

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA submits this Special Mention report primarily to highlight two issues on which Taiwan government needs to take immediate action. On January 16, 2009, Taiwan was removed from the Watch List (for the first time since 1998) in recognition of the effective job that that government has done in curbing piracy. However, in addition to Taiwan taking action on the issues highlighted in this report, the U.S. government must continue to monitor Taiwan's copyright and enforcement regime to ensure that this commendable record is maintained.

**Executive Summary:** While Taiwan has done a good job in forging an effective and deterrent enforcement regime in most areas, piracy issues remain, including high levels of Internet piracy to which this submission is principally addressed, and the continuing need to maintain aggressive prosecutions against end-user piracy of software, against physical piracy generally and against book piracy around college campuses. The key issue now is to ensure the proper implementation of the new ISP law adopted in April 2009 and the TIPO regulations adopted on November 17, 2009 by rights holders and ISPs.

On January 12, 2010, the Legislative Yuan adopted legislation dealing with collective management organizations. That legislation continues to provide overbroad authority to TIPO to fix tariffs for the broadcast of music and sound recordings and continues to allow delays in fixing a tariff and interferes with the ability of rights holders to collect royalties. Another amendment to Article 37 of the copyright law withdraws the ability of rights holders to pursue criminal remedies unless they are members of a collection society. These amendments should be further modified to favor a freer market approach and to remove delays and other deficiencies.

IIPA urges the U.S. government to continue to monitor other issues in Taiwan, including more aggressive enforcement against Internet piracy, end-user piracy of software, piracy of physical product, including entertainment software, and against illegal photocopying of textbooks around university campuses. IIPA again commends the Ministry of Education for its action in dealing with filesharing by students on TANet and other commercial ISPs, but hopes that the same vigorous approach will be extended to other ongoing infringing activities on campus, such as unauthorized photocopying occurring on university campuses. IIPA also urges Taiwan to adopt anti-camcording legislation, to make Internet piracy a public crime and to extend the term of protection for copyright material.

**Priority actions to be taken in 2010:** IIPA requests the following actions by the government of Taiwan, which, if taken, would result in the most significant commercial benefits to the copyright industries:

### Enforcement

- Continue aggressive and deterrent enforcement against piracy generally and particularly against piracy on the Internet, end-user piracy of software, against illegal photocopying of textbooks during peak academic copying periods and against piracy of entertainment software;
- Provide improved training and manpower to the IPR police (IPRP) and to the joint Internet infringement inspection special taskforce (JIST).

### Legislation and Related Regulatory Issues

- Issue a notice clarifying that ISPs lose all "safe harbors" under the new ISP law if they do not fully implement a policy of suspending or terminating repeat infringers;
- TIPO must become actively involved in ensuring that ISPs and rights holders negotiate an effective Code of Conduct implementing the "graduated response" obligation in the new ISP law;



- Modify new legislation on collective management to remove impediments to negotiating fair tariffs for the broadcast of music and sound recording and to collecting such royalties;
- Make Internet piracy a public crime;
- Adopt anti-camcording criminal legislation;
- Adopt copyright term extension legislation.

For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

## **PIRACY AND ENFORCEMENT UPDATES IN TAIWAN**

In 2009, piracy of physical product has continued to decrease. Taiwan is to be commended for reducing industrial (factory) OD piracy and retail OD piracy to very low levels. Enforcement in these areas and cooperation of the enforcement authorities continues to be good. However, Taiwan continues to suffer from high levels of Internet piracy.<sup>1</sup>

**Internet piracy and enforcement:** Over 67% of Taiwan's population used the Internet in mid-2009 (15.4 million users), with broadband connections representing about 75.46% of households (5.64 million).<sup>2</sup> It is the predominant form of piracy for the music and recording and the motion picture industries in Taiwan.

Both the music and recording and the motion picture industries continue to get good cooperation from ISPs in securing takedowns of infringing material in the hosted environment, but no cooperation in dealing with P2P filesharing which accounts for the vast majority of the losses to these industries. Compliance rates in the hosted environment were around 99% in 2009 for the recording industry and around 90% for the motion picture industry. These excellent compliance rates pertained even before the passage of the ISP law and should improve even more. For the music and recording industry, filesharing software services, website, and cyberlocker sites located in China pose serious problems. While FOXY ([www.goFOXY.net](http://www.goFOXY.net)) and its nominal operator were indicted in May 2009, the case remains pending in the courts. FOXY is still operating due to its server being located in the U.S. and reportedly its true operators located in China, making them inaccessible to Taiwan prosecutors. The issue still under consideration by the prosecutors is whether Article 87(7) is applicable. This is the new P2P law's provision added to the Copyright Law in 2007 which provides for criminalizing the provision of software or other technologies from which the infringer has "receive[d] benefit." and where there is an "intent to allow the public to infringe economic rights."

