

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY¹

IIPA recommends that Taiwan remain on the Special 301 Priority Watch List.

Piracy rates in Taiwan continue to hover at levels not seen since the 1980s, when Taiwan was singled out as the world's worst piracy haven. Such rampant piracy can be attributed to the government's heretofore ineffective management of plants producing optical media (i.e., CDs and other discs read by an optical device such as a laser), inadequate enforcement against other forms of piracy, involvement of crime organizations in piracy, increasing involvement of students/juvenile offenders in piracy, insignificant court judgments, and increasing "burning" of pirate CD-Rs.

The pirate trade in optical media remains at epidemic proportions. Ironically, on November 16, 2001, just days after Taiwan passed a law to control optical media production, law enforcement officers in Los Angeles announced the largest seizure of counterfeit software in U.S. history, valued at \$100 million, coming from what police and federal investigators said was a "well-funded syndicate" operating in Taiwan, and noting that the bust was like "intercepting a drug cartel." Passage of the optical media law was a most positive sign, and IIPA hopes that this new Law will be aggressively enforced. Unfortunately, however, it contains gaps that, if not remedied in regulations or in actual, practical enforcement, could protect those who presently engage in pirate production. The law must be strictly implemented and enforced and followed up with tough, deterrent penalties and equipment seizures that will effectively reduce piracy rates. The new Law, for example, fails to require licenses of those who make or use the key tools of piracy – pirate masters and stampers – which have no legitimate use other than to pirate U.S. movies, music, business and entertainment software. The optical media piracy problem in Taiwan has become out-of-control, and requires aggressive enforcement to provide necessary relief to right holders. IIPA believes the Taiwan government has the political will to ensure that pirate production is severely reduced through aggressive enforcement and the imposition of truly deterrent measures. The next few months will tell the tale.

Other piracy phenomena in Taiwan that must be tackled in 2002 include: the illegal use of software in organizations; retail piracy, including the notorious *Ta-Bu-Tieh* or CD-R compilations of works, sound recordings, computer programs and games, and pirate night market vendors; the illegal distribution of pirate works over the Internet; the burgeoning cross-border trade in pirated products (including the export of product that is illegal in the destination country – now clearly illegal under the WTO); the distribution of pirate product, including optical media and "burned" CD-Rs, at schools and on college campuses by students acting on their own or on behalf of

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

criminal gangs; illegal photocopying and publishing of academic textbooks at universities; and unauthorized public performances of copyrighted movies in “MTVs” (mini-theaters).

In order to address the piracy problems in Taiwan, and in order to meet Taiwan’s obligations under the WTO/TRIPS Agreement, to which it is now a party, the government needs to effectively implement its new Optical Media Management Statute (2001) and work to eradicate optical media piracy. In addition, the government must kick off a sustained copyright enforcement campaign throughout 2002 against all pirates in the manufacturing, distribution, and retail sectors. A related campaign must address corporate end-user software piracy as an incentive to get companies to take legal compliance seriously. Enforcement actions and results should lead to deterrent results, and be widely publicized for maximum deterrent effect.

The government in Taiwan must also work to solve the many procedural hurdles that continue to hinder copyright owners’ efforts to protect their works in Taiwan. These include: the transfer of power for issuance of search warrants from prosecutors to courts, which is negatively affecting the ability of some industries to get warrants; making piracy a “public” crime in all cases; continued challenges to powers of attorney (POAs) of U.S. right holders in some court cases and in raids; raiding authorities’ failure to seize all pirate product and tools and implements used in piracy; and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids.

Finally, as a new member of the WTO, Taiwan’s leaders must be forward-looking, and Taiwan’s consideration of amendments to its copyright law that include many provisions needed to establish an adequate legal framework for electronic commerce is a welcomed sign. While there are many positive aspects in the latest draft IIPA has seen, some further changes (outlined below) are needed to bring Taiwan’s law into compliance with TRIPS, as well as make Taiwan’s law one of the world’s most modern, by implementing the key requirements of the latest WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

For 2001, trade losses to the U.S. copyright industries due to piracy in Taiwan were an estimated \$333.1 million.

TAIWAN: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	35.0	30%	30.0	30%	20.0	20%	15.0	10%	15.0	10%	17.0	10%
Sound Recordings ²	51.7	48%	60.5	44%	60.0	35%	55.0	20%	10.0	12%	8.0	8%
Business Software Applications ³	107.0	52%	123.9	53%	97.6	54%	112.1	59%	104.6	63%	111.7	72%
Entertainment Software ⁴	119.4	70%	319.3	90%	115.7	68%	103.2	65%	102.6	65%	109.0	69%
Books	20.0	NA	20.0	NA	21.0	NA	19.0	NA	5.0	NA	5.0	NA
TOTALS⁵	333.1		553.7		314.3		304.3		237.2		250.7	

COPYRIGHT PIRACY TRENDS IN TAIWAN

Pirate Optical Media Production in Taiwan

At least 61 known optical media plants in Taiwan (and possibly nine or more underground plants) now engage in the manufacture of finished optical media products, including CDs, CD-ROMs, VCDs, DVDs, and “burned” CD-Rs, as well as blank media, including blank CDs, CD-Rs, CD-RWs, DVD-Rs and DVD-RWs. At least 18 of these factories have DVD replication facilities. The 61 plants in Taiwan contain well over 1,187 replication lines, including 93 DVD lines, 229 VCD/CD lines and 865 CD-R lines. Total production capacity of the plants (not including the CD-R capacity) is an astounding 1.127 billion (calculated by multiplying 322 lines X 3.5 million copies per line per annum),⁶ dwarfing any possible legitimate domestic demand (only about 40 million units) for Taiwan’s nearly 22.4 million people. Taiwan is now arguably the world’s worst piracy haven for optical media production for export, as product from Taiwan has been found in 2001 in far away places as Paraguay⁷ and Mexico.⁸ In addition, “burned” CD-Rs in Taiwan, including

² Estimated displaced sales of sound recordings in Taiwan due to piracy were \$51.7 million. The piracy level for 2000 was revised upward to 44% in May 2001.

³ BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 submission, BSA’s 2000 loss figure of \$127.3 million was reported as preliminary. This number was finalized in mid-2001, and is reflected above.

⁴ IDSA’s loss estimates for 2001 approximate lost in-country sales, but do not attempt to estimate losses attributable to in-country production for export.

⁵ In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Taiwan were \$557.1 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Taiwan in 2000 are adjusted to \$553.7 million.

⁶ A more aggressive industry assessment, based on production 365 days per year, put Taiwan’s production capacity at well over 2.6 billion discs per year.

