

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 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: The piracy situation in Taiwan worsened in 2014. Internet piracy remains the most urgent problem in Taiwan. A 2014 survey of Taiwan's Internet users by Sycamore Research and Marketing revealed that 73% of respondents admitted to having streamed or downloaded unauthorized content, even though 81% admitted piracy is wrong, 74% said the circulation of pirated content hurts Taiwan's creativity and adversely impacts local jobs, and 67% said the government should do more to halt such infringing activity (with 63% of respondents supporting disabling access to websites).² Taiwan remains without an effective mechanism to address foreign websites whose business models are built on piracy. Other piracy problems include rampant unauthorized photocopying of textbooks on or around university campuses, and growing media box/set-top box (STB) piracy.

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) has resulted in lowering the priority for copyright cases. The number of CIBr officers has declined, and the bonus system for fighting piracy was dismantled. Amendments to the "Communication Security and Surveillance Act," which passed Taiwan's Legislative Yuan in January 2014, went into effect in late June 2014. The amendments further restrict police authority to undertake online investigations.³ As a result, the CIBr has apparently withheld a number of right holder referrals. While the government held one meeting in September 2014 between right holders and ISPs to discuss graduated response, this is not nearly enough to encourage ISPs to more effectively cooperate with right holders trying to protect their rights. Judges still appear to view copyright piracy as a minor offense and sometimes lack the technical background to understand the scope of harm caused by Internet and new technology infringements, and in many of the most recent criminal cases, prosecutors have agreed to suspended sentences.

A study undertaken by Oxford Economics demonstrates what is at stake for one industry, as the local film and television industries directly contribute US\$5.5 billion to Taiwan's GDP, supporting 113,800 jobs and generate approximately US\$543 million in tax revenues. We urge the Taiwanese government to reinvigorate its commitment to protect this important contributor to Taiwan's economy and to address copyright industry concerns appropriately.

PRIORITY ACTIONS REQUESTED IN 2015

Enforcement :

- Ensure that the CIBr is provided with sufficient manpower, funding, and resources.
- Reinstate award budget for major anti-piracy cases.
- Improve court practices, particularly among prosecutors, 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 copyright infringement, including understanding the nature and seriousness of online piracy.

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/2015SPEC301HISTORICALCHART.pdf>.

² Sycamore Research and Marketing, *Project Cate: Exploring Online Piracy Behaviour and Attitudes in Taiwan*, June 12, 2014, at http://www.tisf.org.tw/press_releases/2014/Taiwan%20FULL%20PUBLIC%20DECK-%20English%20Version.pptx (cached).

³The amended law requires officers to obtain court orders before soliciting further information from ISPs such as IP address account information.



- Ease the process of obtaining search warrants by clarifying and making consistent (across the various offices) evidence collection procedures and threshold evidentiary requirements to initiate an enforcement action.
- 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:

- Implement the provisions in the Copyright Act dealing with ISP liability to provide appropriate incentives for expeditious removal of infringing materials, including forwarding notices to infringers and implementing repeat infringer policies.
- Ensure that the contemplated copyright law amendments:
 - introduce a clear legal basis and effective provisions for administrative and/or judicial remedies to address access in Taiwan to websites facilitating infringement in Taiwan/non-hosted infringements;
 - make Internet piracy a “public crime”;
 - fix copyright collective management provisions to remove the authority of the Taiwan Intellectual Property Office (TIPO) to set a “joint royalty rate,” appoint a “single window” for collection, and instead, incorporate a “willing buyer, willing seller” standard into rate-setting procedures, and also accord economic evidence in rate review procedures for public performance right tariffs due consideration;
 - 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;
 - do not relax or reduce criminal liability standards (including maintaining public crime for optical disc piracy);
 - do not unreasonably extend exceptions beyond what is permissible under Taiwan’s TRIPS obligations; and
 - extend the term of protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) 95 years from publication, or at least 70 years from publication.

Market Access Issue:

- Cease setting a price ceiling on pay TV subscriptions given the upcoming digitization of the spectrum.

