

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report on Taiwan 1) to raise significant concerns over growing Internet piracy in the market and the failure of the Taiwanese government to implement measures in place which could help combat this problem and foster greater cooperation among ISPs, and 2) to raise other significant copyright piracy and enforcement concerns which, if not addressed, should lead to re-listing Taiwan on the Special 301 Watch List.¹

Executive Summary: Internet piracy remains the most urgent problem in Taiwan, and the emergence of “media box” piracy, consisting of set-top boxes by which Taiwanese are infringing copyright, and the position taken by the Taiwanese government that the “media box” is legal (notwithstanding that its manufacturers in China do so knowing the device is predominantly used to infringe), has raised a significant new concern. Commercial photocopying of textbooks on or around university campuses remains rampant. The Taiwanese government, which once took a serious attitude toward copyright piracy, has allowed the problem, particularly in the online environment, to once again spiral out of control. We remain deeply concerned that ISPs and couriers (shipping the “media boxes” or hard discs with infringing content) do not take any responsibility or cooperate with right holders trying to protect their rights on the Internet or at the borders. This attitude seems to reflect that of the government. Meanwhile, police and prosecutorial turnover means new officers have little awareness of copyright infringement cases or investigative techniques and needs, although we note positively the establishment of the Taiwan High Prosecutors’ Office, Intellectual Property Branch, deployed with 15 prosecutors as the counterpart of the Intellectual Property Court. Judges generally view copyright piracy as a minor offense, so most criminal cases recently have resulted in suspended sentences or “suspended indictments.” There were great hopes after passage of the ISP liability law in April 2009 and Taiwan Intellectual Property Office (TIPO) regulations adopted in November 2009 that the government would begin addressing P2P and other online infringements in a more serious way, but the law remains dead letter, thereby stifling right holders’ abilities to leverage much-needed cooperation from ISPs in combating online infringements.

PRIORITY ACTIONS REQUESTED IN 2013

Enforcement Issues

- Fully implement the ISP liability law to provide an effective remedy against Internet infringements, including holding ISPs responsible if they do not have and implement a termination policy for repeat infringers. Consider new measures to deal with foreign websites infringing copyright in Taiwan.
- Improve enforcement against illegal photocopying on and near university campuses, especially during peak academic periods when unauthorized copyright is rife.
- Ensure IP courts hear first instance infringement cases for most types of copyright infringement cases, and introduce compulsory Internet, software, and other copyright infringement investigation trainings for judges and prosecutors.
- Streamline the enforcement processes among Taiwan Customs, and reduce bureaucracy and red tape so as to speed up copyright infringement prosecutions initiated by them.
- Ease process of obtaining search warrants by relaxing evidence collection and burden of proof hurdles.
- Confirm that Intellectual Property Rights Police (IPRP) merger into criminal force will not dilute its IPR enforcement efforts.

¹For more details on Taiwan’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.



- Ensure IPRP and Joint Internet Infringement Inspection Special Taskforce (JIST) have adequate manpower, equipment, and training.
- Increase the award budget for IPR cases, and ensure that awards are available for Internet-based infringement cases.
- Encourage legalization of pay-TV market.
- Reinvalidate Customs' response times to deal with infringing materials at borders; swiftly forward such cases to prosecutors.

Legislative Issues

- Pass amendment deeming crimes involving copyright infringements, including Internet infringements, public crimes to facilitate *ex officio* enforcement.
- Adopt administrative guidelines clearly detailing and implementing the ISP liability provisions of the copyright law to provide an effective and fair mechanism to address Internet infringement, including clarifying that ISPs lose all "safe harbors" under the new ISP Law if they do not have and implement a termination policy for repeat infringers. In addition, pass amendment to provide a more effective remedy against websites fostering massive infringements of copyright; remedy should ensure a fair and effective mechanism to disable such activities.
- Outlaw "media box" piracy.
- Amend the Copyright Collective Management Organization Act to remove unacceptable provisions denying use of agents, empowering TIPO to set a "joint royalty rate," and appointing a "single window" for collection.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.
- Pass copyright term extension.

Market Access Issue

- Cease setting price ceiling on pay-TV subscriptions.

PIRACY UPDATES IN TAIWAN

Internet Piracy Worsens in Taiwan: Over the past several years, industry has noted an increase in the severity of Internet piracy with increased Internet and broadband penetration,² particularly in the use of deeplinking, P2P,³ BitTorrent, blogs, and "one-click hosting," to infringe copyright in movies, music, software, games, and books and journals.⁴ People in Taiwan often obtain unauthorized content from websites located overseas, particularly websites located in mainland China (due generally to their preference for Chinese language interfaces), such as *youtmaker.com*, *verycd.com*, Xunlei's Thunder (*xunlei.799.com.tw*), *streamdrag.com*, *1ting.com* and *1g1g.com*. The music industry roughly estimates Internet piracy in 2012 at 85% (only slightly down from 88% in 2011) with US\$130 million in estimated losses due to online piracy.⁵

"Media Box" Piracy – A Rapidly Emerging Threat Requiring an Equally Rapid Response: A newly emerging problem throughout Asia is "media box" (set-top device) piracy, in which a user connects illegal sites to stream or download illegal content through the box. This phenomenon is the fastest growth Internet-based piracy in

²Mag Chang, *Internet Use Hits All-Time High in Taiwan*, Taiwan Today, July 10, 2012, at <http://taiwantoday.tw/ct.asp?xItem=193241&ctNode=413>. The article reports that the number of Taiwanese Internet users over the age of 12 reached an all-time high of 15.94 million in May 2012, accounting for more than 77% penetration, according to the Taiwan Network Information Center. More than 12 million of those, or 74.18%, use broadband and 80% of all households have broadband. More than 47% of users are engaged in online gaming.