⁷ In April 2001, twelve containers shipped from Taiwan via Uruguay were intercepted in Paraguay. Inspection revealed 4.9 million blank CD-Rs along with various other contraband including printers, computers and clothing.

compilations of music (including MP3 audio files), computer programs, console-based games, etc., flood the domestic markets in Taiwan.

Other Piracy Phenomena in Taiwan Evidence a Culture of Illegality

The illegal use of software in organizations (i.e., end-user piracy), as well as direct sales of infringing discs, Internet-based piracy and CD-R burning of U.S. copyrighted works, flourished in 2001. Piracy phenomena in Taiwan that must be tackled in 2002 include:

- **The Illegal Use of Software in Organizations:** Not only companies, but also the Taiwan government itself, as well as educational institutions, continue in their use of unauthorized software. The Directorate General for Budget, Accounting & Statistics (DGBAS) conducted a survey on SAM practices within central level government ministries, departments and agencies in the first half of 2001.⁹ Information technology staff at over 900 agencies completed the survey.¹⁰ The results indicate the same results or slight improvement over a similar survey conducted in 1999, since a little over 30% of respondents still admitted they did not purchase software through one centralized office (the same as 1999), but only 32% of agencies in 2001 did not maintain a database or catalog of assets to manage software and license agreements (down from 55% in 1999), a positive sign. The business software industry is pleased that DGBAS continues its work, but points out that DGBAS has no enforcement powers to ensure that government agencies are following good software asset management practices. The government must set up an enforcement mechanism to conduct audits on government agencies on software use and determine penalties for non-compliance.
- **Retail Piracy, Including “Burning” of CD-Rs:** Piracy includes the notorious *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations containing audiovisual works, sound recordings, computer programs (including reseller piracy and unauthorized loading of software onto hard disks of computers prior to sale) and games (e.g., piracy of console-based videogames is nearly 100% in Taiwan, including both CD-Rs and CD-ROMs, while roughly 30% of all personal computer games sold in Taiwan are pirated). There are also reportedly 250 night-market vendors regularly selling both pirated and counterfeit products throughout Taiwan. Another emerging problem is “burning” of CD-Rs. For example, illicit websites located on Taiwan college and university campus servers make illegal files available for downloading or copying onto blank CD-Rs. 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. Students involved in such piracy either act alone or at the behest of criminal gangs. With respect to audiovisual works sold

⁸ In December 2001, simultaneous raids conducted in 13 locations in Tepito, Mexico revealed 10 million blank CDRs seized and found to be manufactured by Princo, a major Taiwanese supplier of blank CD-Rs throughout Latin America.

⁹ Similar SAM questionnaires were conducted in 1999, when the Directorate General for Budget, Accounting & Statistics (DGBAS) had government agencies in Taiwan fill out a questionnaire, and 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.

¹⁰ Replies for the Sam survey were broken down by agencies, with a range of PC counts from as low as 1 PC to over 1,000 PCs per agency.

and/or rented through the retail shops, as a result of the Government Information Office's loosening of its regulatory control over retail shops in 2001, more of those shops engage in the unauthorized duplication of CD-Rs. GIO must once again tighten its grip on the retail markets.

- **Internet Piracy:** Distribution of finished pirated product using the Internet (mainly on-demand "burning" of copyrighted content), as well as downloading of copyrighted works over the Internet, are growing phenomena in Taiwan. 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. The problem of Internet piracy must be addressed by the Ministry of Education, the Ministry of Transportation and Communications (MOTC), and other law enforcement authorities. Phenomena include the following:
 - **Distribution of Finished Product (Advertising Over the Internet):** Distribution from websites at schools and elsewhere 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), including CD-R sales of "finished" as well as custom-made infringing discs (including MP-3 format) over the Internet and located in Taiwan. As much as 30% of all piracy of entertainment software in Taiwan may be connected with the Internet.
 - **Downloads of Pirated Materials from Websites, "Peer-to-Peer" File-Sharing, "Napster" Clones, at Cyber-Cafés, etc.:** There are increasing numbers of infringing FTP ("file transfer protocol") sites in Taiwan, making available unauthorized MP3 files for download. Another problem involves pirated uses of copyrighted works (including entertainment software) at "cyber-café," of which there are 3,000 throughout Taiwan. The record industry is also aware of at least two Napster clones operating out of Taiwan, with mirror sites set up in neighboring Asian countries and/or other countries. A number of these sites or infringing files have been traced back to the servers of Taiwan educational institutions or government agencies.
- **Cross-Border Trade in Pirated Goods:** There is still a burgeoning cross-border trade in pirated products, including the export of product that is illegal in the destination country.¹¹
- **Unauthorized Public Performances:** Such piracy includes the unauthorized public performances of copyrighted movies in "MTVs" (mini-theaters).
- **Illegal Photocopying and Publishing of Academic Textbooks at Universities:** Such piracy is most prevalent in Taipei and other major cities, including around prestigious campuses such as

¹¹ One success story involving cross-border piracy was the infringement finding by the Taiwan High Court on May 25, 2000, ruling that Chungtek's Technology Co. must pay Microsoft Corp. NT\$242.32 million (US\$7.87 million) for pirating Windows 95 and other software. The court said Chungtek's 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 Chungtek'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, Chungtek'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.

the National University in Hsin-Chu, and now makes up roughly 20-40% of the total textbook market in Taiwan. Local photocopy shops actively carry out photocopying and binding services mainly for students and teachers at schools and universities. In 1999-2001, several copy shops were raided. Pirate "offset" printing has largely disappeared in Taiwan; in 2000, one commercial pirate of books was convicted, although the result was a disappointing seven-month, suspended, sentence.

- **Ad Masking:** Some Taiwanese cable systems either substitute or "mask" ads carried on satellite pay TV channels. They do this either by putting a "surround" of their own around an advertisement or by substituting the advertisement altogether. This is explicitly contrary to the Taiwan Broadcasting Act, the enforcement of which rests with GIO. GIO has been approached and agrees that such action is illegal, but offered the excuse that enforcement of the law had been delegated to the municipal level, and they did not have the resources to enforce the regulations. They undertook to contact the local authorities to remind them of the law, but so far, there has been no successful resolution.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan Must Effectively Implement the Optical Media Management Statute

In order to address the optical media piracy problem in Taiwan (and in order to meet Taiwan's obligations under the WTO/TRIPS Agreement, to which it is now a party), the government needs to effectively implement its new Optical Media Management Statute (2001) and work to eradicate "optical media" piracy. As a start, Taiwan must do the following in the first half of 2002:

- Put on notice existing optical media plants that licensure must be completed by May 14, 2002, and gear up administrative organs for sustained enforcement against plants failing to comply;
- Set stricter standards for new plants wishing to engage in the production of optical media, including inquiry into production capacity, verification of rights, etc.;
- Seize illegal prerecorded optical media and machines and tools used to produce such media, and also give administrative authorities the discretion to seize illegal stampers/masters and machines and tools used to produce them; and
- Provide transparency of permit information, filings by "blank" manufacturers, reports of exports/imports of machines or tools, reports of investigations, raids and results of such investigations and raids, Customs' activities, etc.

