

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### TAIWAN

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** With passage of amendments in the Legislative Yuan's Special Session in August 2004, the deficiencies in the 2003-passed amendments were, for the most part, repaired. With Taiwan's enforcement actions remaining at a high level, IIPA recommended in November 2004 that Taiwan be upgraded to the Watch List at the end of the U.S. government's out-of-cycle review investigation announced in May 2004. On January 18, 2005, USTR announced Taiwan's upgrading to the Watch List. Even though enforcement continues, for most sectors, at a high level, some critical problems remain. Therefore, IIPA recommends that Taiwan remain on the Watch List.<sup>1</sup>

**Overview of Key Problems:** With the exception of piracy rates for business software, piracy rates continue to remain high in Taiwan (though rates in some sectors are — finally — beginning to come down). Raiding remains at a high level and penalties have become more deterrent as a result of the 2004 amendments to the copyright law and greater awareness of the need for deterrence among prosecutors and judges. While exports of pirate OD products have virtually disappeared, and illegal factory production appears to have diminished significantly, the organized criminal syndicates that control most of the piracy business in Taiwan have moved their operations increasingly to CD-R and DVD-R “burning” and to the Internet. Taiwan has moved aggressively to raid “burning” operations and recent raids have resulted in huge seizures. New *ex officio* authority granted to the police by the 2003 amendments (with respect to OD piracy) has resulted in considerable headway being made against piracy in the night markets. Taiwan continues, however, to be world's largest supplier of blank recordable media to pirate operations globally and, to date, Taiwan has not prosecuted factories that “knowingly” supply blank product to affiliate pirate operations abroad. While IIPA hopes that these aggressive enforcement actions continue and result in a welcome lowering of the piracy rates in 2005, Taiwan must now focus on new policies and actions which continue to threaten the domestic and international copyright industries. The first of these challenges is the Internet. With over 12.7 million Internet users and among the highest broadband penetration in Asia, piracy threatens to dominate unless (a) new legislation is enacted clarifying secondary liability of ISPs and establishing an effective statutory notice and takedown system and (b) immediate action is taken to halt the illegal activities of the notorious P2P operations — Kuro and Ezpeer. These two services were indicted by Taiwan authorities over a year ago and still no action has been taken to slow down their income stream or their continued offering of infringing music and other files. Taiwan also continues to be plagued by two historical problems: off-campus, and now increasingly on-campus, photocopying of textbooks and journals, and the continuing production of pirate chips exported from Taiwan for assembly in China into pirate videogames used in Nintendo handheld game players. Enforcement against end

---

<sup>1</sup> For more details on Taiwan's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

user piracy continues to improve and piracy rates have held steady at 43% from 2003 to 2004. The government has taken laudable action, most in 2003 and early 2004, against organized crime syndicates engaged in software counterfeiting. If these remaining issues can be resolved and deterrent enforcement continues, Taiwan stands poised to once again be viewed as an Asian success story, as it was in the late '90s, when piracy rates were down significantly.

## **Actions to be Taken by the Government of Taiwan**

In order to lower the piracy rates which still persist in most copyright industries, and in order to deal with the growing problem of Internet piracy, commercial photocopying on and off campus and the production of pirate Nintendo chips, the government needs to take the following actions immediately:

- Continue a sustained copyright enforcement campaign throughout 2005 against all types of piracy, and particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Bring more effective enforcement against Internet piracy generally, make significant enforcement inroads against peer-to-peer piracy, beginning with the immediate closing/conviction of the notorious P2P pirate services, Kuro and Ezpeer. Adopt further copyright law amendments to clarify secondary liability of ISPs and other intermediaries and establish an effective statutory notice and takedown system and ensure that current provisions prohibiting the circumvention of technological protection measures, both through illegal acts and via illegal devices or services are fully effective;
- Adopt effective policies, through the Ministry of Education and other government agencies, to ensure that (a) government-owned servers or other computer facilities are not used for the illegal trading of infringing files containing protected material, (b) universities work with enforcement authorities to initiate crackdowns against on-campus photocopying, and (c) appropriate guidelines are issued to elementary and secondary school administrators concerning the use of copyright materials in the classroom;
- Continue the effective enforcement against corporate end user piracy of business software and against software counterfeiting by organized criminals;
- Take immediate action to limit the use of the US\$30 daily “buy-out” of jail terms of six months or less. We understand this is within the authority of the prosecutors and it is essential that this discretion be used to impose deterrent penalties for piracy;
- Issue an executive order on software legalization in government agencies—one of the larger markets for software;
- Amend the 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/DVD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, are imposed;
- Further amend the copyright law to extend the term of protection of works, sound recordings and performances in line with growing international trends.