³For example, IIPA cited *Xunlei*, a Chinese site, in its 2012 Notorious Markets recommendations, as did an IIPA member. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf.

⁴Over 16.1 million Taiwanese use the Internet, or 70% of the population. An astonishing 95% of Internet users in Taiwan (roughly 15 million) have broadband connections, whether wired or wireless. See Budde.com, *Taiwan - Broadband Market - Overview, Statistics and Forecasts*, at <http://www.budde.com.au/Research/Taiwan-Broadband-Market-Overview-Statistics-and-Forecasts.html>.

⁵The physical piracy rate for sound recordings in 2012 was an estimated 11% with US\$7 million in estimated losses. These numbers are accompanied by an uptick in the digital music market of 35% year-on-year through the first half of 2012 and 21% decrease in physical music market (the latter being due to economic recession). Digital sales now make up 23% of the market in Taiwan, up from 17% in 2011. Physical pirate OD products in Taiwan are distributed mainly through home delivery (pirate product catalogues are either dispatched to consumers' doorsteps or available on the Internet).

Taiwan (and is a noted phenomenon throughout Asia). The boxes originate in China, and various kinds of boxes are available all throughout Taiwan, including at so-called “3D” shops that sell computers, software, and peripherals. There are generally understood to be three different types of device: 1) a device that can directly connect to foreign sites (again, these sites are virtually all located in China); 2) a device with a hard disc to store downloaded contents; and 3) a device with an SD card which helps novices connect with the foreign site. Virtually all the foreign websites to deal with these boxes are operated in China, so there is no language barrier for local Taiwanese users.

Book Piracy Continues Causing Harm to U.S. Publishers: Illegal photocopying of books and journals on or near university campuses causes great harm to the U.S. publishing industry. Publishers find numerous instances of unauthorized photocopying by campus photocopy centers and the majority of students using illegally photocopied texts in the classroom. Unauthorized photocopying (particularly of higher education and English language textbooks (ELT)) remains the most damaging problem for U.S. and Taiwanese publishers. There have been instances where the photocopy shop delivers cases of illegal copied textbooks to the campus mail room, and being unable to locate the intended recipients, the mail room actually delivered the pirated copies to the publishers (apparently relying on the publisher logos on the covers). Online piracy, particularly of textbooks and password-protected material, is on the rise in Taiwan, being made available mainly from servers/sites in China.

Software Piracy Remains Below Average, But Still Harms Right Holders: Software piracy, including the unlicensed use of software by enterprises, continues to cause losses to the software industry, notwithstanding that the rate of piracy has steadily dropped over the years. Currently, the piracy rate sits just below the world average at 37%, with a commercial value of unlicensed software in Taiwan of US\$293 million (an increase from prior years as the overall size of the software market continues to grow).⁶

Signal Theft: Taiwan remains a territory replete with piracy of pay-TV content. As of September 2011, there were a recorded 5.09 million cable TV subscribers (a penetration rate of 63%) in Taiwan, but Nielsen and other reputable third parties consistently record far higher numbers of people who watch pay-TV at home, possibly as many as 95%, according to the industry group Cable and Satellite Broadcasters Association of Asia (CASBAA). This is likely due to a combination of piracy by individuals or buildings (combined with Taiwan government inaction) and under-declaration by local, independent cable operators. In either case, content owners do not end up receiving fair compensation for the number of consumers actually viewing their programs in Taiwan.

ENFORCEMENT UPDATES IN TAIWAN

Despite a couple of continued bright spots⁷ or areas of continued cooperation,⁸ the enforcement situation in Taiwan has deteriorated in the past several years to the point that, without some signs of positive change, IIPA members will consider recommending that Taiwan once again be placed back on the Special 301 Watch List.⁹

⁶BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Taiwan was 37%, representing a commercial value of unlicensed software of US\$293 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁷For example, due to continued cooperation with law enforcement authorities, hard goods piracy is rarely seen on the streets in Taiwan. As another bright spot, we understand that recently, the Investigation Bureau of Ministry of Justice (MJIB) has appeared more proactive on dealing with copyright infringement, showing an interest in copyright infringement cases (as opposed to only high profile/high value cases such as those involving organized crime or drugs). MJIB representatives participated, along with the local motion picture anti-piracy group, Taiwan Federation Against Copyright Theft staff, in a forum on cross-straits copyright infringement organized by TIPO and the Chinese Plate Right (Copyright) Association and coordinated with TFACT representatives thereafter, resulting in an MJIB investigation and raid in November 2012 against a “media box” manufacturer, Chuan Xi Fu. In January 2013, MJIB again coordinated with TFACT and undertook enforcement against an Internet forum site distributing unauthorized content.