Two discouraging decisions in Taiwan's trial court in 2009 and 2010 resulted in the dismissal of charges of copyright infringement, twice, against the operators of the infamous website Ezpeer. The basis of the rejection - that local investigators who filed the complaint with law enforcement authorities lacked the proper legal authority to do so - has never been raised and sets a chilling precedent for online rights enforcement in Taiwan. The 2010 decision remains under appeal and both MPA and RIAA/IFPI report continuing good cooperation with enforcement authorities in raiding pirate websites and generally deterrent penalties being issued by the courts. All industries urge that this record continue.

The local recording industry reports that its newest problem is the large quantity of unauthorized music files available from the iTunes store. Cease & desist letters have been sent and discussion with iTunes are continuing.

While enterprise end-user piracy continues to cause the greatest losses to the software industry, Taiwan continues to have the second highest number of online software infringements in Asia. BSA sent out over 32,000 takedown notices through October 31, 2009. It also reports many *ex officio* raids by the enforcement authorities against sites selling software online. About 90% of the online software piracy in Taiwan occurs over P2P services.

<sup>1</sup> End-user piracy of software in businesses also increased also slightly from 39% in 2008 to 40% in 2009.

<sup>2</sup> Source: <http://www.twnic.net.tw/download/200307/96305b.pdf>; <http://www.internetworldstats.com/>

Academic publishers also report a significant growth in Internet piracy, much through the Ministry of Education's university intranet system, TANet. Unauthorized access to electronic academic and professional journals compromises legitimacy of licenses, and scanned academic texts and reference books are increasingly subject to P2P filesharing.

All industries report that the Ministry of Education (MOE) has been doing a better job at policing illegal filesharing of movies, music, books, videogames and software. It is enforcing its Action Plan through a special task force set up for that purpose. The recent problem of filesharing moving to commercial ISPs due to bandwidth limitations over TANet was the subject of a November 27, 2009 meeting of this task force, which includes representatives of the local rights holders organizations part of the Taiwan Intellectual Property Alliance (TIPA). At TIPO's request, the MOE agreed to add a regulation extending the ban on use of P2P software by these services, along with the adopting of appropriate measures to prevent P2P and BitTorrent software usage on the campus network. The industries will be monitoring the implementation of these new directives. Since the new ISP legislation also applies to TANet, the MOE has been working with industry in a positive and cooperative way.

Other forms of Internet piracy are also growing. Internet cafés have become hotbeds of piracy of both motion pictures and music.

As discussed further below, the current challenge is to fully implement the new ISP law, with TIPO's required assistance, to forge a workable Code of Conduct among ISPs and rights holders that would result in suspending or terminating the accounts of repeat infringers in the P2P environment.

**Physical piracy and enforcement:** Illegal burning of copyright content onto recordable discs is now clearly the predominant form of optical disc piracy in Taiwan, and all industries report that OD piracy has significantly diminished in Taiwan. For example, the music and recording industry reports estimated losses of **\$4.2 million** due to physical piracy and a piracy rate of **20%**. While pirate factory production is a very minor problem, due to commendable enforcement by the enforcement authorities, it is important for Taiwan to continue to monitor the plants vigilantly to avoid backsliding.

**End-user piracy of business software:** The rate of business software piracy increased by 1% from 39% to **40%** from 2008 to 2009, the first increase in many years. Losses remained almost constant at **\$112 million** in 2009 compared to \$111 million in 2008. Like other industries, BSA continues to have a good working relationship with the enforcement authorities and is able to get the cooperation of the police and prosecutor's office for end-user enforcement actions fairly promptly. Nevertheless, many of the procedural problems noted in IIPA's past submissions, continue to persist in 2009, i.e., unclear guidance on the information needed to secure a search warrant for police raids and unduly focusing on the use of informer testimony for all end-user enforcement. BSA urges TIPO to cooperate with it in helping to train prosecutors and judges in the particular intricacies and unique aspect of end-user piracy enforcement.