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.⁴

Piracy Worsens, Including Rampant Internet Infringements and Growing “Media Box” Problem: Market indicators suggest that the situation in Taiwan for copyright owners markedly worsened in 2014. In the Internet environment, foreign websites providing illegal content (including streaming sites and cyberlockers which are popular for audiovisual and musical content) remain a significant problem harming right holders’ ability to commercially operate in Taiwan. One particularly popular rogue site, *yny.com*, is the 14th most accessed site in Taiwan (and the 43rd most accessed site in Hong Kong) and has a worldwide Alexa ranking of 496 (much more popular than in 2013). Other particularly problematic sites include *VeryCD.com* (ranked 2,728th in Taiwan, and 234th in China) (noted for infringing music); and *TW116.com* (ranked 407th in Taiwan, 501st in Singapore, and very high in Hong Kong and Malaysia),⁵ and *myvideos.com.tw* (ranked 911th in Taiwan) (both noted for infringing motion pictures). Particularly popular are the use of streaming, forum, blog,⁶ deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites to infringe copyright in movies, music, video games, and books and journals. Mobile apps are a more recent but growing platform for disseminating illegal content. The music industry estimates the Internet piracy rate at roughly 85% in 2014 (up from roughly 82% in 2013). 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

⁴See, e.g., IIPA, *Taiwan*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301TAIWAN.PDF>.

⁵*TW116.com* is a notorious site built on, and commercializing, the infringement of others. The site primarily uses *Xigua Player* links.

⁶Forums are a serious problem, including *yny.com* and *ck101.com* (the 38th most accessed site in Taiwan), as just two examples. The flow of music and audiovisual content through these forums is large.

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.

The sale of media boxes or STBs facilitating piracy has increased considerably in Taiwan, and is now the fastest growing Internet-based piracy in Taiwan. Mostly originating in China and available throughout Taiwan openly, including at so-called “3D” shops that sell computers, software, and peripherals, and via online retailers, STBs facilitate unauthorized receipt of pay-TV content, allow users to organize pirate sites, and permit mass storage of pirated materials. Motion picture industry staff have detected more than 30 different brands of such devices now available in the marketplaces in Taiwan. These boxes can directly connect to foreign pirate sites (usually in mainland China), often contain a hard disk to store downloaded content, and often have an SD card slot which helps novices connect with foreign sites. TIPO has indicated in the past that STB piracy can be addressed through current provisions of the law and that one case was commenced in 2013, but we have no update on the outcome of this case.⁷ It is also 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, which would amount to a violation of anti-circumvention provisions in Taiwan’s Copyright Act.

Internet Enforcement Largely Lacking Due to Lack of Sufficient Legal Provisions and Government Will to Effectively Tackle the Problem: Regarding enforcement, while the takedown rate remains high for hosted content in Taiwan (over 90% for industries reporting, with good cooperation from ISPs), Internet users in Taiwan increasingly obtain unauthorized content from websites located overseas, particularly websites located in mainland China. Thus, while a remedy exists for domestically hosted websites (either civil or criminal), such is not the case for foreign-based infringing websites. As regards non-hosted forms of infringement, music right holders worked with one ISP in Taiwan, HiNet, to try a six-month test to see how implementation of the ISP graduated response would work in practice. Unfortunately, this process revealed flaws since a very low percentage (fewer than 30%) of the already-low number of warning messages were successfully forwarded by ISPs to their subscribers. This may be due to several factors, including that ISPs believe they are under no legal obligation to forward notices to infringers, there has been no implementation of the ISP rules, and ISP subscribers are not mandated to provide an email address. Because of the low success rate, TIPO was disinclined to maintain the program. Taiwan’s relative isolation from the international community, along with the existing Copyright Act and reluctance of TIPO to encourage or support strong action or change to the laws, has resulted in ISPs (especially those considering themselves to be ‘mere conduits’) demonstrating extreme reluctance to cooperate. There is no Memorandum of Understanding (MOU) in place, nor has there been any active negotiation underway. TIPO’s meeting in September 2014 between right holders and ISPs resulted in no consensus. Further regulations or legislation will be crucial to provide an appropriate response to Internet piracy in Taiwan and to effectively encourage ISP cooperation with right holders to educate and, under certain circumstances, deal with repeat infringers. As things stand, Taiwan is an outlier in Asia, since most other countries are taking active steps to address the growing online and mobile piracy problem.

