

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY

Special 301 recommendation: While there have been some recent positive moves in Taiwan to tackle increasing piracy rates, by enforcing its new Optical Media and Copyright Law accompanied by deterrent sentences, and by making significant improvements in its draft Copyright Law amendments, the results are not yet evident. Accordingly, IIPA recommends that Taiwan remain on the Special 301 Priority Watch List.¹ For 2002, trade losses to the U.S. copyright industries due to piracy in Taiwan were an estimated \$756.7 million.

Overview of key problems in Taiwan: The uncontrolled growth of optical disc production facilities in Taiwan, the even more recent migration of piracy to commercial CD-Rs and the generally ineffective efforts by the Taiwan government to control these activities through aggressive and deterrent enforcement of its 2001 Optical Media Management Law and its copyright law, have led to a significant increase in piracy rates for most copyrighted material in Taiwan. This has again put Taiwan into the category of one of the world's worst pirate havens. Organized crime has infiltrated and internationalized this business with Taiwan continuing as a major source of the raw materials for pirates, disrupting global markets. Retail piracy in the night markets is also growing and has increasingly become more sophisticated, with pirates using courier services and juveniles who are not subject to deterrent penalties and behind whom the real pirates can hide. Despite increased cooperation by the Ministry of Justice in conducting raids of commercial photocopy shops, illegal photocopying of textbooks continues as a major problem, largely due to the unwillingness on the part of Taiwan officials to target illegal photocopying at university bookshops and other on-campus locations.

U.S. government (including Congressional) and industry engagement over the entire year has escalated, seeking to persuade the reluctant Taiwan government to devote necessary resources to the piracy problem, take deterrent action against blatant and organized OD factory piracy and amend its copyright law to provide the tools necessary to fight piracy effectively, such as through making piracy a "public" crime and thus allowing the police to act *ex officio*, without the need for a formal complaint from a right holder. It has only been very recently that there have been some hopeful signs, with the Taiwan authorities finally engaging to improve its proposed amendments to its copyright law, and with some of the first convictions of major pirates with deterrent prison terms. However, much more needs to be done.

Actions to be taken by the Government of Taiwan: In order to address the massive piracy problems in Taiwan, in order to meet Taiwan's obligations under the WTO/TRIPS Agreement, to which it is now a party, and in order to put the tools in place to deal with Internet piracy, the government needs to take the following actions immediately:

¹ For a history of Taiwan's involvement in the Special 301 process, see Appendix E.

- Effectively implement its Optical Media Management Statute (2001), including amending it to increase penalties and overall deterrence, by expanding its coverage to deal with the real threat of massive commercial production of CD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, are imposed;
- Initiate a sustained copyright enforcement campaign throughout 2003 against all pirates, particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Increase enforcement against illegal photocopying around university campuses;
- Amend its copyright law in the first quarter of 2003 to make piracy a public crime, increase penalties, extend the term of protection for copyright material and fully and correctly implement the provisions of the WIPO "Internet" treaties.

TAIWAN
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	42.0	44%	35.0	30%	30.0	30%	20.0	20%	15.0	10%
Records & Music	98.6	47%	51.7	48%	60.5	44%	60.0	35%	55.0	20%
Business Software Applications ³	NA	48%	106.8	53%	123.9	53%	97.6	54%	112.1	59%
Entertainment Software	596.1	56%	119.4	70%	319.3	90%	115.7	68%	103.2	65%
Books	20.0	NA	20.0	NA	20.0	NA	21.0	NA	19.0	NA
TOTALS	756.7		332.9		553.7		314.3		304.3	

COPYRIGHT PIRACY REMAINS OUT OF CONTROL

Pirate Optical Disc Production Remains Among the Highest in Asia

In 2001 there were at least 61 known optical disc plants in Taiwan (and possibly nine or more underground plants) engaged in the manufacture of finished optical disc 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. In 2002 the number of licensed factories

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$107 million at 52% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

remains at 61 with 3 suspected underground plants, but the production capacity has increased, and pirate production continues to flood the local market. There are now 81 DVD lines (93 lines in 2001), 202 VCD/CD lines (229 lines in 2001) and 889 CD-R lines (865 in 2001). With 38 lines able to produce masters (37 in 2001), Taiwan now has 1,205 production lines (1,187 in 2001) Production capacity of lines not producing blank CD-Rs increased to 1.127 billion in 2002 and despite some enforcement successes, piracy rates for audio and video product have continued to escalate as the above chart clearly demonstrates. Taiwan continues to be one of the world's worst piracy havens for optical disc production and a key source for the raw materials used globally in the international piracy business. In addition, "burned" CD-Rs in Taiwan, including movies, compilations of music (including MP3 audio files), computer programs, console-based games, etc., flood the domestic markets in Taiwan. RIAA/IFPI report that the ratio of pirate factory production and pirate commercial CD-R production is now approximately 4:6 showing the clear migration of this massive global problem from traditional factory production to harder-to-detect commercial CD-R production. Much of this factory and CD-R production is controlled by the same criminal syndicates.