The Optical Media Management Statute is merely an additional tool to fight unauthorized optical media production, which often also amounts to copyright piracy (actionable under the copyright law). The proof in 2002 will be in the results of efforts garnered by the various enforcement authorities, including MOEA and the police, to root out unauthorized optical media production from Taiwan, including by seizing product from wholesalers and warehouses and tracing the source of production. Also instructive will be the extent of seizures at the Taiwan borders of what we know to be multiple millions of illegal discs per year. IIPA understands that the factory run by Digi Gold was sealed in 2001, the managers of the plant were indicted in February

2001, and one further hearing was held in June 2001. However, disappointingly, there has been no further progress on this case.

The year 2002 will be pivotal in determining whether the Taiwanese have succeeded in shutting down or stopping the illegal producers of finished optical media, optical media plants that fail to comply with the requirements of the new statute, and unscrupulous importers and vendors of the key tools of optical media piracy, namely, pirate stampers and masters. The authorities should also raid against the “conscience-vending box” stands in the night markets (stands often run by children or students in which customers place money in a box in exchange for their choice of CDs). Where possible, the Taiwan authorities should introduce internal merit systems so that police officers have incentives to pursue this new form of piracy distribution.

Criminal Enforcement in 2001

As in previous years, the industries continued to get a sizeable number of cases brought criminally in 2001, although most were against small-time pirate distributors (in night markets and the like). For the music industry, in 2001, 766 of 807 defendants (around 95%) were convicted in criminal cases brought before the courts, although the majority of judgments granted were either commuted to fines or suspended sentences, regardless of whether they were first-time or repeat offenders.¹² Such court judgments obviously have little deterrent effect on infringers. Also, in 2001, the number of juvenile offenders far exceeded the number of adult offenders, a very disturbing trend: out of the 2,235 raids conducted, a total of 2,621 offenders were arrested. Of those arrested, 1,669 were juvenile offenders (aged 11 to 17 years),¹³ compared with 952 adults arrested). Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them; instead, they only reprimand them for their misconduct or send them to a juvenile correctional institute. As a result, criminal organizations frequently employ juveniles to distribute infringing discs in order to avoid liability. Regarding newer forms of piracy, including MP3 files from computers and the “burning” of music CD-Rs, the recording industry reports that of the 54 cases filed by it in 2000, seven have been prosecuted, resulting in 35 convictions (involving 39 defendants). In 2001, of the 50 cases filed, four have been prosecuted, resulting in 14 convictions (involving 16 defendants).

The motion picture industry conducted 1,118 raids in 2001, leading to the commencement of 1,060 cases (including 644 cases involving juveniles).¹⁴ A full 465 cases resulted in a criminal conviction; however, 36 of the sentences were either commuted to fines or suspended, and a full 390 cases involved juveniles. The criminal docket was not as full for the business software industry, as they focused efforts on mounting raids against unauthorized corporate “end-users” of business software (ten raids were run), while only four raids were run in 2001 against pirate resellers of software; the time-frame for prosecutions has ranged from six months to an unacceptably slow two years, depending on workload of the Prosecutor’s Office.

¹² Only 107 out of the 766 defendants convicted (or only 14%) actually served time in jail.

¹³ Recording industry statistics indicate that of the juveniles brought before the courts, five were only 11 years old, 27 were only 12 years old, and nearly half were 15 or younger.

¹⁴ Seizures included five VCD production lines, six printing machines, four VCD players, 465 silk-screens, 251,518 pirated VCDs, 901,199 pirated VCDs/CDs and 1,849 pirated DVDs.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	TOTALS
Number of raids conducted	1,118	13	2235	3,366
Number of cases commenced	1,060	15	2255	3,330
Number of defendants convicted (including guilty pleas)	488	3	766	1,257
Acquittals and dismissals	10	0	34	44
Number of cases Pending	562	19	1435	2,016
Total number of cases resulting in jail time	96	3	743	842
Suspended prison terms	49	2	300	351
Maximum 6 months	25	0	150	175
Over 6 months	6	0	23	29
Over 1 year	18	2	127	147
Total suspended prison terms	506	NA ¹⁵	10,800	11,306
Prison terms served (not suspended)	47	1	443	491
Maximum 6 months	33	0	331	364
Over 6 months	3	0	28	31
Over 1 year	11	1	84	96
Total prison terms served (not suspended)	386	NA ¹⁶	4688	5,072
Number of cases resulting in criminal fines	1	2	57	60
Up to \$1,000	0	0	5	5
\$1,000 to \$5,000	1	0	49	50
Over \$5,000	0	2	3	5
Total amount of fines levied (in US\$)	1,515	15,142	114,000	130,657

¹⁵ Total duration of suspended prison terms was six years.

¹⁶ Total duration of served prison terms was 1.2 years.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS 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 ¹⁷	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 ¹⁸	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

¹⁷ These suspended sentences range in time from one to twelve months, but most were over six months.

¹⁸ Twelve cases brought in 2000 against juvenile offenders involved piracy against motion picture titles. All 12 cases led to convictions, but as juveniles, they received reprimands and accepted reformatory education until the age of 20.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 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 ¹⁹	NA	1
Total Prison Terms Served (not suspended)	209 months	NA	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

Enforcement Against Internet Piracy in 2001

With the exponential growth of Internet piracy in Taiwan (both distribution of finished pirated goods using the Internet as advertisement, and direct download of infringing materials) in the past couple of years, the Taiwan government, beginning to recognize the magnitude of the problem, has begun taking actions against such piracy. Previously, its efforts had focused on pornography, but in 2000 and 2001, enforcement authorities began focusing more on online marketing of *Ta-Bu-Tieh* (compilation) CDs as well as pirated VCDs and DVDs, with some encouraging results. The motion picture industry conducted 23 raids against pirates distributing infringing works via the Internet, resulting in the seizure of 31,570 pirated CD-Rs and the arrest of 23 pirates. Subsequent prosecutions resulted in nine convictions, with one defendant being imprisoned immediately for 18 months, and seven defendants given suspended sentences with jail terms ranging from 7 to 24 months (with probation periods ranging from two to four years). The recording industry searched 654 unauthorized web and FTP sites (225 Taiwan sites and 429 foreign sites). A total of 157 warning letters were sent to the above, as well as 134 letters to related ISPs. This letter campaign resulted in 150 sites being closed down. Other industries report more trouble getting cooperation of Internet service providers (ISPs).²⁰ The business software industry has

¹⁹ 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.