The implementation of the amendments to the Communication Security and Surveillance Act has also negatively impacted government will to investigate online infringement because it restricts the information police can obtain from ISPs without a court order. In large part, as a result of these negative developments, the local motion picture investigators report that the number of successful raids throughout the first eleven months of 2014 decreased (year-on-year) to 37 in 2014 from 94 in 2013.

IPRP Reorganization Into CIBr and Removal of Award Structure Have Resulted in Downgrading of Priority of Copyright Cases: The IPRP, prior to its disbanding on January 1, 2014, was one of the more effective units in Taiwan in the fight against copyright piracy. Its reorganization into the CIBr has resulted in decreased human resources, funding, and prioritization of copyright infringement cases. In the transition to a CIB brigade (CIBr), a number of good IPRP investigators were ‘dismissed’ because they were not trained as “criminal police,” resulting in a down-sizing in the number of officers and squadrons (from five squadrons down to three squadrons; before the

⁷In China, some STB companies have sought licenses from copyright owners, a positive sign that the raising of this issue, including in the cross-straits context, is helping. But much more needs to be done in Taiwan to curtail this activity.

reorganization, the IPRP had seven squadrons located in seven major cities). The CIBr also operates under a decreased budget but is expected to maintain nationwide coverage. At its peak, CIBr was supposed to have 218 officers. IIPA believes the CIBr needs to reinvigorate the human capital back to at least 185 officers, must keep IPR protection within the division 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/mobile piracy in the future. The budget must be increased to make it sufficient to effectively enforce against copyright infringement. 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 piracy, book piracy,⁸ unauthorized camcording, media box/set-top box (STB) piracy, signal theft, and limited piratical imports. Finally, TIPO should continue in its advisory role.

Award Budgets Must Be Reinstated: It is critical to reinstate an award budget so that the CIBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. Unfortunately, the previous budget of NT\$4.5 million for awards for physical and Internet cases was entirely removed in 2014 because the Ministry of Economic Affairs (MOEA), responding to pressure from the Legislative Yuan (LY), eliminated TIPO's budget for such 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.

Improvements Needed for IP Courts: Many reports from copyright and other IP right holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal procedures do not result in deterrence. In the criminal context, prosecutors usually settle for "suspension of indictment" in digital piracy cases. Regular training schedules should be established for judges and prosecutors on specific issues related to IP infringements, focusing on the technical particularities of Internet and new technology-based copyright infringement cases, aspects of the civil and criminal system that are not operating smoothly for right holders, and primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the online and digital environment.

COPYRIGHT LAW AND RELATED ISSUES

IIPA expresses deep concerns over the continued lack of an administrative or judicial remedy against foreign piracy services targeting Taiwan users, the lack of cooperation from ISPs over such services and against repeat infringers, and the proposed (but now reportedly still-shelved) amendments to Taiwan's Copyright Act that included several unfavorable elements for right holders.

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements Emanating from Outside Taiwan: Many of the online services built on infringing activities of others, and/or fostering or encouraging it, are located outside of Taiwan. Nonetheless, the infringing activities all happen within Taiwan and should create a nexus for action. Many jurisdictions in addition to Taiwan are working toward approaches to halt services from being accessed at their borders. We believe that all organs of the Taiwanese Government (TIPO, the Ministry of Justice/Judicial Yuan, and the Legislative Yuan) should remain steadfast in seeking an appropriate remedy that is narrowly tailored with appropriate processes to halt services which are built on, facilitate, and/or encourage infringement. However, no remedy has been proposed as part of the recent (but now shelved) copyright review process. This is unfortunate. Governments in the region, including recently in Indonesia and Singapore, have adopted and/or refined approaches that provide a mechanism for petitioning for orders instructing ISPs to disable access to rogue sites without regard to any liability of the ISP for authorizing or facilitating such infringement.