As a result of the production and sale of such massive quantities of pirate OD product in Taiwan, sales of U.S. and local audio and video product have decreased substantially, threatening the viability of Taiwan as a vibrant market. Moreover, failure to deal effectively with the problem is damaging Taiwan's reputation internationally. RIAA/IFPI reports that sales have dropped off 13.4% in just the first six months of 2002 (and fell 22.9% in 2001) with revenues dropping from \$306 million in 1999 to US\$170 million in 2001. Taiwan has dropped from the second largest music market in Asia in 1999 to the fourth largest today, after Japan, South Korea and India. This rise in piracy has had the greatest adverse impact on local artists who now account for half the music sales in Taiwan, while the figure was 66% in 2000. Taiwan's status as the creative center of Chinese music is now threatened; Taiwan has been the source of 80% of Mandarin music worldwide. Employment in the recording industry has fallen 30% since 1999. The piracy rate for video product has increased more than 35% in the last 5 years.

The piracy rate for entertainment software also remains high. While most pirate discs are pressed in the factories, the rate of CD-R burning is rapidly increasing. China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market. In August 2002, Guangzhou administrative enforcement officers raided the Yongshen Electronic Factory where approximately 10,000 counterfeit *Game Boy Color* printed circuit boards and about 300 Game Boy Color game cartridges were confiscated. The owner of the factory was a Taiwanese national who had purchased the pirated component parts in Taiwan, shipping the parts back to China for assembly at his factory. Charges have been filed against the owner and the matter remains pending.

Piracy at the Retail and Wholesale Level Remains Unacceptably High

The takeover of the markets by manufactured (pressed) optical disc product as well the spectacular recent growth of CD-R piracy has devastated the legal market throughout Taiwan. Notorious *Ta-Bu-Tieh* or CD-R (CD-recordable) compilations abound and these and factory produced OD product are marketed all over Taiwan through an estimated 300 night-market vendors. According to RIAA/IFPI, the population of night market vendors has increased from an estimated 250 in 2001 to 300 in 2002 indicating that current enforcement efforts have not had a significant deterrent effect. Product sold by these street vendors can vary from a few hundred to thousands of pirate music CDs, VCDs, DVDs, CD-ROMs and videogames each. These vendors are highly mobile and to prevent arrests, they have increasingly used the "Conscience Vending Box" tactic where the vending location is not manned by the pirates but price information is posted at the stall and money collected in plastic buckets or boxes. In 2001 it was

estimated that 40% of the vendors used this tactic. In 2002 this surged to an estimated 90%. The remaining 10% hire juveniles to man the stalls in order to avoid or deter the arrest of the stall vending personnel. As described in further detail in the enforcement section, 55% of the arrests made were of juveniles where deterrence is virtually non-existent.

While night markets are still an important source of pirate product at the retail level, many new techniques appear to be taking over. Mail order has been a growing channel for pirates operating at the retail level in Taiwan. Advertisements are regularly placed in newspapers or on the Internet. Accounts are then opened at the Post Office and the pirate product is mailed to the consumer with the money collected by the post office. Courier services are also used to deliver pirate product and collect payment.⁴ Pirate product catalogues are printed with untraceable mobile phone numbers and spread around office buildings throughout major cities with couriers doing the rest. Sometimes product is transferred between courier services en route to avoid detection and arrest. This courier service technique has grown enormously in 2002 and industry reports that the distribution centers supplying the couriers are part of organized criminal syndicates that control pirate production and distribution throughout Taiwan, from production to even retail. However the syndicate owners are rarely known and virtually never caught and punished. Arrests are almost always of insignificant lower level operatives. Another technique for getting the pirate “word” out is the use of “flyers” placed in newspapers. The government has recently warned newspaper distributors to discontinue their practice of supporting piracy in this way. The effect is as yet unclear since, despite this government warning to the newspaper distributors and their stated willingness to cooperate (under threat of being held as accomplices under the copyright law), the distributors have claimed that they cannot distinguish the flyers and have asked the government to do the work by setting up a system.

While it has been clear for some time that even factories engage in CD-R “burning” for product with less demand (and don’t appear to view the burning of CD-Rs as a competitive problem), there has been a massive increase in the commercial duplication and distribution of CD-Rs of U.S. copyrighted works throughout Taiwan. In addition, 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 CD-R piracy was originally limited to within colleges, it is now a major problem in the night markets and is present in all pirate distribution channels, and by some accounts represents up to 50% of the pirate market in the country. With respect to audiovisual works sold and/or rented through retail shops, the Government Information Office maintained a system of loose regulatory control over the retail shops in 2002. Despite this, even more of such shops continue to engage in the unauthorized duplication of CD-Rs. GIO must once again tighten its grip on the retail markets.

Corporate End-User Piracy of Business Software Remains a Problem

The piracy rate for business software has declined 5% since 2000 in part due to some improvement in corporate end-user piracy enforcement. In 2002, the “Action Year for IP Enforcement” as declared by the Taiwan government, the Ministry of Justice and Ministry of Economic Affairs endorsed a BSA 60-day truce campaign. During this period, the government

⁴ Recently the Taiwan Minister of Justice has specifically told courier companies that they will be arrested as accomplices. This announcement was made following the well-reported “Catch me if you can” incident reported below.

joined with BSA in educating businesses about the copyright law and software asset management seminars. This campaign was followed by a series of criminal raids against corporate end users. Also, in April 2002, the Premier issued instructions to all government agencies to conduct software audits and to report back the findings. The Directorate General of Budget, Accounting and Statistics (DGBAS) followed up and requested all agencies to provide audit results by May 2002. While this action fell short of the Business Software Alliance's (BSA) request for an executive order on government legalization, which many other governments have issued, this was a move in the right direction. The piracy rate remains too high and much more still needs to be done.