²⁰ For example, the entertainment software industry reports that many ISPs are refusing to take down pirate sites, many of which are mirror sites with the server located in Hong Kong.

provided numerous leads to the police on Internet piracy cases, but has not gotten raids or other feedback from the police on the status of the cases.

IIPA also began to see some positive results from the Ministry of Education's (MOE) agreement 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. From December 2000, the recording industry has provided the MOE information regarding infringing Internet websites and servers on a monthly basis. In 2001, the recording industry provided information regarding 50 illegal pirate music (MP3) websites and 43 FTP ("file-transfer protocol") sites hosted within the servers of educational institutions for MOE's further action. This information resulted in the shutting down of 48 pirate music websites and 21 FTP sites being closed down. In April 2001, the Tainan District Prosecutor's Office raided the dormitories of National Cheng Kung University (NCKU), revealing that 14 students were allegedly infringing 18,000 copyrighted song titles owned or controlled by Taiwan record companies through FTP sites. While this case eventually settled, one of the conditions of the settlement was the MOE's issuance of "Guidelines for the Use of Internet in Campus Networks," which were finally issued on December 26, 2001. 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 National Police Administration of the Ministry of Interior, to coordinate a joint effort to enforce against all forms of Internet piracy, including MP3 piracy.

Call for Sustained Copyright Enforcement Campaign in 2002

A *permanent* enforcement body must be established, perhaps headed by a special prosecutor, to carry out sustained, island-wide enforcement. The merits of such task force are:

- To centralize executive authority, helping to integrate manpower and intelligence from other agencies;
- No jurisdictional limitations on enforcement authority means increased chances of successful investigation of the origins of piracy and criminal organizations;
- Professional training can be given effectively; and
- A fixed contact for industry information, complaints and requests.

Such an enforcement body, in conjunction with other enforcement authorities (including the police, the Ministry of Justice Investigation Bureau (MJIB), and the Prosecutor's Office) must adequately follow up and prosecute all forms of piracy mentioned above.

In addition, Taiwan must enhance the legal tools available to crack down on the burgeoning cross-border trade in pirated products. 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 broad 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, based on the notion that such product was not illegal in Taiwan. Since Taiwan is now a member of the World Trade Organization, and bound by the TRIPS Agreement, those products destined for export are clearly illegal in Taiwan, as well as in the destination country. 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.

In 2001, the police devoted resources (as they had in the 1999 "K Plan") to anti-piracy, leading to 2,235 successful raids on behalf of the recording industry alone.²¹ For the business software industry, there have been fewer raids on markets and Internet pirates, when compared with the 1999 "K Plan." Thus, actions in 2001 have had little impact in minimizing piracy levels. In order to lower piracy levels, what is needed is the devotion of adequate resources from the Taiwan government to engage in a sustained copyright enforcement campaign throughout 2002, to focus on all aspects of pirating, including manufacturing, distribution, and retail sectors.

Campaign Must Address "Corporate End-User Piracy" as Well as Legalized Use of Copyrighted Materials by Government, Businesses and Schools

A related campaign in 2002 must address the legal use of copyrighted works in a business setting (so-called corporate "end-user piracy"), as well as by government entities and in schools. Due to the prevalence of software piracy and unlicensed copying of software, many companies and individuals do not recognize that the purchase of legal software is a mandatory business practice (just as is the legal purchase of raw materials or the legal employment of labor). The campaign must convince decision makers in Taiwan organizations, particularly small- and medium-sized companies, to legalize their software use, by providing them with the skills and resources they need to legalize, through public/private sponsored software asset management training and government financial assistance for IT deployment. The government must act as a model for entities on how to manage their software use, educate entities of the need to use software responsibly, and carry out high profile enforcement actions against organizational pirates. The Taiwan government has made encouraging statements about the need for legal use of software in Taiwan's businesses, government entities and educational institutions.²²

With respect to government software management, which will provide a model for the rest of the business and academic community, several steps must be taken:

²¹ This was a significant increase in raiding from 2000, when there were 1,460 raids taken on behalf of the recording industry.

²² One of Premier Chang's key ministers announced in mid-January 2002 that the government had decided to dub 2002 as the "Action Year of IPR Protection." The premier appealed to all business owners to audit their software and to use only authorized software. He said the government would demand each ministry and department to promote IPR measures, to provide staff with IPR training and to establish internal audits. He said the prosecutor's office of the Taiwan High Court would set up a joint task force with the police to initiate searches. He appealed to students and the general public not to get involved in software or Internet piracy, and encouraged Taiwan's people not to buy, sell or use unauthorized software, and instead, "set a role model for the knowledge-based economy, corporate citizenship and the digital society."

- Require each government office to appoint a senior official who is responsible for compliance with that office's software asset management rules;²³
- Name the Research, Development and Evaluation Commission as the entity responsible for auditing offices' compliance with the guidelines, and determining penalties for non-compliance;²⁴
- Publicize each government office's software asset management practices; and
- Have Taiwan government contractors self-certify that they use legal software, and make such use a condition to bid on government contracts.

The government should also kick off a broad public educational campaign focused on corporate end-user piracy, to show that corporate end-user piracy is a threat and that the government will follow up to enforce software copyrights. The Ministries of Justice and Economic Affairs should join in this campaign through a press conference, public notices/advertisements, and enforcement actions. Publicity on the government's efforts to enforce software copyright to the general public will have tremendous impact on the public's perception of what is right and wrong with respect to copyrighted software. IIPA looks to the Taiwan government to make 2002 a year of public education and enforcement by the Ministries of Justice and Economic Affairs against corporate end-user piracy, and that the dialogue coming out of the Cross-Ministerial Meeting on Software IPR Infringements in December 2001 now be turned into action.

²³ The Executive Yuan's "Operating Guidelines for the Management of Computer Software in Government Agencies" (EY Tai 86 Su Shou Shen No. 0745, Nov. 25, 1997), issued by the Directorate General for Budget, Accounting & Statistics (DGBAS), needs to be revised along the lines of the U.S. government's "Model Guidelines [to] Implement the Executive Order on Computer Software Piracy (March 17, 1999) and the Hong Kong government's Implementing Procedures for the Proper Use and Management of Software (2000). In particular, the Guidelines should specifically appoint a single management-level official to be personally responsible for implementing the agency's software management policy, and certify compliance with this policy on an annual basis. Each government agency should immediately make available on its website all rules, procedures and practices it employs to manage its software assets. BSA recommends that the Research, Development and Evaluation Commission be appointed with this responsibility. BSA also recommends that DGBAS revise their *Operating Guidelines for the Management of Computer Software in Government Agencies* ("Operating Guidelines") (11/25/97) along the lines of the U.S. Federal Government's "Model Guidelines [for] Implementing the Executive Order on Computer Software Piracy" (March 17, 1999). To assist DGBAS, BSA provided to DGBAS in Dec. 2000, a comparative analysis of DGBAS' Operating Guidelines with the U.S. Federal Government's Model Guidelines, the Hong Kong Government's Implementing Procedures for the Proper Use and Management of Software and Deloitte & Touche's Best Practices in the format of a table.