**TAIWAN**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2000-2004<sup>2</sup>**

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	40.0	40%	42.0	44%	42.0	44%	35.0	30%	30.0	30%
Records & Music	49.4	36%	58.0	42%	98.6	47%	51.7	48%	60.5	44%
Business Software <sup>3</sup>	83.0	43%	83.0	43%	91.2	43%	106.8	53%	123.9	53%
Entertainment Software <sup>4</sup>	123.0	63%	261.8	42%	596.1	56%	119.4	70%	319.3	90%
Books	20.0	NA								
<b>TOTALS</b>	<b>315.4</b>		<b>464.8</b>		<b>847.9</b>		<b>332.9</b>		<b>553.7</b>	

## **COPYRIGHT PIRACY IN TAIWAN**

### **Pirate factory production of optical disks, “burning,” and Internet piracy**

Over the last year, the Taiwan authorities, under the leadership of Justice Minister Chen, Interior Minister Su, Director General Tsai of TIPO and TIPO’s Jack Lu<sup>5</sup> have begun to make a dent in the massive OD and other types of piracy that have grown out of control in the last five years. OD piracy in Taiwan is now characterized primarily by CD-R and DVD-R burning activity in clandestine labs and in retail shops. This “burned” pirate product now makes up the majority of pirate product being traded in Taiwan; factory pirate production (including export) — due to aggressive raiding and more deterrence — has diminished significantly. IIPA members report that many of the same criminal operations responsible for factory production and distribution continue to be involved in highly organized “burning” activities.

In 2004, Taiwan has done a much better job of inspecting suspected OD plants, closing down lines and reducing overall factory production of pirate product. Non-factory OD piracy has also been reduced through numerous *ex officio* raids, now permitted under the new copyright amendments, against wholesalers, retailers and night markets, making a significant dent in piracy in this sector. This more aggressive enforcement has unfortunately caused the pirates to adjust their activities and move their distribution networks increasingly underground — in harder to detect burning operations and onto the Internet, where “hard goods” sales, downloading and streaming activities have grown significantly. In IIPA’s 2004 report, we noted this phenomenon of increased “underground” and Internet-based piracy. Finally, over the last year, we have begun to see overall OD piracy rates begin to dip. However, this can only continue through sustained enforcement. It

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission at <http://www.iipa.com/pdf/2005spec301methodology.pdf>.

<sup>3</sup> BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Taiwan, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$139 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>4</sup> ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

<sup>5</sup> Thanks also are extended to Commander Vic Liao of the IPR Police and Lee Hsiang Chin, Chief of the 9th Investigation Bureau and others too numerous to name.

was the failure to sustain aggressive enforcement after piracy was significantly reduced in the late '90s that caused a major drop in legitimate sales and sent piracy rates skyrocketing again.

In 2003 there were reportedly 61 (same as in 2002) known optical disc plants in Taiwan (not including underground plants) engaged in the manufacture of finished optical disc products, including CDs, CD-ROMs, VCDs, and DVDs. There were 12 dedicated DVD lines. In 2004, there continue to be 17 owner groups but they have reduced the number of plants producing content ODs to 44 from 61. However, the number of lines at these 44 factories totaled 315 in 2004, an increase of five lines from 2003. This appears to indicate that the owner groups have in fact not reduced capacity to produce content OD, but simply consolidated production lines in a fewer number of plants. If blank CD-R plants are added to the 44 content plants, the total is 93 total plants. The estimated capacity of the content OD plants is up slightly to 1.1 billion units annually (1.085 billion units in 2003 and 990.5 million in 2002). Total production capacity, including blank CD-R and DVD-R production, is estimated at a staggering 9.86 billion units annually, which is reportedly up two billion units from 2003. This is over three times greater than any other country in the world! As can be seen, Taiwan continues to be the world's largest supplier of blank OD media product, including to pirate syndicates worldwide. IIPA members continue to be concerned over organized crime operators and factory owners intentionally selling blank CD-Rs/DVD-Rs to known and affiliated criminal organizations in Latin America and other regions throughout the world. IIPA and its members have regularly asked Taiwan authorities to use its investigative machinery to wiretap suspects and bring conspiracy or similar actions against those knowingly selling to pirates.

The enforcement pressure on the factories producing pirate disks has led to the major growth in CD-R "burning," reported above, much of it carefully organized and managed from the production through ultimate sale cycle. MPA reports that 96% of the seizures in 2004 of pirate OD product were of "burned" CD-Rs/DVD-Rs. This "burned" pirate product, including movies, compilations of music (including MP3 audio files), computer programs, console-based entertainment software, etc., continues to enter the domestic markets in Taiwan. The entertainment software industry also reports the continued import of its pirate product from other key pirate producers in Asia.

As a result of the production and sale of pirate OD product in Taiwan, sales of legitimate U.S. and local audio and video product have decreased substantially over the last five years, which has threatened the viability of Taiwan as a vibrant market. RIAA/IFPI reports that sales have dropped off 10% in 2003, with revenues dropping from \$306 million in 1999, to US\$170 million in 2001 and to US\$131.9 million in 2003. As of 2003, Taiwan had dropped from the second largest music market in Asia in 1999 to the fifth largest today, after Japan, South Korea, India and China. Taiwan's status as the creative center of Chinese music has been threatened; it has been the source of 80% of Mandarin music worldwide. The piracy rate for video product has increased more than 35% in the last few years, but has finally dropped back to 40% in 2004.