**Book piracy:** While cooperation with the authorities against illegal photocopying of academic material continues to go well, unauthorized photocopying (particularly of higher education and English language textbooks (ELT) remains the most damaging problem for U.S. and Taiwanese publishers in 2009. Illegal photocopying continues to occur both on or near university campuses and the industry's call for *ex officio* action by the police has generally been heeded with respect to off-campus efforts. Indeed, the Taiwan authorities have been of tremendous help to the local publishers in their efforts on IP education and awareness, as well as enforcement actions. However, law enforcement authorities remain reluctant to pursue actions against the copy shops that continue to operate on campuses. While the industry is mindful of the sensitivities that continue to surround law enforcement action on university campuses, law enforcement authorities should also begin to consider how to better address this problem. It remains the case that these on-campus photocopy shops – which are obviously commercial enterprises – continue to provide illegal photocopies of academic materials, and yet there has been little action against such copy shops. Copy shops have also grown more sophisticated in their efforts, generally not keeping stockpiles of unauthorized copies on

hand, but make them to order. Furthermore, print runs are often at night or after hours, with immediate offsite delivery to avoid detection. Advanced investigative techniques are needed and the authorities must continue to concentrate their enforcement efforts during the peak academic book-buying seasons. IIPA and AAP also call upon MOE to continue to aggressively implement its action plan with respect to book piracy. As AAP understands the current situation, the plan involves a "self-assessment" by the university as to its compliance with the MOE action plan. However, there does not appear to be an independent monitoring or audit mechanism through which the MOE conducts its own evaluation of whether the university is in fact complying with the action plan elements. This is a critical element to making an objective assessment of whether a university is undertaking the necessary steps to ensure that its various departments are addressing infringing activity occurring on its campuses. AAP also notes that online piracy, particularly downloads of scientific, technical and medical textbooks and textbooks solutions manuals, is a growing concern. Finally, it remains the case that courts tend to treat book piracy cases rather lightly, typically imposing light penalties or mere probation upon conviction. For enforcement efforts to be effective and begin to positively impact the market, the level of penalties imposed must be sufficiently deterrent. Low fines will not encourage a copy shop to stop its illegal activities but will be viewed merely as a cost of doing business.

## **COPYRIGHT LAW AND RELATED REGULATORY ISSUES**

**Implement an effective "graduated response" system for dealing with P2P piracy:** One important issue in 2010 is implementation of the provisions of the new ISP law requiring ISPs to implement a policy of terminating or suspending the accounts of repeat infringers (the so-called "graduated response," or "three strikes" mechanism) in the P2P environment. With such a mechanism in place, there is the potential to meaningfully reduce high online piracy levels.

On November 17, 2009, TIPO finalized its regulation to implement the new ISP law. These regulations dealt only with the process of notice and counter-notice and did not set out the basic parameters of how ISPs should implement the new obligation set forth in the amended Article 90*quinquies* requiring ISPs to notify its users of its copyright protection policy and to implement it.

IIPA supports Taiwan's legislation concerning a "graduated response" system by ISPs and supports the negotiation among rights holders and ISPs of an agreed-upon "Code of Conduct" to govern the operation of such a system. Despite the risk that ISPs could lose all safe harbors extended by the law if they do not promptly and fully implement a "graduated response system, ISPs have been reluctant to sit down with rights holder groups to fashion a Code of Conduct that is efficient, inexpensive and fair to rights holders, ISPs and users.

IIPA encourages TIPO to become involved directly. In its letter, TIPO notes that if rights holders "could reach agreement [on their part], TIPO would be most glad to assist the rights holders and the ISPs to arrive at a consensus at the earliest possible." After passage of ISP liability legislation, TIPA members met twice with major ISPs (all of which are members of the major ISP organization, TWIA) to seek agreement on how to address this matter. The three-strike definition and process, in particular for P2P infringement, were key issues of both meetings but no consensus was reached. Similar issues were also brought to a public hearing hosted by TIPO on June 30 but again, no concrete conclusion was reached. Recent reports from industry suggest that ongoing cooperation with certain ISPs for certain elements of cooperative enforcement may indeed be feasible. However, IIPA continues to believe that TIPO involvement is critical to completing a workable Code of Conduct among the parties.