²⁴ The RDEC has achieved remarkable success in promoting "E-Government."

Campaign Must Address Connection Between Organized Crime and Piracy

The Taiwanese government must acknowledge the involvement of criminal organizations in what has become the highly profitable piracy business.²⁵ The Taiwan government must commence concerted and coordinated efforts to combat such organized criminal activity, including white-collar criminal activities. For example, pirate companies engage in elusive (e.g., name and address changes, convoluted paper trails of piratical and investment activities in Greater China and in Latin America, etc.) and sometimes even violent behavior.²⁶ The enforcement task force established to fight other forms of piracy must also work to coordinate among government agencies that specialize in “white collar” crimes, to improve the government’s ability to keep track of evasive efforts of pirates. The task force should identify training needs in order to enhance their ability to investigate and pursue sophisticated criminal networks engaged in cross-border pirate operations. In this way, foreign governments, international organizations and industry can cooperate to help fill those needs.

A new method of piracy distribution which appeared in 2000 and 2001 illustrates the adeptness of the criminal organizations in eluding enforcement. Pirate vendors in night markets island-wide now set up a “conscience vending box,” namely, a payment collection box placed beside the stand selling infringing discs, manned by a juvenile. Consumers wishing to buy the infringing discs simply throw money into the collection box and select the infringing discs they want. Should the police raid the stand, the person minding the stand will abandon it as well as the collection box and abscond. Because the police cannot identify the offenders, no prosecution case can be brought, or even if the lackey is caught, s/he will not be subject to criminal penalties but only be reprimanded and “correctional” education (see discussion above).

Procedural Hurdles That Result in Ineffective Enforcement of Copyright

The government in Taiwan must also work to solve the many procedural hurdles that continue to hinder copyright owners’ efforts to protect their works in Taiwan. These include: the transfer of power for issuance of search warrants from prosecutors to courts, which has made obtaining warrants difficult for some industries;²⁷ continued challenges to powers of attorney

²⁵ Links between the piracy business and organized criminal activities abound. For example, in February 2001, record industry representatives, together with enforcement authorities, raided a building in Lou Chou, Taipei, where almost 57,000 infringing CDs of local and international music, 2,500 CD-Rs and 142 music “stampers” (the key part needed for mass production of optical media) were seized. Six stolen luxury cars were also found concealed within the premises, which were being dismantled for spare parts. In May 2001, another raid on a residential premises in Kaohsiung city yielded 70,000 unauthorized optical discs, mainly of pornographic material, and illegal firearms. A storage facility linked to the premises uncovered three modified rifle barrels and a quantity of ammunition. The following month, another address in Kaohsiung was discovered to be a sophisticated CD-R “burning” laboratory as well as an illegal firearms factory. Criminal organizations engaged in the manufacture of pirated works also control distribution channels, especially the night markets island-wide. In 2001, the record industry together with the police successfully raided ten packaging houses and more than ten warehouses storing pirated goods, seizing over 800,000 units of pirated CDs.

²⁶ 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.

²⁷ The Legislative Yuan transferred the power to issue search warrants from prosecutors to the courts effective July 1, 2001. The system prior to the amendment worked well, because prosecutors could issue warrants immediately upon request and were familiar with the timing needs and operational difficulties encountered during raids by enforcement authorities.

(POAs) of U.S. right holders in court cases and in raids;²⁸ raiding authorities' failure to seize all pirate product and tools and implements used in piracy;²⁹ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. Most importantly, all piracy offenses must be "public" crimes, without the need for a prior complaint from the right holder.

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

As noted already, Taiwan is now one of the world's worst exporters of pirate copies of U.S. copyrighted works. All of the mechanisms that have been put in place by the Taiwan government to catch pirated exports at the borders 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

²⁸ 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 somewhat 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. 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.

²⁹ 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 software found in raids that includes pirate initialization codes in the hands of the pirates.

ineffectiveness. In 1998, the government published and implemented a new set of EMS regulations. Those regulations 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); and
- The retention by the IPO of its responsibility to verify copyright authorization/SID code for VCDs and DVDs, and the expansion of this authority to the export of other copyrighted goods.

COPYRIGHT-RELATED LEGAL REFORM IN TAIWAN

Taiwan Passes Long-Awaited Optical Media Management Statute

On October 31, 2001, the Legislative Yuan of the Republic of China (Taiwan) passed the Optical Media Management Statute (2001) (“OD Law”) (the OD Law was promulgated on November 14, 2001).³⁰ This new Law represents a weakened version of the draft law that had been approved by the Executive Yuan (EY) earlier in 2001. The Law brings under regulatory control (of the Ministry of Economic Affairs, MOEA) plants now engaged in the production of optical media in Taiwan, employing a system of: granting permits to persons/entities engaged in the production of “pre-recorded optical discs”; otherwise regulating production of stampers/masters (through SID Code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of “blank” media.³¹ Failure to obtain a permit, the unauthorized manufacture of “pre-recorded optical media,” and other infractions, can result in criminal fines and the remote possibility of imprisonment against plants (and their “responsible person[s]”). Seizure of unauthorized pre-recorded discs and equipment used in such unauthorized production is also possible, though it is disappointing that this is not made mandatory. In addition, it is highly unfortunate that seizure of unauthorized stampers/masters, or equipment used for manufacturing stampers/masters or blank media, is not expressly provided for in the Law.

The Taiwan government’s weak permit requirements as to “blank” media, and its refusal to require permits to produce stampers/masters (or at least expressly provide for seizure of unauthorized stampers/masters), result in a weakened law with the possibility of serious gaps in

³⁰ IIPA understands that MOEA planned to begin visiting optical disc factories in January 2002; however, this exercise means little in that the plants to be visited were to be pre-warned of such visits.

³¹ IIPA has now seen a preliminary translation of some of the implementing regulations, including “Laser Disk Production Permit and Application [Regulations],” and understands that this regulation also provides that companies that wish to produce “blank laser disks should apply in advance” for a permit. While IIPA has not yet fully analyzed these regulations, it appears that the requirements to produce blank media are far less stringent than those for producing “pre-recorded” media.

coverage. With respect to persons/entities that produce “blank optical discs” (which would include production of blank CD-Rs), the OD Law only appears to provide for transparency (and according to the newly promulgated regulations, even those transparency requirements are far weaker than those for pre-recorded media). Also, as was the case with the EY-approved Bill, the OD Law does not require permits to produce stampers/masters, but instead only imposes fines on persons/entities manufacturing stampers/masters who: 1) manufacture without applying for,³² without using, or using false, SID Code, or provide SID Code for use by others (art. 20); 2) fail to report the export or import of manufacturing equipment to MOEA (art. 12 and 21); or 3) evade, impede, or refuse inspections (arts. 13 and 22).

