFI) and the General Chamber of Commerce of the R.O.C. (ROCCOC) urging their member organizations/associations to use genuine software. This single letter cannot change public attitudes, however. Further actions of this type are necessary. IIPA looks forward to the Taiwan government taking the lead in public educational campaigns on corporate end-user piracy by sending letters directly to general managers of companies, as the Malaysian and Hong Kong Governments did in 2000. IIPA also recognizes the cooperation of the Minister of Education in sending out a letter dated December 13 (similar to one sent out in November 1999) to educational bureaus, county/municipal governments and educational institutions, directing them to regularly inspect websites and computer classrooms to delete any illegal software, as well as to strengthen awareness of intellectual property rights, anti-piracy and procurement of legal software.

IIPA was further heartened by Premier Chang's positive comments in a meeting with the business software industry on December 1, in which the Premier indicated the Taiwan government's commitment to develop a strong and healthy local software industry. IIPA believes that the first necessary step to creation of a strong local software industry is the issuance of a new executive order at the Premier's level, mandating that all government offices and government vendors use only authorized software.²¹ The Taiwan government's effort to systematically implement this decree in a transparent manner should be the bases of a public education campaign on proper software asset management. Proper software asset management within government will involve amending the current Directorate General for Budget, Accounting & Statistics (DGBAS) "Operating Guidelines for the Management of Computer Software in Government Agencies" (effective November 25, 1997) along the lines of the U.S. Federal Government's "Model Guidelines [for] Implementing the Executive Order on Computer Software Piracy" (March 17, 1999) or the Hong Kong Government's "Implementing Procedures for the Proper Use and Management of Software." Thorough measures like training for civil servants and mandatory periodic software audits in all government agencies in the revised Operating Guidelines will at least help to implement the Executive Yuan Directive (February 8, 1999) directing government agencies to use "legally obtained software." IIPA also recommends that the Taiwan government convene a cross-ministerial meeting to discuss implementation of the above as requested in the December 1 meeting with Premier Chang.

²¹ The business software industry engaged the Directorate General for Budget, Accounting & Statistics (DGBAS) to have government agencies in Taiwan fill out a questionnaire on software asset management (SAM). The results indicated that as of November 1999, roughly 30% of agencies did not purchase software through a central office and 55% of agencies did not maintain all software registration and license information in a centrally located system. More than half of the agencies had, according to the survey, educated their workforce on SAM, and DGBAS did agree that there was room for improvement. Perhaps more importantly, DGBAS agreed to include questions on SAM practices in the 2000 government survey on computer use, with new and different questions to address specific issues.

Failure of the Export Monitoring System (EMS) to Defeat Export Piracy

As noted already, Taiwan is now one of the world's worst pirate exporters. All of the mechanisms that have been put in place to catch pirated exports at the borders (before they leave Taiwan) are failing. Customs has referred suspected pirate exports of CDs to industry representatives for verification, but this practice slowed considerably in 2000. The Customs department stopped referring cases of export of various industry-sector piracy to their respective associations for verification. One industry group reports that they were summoned to the airport to inspect 3,000 pieces in January 2001. Such sparse seizures and minimal use of the system is by no means what was intended. The EMS was established in 1993 as a result of U.S. pressure, and was aimed at intercepting pirated products. At that time, the focus was on video games and computer operating systems, but now, with the surge in pirated optical media production for export, the EMS could potentially be used as an effective tool to curb pirated exports of optical media as well. At the time, IIPA viewed this as an innovative and important approach to fighting piracy, but has always expressed concern and disappointment over the system's ineffectiveness. In 1998, the government published and implemented a new set of EMS regulations. Those regs did not improve the system.

The Taiwan government has raised the question of whether the EMS should be abolished since, in their view, it has not been effective. IIPA agrees that the EMS is badly broken, primarily through the failure of the Taiwan government to implement it properly. IIPA agrees that the EMS can be abolished if the following two priority actions are achieved:

- the adoption, implementation and enforcement of comprehensive "optical media" regulations that control copyright piracy at the manufacturing source by strictly regulating optical disc manufacturers (as discussed above);
- the retention by the Government Information Office/IPO of its responsibility to verify copyright authorization/SID code for the export of VCDs and DVDs; and