⁸Unauthorized photocopying of books (particularly higher education and English language teaching materials (ELT) and journals remains the primary problem faced by the U.S. publishing industry in Taiwan. Publishers continue to find photocopy shops in and around university campuses engaging in unauthorized photocopying on a large scale. In recent years, publishers have also seen an increase in online piracy, particularly of textbooks and password-protected material, though the unauthorized copies of reading materials are being made available mainly from servers/sites in China.

Full Implementation of ISP-related Provisions Needed: The Taiwanese 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, including the proper implementation of the graduated response provisions already enacted in Taiwan's Article 90*quinquies* applied to file-sharing of unauthorized content. In particular, it should be clarified that ISPs lose "safe harbors" under the 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, Now On Hold, Should Address Non-Hosted Infringements, and Avoid Weakening Criminal Liability, Creating New Broad Exceptions, and Adding Onerous Collective Management Provisions: TIPO released a discussion draft copyright revision in April 2014, but shelved the draft during the summer after hearing from affected stakeholders. IIPA reviewed that draft and found it flawed in fundamental aspects.⁹ First, the shelved draft failed to address the most pressing needs, including 1) addressing non-hosted infringements and foreign rogue websites targeting Taiwan users, 2) deeming Internet piracy a "public crime" (as was so successfully done regarding optical disc piracy), 3) making it an offense to engage in unauthorized camcording of motion pictures, and 4) extending term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Second, the draft as presented would have created numerous new problems, including 1) the introduction of new, overly broad exceptions to protection, some of which may have called into question Taiwan's TRIPS obligations,¹⁰ 2) proposing the relaxing of criminal liability standards (e.g., removing the "public crime" designation for optical disc piracy),¹¹ and 3) making some fundamental changes to the treatment of related rights, particularly with respect to sound recordings,¹² among many problematic proposals. To the extent the drafters wished to tackle collective management issues, any forthcoming draft should 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 reviewed, revised, and approved by TIPO; and eliminate TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection.¹³

We applaud TIPO for listening to all stakeholders during the process of vetting the April draft and temporarily shelving the project until views can be heard and proper policies devised. We understand TIPO is working on a new draft amendment but there is no timeline at present, and IIPA looks forward to reviewing it in light of the above comments.

MARKET ACCESS ISSUE

Price Ceiling on Pay-TV Subscriptions: The Taiwanese Government currently maintains a price cap on monthly cable television fees for analog cable television services, while monthly rates for digital cable television are not regulated. The price cap 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"

⁹There were some positive features including adding an Internet re-transmission right which would apply to all subject matter.

¹⁰We understand the drafters were looking at a distance learning exception, and the TEACH Act in the U.S. should act as a reference to provide guidance on the properly narrow scope of permissible distance learning activities.

¹¹While industry reports indicate a decrease in the retail marketplace of pirated optical discs in Taiwan, this is mainly due to two factors: increasing online infringement, and the increasing availability of optical disc piracy through online channels. Another change would have unreasonably restrained and discriminated against copyright owners by making criminal remedies unavailable if the right owner is not members of a collective management organization.

¹²As examples of some changes initially contemplated, TIPO initially intended to introduce a "neighboring rights" system but decided to maintain sound recordings as works after industry opposition. In addition, the new Internet retransmission right was to be afforded to works, but sound recording right holders and performers would only have been entitled to a remuneration right. Third, moral rights would have been withheld from sound recording right holders. Other issues to be worked out include the possible joint collection by sound recording producers and performers of royalties for public performance of a phonogram to which the performance is fixed. Industry does not oppose this assuming that its main rights organization may undertake the collection on behalf of performers.

¹³The 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.

policy within a digitized environment), the Taiwanese government should ease any current price controls in this market.

TRAINING AND OUTREACH

Right holders continue to work with the Taiwanese government, organizing dozens of campus outreach campaigns for students, as well as participating (in TIPO-led) and organizing training seminars for judges, police, prosecutors, customs officers, and other law enforcement units. Industry also provides assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from outside Taiwan, e.g., mainland China), and supporting raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors. The industries provide publicly available data (including the recording industry's website in Taiwan) with important information about anti-piracy actions and copyright protection campaigns. Industry remains available and interested in providing more of the same in 2015, including through the AIT, the European Economic and Trade Office (ECTO), ECCT, and the AmCham.