

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Taiwan be placed on the Special 301 Watch List.¹

Executive Summary: Internet piracy remains the most urgent problem in Taiwan. Taiwan remains without an effective mechanism to address websites, mostly foreign, whose business models are built on piracy. There is concern over the decision to reorganize the IPR Police (IPRP) into a new Criminal Investigation Brigade (CIBr) under the Second Police Special Headquarters (SPSH) of the National Police Agency (NPA), Ministry of the Interior (MOI). Equally concerning is the dismantling of the bonus systems for fighting piracy, which may also signal a weakening of the Taiwan Government's commitment to enforcement against copyright piracy. IIPA further remains concerned that ISPs are not effectively encouraged to cooperate with right holders trying to protect their rights on the Internet or at the borders. Judges appear to view copyright piracy as a minor offense, and most recent criminal cases have resulted in suspended sentences. Foreign-based websites targeting Taiwan users have eroded the legitimate market for local and foreign right holders. Other piracy problems include the unauthorized use of software and other copyright materials by enterprises and government agencies, and rampant commercial photocopying of textbooks on or around university campuses. We urge the Taiwan Government to reinvigorate its commitment to address copyright industry concerns appropriately.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement Issues

- Ensure that the reorganization of the IPRP into the CIBr does not diminish enforcement, i.e., ensure manpower, resources, and equipment are not decreased, and that case targets are maintained and met.
- Maintain award budget for major anti-piracy cases.
- Improve IP courts to reduce numbers of “suspension of indictment” cases, and increase convictions resulting in deterrent penalties.
- Increase trainings for judges and prosecutors on specific issues related to IPR infringement for the software, music, film, and publishing industries, including understanding the nature and seriousness of online piracy.
- Ease the process of obtaining search warrants by relaxing evidence collection procedures and burdens of proof.
- Bring and conclude “media box” piracy cases under Articles 87(7) or 91 of the Copyright Law, as aiding or abetting cases under the criminal law, or through other measures.

Legislative Issues

- Establish effective administrative and/or judicial remedies to address access to infringing websites in Taiwan.
- Implement the ISP law to provide appropriate incentives for expeditious removal of infringing materials, including forwarding notices to infringers and informing and implementing repeat infringer policies.
- Ensure copyright law amendments: 1) do not relax or reduce criminal liability standards; 2) make Internet piracy a “public crime”; 3) include provisions addressing non-hosted infringements; 4) fix copyright collective management provisions to allow the use of agents, and remove the authority of the Taiwan Intellectual Property Office (TIPO) to set a “joint royalty rate” and appoint a “single window” for collection; 5) make it an offense to use/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; and 6) extend copyright term in line with the international trend.

¹For more details on Taiwan's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Taiwan's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



Market Access Issue

- Cease setting a price ceiling on pay TV subscriptions.

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.²

Concerns Exist Over IPRP Reorganization Into CI Br, and Removal of Award Structure: The IPRP has been one of the more effective units in Taiwan in the fight against copyright piracy. Its reorganization, effective January 1, 2014, into the new CI Br is fraught with challenges. First, CI Br must keep IPR protection as the most important mission and must assign a Commander and supervisors who understand IP and have the know-how to take effective action against physical and Internet piracy in the future. Second, the manpower for the new CI Br must be maintained. IPRP was comprised of only 166 policemen as of late 2013, far less than the fully authorized force of 218. Before the reorganization, the IPRP had seven squadrons located in seven major cities. The CI Br only has three investigation teams located in Taipei, Taichung and Kaohsiung.³ The reduction in manpower and locations may already be impacting negatively the effectiveness of the force. Reports that the force will be decreased further to only 100 officers, and that fewer than half of the current IPRP team will be retained, raise deep concerns. Third, other resources, including an adequate budget, must be sufficient to effectively enforce against copyright infringement. Fourth, benchmarks must be maintained for copyright cases, both in terms of the numbers of cases heard, as well as reasonable targets for successful convictions. It is important that such targets are broken out by the type of piracy, e.g., Internet, software,⁴ book piracy,⁵ camcording, media box,⁶ signal theft, and border seizures.⁷ Fifth, TIPO should continue in its advisory role.

Award Budgets Must Be Maintained: It is critical to maintain an award budget so that the CI Br officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. Unfortunately, the proposed budget of NT\$4.5 million for awards for physical and Internet cases in 2013 was cut to NT\$3.5 million by the Legislative Yuan (LY). Worse, IIPA understands there is no budget for awards in 2014 because the Ministry of Economic Affairs (MOEA), responding to pressure from the LY, eliminated TIPO's budget for such the awards. IIPA recommends the reinstatement of reasonable awards. It is unfortunate that TIPO's role will be relegated to a training budget for IPR enforcement officers, and will no longer play an important role in the IPR police force as in the past.