Taiwan Authorities Permit Massive Transshipment of Pirated Goods Through Taiwan

In view of the critical role that Taiwan plays as a transshipment point for counterfeit goods, it is essential that Taiwan increase the enforcement authority of Customs agents in Taiwan to identify and prosecute the transshipment of infringing products. Pirated and unauthorized products regularly pass through Taiwan ports on their way to other destinations. Not only has Taiwan Customs been unable to curb pirate exports effectively through the export monitoring system (EMS) instituted in 1993, but it has remained inactive in the area of monitoring for illegal items in transit. The Taiwan government's initial response to industry on this issue has been to evade it, either by claiming that pirate items in transit are not the responsibility of the Taiwan government. The government, by allowing massive shipments to transit through Taiwan, tacitly accepts this practice of the worldwide movement of pirate product through Taiwan. This is unacceptable. IIPA urges that pressure be applied on Taiwan to take swift action on the enforcement level to make inroads into this problem plaguing Taiwan.

COPYRIGHT-RELATED LEGAL REFORM IN TAIWAN

Issuance of Draft Copyright Law Amendments That Fail to Adequately Implement the WIPO “Internet” Treaties, and Contain Other Deficiencies

IIPA was pleased that the Taiwan government released for public comment Proposed Draft Amendments to the Copyright Law of Taiwan (the “Draft”) in August 2000, that include attempted implementation in Taiwan of several key requirements of the new WIPO “Internet” Treaties. The Draft includes legal safeguards for technological protection measures used by rights owners; a broad “public transmission” right, including making available of works (including sound recordings) for on-demand dissemination to individual members of the public; and legal protections for the integrity of rights management information associated with protected works (including sound recordings) and performances. IIPA strongly supports Taiwan’s goal to implement the Treaties provisions now as part of its development strategy and before online piracy levels become acute. We applaud the Taiwan government for moving forward on this path.

IIPA commented on the Draft in September 2000. While there are many positive aspects of the Draft, we believe that the implementation proposed in the Draft for several important Treaties issues (including technological protection measures, a new right of “public transmission,” and rights management information) needs further revision in order to fulfill the requirements of the Treaties. In addition, IIPA believes that certain issues not addressed in the Draft require attention. (These include the reproduction right, the distribution right, the definition of computer programs, retroactivity, limitations on exclusive rights, terms of protection, and certain enforcement provisions). The goal is compliance with the requirements of the Treaties or other international standards of copyright protection. Finally, while not required to implement the WCT and WPPT, Taiwan has chosen to address the issue of the liability of online service providers in a way that, without substantial rethinking, will move Taiwan away from full compliance with WTO/TRIPS standards. IIPA is deeply concerned that Taiwan’s approach to the issue of online service providers fails to preserve appropriate incentives for service providers to cooperate with right holders. It also creates a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation.

The following list, while not exhaustive of possible concerns, summarizes IIPA’s difficulties and recommendations for changes that must be made to the August 2000 Draft:

Reproduction Right

In its current formulation, Article 3(5) of the Taiwan Copyright Law is unclear as to whether temporary or permanent storage of works in digital form is considered “reproduction” that falls within the scope of the reproduction right. This is a serious shortcoming. In the digital, networked environment of the Internet works will increasingly be exploited through the creation of temporary copies of software, music and sound recordings, for example, in the random access memory (RAM) of computers or other devices. In these cases a permanent reproduction will not be needed, and the full value of the work will be exploited through the creation of temporary reproductions. To ensure that right holders are able to control significant exploitations of their works in the digital environment, Article 3(5) must be amended to clarify that permanent and temporary copies in digital form fall within the definition of “reproduction,” and thus with the reproduction right. This clarification is also required under the Berne Convention, the TRIPS Agreement, the WCT and the WPPT. The Taiwan Copyright Law’s use of the term “tangible copy” and its failure to set out that any kind of copy will constitute a reproduction under the Law would at best be confusing, and at

worst take it out of compliance with international standards of protection. To ensure that Taiwan unambiguously meets international standards of protection, IIPA strongly urges Taiwan to clarify in the definition of “reproduction” that it includes ‘direct or indirect, temporary or permanent reproductions, by any means and in any form, in whole or in part, including any permanent or temporary storage of a work in electronic form.’ In view of the needed generality of the definition and its technological neutrality, IIPA also urges deleting any references to specific means of reproduction now contained in the current formulation. Director Chang of the IPO Mr. Chang has indicated that temporary reproductions are already covered under the reproduction right.