Internet Piracy is Growing

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. This type of piracy is also being run by organized groups mainly located in Taiwan but also emanates from 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. So far at least, the Taiwan authorities have not set up an appropriate and trained infrastructure to stop this problem from becoming the next piracy epidemic. The Ministry of Education (with respect to use of University servers), the Ministry of Transportation and Communications (MOTC), and other law enforcement authorities, must respond quickly and effectively with well-organized enforcement strategies.

Two types of piracy predominate. First is the distribution of finished pirate product ("hard goods piracy") using the Internet as an advertising tool. Websites at universities, for example, are used to announce the availability of pirate recordings (including MP3s), videogames in all formats, business software and motion pictures (back-to-back copies of VCDs, CD-Rs or even DVDs), including CD-R sales. Commercial sites also are a growing phenomenon, such as the fortunately short-lived "Movie88.com" site which made thousands of new and old movie titles available for just \$1 each and at the instance of MPA was taken down in February 2002 by a Taiwan-based ISP and the Taiwan enforcement authorities. Entertainment software is also made available through Internet sites. Internet piracy of entertainment software product is now estimated to be at 40%, up from last year's estimate of 30%.

Second, and even more dangerous, is the downloading of pirate copies from websites and FTP sites, and the rapid growth of "Napster" and "Morpheus" clones, using "peer-to-peer" file-sharing technologies, like KaZaa software. This phenomenon is on the increase without any clear strategy to deal with it. The recording and movie industries are 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. Another version of this phenomenon occurs at "cyber-café's," of which there are 3,000 throughout Taiwan. Entertainment software is particularly hard hit at these cyber-cafes. Some IDSA member companies suspect that a large number of these cafes are operated by criminal syndicates and obtain the pirate product used at these cafes from local optical disc factories. IFPI did do some Internet enforcement training of the IPR Task Force in June 2002 after it was formed and lists of infringing websites were provided at that time. Unfortunately the lack of a unit dedicated to this problem has hindered enforcement efforts—currently enforcement is the responsibility of both the Telecommunications Police and the Criminal Investigation Bureau (CIB). In 2002, the recording industry filed a complaint against EZPeer, a Taiwan P2P file sharing service and will shortly sue another such service named Kuro. According to a recent news report, the parent

company of Kuro, music.com.tw, has generated revenue of NT\$190 million (US\$5.5 million) in 2002, 90% of which is generated by Kuro which charges a fee of NT\$99 (US\$2.85) per month for unlimited downloads of illicit MP3 music files. Kuro's users have increased from 50,000 in 2001 to 300,000 in 2002. The industry estimates there are more than 26,000 users online at any time. Kuro has now surpassed EZPeer as the largest free pirate download service in Taiwan. It is reported that the parent company plans to go public in 2003.

Piracy of Textbooks and Other Piracy Issues

Illegal photocopying of entire textbooks is most prevalent in Taipei and other major cities, including on and around prestigious campuses such as 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 addition, illegal photocopying is rampant in bookshops situated on the university campuses themselves. In September 2002, the Taiwan Book Publishers Association, capitalizing on the central government's designation of 2002 as the "Year of IP Enforcement" received generally good, though sometimes uneven, cooperation from the police and Ministry of Justice in conducting over 80 raids throughout Taiwan against photocopy operations. These raids uncovered the infringement of over 600 titles, including approximately 100 Chinese titles, clearly demonstrating that the infringing activity is harming not only foreign publishers, but local creators and publishers alike. The publishing industry has been pleased with the increased level of cooperation from the Taiwan government that allowed for this type of raiding activity. However, lasting success depends on continued efforts by the government to coordinate, support and increasingly self-initiate raiding activities on a regular basis. Success is also *highly* dependent on the government's initiative in enforcing compliance with copyright laws *on university campuses*. The publishing industry is dismayed at the government's unwillingness to raid on-campus facilities, as well as its reluctance to issue mandates and requests to university officials to police illegal photocopying. The Ministry of Education must work closely with university officials to create a climate on the college campuses in which students and educators abide by Taiwan's TRIPS obligations.

The publishing industry is also disappointed by failures at the prosecutorial level. As discussed later in this submission, procedural hurdles continue to hinder effective prosecution, including the discriminatory POA requirements imposed on foreign publishers. U.S. publishers currently have cases from the September 2002 raids pending in the courts, and the government should take immediate action to bring these cases to completion in a timely and expeditious manner.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have resulted in significant damage to publishers. First, publishers have come across instances where teachers and businessmen have cited fair use as justification for copying up to one half of a work without permission. Second, local book companies have also compiled anthologies of text materials from foreign textbooks without permission. Third, publishers report that pharmaceutical companies are increasingly photocopying medical textbooks and clinical reference works for client doctors, without appropriate permission. IIPA and AAP urge the government to clarify the scope of permissible copying by working with publishing representatives and affected third parties to draw up useful and equitable fair use guidelines. This should be followed by judicial and prosecutorial training on fair use and on book piracy generally.