While factory piracy and sales in the night markets are down, the usual piracy techniques continue, though the Internet has now become a major factor in distribution of pirate OD product. Increased pressure through *ex officio* raids (authorized by the 2003 amendments to the copyright law) has made it more difficult to sell product in the night markets and piracy is now more "burning to order" and over the Internet. The use of juveniles continues. Mail order and Internet advertising of hard goods for sale has increasingly taken over the video, audio and videogame marketplace. The same techniques continue from 2003: Advertisements are regularly placed in newspapers or

on the Internet. Courier services are also used to deliver pirate product and collect payment.<sup>6</sup> 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. While these techniques have continued in 2004, increasingly the Internet, where enforcement continues to remain difficult, has been used for the sale of pirate product, as hard goods, or through downloading and streaming.

Hard goods piracy over the Internet affects all copyright sectors, and has become far more prevalent and serious in 2004. The absence of clear secondary liability of Internet service providers has severely hampered enforcement in this area as well as against Internet downloading, primarily of music but other products as well. The entertainment software industry suffers from hard good piracy and downloading from *warez* sites on the Internet, plus, as discussed below, the industry faces piracy at “cyber-café,” and in the online gaming market, which is rapidly growing.

The continued operation of Kuro and Ezpeer remains one of the most vexing irritants in the relations among the copyright industries, the U.S. Government and the Taiwan government. Both these pirate P2P services were indicted in December 2003 and Kuro was again indicted in early November 2004 for allegedly transferring music files to CDs for uploading onto Kuro’s site. It has now been over a year since this first indictment and no significant action has been taken to halt their illegal activities.<sup>7</sup> Both these services charge their customers — Kuro charges a monthly fee of NT\$99 and EzPeer NT\$100 (about US\$3). As reported in last year’s submission, both these P2P software and download services continue to operate openly, advertise publicly and generate huge profits from their illegal conduct. And, in an action that can only be termed outrageous, the Industrial Development Bureau of the MOEA awarded Kuro its “Digital Content Creative Software Award of 2003” even though, reportedly, the IDB actually knew that Kuro was about to be indicted. The recording and film industries and the U.S. government protested this inexplicable action vigorously. RIAA/IFPI reports that together Kuro and EzPeer generated estimated income of close to NT\$1 billion (US\$31.6 million) in 2004 (about the same as in 2003), 90% of which is generated by these monthly charges permitting unlimited downloads of illicit MP3 music files. Total users of both these services increased even after they were indicted. The local legitimate market in Taiwan in 2003 was only NT\$4.4 billion (US\$139.1 million), down precipitously from NT\$12 billion (US\$379.4 million in 1997, when piracy rates were under 15%). These two illegal services alone continue to earn 20% of the income earned by the entire legitimate music industry in Taiwan. Because a large percentage of this downloading activity occurs at universities and colleges over TANet, a government-owned network dedicated to research and education only, it is critical for the Ministry of Education to respond quickly with policies preventing their servers from being used for illegal activities and for the enforcement authorities to continue aggressive criminal actions.

---

<sup>6</sup> In 2003, the Taiwan Minister of Justice has specifically told courier companies that they will be arrested as accomplices. On February 14, 2003, the police arrested the owner of a courier company. On December 9, 2003, he was sentenced to one year’s imprisonment with a probation period of five years.

<sup>7</sup> In a positive sign, however, three Taiwan telecom companies, Chunghwa Telecom, Taiwan Cellular and FarEasTone Telecom have stopped collecting Kuro’s monthly subscription fees from their subscribers. Another telecom, Hinet, had also refused to collect Kuro’s fees, causing it to lose over half its subscribers. However, it has been recently reported that Kuro’s subscriber base is once again back up to 500,000, which it was before the Hinet action occurred. *Taipei Times*, September 15, 2004.

## **Piracy of business software by corporate end users continues as a serious problem, but the piracy rate dropped significantly in 2003, and remained steady in 2004, due to improved enforcement. Taiwan continues to be a hub for software counterfeiting.**

BSA reports that the piracy rate for business software remains at 43%, the same as 2003. Taiwan announced its intention to seek to reduce software piracy rates below 40% and initiated a “software protection action plan” in August 2004 to accomplish that result in 2005. BSA remains pleased with the cooperation it is getting with Taiwan enforcement authorities and particularly, from prosecutors, who have had a number of successful convictions of corporate end use infringers. BSA has also praised the government for endorsing the legalization campaign targeting corporate end users and for conducting a number of training seminars in 2004. BSA continued its own enforcement and educational activities in 2004 to promote the legal use of software.

The counterfeiting of software, controlled to a large extent by Taiwan-based syndicates involved on a worldwide basis, remains a serious problem. In 2004, IIPA reported on two key actions against major Taiwan counterfeiters in 2003, which are discussed in more detail in the enforcement sections below. Dismantling these sophisticated criminal syndicates must be a key objective of the Taiwan government in 2005 and will require the long-term investment of enforcement resources to halt them permanently.