⁸BSA continues to report good working relationships with the IPR police. BSA Taiwan filed five criminal complaints against corporate end-user targets in 2012. In addition, there were many raids initiated by enforcement authorities against targets for selling software over the Internet, and BSA was requested by the enforcement authorities to assist in inspecting illegal CD-Rs or CD-ROMs for eight such Internet piracy cases. Microsoft reports also receiving calls from Customs to inspect suspicious Xbox game titles.

Internet Piracy Not A Public Crime, Thus Results Are Non-Deterrent: Despite some signs of progress in dealing with Internet piracy, including the *EZPeer* conviction in early 2011, by 2012, enforcement against Internet-based piracy activities had become an afterthought on the part of the Taiwanese government. The recording industry reports that 68 Internet-piracy criminal cases were filed between January and November 2012, and 20 (including 10 juvenile) out of 68 cases resulted in judgments. Only three convictions resulted in a prison sentence served (the remainder of those resulting in prison sentence being suspended). Forty-eight cases remain pending. In addition, in digital piracy cases, the ratio of suspension of indictments is high, at 80% (12 of 15) in 2011 and 70% (7 of 10) from January to November 2012.

To address the growing problem of Internet piracy, the Copyright Act should be reformed so that Internet-based piracy is deemed a public crime. Through this change the Taiwanese government can be made to take the serious steps needed to address online infringements in the market, including through *ex officio* enforcement actions. In the absence of this change, police officers, prosecutors and judges have been reluctant to take on the issue of Internet piracy in Taiwan. The numbers of Internet piracy cases are few and dependent on right holder complaints. Of course, from the start, right holders have no right to access to the identification/information of the infringers. Such information can be obtained by police officers, but right holders may only get such information after they have filed a criminal complaint, thus, a Catch-22 situation ensues. Even when right holders have submitted sufficient materials, due to lack of knowledge of Internet technologies, prosecutors and judges have at times not been able to understand the Internet piracy claim. In other cases, prosecutors cannot get approval from the judge for a search warrant due to the judge's insufficient knowledge of Internet-based infringements. Few prosecutors understand the seriousness of Internet piracy, and right holders report that after the recent reshuffle within the prosecutor's office, newcomers to the office have shown even less interest in copyright issues. Right holders are also being pressed by prosecutors and judges to settle such cases.

No steps have been taken by the Taiwanese government to take the necessary steps to achieve full implementation of the ISP liability law. That law held out hope that the Taiwanese government would provide an effective remedy against Internet infringements, including holding ISPs responsible if they do not have and implement a termination policy for repeat infringers. In addition, we urge the Taiwanese government to consider new measures to deal with foreign websites infringing copyright inside Taiwan. In the absence of this legal framework, right holders have had little choice but to attempt takedowns of hosted infringements through cease and desist letters. In this, the industries have been successful in the hosted environment. For example, the recording industry reports over 13,365 C&D letters in 2011 and 12,386 up to November 2012, with a takedown rate against unauthorized music on a hosted website at over 90%. The motion picture industry reports similar success with a 75% takedown rate for major U.S. motion pictures, and relatively fast takedowns.

The situation is bleak, however, when dealing with non-hosted infringements. It is here that the vacuum in leadership in TIPO is most strongly felt, since the legislative framework was supposed to foster ISP cooperation, yet, ISPs are extremely reluctant to cooperate in dealing with non-hosted infringements. In June 2012, after more than a couple years' urging, TIPO finally initiated a meeting between right holders and major ISPs to discuss the long-absent "code of conduct" for ISPs to implement the provisions of the ISP liability law, and to deal with right holder notices of non-hosted infringement and report such to the alleged infringers. Only one ISP, HiNet (the ISP division of Chunghua Telecom), agreed to receive notices, and then only proposed five notices per month. The Taiwanese government must address this problem swiftly and encourage all players to deal more effectively with the growing Internet piracy dilemma in Taiwan. Otherwise, the problem will grow out of control, harming right holders and creating a more significant trade irritant with the United States. We note that TIPO has essentially dropped the ball since passage of the ISP liability legislation. As control of ISPs falls within the jurisdiction of the National Communication Commission (NCC) should now get involved by ensuring full implementation of the ISP liability legislation. Right holders would welcome a meeting immediately with NCC, ISPs, and TIPO to forge a meaningful path forward.

⁹ Even though physical piracy is not the problem it once was, it is somewhat telling that even enforcement against physical facilities is way down. According to the local recording industry's records, there were 22 physical piracy cases in 2011, but only 8 physical piracy actions through November 2012. In each year, there was only one successful raid against a piracy burning lab, according to the industry.