Technological Protection Measures

Taiwan’s copyright law must ensure that copyright owners (which under Taiwan’s law includes performers and producers of sound recordings) have the ability to use and protect technological measures designed to prevent or deter unauthorized uses, including unauthorized access. To achieve this, parties must be prevented from making or distributing devices, or components thereof, that are principally designed, marketed or used to circumvent such technological measures. Unfortunately, on this crucial aspect of implementation of the WIPO Treaties, Taiwan’s Draft solution fails to meet the requirements of the Treaties in several important respects. Article 11 of the WCT requires Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” Article 18 of the WPPT contains, *mutatis mutandis*, practically the same provision as Article 11 of the WCT, although as discussed further below, performances and sound recordings are treated as works and should be properly subject to the provisions of the WCT, not the WPPT.

The implementation of these obligations by Taiwan in the definition of “technological protection measures” in Article 3(15) and in Article 92*bis* of the Draft falls far short of meeting the adequate and effective standard, because:

- while spelling out the criteria by which the business of providing certain circumvention tools would be outlawed, the Draft fails to outlaw the act of defeating a technological protection measure;
- while technologies that control the exercise of exclusive rights under copyright are outlawed in the Draft, technologies that control access to copyrighted materials are not (since the definition of “technological protection measures” leaves out measures that control access);
- the Draft employs what appears to be an overly narrow ‘sole purpose’ test, and does not permit direct or indirect methods to prove a circumvention purpose (for example, by proving that a device or service has no commercially significant purpose or use other than to circumvent) (although we have recently heard that Director Chang of the IPO has indicated that the term “sole purpose” may have been a “typographical error”);
- the definition of ‘technological protection measures’ provides an exception that threatens to eviscerate the rule, namely, technological protection measures do “not include measures to restrict legally permitted exploitation of such works by other persons.” In other words, it appears that a measure that has the capability of restricting a legally permitted use as well as

infringing uses is not considered a ‘technological protection measure’ at all. The ambiguity in the definition of ‘technological protection measures’ must be clarified;

- the Draft requires proof of “intent” that equipment, services, or information will be used to infringe copyrights of other persons, a test that finds no basis in the Treaties and that would, as a practical matter, make enforcement virtually impossible;
- while services and complete devices are covered, components of devices are not explicitly covered;
- civil remedies, including injunctive relief (extremely important to deter this illegal commercial activity), are not available against those who engage in circumventing technological protection measures; and
- criminal penalties for circumventing, without proving that the defendant committed the crime “as a vocation,” are inadequate and even weaker than those applied for copyright infringements (thus, criminal remedies should be conformed so they are at least as severe as those imposed for copyright crimes).

Service Provider Liability Provisions

While not required to implement the WCT and WPPT, Taiwan has chosen to address the issue of the liability of online service providers. The drafters have introduced, in Article 87ter of the Draft, a blanket exemption to liability for copyright infringement for “a person providing electronic transmission network service or facilities” (ISP) with respect to third party infringements “using their service or facilities.” The exemption applies if either the work “made available to the public was uploaded by another person and the content was unknown to [the ISP],” provided that it was “objectively . . . unfeasible” or “technologically impossible” to prevent access to the work; or if the ISP “provides only the function of access by users to the content of works provided by other persons, including automatic and temporary storage of such works at the request of users.” In IIPA’s view, any legislation on this topic should preserve the basic principles of copyright law while advancing electronic commerce. These goals can be balanced in legislation that:

- avoids blanket immunities and other sweeping exemptions that violate international norms and diminish incentives for cooperation;
- preserves and strengthens incentives for cooperation between copyright owners and service providers in detecting and dealing with online theft;
- encourages marketplace solutions – licensing, contracts, indemnification, insurance — to the problem of preventing online piracy;
- respects the role of the courts in preventing infringement and preserving evidence; and
- fits within the framework of copyright law and thus promotes the production and dissemination of creative works.

Unfortunately, the provisions of the Taiwan Draft do not strike the right balance. They fail both to preserve appropriate incentives for service providers to cooperate with right holders and to avoid a blanket immunity/exemption that may violate international norms and diminish incentives for cooperation. In short, without substantial rethinking, Taiwan’s proposed Draft on the liability of

service providers will take Taiwan away from full compliance with its coming WTO/TRIPS and Berne obligations. The provisions fail to avoid the main pitfalls in legislating service provider liability provisions, by:

- conferring a blanket immunity on a service provider if it meets the criteria of the statute, rather than the much preferred solution – adopted in the U.S. and in similar form adopted in the EU – of limiting the remedies available to right holders; decreasing incentives for cooperation and limiting the role of courts in preventing infringement and preserving evidence;
- discouraging marketplace solutions by establishing a ‘shield’ of non-liability for service providers meeting the criteria (thereby providing no incentives to enter into licensing agreements with right holders, for example); and
- requiring actual knowledge of the third-party infringement under the first criterion, and, apparently exempting service providers coming under the second criterion even if they know full well the contents being stored on their networks are infringing.