Response Needed to Worsening Internet Piracy: Over the past several years, several copyright industry sectors have noted an increase in the severity of Internet piracy that has accompanied increased Internet, broadband,

²See, e.g., IIPA, *Taiwan*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TAIWAN.PDF>.

³Squadrons in Taoyuan and Chiayi were abolished in 2013.

⁴The use of unlicensed software in the workplace by businesses (and to some extent, government) causes the greatest revenue losses to the software industry in Taiwan, thereby stunting the growth of the IT sector. The software piracy rate remains below the regional average (37% in 2011 compared with an Asia regional average of 60%). The commercial value of unlicensed software in Taiwan in 2011 was US\$293 million. Data on software piracy rates are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁵Illegal 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.

⁶"Media box" (set-top device) piracy is the fastest growing Internet-based piracy in Taiwan. Various kinds of boxes originating in China are available throughout Taiwan, including at so-called "3D" shops that sell computers, software, and peripherals. The three main types of devices are: 1) those that directly connect to foreign sites (usually in mainland China); 2) those with a hard disk to store downloaded contents; and 3) those with an SD card which helps novices connect with the foreign site. TIPO reports that media box piracy can be addressed through current provisions of the law and that one case was commenced in 2013. These boxes are publicly sold in stores and it is common knowledge and practice for consumers to make modifications on the box to allow users to access illegal content, apps, illegal transmissions, etc. which can be accessed on a smart TV.

⁷Taiwan Customs is responsible for inspection of optical discs which contain infringing materials, and after confirming this, cases are to be transferred to the Aviation Police Bureau (APB) for investigation and then transferred to a prosecutor for criminal referral. Unfortunately, the system is not working as intended. Customs agents have no judicial authority to conduct searches or seizure, but direct APB and prosecutor involvement has led to non-cooperation between Customs and the APB and lack of criminal transferrals. In some cases, transferring a clear-cut case of infringement at the border has taken upwards of two years.

and mobile penetration. Particularly noted are the use of streaming, forum and blog,⁸ deeplinking, P2P, BitTorrent, and “one-click hosting” sites to infringe copyright in movies, music, software, and books and journals.⁹ Mobile apps are a new platform for disseminating illegal content. In addition to online piracy, sales of hard goods through Internet auction and e-commerce sites remain a problem. For example, pirate Blu-ray and DVD discs are being sold on e-commerce websites. Most of these hard goods websites are operated out of mainland China, which send the pirate discs into Taiwan in small packages. IIPA encourages the Taiwan Government to work with industry to engage courier services which have not only refused cooperation but reportedly inform infringers about monitoring.

While the takedown rate remains high for hosted content in Taiwan (over 90% for industries reporting), Internet users in Taiwan increasingly obtain unauthorized content from websites located overseas, particularly websites located in mainland China.¹⁰ While right holders worked with two ISPs in Taiwan, Chunghwa and HiNet, to try a six-month test to see how implementation of the ISP graduated response would work in practice, this process revealed flaws since a very low percentage of the already-low number of warning messages were forwarded to the ISP’s subscriber. The trial shows that further regulation or legislation is necessary to provide an appropriate response to Internet piracy. In addition, while graduated response, put into place several years ago, remains an important element of an overall strategy in Taiwan to effectively encourage ISP cooperation with IP right holders and penalize repeat infringers, a measure is needed which addresses non-hosted websites at the source, i.e., the source services which are built on, foster, or encourage piracy. Without such a measure, ISPs will remain reluctant to cooperate in such cases.¹¹

Improvements Needed for IP Courts: Many reports from copyright and other IP right holders indicate that the Taiwan specialized IP Courts may not adequately be addressing IP matters, including with respect to the adjudication of copyright disputes, from inspection/raid to conviction. “Suspension of indictment” in digital piracy cases are up to 86% in 2013. In the criminal context, difficulties continue in obtaining search warrants due to evidence collection and burden of proof hurdles. In addition to challenges for moving criminal IP cases forward from investigation to prosecution, right holders report that existing civil procedures for provisional measures/injunctions remain ineffective. Regular training schedules should be established for judges and prosecutors on specific issues related to IP infringements for the software, music, film, and publishing industries, focusing on the particularities of Internet-based copyright piracy cases as well as aspects of the civil and criminal system that are not operating smoothly for right holders.