In addition to these noted weaknesses, the OD Law (in comparison with the EY Bill) drastically weakens criminal penalties against plants engaged in unauthorized production (i.e., without a license, at an unauthorized location, or without or with false SID Code) of optical media. Imprisonment for manufacturing “prerecorded” discs (which under the EY Bill would be mandatory after the first offence) is now possible only after a third offence (and a failure to cure),³³ and in the case of blank media producers, only minimal fines are available for failing to adhere to the transparency requirement. The ability to cure violations (i.e., to avoid further fines after the first offence) eviscerates the effectiveness of the criminal remedies under the OD Law.

Other problems abound, including that the OD Law fails to cover persons/entities that engage in the unauthorized “burning” (or “manipulation”) of recordable, writable or re-writable optical media (including those who burn massive copies of unauthorized content on CD-R and like media through, e.g., the use of banked CD-R burners). Lastly, the new law increases in the ‘transition’ periods afforded existing plants, either to file an application for a permit (art. 26) or to file a report as to already-allocated identification codes (art. 24), to six months (from three months) further weaken the transition provisions for implementation of this Law.

Some deficiencies in the Taiwan OD Law may be due to the Law’s failure to specifically deal with certain key issues, such as how to deal with a “grandfathered” plant that fails to meet its requirements on time, how to deal with a person/entity wishing to open a new plant, or under what authority seizures of pirate stampers/masters will take place. Perhaps most importantly, there are no express requirements that the Taiwan government make information about plants transparent. It is possible that implementing regulations that are now being considered or written up will resolve some of these concerns, but it is also vitally important that USG and industry press vigorously to ensure that the Taiwan government follows through with implementation and that it addresses some of the major weaknesses either in the implementing regulations or in practical enforcement of the Law.

³² Unless they already have “identification code” from an agency other than MOEA, in which case, they merely have to notify within six months that they have it (art. 11; *cf.* art. 27).

³³ For example, even after a third offence, imprisonment for manufacturing prerecorded optical discs without a license can be avoided merely by ceasing at that point and “applying” for such license. As another example, even after a third offence of manufacturing prerecorded optical discs without or with false SID Code, imprisonment can be avoided by ceasing at that point and merely “applying” for SID Code allocation.

Problems in Implementation of Optical Media Management Statute

The following bullets identify some of the key problem-areas that must be addressed in the implementation phase of the Optical Media Management Statute:

- **“Grandfathered” Plants Should Not Be Permitted to Avail Themselves of Cure Provisions:** The OD Law requires existing (as of November 14, 2001) producers of so-called “prerecorded optical discs” to merely apply for a permit within six months of the promulgation date (art. 26) (and requires producers of such discs as well as stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (art. 27)). Implementing regulations should make clear that failure to apply for a permit and record already allocated identification code by May 14, 2002 will result in refusal to issue a permit, and that the loopholes contained in arts. 15 and 17 (allowing plants to cure after the first offence) do not apply to existing (“grandfathered”) plants. Therefore, the most severe penalties available for those offences would immediately be applicable to an existing plant that fails to comply with its arts. 26 and 27 requirements. MOEA should also be permitted to set forth conditions in permits granted, including, e.g., verifying, through the production of documentary evidence or other means, the rights of its customers to manufacture or reproduce the discs ordered.
- **New Plants Not Contemplated (or Regulated):** The OD Law does not mention the procedures for a person/entity wishing to start a new plant at all. Implementing regulations should make clear that as there is already over-capacity in Taiwan, MOEA will in its discretion, refuse to grant further permits, and applications received for new plants will be subject to review of the grounds for refusal as laid out in art. 5, as well as such factors as capacity in Taiwan (with the presumption that unless capacity decreases, no new plants would be granted permits in Taiwan), verification of rights of proposed customers to manufacture, etc.
- **Seizure of Stampers/Masters and Seizure of Machines/Tools Used for Making Stampers/Masters:** A serious gap in the OD Law is the failure to expressly provide for seizure of stampers/masters found without SID Code, with false/untrue SID Code, or produced with SID Code provided to an unauthorized third party. It is imperative that authorities be able to seize stampers/masters that fail to meet requirements, as well as machines and tools used to produce such stampers/masters. Authorities such as BOFT and Customs should announce that they will inspect and seize masters not complying with the requirements of the OD law, and they should notify copyright holders or their local representatives for verification as soon as they come across any suspect illegal masters/stampers either in a raid or in an inspection at the border. MOEA should also have seizure authority at least over illegal stampers/masters found in the inspection of a multi-purpose plant (one where both prerecorded optical discs and stampers/masters are found).
- **Seizure of Machines Tools Used to Violate the Law:** IIPA’s translation of Article 15 of the OD law indicates that the machinery used for manufacturing optical media products in contravention of the provisions may be forfeited or seized when they are found to be “specifically” used for making illegal products. However, an alternate translation indicates that the standard for seizure of such machines/tools may be stricter, requiring proof that the machines/tools are “exclusively used” for illegal purposes. If the alternate translation is correct, manufacturing machines used to make legitimate blank discs in the daytime and unauthorized

pre-recorded products at night would not be subject to forfeiture or seizure, making the provision totally meaningless. If that is the correct reading, the OD law must be amended or interpreted in the implementing regulations by removing the restriction.

- **Transparency of All Applications, Notifications, Permit Information, and Records:** It is imperative that implementing regulations confirm that the Taiwan authorities (MOEA, IDB, BOFT, Customs, and the Bureau of Standards, Metrology and Inspection) are required to provide transparent information to relevant parties, including opening up:
 - applications by prerecorded optical disc manufacturers (Article 4);
 - permits issued pursuant to such applications (a copy of the “Permit Document” as referred to in Article 6);
 - “permit information” (Article 6);
 - filings by blank disc manufacturers (Article 4);
 - amendments to “permit information” filed (Article 6);
 - customer orders for “Prerecorded Optical Disks,” documentation of rights licensing by rights;
 - holders, and content of prerecorded optical discs manufactured (Article 8);
 - all SID Code allocations (Articles 10 and 11);
 - reports involving export or import of manufacturing machines or tools (Article 12);
 - reports of inspections by “competent authority,” police (art. 13), or other administrative agencies appointed (Article 14);
 - reports of administrative fines and/or criminal penalties meted out against persons/entities under Articles 15-23; also, reports of any seizures of optical discs and machinery and tools under those articles;
 - Customs reports of activities with respect to prerecorded optical discs, stampers/masters, and machinery and tools (*cf.* Article 24); and
 - applications or recordations pursuant to Articles 26 and 27.