## **Illegal photocopying of textbooks continues as a major problem.**

Illegal photocopying of entire books and journals, primarily academic textbooks and journals, English language materials and professional reference books, is the biggest piracy problem facing the publishing industry in Taiwan. This type of piracy, occurring primarily on and around university campuses, continues to cut heavily into sales by both foreign (primarily U.S.) and Taiwan publishers. Profit-based photocopy shops, located on the perimeters of all major college campuses, actively carry out photocopying and binding services both for students and teachers. While the authorities have been extremely helpful in running raids against these commercial photocopy shops at copyright owners’ requests, self-initiated action by the government remains rare. In addition, government authorities have usually shown strong reluctance to enter the campuses to raid on campus photocopying facilities where such illegal conduct is now rampant.<sup>8</sup> The Ministry of Education should adopt policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations. University officials should also build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those caught engaging in infringing conduct. Publishers also wish to partner with the Ministry of Education in educational and incentive-based initiatives and have recently put forward specific proposals for Ministry consideration. IIPA hopes that Justice Minister Chen’s recognition of the

---

<sup>8</sup> In a speech before the Taiwan Amcham, Minister of Justice Chen recognized and spoke to this problem. “The ministry will work with the Ministry of Education on how to enter school campuses to effectively enforce the law . . . . Although the law does not stipulate which places are off-limits for law enforcers to search, authorities will handle the situation with tact when entering such places as school campuses, the Legislative Yuan or military barracks to avoid controversy,” Chen said. BBC Monitoring Asia Pacific, August 31, 2004. Thereafter, the Ministries of Justice and the Interior, TIPO and industry representatives have regularly communicated with the Ministry of Education and asked for further assistance, but delays continue.

on-campus photocopying problem will result in a significant degree of cooperation in bringing about a drop in this type of piracy.

In both on-campus and off-campus scenarios, the government must be willing to adapt to the nature of the infringers' business. While the government often relies on large stockpiles of infringing product to guarantee effective prosecution, this approach does not reflect the realities faced by publishers. Infringers of books and journals rarely keep large amounts of infringing stock. In fact, publishers are seeing pirates shift to "made to order" business models, in which infringers wait for an order before making infringing product. Orders are also often taken just before the close of business and produced at night with no receipts taken or records kept. The orders are then distributed as soon as they are completed, often away from storefronts by means of delivery vans or cars on campus. Thus, it is extremely important for government authorities to maintain vigilance in tracking these increasingly secretive and underground operations, to make sure enforcement actions keep up with the ever-evolving nature of pirate operations.

Publishers are also experiencing some problems with piracy over the Internet. Academic journal publishers report a high level of unauthorized access, and P2P file sharing of scanned academic texts is on the rise. The industry will continue to monitor these problems and is asking for the Taiwan government's cooperation in ensuring that these problems do not spiral out of control.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have continued through 2004 and 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, publishers report that pharmaceutical companies are increasingly photocopying medical textbooks and clinical reference works for client doctors, without appropriate permission. When the Legislative Yuan adopted new copyright amendments last August, it also requested TIPO to review and issue "fair use guidelines" for educators, libraries and with respect to distance education. TIPO has issued two drafts of such guidelines for educators and libraries and has indicated that it may also put out draft guidelines on distance education at a later time. The Taiwan Book Publishers Association (TBPA) has commented on the drafts issued to date. Publishers remain concerned that these guidelines may exceed the narrow limits and appropriate context for application of fair use. It is as yet unclear when final guidelines will be issued.

## **Piracy of PC, console and cartridge-based entertainment software**

As a result of improved OD-related enforcement, there appears to have been a drop in the piracy rate for PC entertainment software products as compared to prior years. Piracy of console and cartridge-based entertainment software, however, remains very high as does piracy at Internet cafés (or "cyber-cafés"), where the use of pirated or unlicensed entertainment software is prevalent. Of the 3,000 Internet cafés in the country, only about 30% are licensed. Much of the console product is made in factories outside Taiwan in locations such as Malaysia, but controlled by syndicates with operations in Taiwan and easily imported into the country. However, some production still appears to be taking place in Taiwan. Pirated console products are sold in retail shops, where catalogues are furnished to customers looking for "cheaper" product and pirated copies are then either pulled from a back room, under the table, or burned to order and delivered shortly thereafter. The police continue to actively raid retail shops that sell pirated products. In addition to being plagued by downloading and sales of pirate product from *warez* sites (particularly

for PC-based games), unlicensed operators of servers dealing in pirate online gaming divert traffic and potential subscribers from the legitimate site by emulating a publisher's online game.

China continues to be the primary source of pirated videogame cartridges coming into the Taiwan market, though much of this production is believed to be controlled from Taiwan. There is incontrovertible proof that key components of infringing *Nintendo* products continue to be manufactured in Taiwan and exported to China for assembly. Over 1,800 infringing semiconductor chips and PC boards bound for Shenzhen in Guangdong Province were seized by Taiwan Customs, with support from the Aerial Policy Bureau (APB), in mid-December, 2004. In addition, analysis of infringing products sold in the United States under the name Power Player established that the semiconductor chips, which contain illegal copies of *Nintendo* copyright games, embedded in the products were designed and manufactured in Taiwan, demonstrating once again that the export of infringing products from Taiwan remains a current and damaging problem to Nintendo.