Process of Obtaining Search Warrants Needs Improvement: Certain industries report difficulties in obtaining criminal search warrants due to burdens imposed upon their right holders by courts regarding evidence collection and onerous burdens of proof. The software industry reports that some courts, when reviewing the application for a search warrant against enterprise end-user targets, find informant testimony insufficient, and ask for additional evidence such as screen shots to prove the target is using illegal software. This additional proof requirement is imposed notwithstanding that the testimony affirms the informant has direct knowledge of the unauthorized use of software by the target company. 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. Finally, while the TRIPS Agreement 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 in

⁸Forums are a serious problem, including sites like *ck101.com* (the 10th most accessed site in Taiwan), and *eyny.com* (11th), as just two examples. The flow of content through these forums is large. Both sites appear to mask the identity of the registrant as well as the server location.

⁹The estimated losses caused by Internet piracy for music industry were around US\$286.87 million in 2013.

¹⁰In December 2013, IIPA welcomed the decisions of the Beijing No. 1 Intermediate People’s Court holding P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion.com*. This site has caused significant harm throughout Greater China, including Taiwan, as well as Hong Kong and Singapore. Unfortunately, the damages awarded by the court were too low by any account to deter piracy, and the site appears to remain operational with a server location in Inner Mongolia.

¹¹In addition to Chunghwa Telecom and HiNet, Taiwan Mobile Co., Ltd., and Far EasTone Telecommunications (FET) make up the major ISPs in Taiwan.

some cases courts are requiring a copyright certificate to prove ownership, which would be inconsistent with this standard.

COPYRIGHT LAW AND RELATED ISSUES

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements: IIPA is grateful to TIPO for its continuing expressions of mutual concern over non-hosted infringements in Taiwan. As TIPO has indicated, addressing hosted content in Taiwan has not posed as great a difficulty, with takedown rates remaining relatively high. When it comes to non-hosted infringements, however, a problem emerges. While the infringing activity is occurring in Taiwan, the services built on this infringing activity, and/or fostering or encouraging it, are often located outside of Taiwan. The infringement within Taiwan creates the nexus for action, and Taiwan and other jurisdictions are working toward approaches to halt the services from being accessed at the border. We believe that all organs of the Taiwan Government (TIPO, the Ministry of Justice, and the LY) should remain steadfast in seeking an appropriate remedy that is narrowly tailored and with appropriate due process to halt services which are built on, facilitate, and/or encourage infringement. However, during recent meetings with industry, we understand an administrative or judicial remedy against non-hosted infringement remains a sensitive issue and may not be included in amendments to be proposed in 2014. This would be highly unfortunate.

Full Implementation of ISP-related Provisions Needed: The Taiwan authorities have recognized that significant online copyright infringement occurs in Taiwan, including through services that are often offshore. To address this problem, it is necessary that a combination of approaches be implemented, whereby a new administrative or judicial remedy can address online services, while the proper implementation of the graduated response already enacted in Taiwan's Article 90*quinquies* can be applied to large-scale file-sharing of unauthorized content. In particular, further amending legislation should clearly implement the current ISP liability provisions to provide an effective and fair mechanism to address Internet infringement, including by clarifying that ISPs lose the "safe harbors" under the new ISP Law if they fail either: to forward notices to alleged infringing users; or to have and implement a termination policy for repeat infringers.

Copyright Review Should Modernize the Statute and Address Non-Hosted Infringement But Avoid Weakening Criminal Liability or Creating Overly Broad Exceptions; Should Include Fixes to Collective Management Statute: TIPO is in the final year of its three-year plan of Copyright Act reform (2011 to 2013) and has held 46 internal meetings for proposals of draft amendments through December 2013. TIPO has indicated its intention to introduce proposed amendments sometime after February 2014, following which time it will convene a series of public hearings. IIPA understands that there are several changes being considered, including some positive features (e.g., providing an Internet re-transmission right, which should also be afforded to all right holders). However, care should be taken in this process to ensure changes: 1) do not relax or reduce criminal liability standards; 2) make Internet piracy (e.g., mass file-sharing of unauthorized content, or providing online services built on infringement) a "public crime"; 3) include provisions addressing non-hosted infringements; 4) correct problematic provisions regarding copyright collective management to: allow the use of agents; allow the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establish judicial dispute resolution mechanisms in lieu of the requirement to have CMOs tariffs approved by TIPO; and eliminate TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection;¹² 5) make it an offense to use/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; and 6) extend copyright term in line with the international trend. We understand the drafters are looking at a distance learning exception, and IIPA recommends the TEACH Act in the U.S. as a reference to provide guidance on the properly narrow scope of permissible distance learning activities.

¹²The 2010 amendments to the Copyright Collective Management Organization Act leaves in place overbroad authority with 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 market-based approach, allowing for the establishment of fairer tariff rates, and eliminating the single licensing window. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

MARKET ACCESS ISSUE

Price Ceiling on Pay-TV Subscriptions: 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.