Enforcement Against Book Piracy Ineffective, Needs New Approach and Recognition of Seriousness of the Problem: Over the years, IIPA has urged the Taiwanese government to implement effective approaches to legalization of the use of published materials, particularly on or around university campuses. Just as we have urged, the Taiwanese government has remained steadfastly reluctant in its approach to dealing with universities, perhaps fearing the political backlash associated with enforcing copyright and imposing the costs for legitimate books on students. In 2012, the situation did not improve, and requires a new approach. The Taiwan Border Protection Agency conducts copy shop raids twice per year with little result, but this has apparently led the Ministry of Education (MOE) and the Ministry of Justice to conclude that such piracy is not a major concern. MOE is not taking any other effective steps to combat piracy on university campuses and blocks third-parties from investigating piracy on campus. In 2009, MOE prepared an action plan which covered illegal photocopying of academic books and journals. The plan involved a “self-assessment” by each university as to its compliance with copyright laws. However, there is no 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. 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. The plan must be fully and effectively implemented to prohibit illegal photocopying and use of unauthorized materials on campus, backed with sanctions for violations. Universities should also be required to build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those caught engaging in infringing conduct, including lease termination.

IP Courts Should Hear First Instance Criminal Copyright Cases, Expand Influence, Expand Trainings of Judges and Prosecutors on Internet Copyright Issues: The specialized IP Courts in Taiwan, which began hearing cases at the appellate level in criminal cases for both copyright and trademark infringement in July 2008, have handed down some important decisions in the past, but are in need of some reworking. Most right holders believe that the courts should also have jurisdiction for first instance criminal copyright cases, but some believe that the IP Court judges require further training, as they generally view copyright infringements as petty offenses. In the meantime, judicial enforcement of copyright in the regular courts has also not been satisfactory, as judges either suspend indictments or try to convince victims to settle. Second, these lower court judges also traditionally treat copyright infringement as a minor crime, and have rarely delivered deterrent sentences. Third, the IP Courts and Prosecutors’ offices should be better funded. Fourth, learning seminars should be launched for specialized IP judges and prosecutors on various forms of piracy, with a focus on Internet piracy, enterprise end-user software piracy, and book piracy, and forensic and investigative techniques and issues related thereto.

Ease Process of Obtaining Search Warrants by Relaxing Evidence Collection and Burden of Proof Hurdles: Certain industries continue reporting difficulties in obtaining criminal search warrants due to burdens imposed upon right holders by courts regarding evidence collection and onerous burdens of proof.¹⁰ TRIPS requires a presumption of ownership of the copyright matter if the name of the right holder appears in the usual manner. The software industry reports that some courts find informant testimony insufficient proof, asking for additional evidence such as screen shots to prove the target is using illegal software. Publishers also note a lack of consistency with respect to the evidence prosecutors consider sufficient to proceed with a criminal case. In addition to the actual pirated copy, copyright holders are often asked to produce, for instance, detailed receipts with book titles and ISBNs, audiovisual recordings of the crime in progress, names of witnesses, etc. Where the pirated copy is only a portion of a book rather than the entire book, it is also often dismissed as inconsequential and the prosecutor will refuse to use the information to apply for a search warrant.

Confirm that IPR Police (IPRP) Merger Into Criminal Force Will Not Dilute Its IPR Enforcement Efforts: The IPRP Unit’s establishment was a contributing factor in Taiwan being removed from the Special 301 list several years ago. Right holders remain deeply concerned by reports that this Unit’s officers are being stripped of their motivation to engage in IPR enforcement. One indication of this is the planned merger of IPRP into the general criminal police. The IPRP is currently set under supervision of the Special Police Second Headquarters (SPSH) of

¹⁰Search warrant are obtained based on the rules set forth in Sections 128 to 153 of Criminal Procedure Law. According to those Sections, a search warrant and seizure order may be granted upon the application of a copyright owner by the review and approval of a prosecutor and a judge. The search warrant and seizure order once granted shall be executed by a judge, a prosecutor, assistant prosecutor, or police officer.

the National Police Agency (NPA) within the Ministry of the Interior (MOI) deployed with 167 police officers. The SPSH, in order to raise the morale of IPRP officers and attract more outstanding officers to join IPRP, has proposed that IPRP's officers be characterized as criminal police. This characterization will make it easier for them to obtain future promotions. Both the IPRP and SPSH insist there will be no change in their duties as a result of this re-characterization. It is predicted the process will be completed in early 2013. IIPA remains concerned since apparently the Unit will now be responsible for other crimes, possibly including homicide. The Taiwanese government must ensure that copyright infringement cases retain the same priority and earn for the officer the same credit toward promotion as other criminal cases, so that IPRP officers who run anti-piracy actions will not feel at a disadvantage with regard to promotions and career advancement opportunities.