China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market, though it is believed that much of this production is controlled from Taiwan. For example, in August 2002, the Yongshen Electronic Factory, owned by a Taiwan citizen, was raided by enforcement authorities in Guangzhou, China. Approximately 10,000 counterfeit *Game Boy Color* printed circuit boards and about 300 Game Boy Color game cartridges were confiscated. The owner had purchased the components in Taiwan, and then shipped the parts back to China for assembly at his factory.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan Must More Effectively and Aggressively Implement the Optical Media Management Statute

Taiwan has the tools to deal with optical disc piracy in its Optical Media Management Statute, adopted, after much controversy internally and with the U.S. government, in 2001. While that law has a number of weaknesses (discussed below), it can and must be used more effectively to crush this phenomenon which is so devastating the Taiwan market, Taiwan creators, and Taiwan's international reputation. Taiwan's President Chen has declared the "Year of IPR Protection" and promised effective enforcement to the U.S. government and to the Chairman of the U.S. House Judiciary Committee, James Sensenbrenner, at a January 13 meeting in Taipei. Also at this meeting, the President appointed his National Security Council Director, one of his closest advisors, to lead this effort with a six month deadline to fully address and resolve this and other enforcement issues. The IPR Task Force was formed and, as announced at the start of 2003, that force was increased to 220 officers and led by Commissioner Liao Kao Jian, who is under the supervision of the 2nd Security Police. The tools and manpower are in place, some progress has been made in terms of inspections and seizures at plants including a recent raid and seizure of actual equipment at an underground VCD plant on January 13, 2003 (the machines including two VCD lines and one printing machine)—and the conviction and jail sentence given to the Chairman and Plant Manager of the infamous Digi-Gold plant—raided three times since 2000. But still the piracy rates in Taiwan have not come down and the local (and international and U.S.) audio and video industries continue to face declining revenues and local job losses.

Excuses are unacceptable and not credible. The Taiwan authorities, if they have the will, can quickly solve this problem by aggressively inspecting and raiding plants, and seizing all pirate product and equipment, withdrawing licenses, completing old criminal cases, starting new ones, and making sure that heavy fines and jail terms are imposed on factories, both licensed and unlicensed. The government must do this quickly to avoid further market deterioration.

Enforcement against Factory Piracy

While the Digi-Gold sentence was a major step in the right direction, MPA reports that 12 of its factory cases remain pending in the courts, five of them from as early as 2000. While jail terms were given and equipment finally forfeited, the process remains flawed, with little transparency, and with the judicially-ordered and totally unjustified "unsealing" of lines, without notice to the rightholders who were the victims of this blatant piracy, and their reuse for piracy purposes during the pendency of the case.

In 2002, MPA conducted 12 factory raids with 5 reported as “successful,” including the sealing of lines. 10 plants were closed down, including 7 licensed and 3 unlicensed plants. 252 stampers were seized along with 68,874 pirate discs. 13 VCD production lines and 9 printing/packaging machines were sealed. The plant inspection teams conducted 242 inspections, but only 11 at night when most pirate production is suspected to occur. While the seized discs were taken into custody, the replicating equipment was not being removed, with the government claiming there was insufficient warehouse space. However, the authorities have just recently announced a plan to increase the number of warehouses for storing seized discs and machines. In a most welcome development, on January 13, 2003, an underground VCD factory in Taichung was raided and its replicating machines were immediately moved to a new MOEA warehouse.

To achieve the needed results, these inspections must be increased, done completely randomly, and at night. RIAA/IFPI reports that 99% of the pirate music CD product in the market does not contain SID codes, as required under the Optical Media Statute. While some of these discs may be imported, most are either from licensed plants, using non-Sid-coded molds or by unlicensed plants.

RIAA/IFPI reports 9 successful factory raids in 2002 and 3 convictions involving pirate music product. MPA reports 4 convictions.⁵ RIAA/IFPI reports 16 and MPA 12 cases still pending following the recent Digi-Gold conviction.⁶ Working closely with industry, the Taiwan government must exponentially increase all this activity and apply real deterrence in the process if piracy rates are to be reduced.

Organized criminal syndicates continue to dominate piracy in Taiwan, particularly at the distributor level. The recording industry reports 69 raids against warehouses, wholesalers and packaging centers. Investigators determined that several major pirate distributors run these well-developed and well-protected distribution networks throughout the island. Their identities are always well-hidden, however, and hence they are never subject to being caught, arrested and convicted. The key is to arm the expanded IPR Task Force with stronger investigatory powers, train them in improved surveillance techniques and provide them with “public crime” powers and the clear ability to seize all machinery involved in piracy, particularly OD lines.