Director Chang of IPO has acknowledged that Taiwan’s initial Draft approach may be viewed by some as not going far enough. He indicated that the drafters do not want the provisions to be complicated, and that they are inclined to follow the approach in the EU E-Commerce Directive.

New Right of “Public Transmission” and Limitations on Economic Rights

IIPA is pleased that the Taiwan government has taken the steps to amend its law to cover the rights in WCT Article 8 and WPPT Articles 10 and 14. It appears that the new right to “publicly transmit” works goes far toward satisfying the requirements of Article 8 of the WCT. As sound recordings are works under Taiwan law, they should be provided exactly the same treatment as accorded other works. Indeed, with the convergence of all subject matter in the online environment, there is no longer any excuse for treating subject matter differently. Taiwan has correctly made this judgment in its current copyright law. Therefore, Article 24 of the Draft (which limits economic rights as to the authors of sound recordings) should be deleted as unnecessary and out of kilter with treating sound recordings as any other protected work. Also, IIPA is concerned with Taiwan’s decision to replace “publicly broadcast” with “publicly transmit” in several Articles relating to limitations on economic rights (Articles 47, 50, 56, 56bis, and 61). These limitations, which would extend from the confines of public broadcast to digital media included in the definition of “public transmission,” arguably run afoul of the well-established WTO/TRIPS and Berne “tripartite” test for exceptions, and would unacceptably eviscerate the “public transmission” right afforded to right holders in the Draft, taking Taiwan out of compliance with the Treaties.

Distribution Right

The drafters have not proposed adding an exclusive distribution right, as required by WCT Article 6 and WPPT Article 12. The WIPO Treaties added a right of distribution in order to eliminate a gap in the Berne Convention (which does not provide for a right of distribution except for cinematographic works), and to provide such a right to performers and rightholders in sound recordings. Taiwan only provides (in Article 87 of the Law) that “infringement of copyright or plate rights will be deemed to have occurred” in the case of “[d]istribut[ion] . . . or possess[ion] with the intent to distribute . . . infringing articles that are known to infringe on copyright or plate rights,” thereby making those who engage in such infringement civilly liable. This does not expressly

provide the right holder in a work (which includes a sound recording and a performance) with an exclusive right to distribute it. IIPA urges Taiwan to add an exclusive right, both to authorize or prohibit the distribution to the public by sale or other transfer of the original or copies of a work (or sound recording or performance). On the issue of exhaustion, Taiwan has already adopted a national exhaustion approach, highly preferable in terms of providing incentives for creative activity, and part of Taiwan's obligations under the U.S.-Taiwan bilateral copyright agreement.

Rights Management Information

The Draft proposes to create legal protection for the integrity of "electronic copyright rights management information" (RMI) associated with the dissemination of copyrighted works and other protected materials. In particular, the new Draft provides civil and criminal relief for certain unauthorized acts related to the removal or alteration of RMI. Taiwan should be commended for proposing to legislate against inappropriate interference with this key enabling technology of electronic commerce. Enactment of the Draft provisions would go far, but apparently not all the way, toward bringing Taiwan's law into line with WIPO Treaties obligations (WCT Article 12 and WPPT Article 19). Several changes would be needed in order to achieve full Treaties compliance. IIPA urges Taiwan to make the following changes:

- the definition of "[e]lectronic copyright rights management information" (Article 3(16) of the Draft) should also include any numbers or codes that represent such information;
- it should be made clear that nothing in the prohibitions requires the owner of any right in the work to attach RMI to copies of it or to cause RMI to appear in connection with a communication of the work to the public ("public transmission");
- alteration or removal of RMI should also be a violation if it is unauthorized and regardless of its relation to an infringement of copyright. Included in the business activities deemed illegal under Article 87 should be "to distribute, import for distribution, export or publicly transmit;"
- at least with respect to civil remedies, it should only be required that a defendant altering or removing RMI have constructive knowledge that "such action would injure the rights of the copyright owner"; and
- as with the provisions on anti-circumvention, criminal remedies should be conformed so they are at least as severe as those imposed for copyright crimes.

