

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Special 301 Watch List.<sup>1</sup>

**Executive Summary:** Taiwan once stood as a model for strong intellectual property protection throughout Asia, implementing progressive policies, including the establishment of a modern copyright regime, that spurred a flourishing marketplace for legitimate creative offerings from locals and foreign right holders alike. Unfortunately, Taiwan's progress on intellectual property rights protection stalled and, over the past several years, Taiwan has been moving away from policies it once instituted to foster and reward creativity. Internet piracy remains the most urgent problem in Taiwan, as it continued to worsen in 2015, stunting the growth of the creative industry. Taiwan remains without an effective mechanism to address foreign piracy websites that target consumers in Taiwan. Media/set-top box (STB) piracy is rapidly increasing, e-book piracy is growing, and more longstanding forms of piracy, including rampant unauthorized photocopying of textbooks on or around university campuses, continue to fester. IIPA is hopeful that President Tsai's recent election will usher in a new era of protection for the rights of authors and creators, which will spur Taiwan's economy and result in boundless contributions to Taiwan's culture.

Taiwan's lack of will to seriously tackle its piracy problems and to provide adequate protections for copyright holders is reflected in the most recent draft amendments to its copyright law. The draft amendments fail to provide tools necessary to effectively address Internet piracy, including the problems posed by foreign piracy websites and the lack of cooperation by Internet Service Providers (ISPs). Furthermore, rather than demonstrate the seriousness of Taiwan's stated desire to join the Trans-Pacific Partnership agreement (TPP), the draft amendments include numerous inconsistencies with the TPP text and even raise questions regarding Taiwan's respect for its existing international obligations. In a positive development, the National Communications Commission (NCC) indicated a willingness to include a new measure in the draft Electronic Communications Act, similar to those adopted in other parts of the world, authorizing disabling of access to foreign websites whose primary purpose is to infringe, although the measure is not included in the latest draft.

On enforcement, although industry cooperates well with the new Criminal Investigation Brigade (CIBr), the Communication Security and Surveillance Act amended in 2014 further restricts police authority to undertake online investigations. As a result, the CIBr has apparently withheld a number of right holder referrals. Judges continue to 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. In many recent criminal cases, prosecutors have agreed to suspended sentences.

Demonstrating the stakes, a 2014 study undertaken by Oxford Economics shows local film and television industries directly contribute US\$5.5 billion to Taiwan's GDP, support 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 2016**

#### **Enforcement:**

- Ensure that the CIBr is provided with sufficient manpower, funding, and resources.

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<sup>1</sup>For 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/2016SPEC301HISTORICALCHART.pdf>.



- Reinstate award budget and an adequate bonus system 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.
- Continue the campus inspections program, allowing robust rights holder participation in the evaluation of universities and their compliance with the copyright law and their IPR policies.
- 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:

- Encourage the NCC to adopt a new measure providing the authority to disable access to websites intended to facilitate infringement and, once enacted, monitor test cases brought to ensure the law operates effectively and fairly to all parties.
- 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 allow a fair-market based royalty rate and eliminate delays in fixing the rate;
  - make unauthorized camcording of motion pictures in theaters a criminal offense;
  - make unauthorized camcording of live musical performances a criminal offense;
  - do not relax or reduce criminal liability standards (including maintaining public crime status 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) at least 70 years from publication.
- Implement the provisions in the Copyright Act dealing with ISP liability to provide appropriate incentives for expeditious removal of infringing materials online, including forwarding notices to infringers and implementing repeat infringer policies.

## 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.<sup>2</sup>

**Piracy Continues to Worsen, Especially Online:** Piracy continued to increase in Taiwan in 2015, particularly piracy over the Internet and on mobile devices. Foreign websites, such as *eyny.com*, (the 12<sup>th</sup> most accessed site in Taiwan according to Alexa) and *tw116.com* (ranked 352<sup>nd</sup> in Taiwan),<sup>3</sup> that provide illegal content remain a significant problem, harming right holders’ ability to commercially operate in Taiwan. Particularly popular are streaming, forum,<sup>4</sup> blog, deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites, which are used to infringe copyright in movies, music, video games, and books and journals. Apps, including for set-top boxes (STBs) and mobile devices, have become a significant platform for disseminating illegal content. The music industry estimates the Internet piracy rate at roughly 86% in 2015 (increased from roughly 85% in 2014).

<sup>2</sup>See, e.g., IIPA, *Taiwan*, 2015 Special 301 Report, February 7, 2015, available at <http://www.iipa.com/rbc/2015/2015SPEC301TAIWAN.pdf>.

<sup>3</sup>*Tw116.com* is a notorious site built on, and commercializing, the infringement of others. The site primarily uses *Xigua Player* links.

<sup>4</sup>Forums are a serious problem, including *eyny.com* and *ck101.com* (the 38<sup>th</sup> most accessed site in Taiwan), as just two examples. The flow of infringing music and audiovisual content through these forums is enormous.