Decreasing Budgets = Decreasing Impact for IPRP and Joint Internet Infringement Inspection Special Taskforce: Along with the above impact of IPRP re-characterization is a troubling trend of de-emphasis on copyright enforcement. This is evidenced in 2012 by a decreasing number of overall raids.¹¹ The IPRP was authorized to have 220 officers available for enforcement duties, but presently only has 167 personnel; the additional 53 officers are urgently needed. In TIPO and the Ministry of Economic Affairs (MOEA) "Implementation Plan for Strengthening Internet Infringement Preventive Measures," the Joint Internet Infringement Inspection Special Taskforce (JIST) was given the exclusive responsibility for tackling Internet piracy, but its potential has never been realized. JIST was supposed to be comprised of selected personnel with expert knowledge in computers, IT, and technology from the IPRP, but JIST officers are mostly new college graduates who are working there as a substitute for military service. Thus, the Taskforce effectively serves as a training camp. In addition, due to the promotion and transference rules in police system, many good JIST hands have been transferred to other departments, with their successors mostly being inadequately trained. IIPA has called for this unit to be provided greater manpower, more and better equipment (including better broadband connections and computers) to investigate Internet infringements, and more training opportunities on investigation techniques in detecting and enforcing against growing online forms of infringement. Unfortunately, in 2012, JIST did not receive increased resources, and in fact, overall, IPRP's and TIPO's budgets were actually cut by 10%.

Reduction in Award Budget, and No Awards for Internet Piracy Cases: To add to the problems, IIPA understands that TIPO cut the anti-piracy monetary awards payable to IPRP to NT\$3.5 million (around US\$120,000) in 2012, compared to NT\$5 million (around US\$170,000) in 2011 and NT\$20 million (US\$680,000) several years ago. This has severely affected IPRP officers' morale and their willingness to combat copyright piracy. Further, given the serious damage being caused by Internet piracy in Taiwan, IIPA recommends once again that TIPO provide an award budget for Internet piracy cases. Unfortunately, in 2012, TIPO decided not to give any award with respect to Internet piracy cases which do not involve confiscation of physical equipment/devices used for such infringing activities. Yet, as is well understood, Internet-based cases in many cases will not involve seizure of physical goods, equipment, or devices, since the nature of Internet anti-piracy operations is to disrupt the flow of infringing activities, which in many cases are de-centralized to begin with and do not revolve around a single piece of equipment or device. Further, TIPO will not even grant awards for digital files (music, movies, software, etc.) stored in confiscated computers seized in Internet-based piracy enforcement actions.

Encourage Legalization of Pay-TV Market: The Taiwanese government should take steps well within their power to repress the phenomenon on pay-TV piracy, whether it results from individual piracy or commercial fraud. During late 2009, legislators sympathetic to our piracy concerns proposed legislation to make individual theft of cable service a criminal offense. This bill should be reintroduced and enacted. Second, the government should impose improvements in auditing and oversight so that copyright owners are paid based on proper declarations of numbers of subscriptions.

Customs/Aviation Police Bureau/Prosecutor Must Work in Tandem Regarding Infringing Discs at Border: In Taiwan, Customs is responsible for inspection of optical discs which are sent through it and contain infringing copyright works. After Customs confirms such discs contain infringing works, the case is transferred to the

¹¹According to IPRP's statistics, there were 2,243 cases (699 copyright cases and 1,544 trademark cases) in 2011; and 2,567 cases in 2012 (692 copyright cases and 1,875 trademark cases) in 2012.

Aviation Police Bureau for investigation and transferred to a prosecutor thereafter for criminal referral. Unfortunately, the system is not working as intended. Customs agents in Taiwan are public servants, with no judicial authority power to conduct seizure or search. Because of Customs' limited power, the APB and prosecutors' office are involved, but this has led to lukewarm involvement of Customs, leading to non-cooperation between Customs and APB, and lack of transferrals to Taiwan Prosecutors. In some cases, transferring a clear-cut case of infringement at the border has taken upwards of two years. In addition, the number of overall cases referred by Customs in the past year has reportedly decreased by more than half for one major software company. The TRIPS Agreement requires Taiwan to have a mechanism in place for applications to detain suspected pirated goods, and to provide generally for expeditious remedies

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Taiwan is governed by the Copyright Act, amended through 2010. The Act provides a sound legal framework, including important revisions confirming liability of those who encourage copyright through P2P and like services in 2007,¹² and ISP liability amendments in 2009 intended to deal with non-hosted infringements in the online environment. At the same time, some significant regulatory gaps remain, particularly with respect to implementing the ISP liability amendments imposing a duty on ISPs to have in place and implement a fair and effective repeat infringer policy. It is critical that TIPO urgently set to the task of issuing administrative guidelines for implementing the ISP liability provisions of the Copyright Act.¹³ In February 2011, TIPO commenced a three-year process to amend the Copyright Act and reportedly plans release of a draft amendment before the end of 2013. From February 2011 to January 2013, TIPO held 26 internal meetings for discussing and proposing draft amendments. While no draft has been released for comment, from meeting minutes posted on TIPO's website, some concerning legislative developments seem to be emerging, including expanding the scope of "fair use" and adopting "neighboring rights" which would weaken copyright protection for sound recording copyright holders, among other changes.¹⁴ IIPA urges the drafters to carefully weigh its multilateral commitments as well as the potentially harmful commercial effects any changes may have, particularly in this delicate moment in which Taiwan's system is being further refined to address severe and growing online infringements.

The Taiwanese government should also take up the following with priority in 2013.