Definition of Computer Programs

The drafters have not proposed adding a definition for computer programs in the Copyright Law. As it stands, the law does not expressly protect computer programs as literary works, and computer programs are not defined broadly to include, for example, all programs regardless of the mode of their expression. Protecting computer programs as literary works is a TRIPS requirement. Such protection is also required to implement Article 4 of the WCT, which clarifies that "[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention," and that "[s]uch protection applies to computer programs, whatever may be the mode of their expression." IIPA urges Taiwan to take this opportunity to clarify that computer programs are protected as literary works, and that such protection applies to any mode or form of expression of a computer program.

Licensing

The drafters have proposed two alternative versions of Article 37(1), dealing with the scope of licenses granted with regard to as yet unknown technologies. Option A is preferable as it best preserves market forces. IIPA strongly believes that market forces should govern what parties to a contract agree to do with respect to new and even unknown technologies, and the ability to contract freely should not be legislated away. Particularly with rapid changes in technology, copyright owners must have the ability to license or reserve the licensing of technologies now known or hereafter developed.

Limitations or Exceptions to Protection

The Draft proposed replacement of “publicly broadcast” with “publicly transmit” in several Articles relating to limitations on economic rights (Articles 47, 50, 56, 56bis, and 61), as noted above, and the proposed extension of the exception in Article 49 to include “works that are seen and heard” by means of “computer network.” These changes may run afoul of the well-established WTO/TRIPS and Berne “tripartite” test for exceptions (under which exceptions must be limited to special cases, must not conflict with a normal exploitation of a work, and must not unreasonably prejudice the legitimate interests of right holders). In addition to the need to reevaluate the changes made to these provisions, other limitations must be reconsidered for Taiwan to meet international standards. In revising the limitations sections in the Copyright Law, IIPA urges Taiwan to keep the following specific points in mind:

- all of the exceptions in the Copyright Law should explicitly be made subject to the Berne tripartite test;
- the personal use copying exception in Article 51 must be narrowed so that it does not run afoul of the Berne tripartite test (this exception must at least be limited to reproduction in a single, analog copy of “a work that has been publicly released,” provided that such copying does not conflict with a normal exploitation of a work and does not unreasonably prejudice the legitimate interests of right holders);
- the Article 56bis exception (a free compulsory license to rebroadcast wireless transmissions via cable) amounts to a violation of Article 11bis of the Berne Convention, which grants the copyright owner the right to retransmit its works. While the Berne Convention/TRIPS does permit countries to determine conditions under which the right of broadcasting may be exercised, including the possibility of compulsory licenses, Article 56bis clearly does not pass this test; and
- the drafters need to reevaluate other limitations which in light of new technologies may need to be amended in order to meet the long-standing Berne tripartite test.

Confiscation of Infringing Articles and Implements Used to Infringe

Under the original 1992 Copyright Law, Article 98 provided, “[o]bjects that are produced from or used in committing the offenses set forth in Articles 91 through 95 shall be confiscated.” TRIPS requires criminal remedies that include the possibility of “seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.” Reinstating Article 98 would go a long way toward ensuring that Taiwan meets this standard. In particular, the application of this article in practice should permit the seizure of machines, regardless of claims by defendants that tools and

implements do not belong to them, or are owned by “staff” for their personal use. IIPA strongly urges Taiwan to reinstate Article 98. Director Chang has said that he would consider reinstating Article 98, that it was taken out of the copyright law because the government thought it would be covered under the criminal law, but the wording in the criminal law makes it difficult to use (that provision provides that equipment can be confiscated if it is ‘owned by the infringer’). IIPA urges the Ministry of Justice to agree that Article 98 must be reinstated.

IIPA understands that the Intellectual Property Office (IPO) held a series of public hearings on the proposed Draft in Taipei on September 29 and October 4, 2000. They will reportedly engage in internal consultations to consider the public comments, and the revised proposed amendments would then go to the Ministry of Economic Affairs by early 2001, after which time the revised draft will be released for public comment.

Criminalization of Corporate End-User Piracy

Business end-user piracy (the unauthorized use of software by businesses) causes the largest losses in monetary terms to the U.S. business software industry. Business end-user piracy takes place in some cases with the knowledge of management and in other cases because of lax software asset management practices. This problem will not be addressed unless the Taiwan government makes clear to the public that business end user piracy is illegal under Taiwan law and that the government will take action to stop it, followed by high profile steps to enforce the law against business pirates.