The MOEA has apparently already enacted several implementing regulations for the Law, which will assign responsibility for various aspects of the Law to different agencies. For example, the Intellectual Property Office (IPO) under the MOEA will administer SID Codes, the Industrial Development Bureau (IDB) will administer the issuance of permits for manufacture of pre-recorded optical discs, the Board of Foreign Trade (BOFT) will administer the importation and exportation of optical disc manufacturing machines and implements, and the Bureau of Standards, Metrology and Inspection will administer the inspection of manufacturing plants.

Taiwan Draft Copyright Law Strengthens Regime, Although Adjustments Are Still Needed

Taiwan's copyright law was amended in November 2001, as part of the package of laws needed for Taiwan to join the World Trade Organization, to provide a TRIPS-compatible term of protection for computer programs (life of the author plus 50 years). However, the major set of amendments to the copyright law was not considered by the Legislative Yuan before it completed its 2001 session in October. That second set of amendments include attempted implementation in Taiwan of several key requirements of the latest WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA commented in early 2000 on the September 2000 iteration of the draft, and then again on the May 5, 2001 draft (noting that several key improvements were made between the September 2000 and May 2001 drafts, e.g., ISP liability provisions were dropped, the definition of "technical protection measures" was improved, etc.). IIPA has obtained a draft in Chinese in January 2002, but has not yet analyzed it. Like the May 2001 draft, it reportedly includes: legal safeguards for technological protection measures used by rights owners, a broad "public transmission" right, including a right to make available works and sound recordings for on-demand dissemination to 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 WIPO treaties' provisions now as part of its development strategy and before online piracy levels become acute.

The following bullet list summarizes the remaining items that, if clarified, would bring the Taiwan draft closer to compliance with TRIPS and the WIPO treaties:

- **Coverage of Temporary Copies Under the Reproduction Right:** The definition of "reproduction" in the draft (Article 3(5)) must explicitly cover "temporary" reproductions, in order to comport with WCT Article 1(4) and the Agreed Statement, TRIPS and the Berne Convention (incorporated by reference into TRIPS). The definition of "reproduction" must also include "fixation of a performance" to ensure compatibility with Article 14.1 of TRIPS, where an initial "copy" is not involved. While we understand that MOEA's position is that temporary copies are already considered reproductions under the current definition, we continue to believe the law should be specifically clarified to remove all doubt.
- **Adequate Coverage of "Communications to the Public" in the Digital Environment:** The new definition of "public transmission" (Article 3(6*bis*)), and the definitions of "public broadcast" (Article 3(7)), "public presentation" (Article 3(8)) and "public performance" (Article 3(9)), must be adjusted so that the rights and exceptions are clearer, and so that any interactive or similar transmissions are subject to exclusive rights, including for performances and sound recordings, under the WPPT.³⁴
- **Definition of "Public Presentation":** The definition of "public presentation" (Article 3(8)) should include references to "sounds" (necessary to cover sound recordings) in addition to the reference to images and sounds (covering audiovisual works).

³⁴ Additionally, the new definition of "interactive transmission" (Article 3(7*bis*)) should not include the word meaning "automatically"; whether a transmission is automatic is not relevant.

- **Definition of “Technological Protection Measures”:** The definition of “technological protection measures” (Article 3(15)) must be amended to comply with the copy and access control requirements of the WCT and WPPT.
- **TRIPS-Compatible Protection of Performances:** In Article 7*bis*, the word “pre-existing” should be deleted as regards a protected performance, since a protected performance may be of a work created simultaneously with the performance. Also, Article 22 must be amended to give performers the right to control the unauthorized fixations of their performances, in order to comply with TRIPS and the WPPT.
- **WCT/WPPT Distribution Right:** A new Article 22*bis* should be added to give authors (including owners of sound recordings) and performers an exclusive distribution right, in line with the WCT and WPPT.
- **Coverage of Reproductions of Unfixed Performances/Public Presentation:** Articles 23*bis*, 24 and 25 must be amended to ensure coverage for reproductions of unfixed performances, since sound recordings should carry an exclusive right in the situations now drafted as exceptions, and be covered by the public presentation right.
- **Rental Right for Performers (WPPT):** The exclusive right to “lease” (Article 29) must apply to performers to comply with the WPPT.
- **Term of Protection:** Taiwan should follow the modern trend of extending term of protection (both the EU and US have extended their terms of protection, and Japan has, with wartime extensions, in effect, a longer term than life plus 50 years) to “life plus 70” and 95 years from publication for the work of a juristic person (Article 33) or other specified works (Article 34). This change will benefit Taiwan copyright owners who can, for example, only enjoy a longer term in the EU if Taiwan provides longer terms for EU works.
- **Narrowing of Exceptions in the Digital Environment:** Exceptions must be narrowed to preserve the exclusivity of the new “public transmission” right for the WCT (see Articles 47, 50, 56, 56*bis* and 61). The public transmission right encompasses interactive transmissions which must be covered by an exclusive right under the WCT and WPPT. Hence, the term “transmission” should be replaced with “broadcast,” which is a special subset of the public transmission right under the Taiwan draft, and where certain narrow exceptions are permissible under the international treaties. Also, the personal use exception in Article 51 should be narrowed, in light of digital technologies, to permit a single, analog, copy for personal and private use.
- **Scope of Licenses:** Article 37, dealing with licensing, should be amended to ensure that an exclusive licensee may, in addition to exercising rights in the capacity of the economic rights owner, also sue in its own name. In addition, Article 37 should also ensure that while the economic rights owner may not exercise rights within the scope of an exclusive license unless otherwise agreed, the economic rights owner may sue in its own name or may join a lawsuit brought by the exclusive licensee with respect to rights within the scope of an exclusive license unless otherwise agreed.
- **Provision of Ex Parte Civil Searches (TRIPS):** Article 84 should be amended to add a clear reference to *ex parte* search relief as required by Article 50 of TRIPS.