**Copyright Examination and Mediation Committee review process must be revised; TIPO should allow commissioned agents to collect royalties:** As noted above, on January 12, 2010, the Legislative Yuan approved amendments to the Copyright Intermediary Organization Act. Those amendments do little to correct the process by which TIPO has the ultimate authority to approve the tariffs for the broadcasting of music and sound recordings. Fortunately, the amendment as passed did, however, establish a four month time limit on TIPO approval of these tariff and requires TIPO to reconstitute its special tariff setting committee to include rights holders as well as users and experts. The amendments did not allow rights holders to use agents to collect these royalties.

One of the major objectives of rights holders is to ensure that their collecting societies minimize overhead and other administrative costs while ensuring that commercial uses are licensed appropriately. In the area of public performance, these cost savings are achieved in part through the use of commissioned agents. Collecting societies around the world depend upon the use of agents to reach commercial users who publicly perform recorded music; to educate them on the need to obtain a license; and to issue relevant licenses.

In Taiwan, the producers' collecting society used to retain commissioned agents to assist in covering different geographical locations more effectively. However, TIPO's ruling from September 2008 denied the ability to continue with this practice.

The inability to use agents for licensing purposes has a direct negative impact on rights holders' licensing activities. It reduces the amount of remuneration collected and results in a large number of businesses operating without a license, denying from rights holders remuneration to which they are entitled, and undermining the rule of law. There is no justified reason to prevent rights holders from using agents for licensing and royalties collection, and the policy underlying the decision against using commissioned agents is unclear. Any concerns relating to licensing practices can be addressed more effectively by e.g. establishing an industry code of conduct on public performance licensing. Such agreed set of rules would ensure that the system is not abused and that users' interests are maintained.

Neither should rights holders of different categories be obliged to collect royalties together through a single society. The provisions granting TIPO authority to designate a single licensing window and set a joint tariff rate cannot be justified (Article 30 of the recent amendment of Copyright Intermediary Organization Act).

Experience has shown that licensing markets function effectively where rights holders remain free to find the most efficient way to administer their rights. Freeing the market from any restrictions means that competition between different players in the market is maintained, and market powers can determine the best solutions for both rights holders and users. To ensure that these conditions exist in Taiwan, rights holders should be allowed to determine for themselves which collecting society to join and entrust their rights, and whether or not to collect jointly with other rights holders. Restrictions on the ability of right owners to collectively manage their rights through different collection societies are ineffective and threaten the development of the licensing market. In particular, an obligation on all rights holders to collect their performance rights jointly would likely result in conflicts on both collection and distribution of royalties. Consequently, such conflicts would impede the proper functioning of the market and negatively impact on users' ability to obtain licenses. The majority of countries in the world leave it for rights holders to decide how to license their rights. Experience has shown that in most countries, rights holders of the same type prefer to administer their rights under one collective management organization. But their freedom to do so and to decide whether to join a particular organization, or establish a new one, should be maintained.

To ensure that the conditions for the development of the licensing market continue to exist, no obligation to offer "single window licensing" and the joint tariff rate should be introduced. One way to address the concerns relating to the large number of societies would be to require rights holders of the same category of rights to administer their rights through one collecting body. This solution can be implemented on a temporary basis for a limited period of time, following which evaluation of its effectiveness can be made.

**Amend the Criminal Code to make Internet piracy a "public crime":** In 2003, Taiwan designated as "public crimes" all offenses related to OD piracy, obviating the need for a rights holder complaint and giving a push to the police undertaking raids directly when piracy was discovered or where it turned up in an investigation. This had an immediate and favorable impact on OD piracy in Taiwan. Given the vast increase in Internet piracy and its damaging impact on the legitimate market in Taiwan, plus the even greater difficulty for rights holders to unearth these crimes, Taiwan's criminal provisions should now be further amended to include Internet piracy as a "public crime." Rights holders would, of course, continue to work closely with enforcement authorities as they continue to do with OD piracy,

but this added ability to react quickly and decisively to piracy on the Internet, is of critical importance if this growth is to be contained.

**Taiwan should adopt an anti-camcording criminal provision:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to pirate “dealers” throughout the world and over the Internet. Taiwan should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

**Term of protection:** The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and to 95 years from publication for sound recordings and other works of juridical entities.