Criminal Enforcement in 2002

As in previous years, the industries⁷ continued to get a sizeable number of criminal raids. However, again, these efforts haven’t made a major difference in the marketplace; indeed piracy rates are up, not down. The principal problem is that piracy is not a public crime which means that the enforcement authorities are reluctant to act without a formal complaint from right holders, who are simply not equipped to handle the vast volume of paperwork that this requires, thus severely diminishing the ability of the authorities to crack down, in particular on night markets and other highly mobile pirates operating at the retail level. Moreover, the industries do not have the investigatory powers that reside in the government authorities and again, this

⁵ Wei Lai Technology Co., Ltd (1998 raid); Unregistered VCD factory in Hsin Tien City (2002 raid); Nine Friends Technology Co., Ltd (1999 raid) and Digi-Gold Media (3 raids commencing in 2000).

⁶ The RIAA/IFPI and MPA factory raids and convictions overlap, the difference being whether video and/or music product was involved in the raid or criminal case.

⁷ This refers to all copyright industries other than business software, which is discussed separately in this section.

hinders the effectiveness and deterrent effect of the enforcement system. For this reason, IIPA and its members have urged Taiwan, and a number of other countries, to make piracy a public crime, actionable *ex officio* by the enforcement authorities. As discussed further below, the executive branch of the Taiwan government has agreed to propose an amendment to its copyright law making piracy a public crime in most cases. This is a most welcome—and absolutely key—development if it ends up soon as an amendment *actually* adopted and implemented.

The recording industry ran a total of 1524 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories in 2002. This is down from 2235 raids in 2001 even though the government established its police IPR Task Force in 2002. 1502 raids were against retail piracy and 15 against factories. 99% of all raids involved retail piracy. Moreover, convictions and sentences were also down for 2002, providing one more important reason why piracy rates have been rising (see chart). Of the 1,867 persons convicted of music piracy in 2002, it appears that only 70 were given unsuspended sentences of more than 6 months⁸ or only 4.2% of those convicted, down from about 14% in 2001⁹. According to RIAA/IFPI statistics, only a total of \$15,300 in fines were assessed and it is not known how many of these fines were actually paid. In short, for music piracy, it is little wonder that piracy rates have not come down. In 2002, as in 2001, and as noted above, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 903 cases brought by the recording industry in 2002, 558 involved juveniles and only 372 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

Also disappointing was RIAA/IFPI's report of the reduction in the number of raids involving CD-R duplication centers in 2002 even though replication of CD-Rs containing infringing music and sound recordings was growing at an exponential pace. Only 5 such raids were conducted in 2002 (with seizure of 250 CD-R burners), compared to 27 and 12 in 2000 and 2001 respectively (with seizure of 154 CD-R burners), respectively. In one of these raids, in September 2002, involving a packaging center, the police seized 64 CD-R burners, 16,700 blank discs and almost 150,000 pirate CD-Rs.

The motion picture industry conducted fewer raids in 2002 as well, partly as a result of its intention to focus on larger targets. Because of the "juvenile problem" it has become far less cost effective to undertake raids on retail/street vendors in night markets and moreover there is little deterrence in this area in any event. MPA conducted 698 raids (vs. 1,118 raids in 2001), and initiated 671 cases, 551 of which were street vendors cases, 25 were retail shops cases, 69 against distributors, 12 against factories, 15 against CD-R labs and 31 Internet cases. The authorities seized 1,123,922 VCDs, 6,078 DVDs and 1,186,389 CD-Rs. Also seized in 2002 were 697 stampers, 206 silk screens and 14 packaging machines.

⁸ Sentences of six months or less can still be "bought out" to a fine in Taiwan.

⁹ In 2001, only 107 out of the 766 defendants convicted (around 14%) actually served time in jail.

Criminal Enforcement Against Corporate End-User Software Piracy

On March 14, 2002, BSA launched, with the cooperation of the Minister of Justice and the Vice Minister of Economic Affairs a 60 day "Truce Campaign" designed to encourage businesses to audit their software and to legalize as necessary. The campaign included a reward scheme for obtaining corporate end-user leads. The response from the use of a website and hotline was large with over 341 leads coming in. Following up on these leads, BSA conducted 15 criminal end-user raids and one channel raid in the second half of the year. All these raids were successful in turning up unauthorized software. These cases and 13 prior year cases are still pending. In 2002, two prior year cases ended in convictions and fines were imposed. On January 7, 2002, a Taiwan High Court affirmed a district court conviction and sentence of the general manager of Horng Com Data Inc. to seven months in prison and a fine of NT\$60,000 (US \$1,730). The prison sentence was suspended.

This case was followed a month later by the another conviction of Taiwan Product Online Co., Ltd. on February 8, 2002 leading to a small fine of NT\$80,000 (US\$2,306). The defendant appealed and BSA finally settled the case.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS				
2002				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
Number of Raids conducted	698	15 end user 2 channel	1,517	2,232
Number of cases commenced	671	17	903	688
Number of Cases Judgment for Juveniles	304		531	835
Number of Cases Judgment for Adults	367	2	372	741
Number of defendants convicted (including guilty pleas)	876	2	1,867 persons	2,745
Acquittals and Dismissals	9		27	36
Number of Cases Pending	574	30	614	1,218
Total number of cases resulting in jail time	332		345	677
Suspended Prison Terms	128	1	123	252
Maximum 6 months	45		43	88
Over 6 months	17	1	8	26
Over 1 year	66		72	138
Total Suspended Prison Terms	1,443 (months)	1	1,464 (months)	2,907 (months)
Prison Terms Served (not suspended)	204		222	426
Maximum 6 months	132		144	276
Over 6 months	16		9	25
Over 1 year	56		69	125
Total Prison Terms Served (not suspended)	1,800 (months)		2,046 (months)	3,846 (months)
Number of cases resulting in criminal fines	10	2	11	23
Up to \$1,000	1		6	7
\$1,000 to \$5,000	5	2	5	12
Over \$5,000	4		0	4
Total amount of fines levied	US\$63,314	US\$4,000	US\$15,300	\$82,614

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 ¹⁰	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 ¹¹	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

¹⁰ Total duration of suspended prison terms was six years.