In late 2004, the Taiwan Government abolished the Export Monitoring System (EMS), with the stated goal of re-allocating EMS funds to operations against optical disc piracy operations and cybercrime targets. While these are laudable goals, the entertainment software industry notes that not all its members are adequately served through anti-piracy efforts aimed solely at producers of pirated materials on optical disc formats. Component parts of counterfeit cartridge-based games, such as those manufactured for Nintendo handheld devices, continue to be exported from Taiwan, and the EMS then provided the means by which counterfeit component parts could be prevented from exiting the country. Now that the EMS has been abolished, the ESA hopes that (as pointed out in USTR's announcement of the results of the 2004 out-of-cycle review) the measures adopted by Taiwan to monitor the exports of copyrighted materials are as or more effective than the EMS. While the Taiwan government also promised that it would provide its Customs authorities with the requisite training so that it may adequately assume the functions of the III (which was formerly charged with EMS functions), recent experience indicates that whatever training has thus far been provided is far from sufficient. In December, a shipment of over 1,800 counterfeit Game Boy Advance PC boards, die and integrated circuits passed through the Chang Kai-Shek Airport destined for China's Guangdong Province, the international center for assembly and manufacture of infringing cartridge-based video game products. Customs officers at the airport showed no interest in the package and approved it to be shipped by air to China, though the only information on the package identifying the shipper was "Spider." Only when the Aerial Police Bureau (APB) noticed the incomplete information was it suggested that the package be examined, whereupon it was discovered that it was full of infringing product. Thus far, only the APB have been effective in preventing shipments of infringing material out of the country, and it is essential that this agency remain involved in anti-piracy enforcement, particularly as Customs officers have yet to be provided the full and necessary training to identify infringing cartridge-based products and components.

## **Unauthorized performance of pirated motion pictures in classrooms**

The exhibition of pirated CD-R copies of motion pictures, frequently involving titles that have not yet been released in theaters in Taiwan, has become a form of entertainment for students in elementary and secondary school classrooms and is a problem that also needs increased attention. The Ministry of Education should prepare and disseminate appropriate guidelines (highlighting that such uses are impermissible) for the use of copyrighted materials in the classroom.

## **COPYRIGHT ENFORCEMENT IN TAIWAN**

Taiwan must significantly increase and improve actions against all types of piracy now occurring in Taiwan, including growing Internet piracy. It must conclude pending factory and other large cases, continue to increase penalties to deterrent levels (including limiting the “buy-out” of six month jail sentences) and complete its welcome plans to create an IPR court which should have authority over both civil and criminal cases.

Taiwan must also fully use the tools provided by the 2001 Optical Media Management Statute to continue to raid, particularly at night, optical disc factories, both licensed and unlicensed. While this law remains deficient in many respects in comparison to the laws on the books in other jurisdictions — and now must be updated and amended — the government has promised to use it effectively, and, for the most part, has sought to do so. The year 2004 saw continuing improvements in factory raiding, and convictions were obtained, some with welcome deterrent sentences. But many cases remain pending and these must be concluded if the syndicates are to full respond to the message (by legalizing their business or getting out of the business) that piracy will be punished severely.

MPA reports that 11 of its factory cases (down slightly from 12 at the beginning of 2003) remain pending in the courts, and two of these from 2000-2001 have either not been filed or had a first instance decision. In 2004, MPA conducted five DVD and one VCD factory raids, one of which resulted in the seizure of MPA titles and the sealing of two DVD lines (the other factories were replicating pornography at the time of the raids). A total of 662 stampers were seized along with 114,581 pirate discs; one VCD production line and seven printing/packaging machines were sealed. JODE reported 1067 inspections through December 2004, with 417 of these at night (a welcome tenfold increase over 2002). The addition of three new warehouses in 2003 resulted in a reported seizure of 11 lines through December 2003 and another three in 2004.

RIAA/IFPI reports that it was involved in 20 raids against factories and large CD-R labs in 2004 and received a total of 166 convictions (including guilty pleas) involving pirate music product. MPA reports one factory conviction in 2004,<sup>9</sup> with 11 factory cases still pending following the recent Digi-Gold conviction. While not yet satisfactory, the record is certainly improving. This must continue in 2005.

The recording industry ran a total of 278 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories and CD burning labs in 2004; 210 raids were against retail piracy and 20 against such factories and labs. In 2004, as in 2003, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 278 cases brought by the recording industry in 2004, 134 involved juveniles and only 144 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

Because DVD-R and CD-R burning remains so rampant, raiding activity in which MPA’s local program participated was extremely active, particularly in the second half of 2004. Actions included a raid, in August 2004, of one of the largest “burning labs” in Asia. This lab was capable of producing \$47 million worth of pirate movies and music CDs annually. 228 CD-R “burners” and 49 DVD-R burners were seized in the raid; in May 2004, an even larger bust was made, netting 367 CD-R and 49 DVD-R burners. These and similar raids (close to one per day during the month

---

<sup>9</sup> This underground plant was located in Wai Pu in Taichung county.

of November) netted hundreds of CD and DVD burners and thousands of CD-Rs and DVD-Rs. Many arrests were made. MPA also regularly reported how much “profit” these labs, retailers and Internet sites would have made had they stayed in operation for a year. All in all, MPA conducted 608 raids (versus 655 raids in 2003), and initiated 425 cases, including 293 street vendor cases, 28 were retail shops cases, 21 cases against distributors, one against a factory, 23 against CD-R labs, 18 customs cases, and 45 Internet cases (vs. 33 in 2003). All in all, the authorities seized 662 stampers, 110,000 VCDs, 115,551 DVDs, 17,294 DVD-Rs and 1,078,474 CD-R pirate copies in 2004.