Amend the Criminal Code to Deem Piracy, Including Internet Piracy, a "Public Crime": In 2003, Taiwan designated as "public crimes" all offenses related to optical disc (OD) piracy, obviating the need for a right 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, and bolstered the legitimate markets for copyright materials. Given the vast increase in Internet piracy and its damaging impact on the legitimate market in Taiwan, plus the difficulties right holders have had in the Taiwanese market investigating Internet infringements, Taiwan's criminal provisions should now be further amended to include copyright piracy, especially

¹²As IIPA has reported in the past, IIPA commends the adoption of the P2P bill amending Articles 87 and 93 and adding a new Article 97-1 to the Copyright Law. The amendments would make illegal, and subject to civil and criminal liability, the provision of file sharing services with the intent to facilitate infringement. TIPO also now has the authority to close an infringing P2P service once there is a conviction. This would prevent what occurred with *Kuro*, when it continued to operate illegally after the service was convicted and while on appeal. Subsequent to this important amendment, services like *Kupeer.com* and *Hip2p.com* closed immediately, demonstrating the deterrent impact the new law appears to have had.

¹³The local recording industry group, RIT, and HiNet, the largest ISP in Taiwan, have agreed on a six-month test period for HiNet to receive notices, and in part, based on the outcome of this test period, TIPO must issue guidelines for the implementation of ISP liability provisions.

¹⁴The following were reportedly some of the suggested changes made to TIPO which would further weaken the copyright protection for sound recording copyright holders: 1) sound recordings would reportedly not enjoy any new rights; 2) a "right of re-communication to the public" would be introduced as to works but not sound recordings and performances; this right appears to be akin to a retransmission right over the Internet, and must be extended to sound recordings and performances in order to ensure that sound recordings broadcast (or otherwise communicated) or performances cannot be made freely available on the Internet without authorization or payment; 3) works synchronized in an audio-visual work (music video or film), such as musical works but excluding sound recordings and performances, would reportedly be entitled to claim a public performance right; 4) the act of renting, publicly displaying, or distributing a parallel import without consent of the right holder would be decriminalized; and 5) there has been a proposal reportedly of introducing as an exception the communication to the public of content being publicly broadcasted through household loudspeakers or other equipment. IIPA also understands that the recently amended Patent Act now no longer includes a provision on "punitive" compensation, as the Taiwanese drafters have determined such compensation is inconsistent with the notion of civil compensation. In the copyright area, there are no "punitive" provisions, although Article 88 currently provides for "pre-established" damages of up to NT\$5 million if the infringement was "intentional and the matter serious." IIPA wants to ensure that this TRIPS-compatible provision will not be altered in future amendments.

Internet piracy, as a “public crime.” Both IIPA and local industry continue to urge TIPO to make Internet piracy a public crime so this issue can be effectively addressed.

Adopt Administrative Guidelines Detailing and Implementing the ISP Liability Provisions of the Copyright Law to Provide Effective and Fair Mechanism to Address Internet Infringement: Taiwan’s passage of Partial Amendments to the Copyright Law in April 2009 was to usher in a new era in addressing copyright protection on the Internet. The amendments set forth liability standards for ISPs, specifically clarifying that ISPs lose “safe harbors” if they do not have and implement a termination policy for repeat infringers. There was hope in particular that this law, by addressing non-hosted infringements (such as P2P, BitTorrent, blog sites providing links or otherwise indirectly inducing people to infringe, etc.) would foster a new era of cooperation between right holders and ISPs to combat infringement in the online space. However, the November 2009 regulations to implement the new law, while spelling out the notice and counter-notice obligations, 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. As a result, this critical part of the law has remained essentially inoperative.

This issue was a subject of discussion at a June 2012 meeting between TIPO, TIPA, and certain ISPs but the discussion revolved mostly around a possible code of conduct for ISPs to implement the transfer of warning notices to P2P users. The outcome of that meeting has not led to satisfactory results, with only one right holder agreeing to a pilot notice period of six months with ISP HiNet, and then, for twenty notices per month. TIPO must urgently issue administrative guidelines for the implementation of the 2009 legislation, specifically with respect to ISPs implementation of their repeat infringer policies, to provide effective and fair mechanisms to address Internet infringement including in the non-hosted environment, providing greater certitude with respect to liability standards for ISPs, and fostering needed cooperation with right holders. IIPA continues to believe that TIPO involvement remains, and will continue to remain for some time, critical both to ensure the law as amended is fully implemented, and, to the extent possible, that right holders and ISPs can forge meaningful and workable voluntary arrangements to deal with the online infringement threat. IIPA also encourages NCC, which has purview over the ISPs and in many cases their parent telecommunications companies, to get involved in the discussion to forge a workable and effective path forward.

Adopt New Approach to Websites Whose Business Models Are Based on Infringement: The Taiwanese government, led by NCC, is currently in the process of drafting its Telecommunications Law. One proposal being considered is the ability to disable access to a website that engages in breaking the law. In May 2012, NCC proposed a draft amendment to Article 9 of the Telecommunication Act that if the content provided by a user of the telecommunication business violates the law, the telecommunication business may, as technologically feasible, either disable the user from using the network, remove the content, or take other appropriate measures according to a notice from the competent authority of the violation of law. NCC’s proposal did not apply to copyright infringement, and has been rejected by the Executive Yuan which requested a redraft which has not yet emerged. One possibility is that the redraft could cover copyright infringements, including those emanating from abroad. At this stage, after discussions between TIPO and NCC, NCC’s opinion is that the Copyright Act should govern such situations. The issue appears to be easier to address when concerning domestic Taiwan websites, but as noted throughout this report, many of the websites, including those servicing the so-called “media box” piracy are located overseas. An appropriate holistic approach to the problem of Internet piracy, including when the infringement is induced by a foreign website, is required to have a significant impact in Taiwan.