¹¹ 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 ¹²	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 ¹³	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

Enforcement Against Internet Piracy in 2002

As reported in the 2002 submission, the Taiwan enforcement authorities began taking action against Internet piracy in 2001. That effort has continued in 2002. The motion picture industry conducted 31 raids in 2002 vs. 24 raids in 2001 against pirates distributing infringing works via the Internet, resulting in the seizure of 933 pirate DVDs, 201 pirated VCDs, 3,108 pirated CD-Rs, 57 CDR-burners, 32 computers, and the arrest of 29 pirates in 2002 compared to the seizure of 31,570 pirated CD-Rs and the arrest of 23 pirates in 2001. Prosecutions resulted in 16 convictions in 2002 vs. nine convictions in 2001. The recording industry issued a total of 28 warning letters that were sent to the infringing FTP sites and websites, as well as 41 letters to related ISPs. As a result, 63 sites were closed down compared to 150 sites in 2001. There have been no prosecutions for Internet piracy of music so far in Taiwan, which bodes ill for the future. Other industries report more trouble getting cooperation of Internet service providers (ISPs).¹⁴ The business software industry has 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.

¹² These suspended sentences range in time from one to twelve months, but most were over six months.

¹³ 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.

¹⁴ 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.

Effective Criminal Enforcement is Hindered by Numerous Procedural Hurdles

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;¹⁵ continued challenges to powers of attorney (POAs) of U.S. right holders in court cases and in raids;¹⁶ raiding authorities' failure to seize all pirate product and tools and implements used in piracy;¹⁷ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. And last and most importantly, commercial piracy offenses must be "public" crimes, without the need for a prior complaint from the right holder—a number one priority of all copyright industries.

Recent Developments and Some Next Steps

In the last few weeks there have been a number of developments that deserve mention in the hope that they signal a new urgency in the enforcement fight against escalating piracy.

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

- Both RIAA/IFPI and MPA have announced reward schemes for leads to arrests of pirates. MPA's program focuses on the increasing problem of CD-R piracy while RIAA/IFPI's is more general.
- In December 2002, the Taiwan authorities announced an increase in their reward program for leads in "substantial cases" to NT\$1,000,000 (around US\$29,000)
- On January 13, the first day of Judiciary Committee Chairman Sensenbrenner's visit, a pirate VCD was released of the new James Bond film *Die Another Day*. The pirated disc was priced at around US\$3 and opened with the message "[Minister of Justice] Chen Ting-nan, come and catch me if you can!" At the same time, the local media reported that illegal VCD copies of *Hero*, directed by famed Chinese director Zhang Yimou, were also available prior to its authorized release on VCD/DVD in Taiwan, for as little as NT\$80 (US\$2.30). The Minister was incensed and immediately promised an all-out war against the pirates. The next day, he ordered a raid against an OD factory in Taichung which resulted in the arrest of four men and netted 16,000 illegal VCDs. Two VCD lines and one printing machine were immediately removed from the factory.
- The Taiwan authorities announced in December 2002 that they will institute an IPR Action Plan 2003-2005 to "follow on the achievements during the IPR Action Year in 2002." IIPA has not learned the details of such plan but it must result in real, not feigned, achievements that lead to real piracy reductions.
- In 2002, a Taiwan national, Lisa Chen, was convicted in Federal Court in Los Angeles as a ringleader of a massive conspiracy which imported into the U.S. from Taiwan over \$98 million worth of pirated business software. Her arrest occurred in November 2001 after a lengthy investigation and she was sentenced to 9 years in prison and ordered to pay US\$11 million in restitution. It was encouraging that Taiwan prosecutors worked with their U.S. counterparts in investigating this huge piracy case which culminated in the arrest on December 4, 2002 of six executives including several CEOs of Taiwanese firms. They were charged in connection with the production and export of this pirate software. IIPA has been told that the prosecutors have asked the judge for sentences of six to seven years. We will be watching these cases with great interest as a test of Taiwan's willingness to act to effectively deter this massive criminal conduct.
- On January 22, as reported by MPA, the Taichung Police conducted a raid that resulted in the seizure of over 63,000 CD-Rs containing pirate music, games and motion pictures and a record-breaking 127 CD-R burners. Five people were arrested. This CD-R lab was run by a syndicate that was one of the largest suppliers of the night markets in Taichung. MPA reports that in the first two weeks of January, two major criminal pirate syndicates in Taichung have been neutralized. We await the results of the criminal cases.