The publishing industry has long reported on continued problems with unauthorized photocopying and use of infringing materials at universities. While a “Campus Intellectual Property Protection Action” plan has been incorporated into the Ministry of Education’s (MOE) Campus Inspection program since 2006, the inspections merely consisted of self-assessment by universities. In early 2015, MOE met with representatives of the publishing industry in Taiwan to discuss the 2014 assessment results. At this meeting, publishing industry representatives again reiterated their request to participate in the campus inspections. MOE conducted campus inspections of 16 national universities/institutions in first half of 2015; another batch of 26 private universities/institutions were scheduled to be inspected in second half of 2015. In early July 2015, MOE invited publishing industry representatives to participate in the inspections conducted in November and December. The inspections found that while some universities already had policies in place for intellectual property rights (IPR) protection, student and faculty compliance with these policies was less than robust. Allowing rights holder participation is a significant improvement, and will allow greater cooperation among MOE, university administrators and rights holders in strengthening IPR protection on campus.

**Media Box/STB Piracy:** The sale of media boxes or STBs facilitating piracy has increased considerably in Taiwan. Mostly originating in China and available openly throughout Taiwan, including at so-called “3D” shops that sell computers, software, and peripherals, and via online retailers, STBs facilitate unauthorized streaming of motion pictures and television content through apps that allow users to easily find and use such content without permission or payment to rights holders. These boxes often contain, and can connect to, a hard disk to store downloaded content, and often have an SD card slot, which helps novices connect with foreign piracy sites. Motion picture industry staff have detected more than 30 different brands of such devices now available in the marketplaces in Taiwan.

STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The boxes are either pre-installed with apps that facilitate infringement, or users are easily able to obtain apps required to access unauthorized motion pictures and television content. These apps allow the user to connect to a supporting over-the-top (OTT) online infrastructure, including foreign pirate sites (usually hosted in mainland China), that provides users with instant access to infringing audiovisual content. TIPO has indicated in the past that STB piracy can be addressed through current provisions of the law.<sup>5</sup> One case was brought, but decided unfavorably in 2013. Taiwan must do more to eliminate this illegal activity.

**Lack of Government Will and Inadequate Legal Framework Impede Enforcement:** Regarding enforcement, although the takedown rate remains extremely high for hosted content in Taiwan, Internet users there increasingly obtain unauthorized content from websites located overseas, particularly those in mainland China. While a remedy exists for domestically hosted websites (either civil or criminal), such is not the case for foreign-based infringing websites. Regarding non-hosted forms of infringement, music right holders have been frustrated by the unworkable and unenforceable graduated response process.<sup>6</sup> Taiwan’s relative isolation from the international community, along with lack of proper implementation of the existing Copyright Act and the 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. Efforts by right holders to put in place a Memorandum of Understanding (MOU) with ISPs proved to be fruitless. As IIPA has previously reported, further regulations or legislation will be crucial to provide an appropriate response to Internet piracy in Taiwan, including effectively encouraging ISP cooperation with right holders to educate and, under certain circumstances, take action against repeat infringers. Taiwan has become an outlier in Asia, because many other countries in the region are taking active steps to address the growing online and mobile piracy problem. On a positive note, it appears that it is possible that existing remedies under the Copyright Act could be used more effectively to address

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<sup>5</sup>Actions could be brought under Articles 87(7) or 91 of the Copyright Act, as aiding or abetting cases under the criminal law, or through other measures. It would also appear that allowing the boxes to use apps that provide access infringing content is a violation of anti-circumvention provisions in Taiwan’s Copyright Act.

<sup>6</sup>As noted in last year’s submission, the music industry 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; 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.

the problem of foreign websites that primarily infringe, but the courts must issue a judicial interpretation to allow for disabling access to such sites. Also, NCC has expressed a willingness to include such a measure in its draft Electronic Communications Act, but the most recent draft does not appear to include this remedy.

The implementation of the amendments to the Communication Security and Surveillance Act in 2014 negatively impacted investigations into online infringement, because these amendments restrict the information police can obtain from ISPs without a court order.<sup>7</sup> The local motion picture investigators report that the number of successful raids throughout the first eleven months of 2015 maintained a downward year-on-year trend at 35 in 2015, declining from 37 in 2014 and 94 in 2013.

**IPRP Reorganization Into CIBr and Removal of Award Structure Have Resulted in Downgrading of Priority of Copyright Cases:** The IPR Police (IPRP), prior to its disbanding on January 1, 2014, was one of the more effective units in Taiwan in the fight against copyright piracy. As reported, its reorganization into the CIBr has resulted in decreased human resources, funding, and prioritization of copyright infringement cases. In the transition, a number of good IPRP investigators were “dismissed” because they were not trained as “criminal police,” resulting in a reduction in the number of officers and squadrons (from five squadrons down to three; before the 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. 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,<sup>8</sup> unauthorized camcording, media 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 by the Ministry of Economic Affairs (MOEA), responding to pressure from the Legislative Yuan (LY). IIPA recommends the reinstatement of reasonable awards. As we have raised before, 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 Specialized 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.