AAP and the Taiwan Book Publishers Association (TBPA), with the cooperation of the Ministry of Justice, initiated two large raids against hundreds of commercial photocopy shops in 2004 as well as a number of smaller scale raids in Taipei and Tainan counties. These raids resulted in 14 cases against copyshop owners (of which 10 are still pending) and the seizure of 214 different titles, sometimes with multiple copies of each title.

The publishing industry remains disappointed, however, by failures at the trial level in the courts. As discussed later in this submission, procedural hurdles continue to hinder effective prosecution, including the discriminatory POA requirements imposed on foreign publishers. In addition, the evidentiary burden imposed on publishers in proving copyright ownership remains onerous. U.S. publishers currently have 28 cases pending in the courts as a result of actions commenced in 2002-2004, and the government should take immediate action to bring these cases to completion in an expeditious manner.

### **Taiwan must urgently increase enforcement against Internet piracy — now a significant percentage of the pirate market in Taiwan.**

Internet piracy is quickly becoming the dominant form of piracy in Taiwan, primarily using sites to sell “burned” pirate product, but also offering product for downloading. MPA, RIAA/IFPI and BSA have increased their raiding activity in cooperation with the Taiwan authorities but enforcement through notice and takedown is still not at the ISP compliance level that it should be were there legal clarity on secondary liability of intermediaries.

The Kuro and Ezpeer cases are now at the center of the recording industry’s enforcement efforts. In 2004, the recording industry issued a total of 95 warning letters that were sent to infringing FTP sites and websites, as well as 62 letters to related ISPs. As a result, 41 sites were closed down, compared to 176 sites in 2003.

The motion picture industry conducted 55 raids in 2004, compared to 36 raids in 2003, against pirates distributing infringing works via the Internet, resulting in the seizure of 126 pirate DVDs, 4,891 pirated CD-Rs, 825 pirated DVD-Rs, 50 CDR-burners, 16 DVD-R burners, 107 computers, and the arrest of 53 individuals in 2004. Prosecutions resulted in five convictions in 2004 vs. seven convictions in 2003. MPA also reports an increase — to 367 — in Internet takedown actions in 2004.

BSA reports assisting the Taipei police and prosecutors in taking action against two websites in 2004 (<http://members.tripod.com> and <http://home.kimo.com.tw/watteau2003/index.html>) in which more than 200 pirate CD-Rs containing software were seized. Many more such actions will be needed to deal with this growing problem.

The entertainment software industry continued to report low compliance rates with Taiwan ISPs, reflecting the need for an amendment to the copyright law on secondary liability.

**Criminal and civil enforcement against corporate end-user software piracy has succeeded in keeping the piracy rate for 2004 the same as for 2003, but more needs to be done. Enforcement against software counterfeiting is improving but must be strengthened and accompanied by deterrent penalties.**

The Taiwan authorities continued their successful campaign against enterprise end user software piracy in 2004. All in all, two convictions were rung up in 2004. Fines were around NT\$100,000 (US\$3,164) and the salutary results in the end user cases went a long way to convincing businesses to legalize their software use. There was one conviction which involved the judge imposing a jail sentence of 10 months, but unfortunately this sentence was never actually served.

In IIPA's 2004 report, the software industry also reported a number of successful actions by the Taiwan enforcement officials against Taiwan-based criminal syndicates involved in global production and distribution of high-quality counterfeit software. A series of raids were conducted by the Criminal Investigation Bureau of the national police and targeted a criminal organization comprising Arex E & J Technology/ATX International and affiliated individuals and companies (E & J) and by the Investigation Bureau, Ministry of Justice against Maximus Technology and related individuals and companies (Maximus). Information obtained indicates that both the E & J and Maximus organizations were responsible for the production and global distribution of high-quality counterfeit software valued in the millions of dollars. Given the scope of the activities of these criminal organizations, these actions will hopefully have a major impact on global software counterfeiting.

Since these actions, prosecutions have proceeded and the defendants in the Maximus case were indicted in January 2005, and the E&J case is still pending before the prosecutor's office. While the industry is appreciative of the strong cooperation shown by MOJ, MJIB (Investigation Bureau) and the National Policy Agency of Taiwan as part of Taiwan's larger effort to enhance protection for IPR, it will require the sustained investment of enforcement resources, in addition to deterrent penalties, to defeat these criminal syndicates.