THE OPTICAL MEDIA AND COPYRIGHT LAW MUST BE IMMEDIATELY AMENDED

The Optical Media Management Statute Must be Amended

On October 31, 2001, Taiwan's Legislative Yuan passed the Optical Media Management Statute (2001) (the "OD Law" was promulgated on November 14, 2001).¹⁸ Unfortunately, this law represented 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 discs in Taiwan, employing a system of: granting permits to persons/entities engaged in the production of "prerecorded 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.¹⁹ Failure to obtain a permit, the unauthorized manufacture of "prerecorded optical discs," and other infractions, can result in criminal fines and the remote possibility of imprisonment against plants (and their "responsible person[s]"). Seizure of unauthorized prerecorded discs and equipment used in such unauthorized production is also possible, though it is a major flaw 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.

In addition to these noted weaknesses, and among the law's most serious deficiency, the OD Law as passed by the LY (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 codes) of optical discs. Imprisonment for manufacturing "prerecorded" discs (which under the EY bill would be mandatory after the first offense) is now possible only after a third offense (and a failure to cure),²⁰ 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 offense) eviscerates the effectiveness of the criminal remedies under the OD law.

The following summarizes some of these key deficiencies in the Optical Media Management Statute that must be addressed in amendments

- **"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

¹⁸ 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.

¹⁹ IIPA has now seen a preliminary translation of some of the implementing regulations, including "Laser Disc Production Permit and Application [Regulations]," and understands that this regulation also provides that companies that wish to produce "blank laser discs 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.

²⁰ 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.

stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (Art. 27)). An amended law should ensure that the loopholes contained in Arts. 15 and 17 (allowing plants to cure after the first offense) 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.

- **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 the law be amended to give the authorities the power to seize stampers/masters that fail to meet requirements, as well as machines and tools used to produce such stampers/masters.
- **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 disc 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.
- **Transparency of All Applications, Notifications, Permit Information, and Records:** It is imperative that amendments to the law ensure 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 Discs,” 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 Taiwan authorities, realizing that the law as passed has many flaws, has informally indicated that it may amend the law. Since the passage of the OD Law, IIPA and IFPI have prepared a global model template for an OD law and also prepared a set of “key elements” that must be part of any effective OD law. These two documents, representing the views of all the copyright industries, have been provided to the Taiwan authorities. However, no draft has apparently been completed. IIPA urges the authorities to immediately prepare a full range of amendments consistent with these key elements and template—in particular, to increase penalties, to ensure that licenses can be more easily revoked, to ensure coverage of stampers, to adopt a full license requirement for producing blank CD-Rs and to strengthen the authority to seize and forfeit all equipment used in the production of pirate OD product. In the interim, aggressive and deterrent enforcement of the existing provisions, read to give those provisions their broadest scope, must be the highest priority for Taiwan.

Taiwan Must Complete Consideration of its Draft Copyright Law Amendments, Follow USG and Industry Suggestions, Pass Such Amendments Early in the Next Session of the Legislative Yuan, and Implement Those Amendments Immediately

Over the course of the latter part of 2001 and throughout 2002, MOEA/IPO has been regularly engaged with the U.S. government in reviewing a large number of critical amendments to its copyright law. IIPA and its members have regularly provided comments on the various drafts that have issued during this period. MOEA/IPO is to be commended for taking this process seriously and agreeing to adopt many of the industry and USG suggestions for modifying their originally proposed amendments.

Many of these amendments are absolutely critical to strengthening the tools available to the enforcement authorities to deal effectively with the growing piracy rates in Taiwan. Key among these is making commercial piracy a “public crime” allowing the authorities to investigate, seize and commence criminal proceedings without the need for a complaint from the right holder and significantly increasing criminal penalties. Other amendments would fix the remaining TRIPS deficiencies in the law and modernize the law to deal with e-commerce and

the Internet by adopting the provisions of the two WIPO “Internet” treaties. IIPA strongly supports Taiwan’s goal to improve its enforcement machinery, bring its law into compliance with TRIPS, and implement the WIPO treaties’ provisions now as part of its development strategy and before online piracy levels become acute.

The following summarizes the main features of the proposed amendments being considered, including where further adjustments to those amendments are needed:

- **Coverage of Temporary Copies as Part of the Reproduction Right:** The current December 2002 IPO draft properly defines the reproduction right to include temporary and transient copies. This change to Article 3(5) is necessary to comport with WCT Article 1(4) and the Agreed Statement, TRIPS and the Berne Convention (incorporated by reference into TRIPS). Ensuring that such copies are subject to the exclusive right of reproduction will ensure that Taiwan is prepared to deal with the challenges of the new e-commerce environment.
- **Exception to Protection for Temporary Copies:** While IIPA has noted that the “fair use” provisions of Article 65 already provide the mechanism to ensure for exceptions to exclusive rights in appropriate cases, Taiwan so far has chosen to take the EU approach by including a specific exception for temporary copies in Article 22 of the law. However, this formulation, at a minimum, must be recrafted to ensure that, as in the EU situation, such exception language specifically excludes application to computer programs. The EU exceptions to the reproduction right for computer programs are in its Software Directive, not covered by the language of the EU Copyright Directive. Moreover, if the EU approach is taken, then the “fair use” provisions in Article 65 must not be interpreted to give a broader scope of exceptions than the specific language in Article 22. In fact, the fair use provisions should ensure that the EU approach to exceptions does not apply where it would conflict with the normal exploitation of a work or prejudice the legitimate interests of the right holder, as required under Article 13 of TRIPS.
- **Application of the Definition of the “Public Presentation” Right to Sound Recordings:** The definition of “public presentation” [Article 3(9)] should include a reference to sound recordings, as well as audiovisual works. Indeed, such right should be amended to extend to all works.
- **Definition of “Technological Protection Measures”:** The definition of “technological protection measures” [Article 3(16)] must be amended to ensure that access as well as copy controls are covered in order to comply with the requirements of the WCT and WPPT. Existing Taiwan law on hacking is insufficient to comply with these requirements. Similarly, the new Article 80*bis* must be amended to ensure that TPMs protect beyond just acts resulting in an infringement but also cover TPMs that “restrict acts which are not authorized” by the right holder, e.g., access controls.
- **Extending the “Public Performance” Right to Sound Recordings:** Article 26 should be further amended to apply the right to sound recordings as such right is defined in Article 3(11). IIPA is pleased that Articles 24 and 26*bis* were further amended to ensure that all interactive communications of sound recordings and performances are clearly covered as required by the WPPT and that the provisions covering “bootlegging” were clarified in Article 22(2).

- **Clarifying that the Rental Right Extends to Performers and Sound Recordings (WPPT):** The exclusive rental right (Article 29) has been clarified to extend to sound recordings and to performances fixed on sound recordings as required by TRIPS and the WPPT.
- **Term of Protection:** Taiwan should follow the modern trend of extending term of protection (both the EU and U.S. 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:** The personal use exception in Article 51 should be clarified and narrowed, in light of digital technologies, to permit only a single, analog copy for personal and private use.
- **Formalities and Scope of Licenses:** In a welcome change the notarization requirement in Article 37 has been deleted and paragraph 4 has been changed 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.
- **Deleting the Exemption for Retransmissions of Broadcasts by Cable Systems:** IIPA is pleased that paragraph 2 of Article 56*bis*, which provides for such complete exemption (which would violate TRIPS) has been deleted.
- **Eliminate the Intent to Profit Requirement for Civil and Criminal Liability:** IIPA is pleased that the provisions which imposed an “intent to profit” requirement as a condition to civil and criminal liability have been eliminated and urges the drafters to adopt a drafting option to Article 87(4) which ensures that corporate end-user piracy of software is clearly an infringement. However, many of these provisions still literally require the proof of “actual” knowledge; the test should be whether the defendant “knew or ought reasonably to have known” that the work was infringing and these provisions amended accordingly.
- **A Right of Distribution Must be Introduced:** IIPA is pleased that the draft adds an Article 28*bis* incorporating this right with is required by the WIPO Treaties. IIPA is concerned, however, that the first sale doctrine in Article 59*bis* may implicate the exclusive importation right in Article 87(4). This paragraph must be further amended to ensure that parallel import protection is fully preserved.
- **Ensuring Both Civil and Criminal Liability for Violation of TPMs and RMI:** IIPA is pleased that these further amendments were agreed to.
- **Ensuring that the TPMs Provision and Exceptions in Article 80*bis* Fully Comply with the WCT and WPPT:** This provision does not comport with the requirements of the WCT and WPPT. It does not cover access controls. It requires that the TPM be “specifically designed” to circumvent and language must be added to cover “indirect” proof based on how the product is marketed or whether the device has any significant economic purpose other than to circumvent. Moreover, and importantly,

the exceptions are overbroad and must be significantly narrowed to provide effective protection in compliance with the Treaties.

- **Ensuring that Customs has *Ex Officio* Authority:** IIPA welcomes the amendment ensuring that Customs has this authority.
- **Criminal Penalties Must Be Further Increased and Made Truly Deterrent:** Penalties still remain too low to act as effective deterrents under the TRIPS agreement and in an environment where deterrence is not credible. IIPA recommends significant increases in these penalties, welcomes that criminal penalties apply to offenses without an intent to profit, particularly Internet infringements, and has asked the drafters to make this even clearer. The minimum jail term for piracy should not be allowed to be “bought out” with a small fine, as is now the case. Criminal penalties should also be increased for violations of the TPMs and RMI provisions.
- **Making Copyright Infringement a “Public Offense”:** IIPA welcomes the changes to these Articles which would make key commercial infringements “public offenses” without the need to file a formal complaint. This is a major step forward for Taiwan. IIPA recommends, however, that the need to prove that the reproduction or distribution of a work is “exclusively” for sale or rental may create practical problems. We believe this term should be deleted.
- **Berne and TRIPS-Compatible Retroactivity:** Article 106*ter* and *quater* still have not been adequately amended to make them consistent with Article 18(3) of the Berne Convention. While we applaud Taiwan’s recognition of the need, at a minimum, to pay equitable remuneration for derivative works, this same treatment must be extended to making new copies of now-protected works. IIPA also believes that the two-year term remains too long to be compatible with TRIPS with respect to the making of new copies of protected works. Given the long warning already proffered to the public, this period should be deleted.
- **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.