- **Appropriate Proof Requirement for Civil Liability for Infringement:** Article 87(2) should be amended, since TRIPS does not permit conditioning a civil infringement on having a profit motive (such a profit motive is not a condition to any of the other civil infringements, except that in Article 87(2)). While we recognize the courts have not required actual knowledge that the alleged infringer knew that his/her act was infringing, the law as literally drafted could be interpreted this way. We know of no country which has an “actual knowledge” test for civil infringement. Instead the test is whether the defendant “knew or ought reasonably to have known” that the act or copy was infringing. We believe this change should be made.
- **Criminalization of Corporate End-User Piracy (TRIPS):** Article 87(5) should be amended since it would violate TRIPS (Article 61) for that provision to be read to require that end-user piracy be motivated by “direct profit.” Instead, it should be enough that the unauthorized use of software was done in a “business context.” Alternatively, Article 92 of the draft should be amended to add a crime for a person who “possesses in the course of, in connection with, or for the purpose of trade or business” an infringing article, to provide that end-user piracy is a crime (to comply with TRIPS Article 61).
- **Violation of Any Exclusive Right Grounds for Redress:** A new Article 87(6) should be added to include as an infringement “any other act undertaken without the consent of the rightholder which violates his exclusive rights,” since the enumerated list does not cover all the possible infringements e.g., public presentation, public performance, public transmission etc., although these infringements could be “inferred” from other articles, e.g., Article 88.
- **Rights Management Information (WCT/WPPT):** The WCT and WPPT provide that Taiwan should make both unauthorized removal or alteration of rights management information and the circumvention of technological protection measures subject to civil infringement remedies. The current draft only refers to rights management information. A new Article 87ter should be added to provide that both RMI and TPM violations are subject to civil remedies (but not the same as copyright infringements). Corresponding changes should be made to Articles 92bis and 92ter, and the criminal penalties provided in Article 92ter should correspond to those provided for copyright violations.
- **TRIPS-Compatible Criminal Liability for Copyright Infringement:** Article 91 must be amended to be compatible with TRIPS Article 61, which requires that any infringing act constituting “copyright piracy on a commercial scale” be subject to criminal remedies. This is a lower threshold of liability than the “intent to profit” test in the draft Article.
- **TRIPS-Compatible Enforcement Remedy:** A confiscation remedy must be added (namely, by reinserting the previously deleted Article 98) to comply with Article 61 of TRIPS. In addition, the provision must, in order to comply with TRIPS, apply also to tools and implements, the predominant use of which is in the infringement (rather than the “sole use” which would violate TRIPS).
- **Making Copyright Infringement a “Public Offence”:** Articles 100 and 103 should be revised to remove the anachronism that deems copyright piracy to be a “private, non-public offense” requiring a complaint from the rightholder. Since piracy hurts all of society just like other

economic crimes, piracy must be treated as a “public” offense in Taiwan, as virtually all countries do. The police should be able to act *ex officio* in piracy matters.

- **Berne and TRIPS-Compatible Retroactivity:** Article 106*ter* and *quater* should be revised to make them consistent with Article 18(3) of the Berne Convention. These transition provisions are far too broad and the period far too long. Taiwan citizens have been on notice of these needed changes to the law (occurring on WTO accession) for many years. A two-year transition period is unfair to copyright owners and goes beyond what is permitted to countries in Article 18(3) of the Berne Convention, as incorporated in the TRIPS agreement.
- **Appropriate Contributory and Vicarious Liability for the Digital Age:** The current provisions of the copyright law do not afford adequate remedies for copyright owners against either contributory or vicarious infringers (such as the operators of “Napster”-type clones). IIPA understands that the doctrine of contributory liability under Taiwan’s criminal law may not be sufficient to hold the entity aiding and abetting a person in infringing copyright (either by uploading or downloading pirate files from the Internet, for example) liable, without that infringer first being convicted. Accordingly, the copyright law should be amended to expressly allow for the contributory infringer to be held responsible for their actions, irrespective of whether or not the principal offender is prosecuted and/or convicted.

Taiwan Joins the WTO

IIPA is most pleased that Taiwan’s accession to the WTO was approved on November 11, 2001 in Doha, Qatar. Taiwan’s Legislative Yuan ratified the WTO accession on November 17, 2001, and Taiwan officially became a member of the WTO on January 1, 2002. Therefore, as of January 1, 2002, Taiwan is subject to the requirements of the TRIPS Agreement, including the requirements of the enforcement text (Articles 41 through 61). However, as noted above, Taiwan’s law, in many respects, still does not comply with TRIPS. One of the more significant shortcomings is the overly broad and lengthy transition period before all WTO members’ works (including sound recordings) and performances will be protected (Articles 106*ter* and *quater*); if not corrected, those WTO members’ works (sound recordings) and performances that do not already enjoy protection under a bilateral or other arrangement will not receive protection until, at the latest, January 1, 2004. Articles 106*ter* and *quater* must be revised to make them consistent with Article 18(3) of the Berne Convention (and TRIPS).

Reporting of Enforcement Statistics

The Taiwan government has long provided through the Intellectual Property Office, under the Ministry of Economic Affairs (MOEA), aggregate enforcement statistics, including statistics about investigations carried out against retailers, night market vendors, and other small-time pirate distributors. Apparently, reporting on enforcement statistics is far more extensive than the public reports IIPA has received to date, and the government is considering ways to provide less, but more useful, information, to foreign government counterparts and industry representatives. IIPA agrees that some time and effort can be saved in efficiently directing the government’s energy to providing only the most pertinent information about enforcement cases in Taiwan. IIPA commends to the Taiwan government the enforcement charts found in this report to indicate the kinds of aggregate data that is useful to the copyright industries. Future reporting on enforcement should at least include the following:

- Number of Raids conducted
- Numbers and types of product seized
- Numbers and types of machinery and equipment seized
- Number of cases commenced
- Number of rejections for a criminal search warrant filed by an IPR owner (this data point will distinguish cases brought by IPR owners and retail/street piracy cases brought by the Government as a result of crackdowns)
- Cases broken down by major cities and counties
- Number of defendants indicted
- Ages of accused (or defendants if under 18)
- Number of defendants convicted (including guilty pleas)
- Acquittals and dismissals
- Reasons for acquittals and dismissals
- Number of cases pending
- Total number of cases resulting in jail time
 - Total suspended prison terms
 - Maximum 6 months
 - Over 6 months
 - Over 1 year
 - Total prison terms served (not suspended)
 - Maximum 6 months
 - Over 6 months
 - Over 1 year
- Number of cases resulting in criminal fines
 - Up to \$1,000
 - \$1,000 to \$5,000
 - Over \$5,000
- Total amount of fines levied
- Number of cases involving infringing/violating CD manufacturers
 - Numbers of machines or pieces of equipment seized, and if not seized, the reason why
 - Information for the SID code embossed on the seized CD products
 - Administrative penalties imposed against those failing to imprint SID code
- Information regarding the confiscated arms and munitions found in copyright raids
- Individual case
 - Case number and contact information for the police and prosecutor assigned to the case
 - Whether U.S. product is involved
 - Nature of infringement (movie, music, software and games)
 - What works were infringed
 - Number of infringements