Prohibit “Media Box” Piracy: The Taiwanese government should clarify that “media boxes” comprised of hard drives containing infringing materials are subject to immediate seizure under the current Copyright Act. Boxes comprising of a hard disc filled with infringing content appear to raise a relatively easy case, since there would appear to be direct infringement occurring, possibly at the point of sale of the box (if not at the point of manufacture). For other categories of media box, we may need to look at the advertising of the boxes to determine if they are advertising a product to infringe copyright. We understand the devices often have to be modified at the point of sale or by the customer in order to enable them to infringe, but that the instructions for modification are provided by the

manufacturer through its website or through the point of sale. Such instructions or modification may be sufficient to show a violation, e.g., Article 87(7) of the Copyright Act. Article 87(7), para. 1 provides that a person is deemed to have unlawful intent when the “advertising or other active measures employed by the person instigates, solicits, incites, or persuades the public to use the computer program or other technology provided by that person for the purpose of infringing upon the economic rights of others.” To the extent the infringement occurs with the aid of the box, it may be argued these boxes constitute “materials and implements” the predominant use of which is to infringe copyright, and therefore they should be subject to immediate seizure upon evidence of infringement (again, likely at the point of sale). To date, the Taiwanese authorities have apparently considered such boxes to be similar in function to mini-computers and thus manufacturers and distributors are not considered to be violating the present Copyright Act as long as the device or its sellers do not encourage its use by consumers to obtain illegal content. Since the purchaser must make some small adjustments to connect to foreign websites, the manufacturers also take no responsibility for its illegal operation. We would urge the United States to engage with its Taiwanese government counterparts to enable effective action against this growing problem.

Amend the Copyright Collective Management Organization Act to Remove Unacceptable Provisions (Denying Use of Agents, Empowering TIPO to Set a “Joint Royalty Rate” and Appointing a “Single Window” for Collection): On January 12, 2010, the Legislative Yuan adopted amendments to the Copyright Collective Management Organization Act (CCMOA). The Act as amended unfortunately leaves in place overbroad authority in TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings and allows for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. The Act establishes a four-month time limit on TIPO approval of these rates and requires TIPO to reconstitute a special rate setting committee to include right holders as well as users and experts. The Act should be modified to favor a freer market approach, allowing for the use by right holders of agents to collect royalties, allowing for fairer tariff rates, and doing away with the single licensing window.

First, the Act does not allow right holders to use agents to collect royalties. One of the major objectives of right 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, a 2008 TIPO ruling denied agents the ability to continue this practice. The inability to use agents for licensing purposes has a direct negative impact on right holders’ licensing activities. It reduces the amount of remuneration collected and results in a large number of businesses operating without a license, denying right holders remuneration to which they are entitled, and undermining the rule of law. There is no justified reason to prevent right 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 sets of rules would ensure that the system is not abused and that users’ interests are maintained.

Second, most unfortunately, the tariff rates approved by TIPO are set far too low. For example, the collecting society for the sound recording industry, ARCO, proposed a tariff rate for public performances of recorded music on the subway and by rail/high-speed rail of NT\$600 (US\$20) per carriage per year, which TIPO cut to NT\$200 (US\$6.80). Similarly, the tariff rate for public performances on highway and tour buses was proposed at NT\$2,000 (US\$68) per bus per year, which TIPO cut to NT\$550 (around US\$18.50). The tariff rate for hotel rooms per year was proposed at NT\$240 (US\$8) but was set by TIPO at NT\$40 (US\$1.40). The tariff rate for shops and retail was proposed at NT\$2500 (US\$86) but was set by TIPO at NT\$1050 (around US\$36). The latter two result in losses of revenue to the music industry of nearly US\$1 million per year.

Third, the Act provides for a single society to collect royalties for right holders of different categories. Article 30 of the Act grants TIPO the authority to designate a “single licensing window” and set the joint royalty rate.

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 right holders and users. To ensure that these conditions exist in Taiwan, right 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 right 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 right holders to collect their performance rights jointly will result in conflicts on both collection and distribution of royalties. 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, right holders of the same type prefer to administer their rights under one collective management organization, but again, this freedom to decide whether to join a particular organization, or establish a new one, should be maintained.

Taiwan Should Adopt an Anti-Camcording 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. Illegal camcording destroys entire windows for distribution of audiovisual works, and camcording pirates do not discriminate between domestic or foreign films, and do not care that they are harming the local cinema businesses. Several countries in the region, as well as other previous hotspots of camcording piracy, have enacted statutes outlawing the use (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work (in whole or part). Taiwan should swiftly amend its law to address this problem which is causing increasing harm throughout the region and locally in Taiwan.