The current copyright law is ambiguous as to whether corporate end-user piracy is a criminal offense. Without such clarification or warnings from the Taiwan government, it is difficult to see how the Taiwan government can move forward an agenda to convince companies to use only legal software. The Hong Kong government recently amended its Copyright Ordinance to clarify that possession of an illegal copy of a protected work in a corporate environment is subject to criminal penalties. This provision will come into force on April 1, 2001, preceded by a public educational campaign launched by the Hong Kong Government. IIPA recommends that the Taiwan Government make a similar clarification under its law.

Two Year Grace Period After WTO Accession for Works to Be Protected Retroactively Amounts to Government-Sanctioned “Open Season” On Piracy

As reported for the past two years, under the copyright amendments of January 23, 1998, retroactive protection for works and sound recordings for their full Berne/TRIPS-compatible term of protection will only come into effect two years after Taiwan joins the WTO. Specifically, Article 106ter gives a person who has “begun the exploitation, or has made significant investment for the exploitation” of a work the ability to continue to exploit such works “during the two-year period” after Taiwan is accepted into the WTO (the provision does not expressly limit this two-year delay to existing copies). In practice, Article 106ter amounts to an overly long delay in providing full TRIPS-level protection upon Taiwan’s accession to the WTO, and will leave Taiwan in violation of TRIPS the moment Taiwan accedes. IIPA is very troubled by this two year “grace period”. It amounts to a governmentally sanctioned “open season” for continued unauthorized exploitation of valuable copyrights without any compensation to the owner. In addition, Article 106quater, besides granting a similar exemption for certain derivative works that would take effect two years following Taiwan’s entry to the WTO, amount to a TRIPS/Berne-inconsistent compulsory license. Both Articles 106ter and 106quater must be deleted for Taiwan to be in compliance with international obligations upon its accession to the WTO.

In the August 2000 Draft copyright law amendments, the drafters did not address the failure of the Copyright Law to provide full retroactive protection for all WTO members' works. IIPA notes that more than three years has passed since the passage of Article 106ter (giving those intended to benefit from the exemption ample time to make use of it already, and ample warning that Taiwan, in order to meet its TRIPS requirements, must protect all works including sound recordings retroactively for their TRIPS-compatible terms). Director Chang of the IPO has indicated that it will be difficult to repeal the two-year transition period, and asserts that right holders are protected as the burden will be on the infringer to prove that it had already begun to exploit a work or had made a significant investment in the work prior to the provision's entry into force. As already noted, such infringers have already had a grace period prior to Taiwan's joining the WTO, and should not be entitled to continue harming copyright owners past the date of accession.

Production for Export of Materials That Are "Legal" in Taiwan But Pirate in the Destination Country Must Be Prohibited

Several huge shipments destined for Latin America have been stopped at the Taiwan border (one in May 1998, and one in early 1999), only to be released, as the customs agents deemed the repertoire not protected in Taiwan (there is no bilateral arrangement between the alleged copyright owners' countries and Taiwan). Latin repertoire is being mass-produced without the authorization of the copyright owner for export to countries where such unauthorized reproductions would be illegal. IIPA calls upon the Taiwan authorities to implement a regulation (similar to the one implemented for pre-1965 motion picture titles) requiring companies exporting unauthorized reproductions of Latin titles to produce certificates from the importing country's local authority that such titles are legal in the importing country. Companies unable to produce such a certification should not be issued an export permit to ship the product from Taiwan. The government of Taiwan must adopt procedures that would require manufacturers and exporters to establish the legitimacy of their productions/exports in the country of destination.

The failure to address Latin music piracy also implicates the US-ROC bilateral, inasmuch as much Latin product is simultaneously released in the U.S., or owned by U.S. companies, thus triggering protection under the bilateral. According to the bilateral, Latin product that is first published in the U.S. or published in the U.S. within 30 days of its first publication elsewhere, shall be protected by Taiwan copyright law. In addition, Latin product that is first published in a country which belongs to a multilateral copyright convention to which the U.S. also accedes, and as to which a Taiwanese or American gets exclusive license within one year following the first publication of the work, shall be protected by Taiwan copyright law. The above-mentioned protection is not necessarily based on registration of copyright. Therefore, if the fact of first publication and/or the fact of acquiring exclusive right can be proved, the work must be protected according to the agreement.

Sentencing Enhancements Should be Applied to "Professional Pirates" to Achieve Deterrence

Finally, courts are still refusing to apply sentencing enhancement provisions applicable to "professional pirates," which would make imprisonment mandatory. As a result, persons engaged in the business of piracy often receive suspended and otherwise non-deterrent sentence.