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<sup>7</sup>The amended law requires officers to obtain court orders before soliciting further information from ISPs such as IP address account information.

<sup>8</sup>Unauthorized 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.

## **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, the proposed amendments to Taiwan's Copyright Act that included several unfavorable elements for right holders, and TIPO's inappropriate expansion of Taiwan's compulsory license scheme.

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements Emanating from Outside Taiwan:** It remains the case that many of the online services built on infringing activities of others, and/or fostering or encouraging infringement, are located outside of Taiwan. Nonetheless, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. More than three dozen jurisdictions around the world in addition to Taiwan are working toward approaches to halt illegal 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 that are built on, facilitate, and/or encourage infringement. It is unfortunate that no remedy has been proposed as part of the copyright review process. Governments in the region, including recently in Indonesia and Singapore, have adopted and/or refined approaches that provide a remedy for ISPs to disable access to sites that are primarily infringing. As noted above, NCC has indicated interest in enacting a new measure to disable access to infringing websites but, thus far, the proposal appears to be inadequate.

**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 of infringement to alleged infringing users, or to have and implement a termination policy for repeat infringers.

**Proposed Copyright Amendments Are Inconsistent With International Norms:** TIPO released the third draft of amendments to the Copyright Act in October 2015. IIPA had provided extensive comments on the second draft of amendments, but, disappointingly, very few of IIPA's comments were reflected in the third draft. In response to the third draft, IIPA reiterated most of these comments and added some others.

Although the third draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. First, the draft misses the opportunity to strengthen Taiwan's enforcement framework to address non-hosted infringements. Second, the draft fails to address Taiwan's urgent need to address foreign rogue websites targeting Taiwan users. A new mechanism is needed to deal with rogue websites that are specifically built to induce and encourage infringement and target users in Taiwan.

The draft also fails to address many of Taiwan's other pressing needs, including: 1) deeming Internet piracy a "public crime" (as was so successfully done regarding optical disc piracy); 2) making it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters; 4) making it a criminal offense to engage in unauthorized camcording of live musical performances; 4) correcting problematic provisions regarding copyright collective management;<sup>9</sup> and 5) 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

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<sup>9</sup>Corrections should include allowing the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establishing judicial dispute resolution mechanisms in lieu of the requirement to have CMOs tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings, and allow for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

any case, no less than 70 years). In addition to retaining an inadequate term of protection, the draft includes many other provisions that are inconsistent with evolving international norms and may even raise questions regarding Taiwan's compliance with its existing international obligations. For example: the draft introduces new, overly broad exceptions to protection, some of which would call into question Taiwan's compliance with its TRIPS obligations;<sup>10</sup> relaxes criminal liability standards (e.g., removing the "public crime" designation for Optical Disc piracy; requiring participation in collective management organizations as a prerequisite for criminal enforcement; and exempting a broad range of uses of copyright works from criminal liability);<sup>11</sup> and requires right holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement. Additionally, authors of sound recordings should be afforded exclusive rights for public performance and retransmissions, as many other countries around the world have done, and the provision on circumvention of technological protection measures should be clarified to ensure the standards are in line with those of the United States.<sup>12</sup>

As IIPA noted in its comments, the third draft unfortunately includes significant inconsistencies with the obligations set forth in the TPP text, including the inadequate term of protection and the lack of *ex officio* authority discussed above. Leaving these inconsistencies uncorrected is at best a substantial missed opportunity. At worst, it sends a signal that Taiwan may not be serious in its stated desire to join its neighbors in the TPP environment.

**TIPO Inappropriately Expanded Compulsory Licensing to Karaoke:** TIPO recently approved a compulsory license application for musical works recorded and reproduced on SD memory cards for use on karaoke music equipment. This does not appear to be within the scope of the compulsory license provisions of the Copyright Act and will have a negative impact on the market for licensing musical works.

## **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 training seminars organized by TIPO for judges, police, prosecutors, customs officers, and other law enforcement units, and organizing similar seminars themselves. 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). Industry also supports 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 2016, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

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<sup>10</sup>To ensure compliance, the three-step test (i.e. TRIPS Article 13) should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

<sup>11</sup>While 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 pirate Optical Discs through online marketplaces. The draft mandates that right holders participate in a collective management organization to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. Decriminalization of parallel imports should not be overbroad because the government needs appropriate means to address the fact that many piratical imports are labeled as legitimate goods, which undermines Taiwan's legitimate marketplace. And the exemptions from criminal liability set forth in Article 46 are too broad, covering, for example, exploitation of digitized karaoke machines or jukeboxes which contain reproductions of musical works for public performance.

<sup>12</sup>Draft Article 87 identifies the three conditions for a prohibited circumvention technology, device, components, etc., similar to requirements found in U.S. law. Unfortunately, it is not clear whether just one of the three conditions must be satisfied, as is the case in U.S. law, or whether all three conditions must be satisfied, which would substantially weaken the standard of protection.