BSA and business software companies also continued to file civil actions against pirates in 2004, many in connection with accompanying criminal actions. BSA reports that damages totaling \$54,094 were assessed in all the actions concluded in 2004. Statistics for civil cases in 2003 appear below.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 TAIWAN					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING	TOTALS
NUMBER OF RAIDS CONDUCTED	608	4	278	4	894
NUMBER OF VCDs SEIZED	110,000	0	9,992	0	119,992
NUMBER OF DVDS SEIZED	115,551	0	435	0	115,986
NUMBER OF CDs AND CD-Rs SEIZED	1,078,474	253	308,332	0	1,387,059
NUMBER OF BOOK TITLES SEIZED	NA	NA	NA	214	214
NUMBER OF INVESTIGATIONS	1116	5	155	14	1290
NUMBER OF VCD/CD LAB/FACTORY RAIDS	34	0	20		54
NUMBER OF CASES COMMENCED	425	5	166	14	610
NUMBER OF INDICTMENTS	256	2	24	8	290
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	269	3 <sup>10</sup>	171	2	445
ACQUITTALS AND DISMISSALS	0	0	13	2	15
NUMBER OF CASES PENDING	209	13 <sup>11</sup>	100	10	332
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	63	1	69	0	132
SUSPENDED PRISON TERMS		1			1
MAXIMUM 6 MONTHS	0	0	0		0
OVER 6 MONTHS	0	0	5		5
OVER 1 YEAR	15	0	28	1	44
TOTAL SUSPENDED PRISON TERMS	936 months	10 months	33	2 yrs	
PRISON TERMS SERVED (NOT SUSPENDED)		0			0
MAXIMUM 6 MONTHS	38	0	0		38
OVER 6 MONTHS	2	0	0		2
OVER 1 YEAR	8	0	36		44
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	345 months	0	36		
NUMBER OF CASES RESULTING IN CRIMINAL FINES	0	2	3	2	7
UP TO \$1,000	0	0	1	0	1
\$1,000 TO \$5,000	0	2	2	2	6
OVER \$5,000	0	0	0		0
TOTAL AMOUNT OF FINES LEVIED (IN US\$\$)	0	US\$6,710	US\$6,000		US\$12,710

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 TAIWAN		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
NUMBER OF CIVIL RAIDS CONDUCTED	0	2 <sup>12</sup>
POST SEARCH ACTION	0	15 <sup>13</sup>
CASES PENDING	0	5
CASES DROPPED	0	0
CASES SETTLED OR ADJUDICATED	0	10
VALUE OF LOSS AS DETERMINED BY RIGHTHOLDER (\$USD)	0	US\$511,633 <sup>14</sup>
JUDGMENT AMOUNT (\$USD)	0	US\$54,094 <sup>15</sup>

<sup>10</sup> Represents the number of defendants convicted in 2004, regardless of when such criminal cases were commenced.

<sup>11</sup> Represents the number of cases pending in 2004, regardless of when such criminal actions were commenced.

<sup>12</sup> Represents the number of civil complaints filed during 2004.

<sup>13</sup> Represents the number of post search actions in 2004, regardless of when such cases were commenced.

<sup>14</sup> Represents the figure of the total losses (not actual losses) as stated in the civil complaints filed in 2004.

<sup>15</sup> Represents the total amount for which judgments were rendered in the year 2004, regardless of when the cases were commenced.

## **Effective criminal enforcement continues to be hindered by numerous procedural hurdles.**

The government in Taiwan must continue to work to solve the 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;<sup>16</sup> continued challenges to powers of attorney (POAs) and copyright ownership of U.S. right holders in court (though this situation has improved for some industries) and in raids;<sup>17</sup> raiding authorities' failure to seize all pirate product and tools and implements used in piracy;<sup>18</sup> and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids.

## **PASSAGE OF CORRECTIVE AMENDMENTS TO THE COPYRIGHT LAW IN AUGUST 2004 WAS A MAJOR POSITIVE STEP; HOWEVER, FURTHER AMENDMENTS ARE NEEDED, AS ARE AMENDMENTS TO THE OPTICAL MEDIA LAW**

In June 2003, effective July 2003, Taiwan's Legislative Yuan (LY) failed to adopt certain key recommendations made to it by the Executive Yuan (EY) and passed a number of copyright law amendments that either failed to advance protection and enforcement or significantly undermined it. For example, the LY

1. eliminated provisions recommended by the EY preventing the circumvention of technological protection measures which are critical to safeguarding transmission of content on the Internet and trading in digital products, like DVDs, videogames and business software;
2. eliminated a provision allowing Customs authorities to act *ex officio*;
3. decriminalized certain activities which were criminal under the prior law and established unnecessary and unreasonable thresholds to what is a criminal activity for other acts;
4. eliminated provisions that established minimum penalties and included provisions that would permit judges to impose only fines and not jail time.

---

<sup>16</sup> 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.

<sup>17</sup> The publishing industry continues to experience these problems in some districts, particularly Tainan District, where five cases were dismissed in 2004 due to unjustified POA and ownership issues. Due to the industry practice of publishing under a number of different names or "imprints," especially after mergers, publishers have been asked to provide certified copies of merger documents in order to show ownership of imprints that don't match their company name. Affidavits should suffice, but do not.

<sup>18</sup> 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.