Pass Copyright Term Extension: The Taiwanese government should follow the international trend in place in over 80 countries to extend the term of copyright protection. The term should be extended to life plus 70 years, and to 95 years from publication for sound recordings and other works of juridical entities. Countries in the Organization of Economic Co-operation and Development (OECD) who have extended terms also have increased production in audiovisual materials. Extending term in Taiwan will also ensure that its older works are not discriminated against in countries which have extended term but do not follow the “Rule of the Shorter Term.”

MARKET ACCESS ISSUES

Price Ceiling on Pay-TV Subscriptions: To add injury to the ongoing harm of pay-TV theft in Taiwan, the Taiwanese government currently supports a price ceiling policy for pay-TV subscriptions which provides a disincentive for content providers to enter the market. While this situation should be changed with oncoming digitization (it should be easier for the government to support a “pay what you see” policy within a digitized environment), the Taiwanese government should ease any current price controls in this market.

TRAINING AND PUBLIC AWARENESS

As has been the history, the Taiwanese government itself, and in conjunction with right holders, have held many training and public awareness sessions over the years. Some of the Taiwanese government activities relate to encouraging legal usage of copyright materials. In 2012, TIPO once again was helpful in campaigning to urge Taiwanese government agencies as well as government-funded educational institutions to obtain necessary licenses from right holders before using copyright materials. In addition, the MOEA, TIPO, the Judicial Yuan and the Ministry of Justice provided several training programs including the following:

- Training programs by “Judicial Personnel Study Institute of Judicial Yuan”:
 - March 1, 2012, April 5, 2012, June 1, 2012, July 23, 2012, August 17, 2012, October 8, 2012, and October 26, 2012 for 30 judges, judges’ assistants and clerks (each time) on topics such as “Practices of Perpetuation of Evidence and Provisional Remedies Proceedings of IPR Civil Cases.”
 - August 8-10, 2012 for “15 judges from IP Court and 30 judges from district courts and high courts who are in charge of IPR cases” on “Study and Analysis of the Latest Copyright Infringement Cases,” “Case Study of Reproduction and Adaptation of Works” and “Analysis of Criminal Liability for Copyright Infringement.”
- Training programs by “Judges and Prosecutors Training Institute of MOJ”
 - May 21-25, 2012 for “All new judges and prosecutors” on topics such as “Perspective of IPR Case Practices,” “Analysis of Internet Infringing Cases,” “Review of Criminal Policy for IPR,” “Investigation of IPR Cases,” “Perspectives of IPRP Operation,” “Study of Copyright Legal System,” “The Role Prosecutors Are Playing in IPR cases,” and “Cross-Relation Between IPR Laws and the Fair Trade Act.”
- Training programs by MOEA /TIPO
 - May 28-June 1, 2012 for “60 police officers from economic division of local police agencies island-wide and IPR police officers” on “Practices of Investigation Against Copyright Infringing Cases,” “Criminal Investigation Against Trademark Infringing Cases,” “Practices of Investigation Against Illegal Copies,” “Practice of Identifying Luxury Goods,” “Study on Trademark Infringement,” “Exploration of Cloud World,” “Practices of Investigation Against Audio-Visual Works,” and “Practices of Investigation Against Sound Recordings.”
 - June 4-8 2012 for “60 police officers from economic division of local police agencies island-wide and IPR police officers” on “Practices of Investigation Against Internet Infringement Cases,” “Practices of Investigation Against Game-Ware Infringement Cases,” “Judgment Criteria for Unauthorized Public Performance Via Karaoke Machine,” “Practices of Investigation Against Infringements by Small-Amount Auction, Blogs and Unauthorized Transmission,” “Practices of Investigation Against Pirate CD Plants, Pirate Product Catalogues Attached to Newspapers and Company Software Infringement,” “Practices of Customs Border Controls,” “Practices of Investigation Against Pirate Computer Software,” and “Practices of Investigations Against Karaoke Infringement.”

In addition, in 2012, industry was quite active in training in Taiwan. The software industry cooperated with TIPO, the Intellectual Property Rights Protection Taskforce, Taiwanese Customs, and the MOE to provide in total 13 seminars and trainings on software and IPR protection related issues, such as how to identify genuine software and how to manage IPR in universities. The attendees included around 460 school and university faculty, 260 police officers, and 300 other government officials (IT or procurement related). The motion picture industry also conducted trainings, including one for regular police on copyright knowledge, held on May 31, 2012 (40 police attended the session), two trainings for IPR Police on copyright issues held on October 16 and 18, 2012 (80 police attended the two sessions in total), five trainings for Customs Officials on detecting illegal DVDs held on June 5, 13, 20, 26, and August 31, 2012, (300 officials attended these programs in total), and two training programs for newly drafted JIST officers on March 29, 2012 and November 8, 2012 (20 draftees to the JIST force attended the programs). The local recording industry group, RIT, also conducted a training on copyright issues affecting the record industry for a group of 40 police officers on June 1, 2012. In addition, RIT participated in two copyright educational campaigns for 250 high school students on October 9, 2012 and 150 university students on December 5, 2012. Nevertheless, more training for judges and prosecutors on Internet, software, and other IPR related infringement investigations is needed.