Through the extraordinary efforts of the EY, through MOEA and TIPO, the LY, in a short August 2004 special session, was persuaded to adopt amendments correcting many of the deficiencies in the June 2003 amendments. While it had been hoped that the EY version of the provisions covering the issues noted above would be adopted, the LY made certain changes which, while not what industry or the USG had asked for, substantially followed the EY's recommendations. The notable exception to this conclusion, referring to point 4 above, is that the LY did not change the provisions eliminating most minimum penalties and did not restore many of the provisions which would have required jail time. In general, however, particularly when viewed in the light of TIPO's explanation of some of the amendments more controversial provisions, IIPA views these amendments as positive. The following are the highlights of the 2004 amendments, along with concerns that remain:

1. Protection for TPMs was reinserted even though the provision differs from the EY Bill's version in that additional exceptions are created, applying to both acts and trafficking in devices and services, without statutory standards. TIPO has indicated that it intends to follow the DMCA in fashioning, in interpretations or regulations, the scope of the exceptions. This will require careful monitoring to ensure that exceptions are kept narrow and that they do not apply to devices and services. Both civil and criminal liability attaches.
2. The "intent to profit/no intent to profit" distinction was completely removed and the structure returns to that in the EY Bill.
3. The amendments restore the EY Bill's version of the exception for temporary copies.
4. The last paragraph of Article 26 (old Article 26.4) mandating that performers share in royalties with record producers regardless of contracts was removed.
5. The amendments restore the right of Customs to act *ex officio* but with the addition of statutory timetables, which IIPA hopes will not be prejudicial to some copyright industries and companies.
6. The amendments restore most of the criminal penalty provisions of the EY Bill. However, the EY Bill had mandatory minimum fines and jail terms for various offenses. Few of these were retained in the new law as amended in August 2004.
7. While TIPO fortunately maintains that an amendment to Article 91 *bis* continues criminal penalties for the sale or rental of parallel imported products (the act of importation itself is not criminal, however, based on the 2003 LY amendments), such remedy, even for OD products, must be commenced with a complaint (e.g., the offense is not a public crime).
8. The amendments remove the knowledge test from the provision of Article 87 dealing with civil liability for end user software piracy.
9. At the last minute, a provision was added to Article 91 stating that personal copying and acts deemed fair use are "not infringements." This provision remains of great concern, even though TIPO, in an administrative interpretation, states that this adds nothing of substance to existing law.

On December 2, 2004, TIPO issued its promised “interpretations” of the new amendments to guide judges, enforcement officials and the public. Upon review, many of the concerns IIPA had initially noted about the amendments were removed based on these interpretations.

IIPA continues to remain concerned, however, that the weakened criminal penalties will send the wrong message and that Taiwan may slip again into a situation where pirates do not receive deterrent sentences, and particularly do not receive jail time in cases where this would be the only means to deter the type of organized criminal activity which has characterized the piracy landscape in Taiwan.

At the same time that the LY adopted these amendments, it instructed TIPO to draft guidelines on educational fair uses. TIPO has stated that the guidelines will be based upon the U.S. “Guidelines for Educational Uses of Music”, “Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes” and “Fair Use Guidelines for Educational Multimedia,” as well as Hong Kong’s “Guidelines for Photocopying of Printed Works by Not-for-Profit Educational Establishments.” TBPA provided background materials to TIPO as it was engaged in preparing draft guidelines and the public and industry were permitted to provide comments on the initial draft. We now await further drafts and opportunities to engage on these issues.

While these amendments are welcome, Taiwan’s task of upgrading its copyright law to modern standards is still not complete. As IIPA has noted previously, the law must be amended to clarify the secondary liability of ISPs and should contain a statutory notice and takedown regime which is effective and provides incentives for ISPs to comply, both with respect to traditional websites and FTP sites but in the new P2P environment as well. The term of copyright protection should also be extended to 70 years *post mortem auctoris* and to 70 years at least for sound recordings and other works of juridical entities.

As we noted in our November submission on Taiwan’s OCR proceeding, IIPA greatly appreciates the efforts made by Director General Tsai, Deputy Director Jack Lu, and Ms. Margaret Chen to achieve the passage of these corrective amendments.

## **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). 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 brought 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 “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. Failure to obtain a permit, the unauthorized manufacture of “pre-recorded 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 pre-recorded 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 weakened 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 "pre-recorded" discs (which under the EY bill would be mandatory after the first offense) is possible only after a third offense (and a failure to cure),<sup>19</sup> 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.

## **Some of the key deficiencies in the Optical Media Management Statute that must be addressed in amendments**

- **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);

---

<sup>19</sup> For example, even after a third offense, 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 offense 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.

- 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 (Article 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, have informally indicated that they 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 in an earlier iteration; the newest version will be provided in the near future.

To date, we understand that 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 apply the full licensing requirement to plants producing blank CD-Rs, to strengthen the authority to seize and forfeit all equipment used in the production of pirate OD product, and to adopt a registration requirement for those that engage in the commercial burning of CD-Rs, DVD-Rs etc. 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.

**THIS PAGE LEFT BLANK INTENTIONALLY.**