



November 4, 2004

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Re: Taiwan: 2004 Special 301 “Out-of-Cycle Review” on Intellectual Property Rights Practices, 69 Fed. Reg. 60928 (October 13, 2004)

To the Section 301 Committee:

This post-hearing submission responds to the Committee’s request for comments regarding Taiwan’s “out-of-cycle” review in the 2004 Special 301 process. IIPA recommends that, for the reasons discussed below, Taiwan be moved from the Priority Watch List to the Watch List.

ABOUT THE IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,300 companies producing and distributing materials protected by copyright laws throughout the world. The copyright-based industries continue to provide major contributions to the U.S. economy, jobs and foreign sales/exports.¹ IIPA has participated in the annual Special 301 process since its first proceeding in 1989, and in February 2004, we filed extensive comments on the copyright industries’ views regarding enforcement and legal reform in Taiwan.²

¹ In October 2004, the IIPA released its latest economic report entitled *Copyright Industries in the U.S. Economy: The 2004 Report*, the tenth such study written by Stephen Siwek of Economists Inc for IIPA. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data shows that in 2002, the U.S. “core” copyright industries¹ accounted for an estimated 6% of U.S. Gross Domestic Product (GDP), or \$626.6 billion and the “total” copyright industries accounted for an estimated 12% of U.S. GDP or \$1.25 trillion. The “core” copyright industries employed 4% of U.S. workers in 2002 or 5.48 million persons. Factoring out the difficult economic year of 2002, between 1997-2001, the “core” copyright industries’ employment grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39% per year). Finally, in 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, motor vehicles, equipment and parts, and aircraft and aircraft parts.

² See Taiwan, IIPA, 2004 Special 301 Submission to the U.S. Trade Representative, February 13, 2004, posted at <http://www.iipa.com/rbc/2004/2004SPEC301TAIWAN.pdf>.

TAIWAN HAS MADE SIGNIFICANT LAW REFORM AND ENFORCEMENT PROGRESS IN 2003-2004

On May 3, 2004, USTR announced its decision to maintain Taiwan on the Special 301 "Priority Watch List" and conduct an out-of-cycle review in the fall of 2004.³ The OCR was to measure whether Taiwan had made progress on two main fronts, as they had promised to do: First, whether Taiwan had kept its commitment to make further corrective amendments to the copyright amendments that were adopted in July 2003 but which were substantially deficient in meeting industry and USG goals, and, second and most important, whether the progress that had been made in the second half of 2003 in enforcing the Optical Media Management law and the Copyright law to attack the high levels of piracy at the production, distribution and retail levels, and on the Internet, was both continuing and deterrent. IIPA's conclusion is that Taiwan has made significant progress in both these areas, with one major exception: two internet services—Ezpeer and Kuro—continue to operate infringing commercial services. Given the generally positive results that have occurred, we recommend moving Taiwan to the Watch List. However, we will be carefully monitoring whether Taiwan is doing everything in its power to address the open and notorious activities of these well known online services. We fully expect that Taiwan will quickly take effective steps to ensure that these services stop engaging in, or facilitating, the transmission of unauthorized materials.

CORRECTIVE COPYRIGHT LAW AMENDMENTS

In June 2003, effective July 2003, Taiwan's Legislative Yuan (LY) failed to adopt certain key recommendations made to it by the Executive Yuan (EY) and passed a number of copyright law amendments that either failed to advance protection and enforcement or significantly undermined it. For example, the LY

1. eliminated provisions recommended by the EY preventing the circumvention of technological protection measures which are critical to safeguarding transmission of content on the Internet and trading in digital products, like DVDs, videogames and business software;
2. eliminated a provision allowing Customs authorities to act *ex officio*;
3. decriminalized certain activities which were criminal under the prior law and established unnecessary and unreasonable thresholds to what is a criminal activity for other acts;
4. eliminated provisions that established minimum penalties and included provisions that would permit judges to impose only fines and not jail time.

Through the extraordinary efforts of the EY, through MOEA and TIPO, the LY, in a short August special session, was persuaded to adopt amendments correcting many of the deficiencies in the June 2003 amendments. While it had been hoped that the EY version of the provisions covering the issues noted above would be adopted, the LY made certain changes which, while not what industry or the USG had asked for, substantially followed the EY's recommendations. The notable exception to this conclusion, referring to point 4 above, is that the LY did not change the provisions eliminating most minimum penalties and did not restore many of the provisions which would have required jail time. Upon detailed review, however, and in light of enforcement efforts made to date and the level of penalties that have been

³ See Office of the U.S. Trade Representative, 2004 Special 301 Report, May 3, 2004, posted at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf

imposed in many cases, IIPA and its members find the overall amendments to be satisfactory and applaud the Taiwan government for making them. IIPA remains concerned, however, that Taiwan may slip again into a situation where pirates do not receive deterrent sentences, and particularly do not receive jail time in cases where this would be the only means to deter the type of organized criminal activity which has characterized the piracy landscape in Taiwan.

Our positive recommendation is also based on informal assurances by TIPO that regulations and interpretations would be issued that would correct many of the remaining uncertainties left by the LY's actions. For example, TIPO has indicated that its regulations to implement the new technological protection measures provisions added by the LY in August would be implemented consistent with the WIPO Internet treaties obligations including by maintaining narrow exceptions to the extremely important tool to protect works on the Internet. TIPO has also indicated that it will clarify Article 91, subparagraph 4 which states that it is not a copyright infringement if a work is "only for personal reference or fair use." As drafted, this is a potentially troubling provision and IIPA urges TIPO to be cautious and careful in drafting the LY-requested guidelines on the fair use of works in the educational context covering photocopying and distance learning. TIPO has stated that the guidelines will be based upon the U.S. "Guidelines for Educational Uses of Music", "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" and "Fair Use Guidelines for Educational Multimedia. IIPA and its members welcome the opportunity to provide background materials to TIPO as it prepares these guidelines and then to comment on drafts as they become available. IIPA would also urge that a proper and TRIPS-compatible interpretation of "personal reference," particularly as it might impact on the online environment, be issued by TIPO, following full industry comment. Indeed, IIPA looks to TIPO to do everything possible to ensure the full, proper and deterrent implementation of ALL these new amendments.

IIPA greatly appreciates the efforts made by Director General Tsai, Deputy Director Jack Lu, and Ms. Margaret Chen to achieve the passage of these corrective amendments.

IIPA is also pleased and relieved that the LY did not take up an amendment, a new Article 51*bis*, proposed by the illegal internet services, including Kuro and Ezpeer, which would have provided for a TRIPS-incompatible compulsory license legalizing the continued unauthorized P2P filesharing which was already generating significant profits for these illegal services. We urge Taiwan to bury this bad idea forever.

Finally, if the United States and Taiwan contemplate an FTA, Taiwan should pursue copyright term extension as part of its next legislative reform efforts, along with the Internet-related amendments discussed below.

Progress on Enforcement and Work Still Undone

Following adoption of the new copyright amendments in 2003 which made piracy of optical disc products a "public crime" without the need for a right holder complaint, there was a welcome increase in enforcement activity against factories, distributors and night markets. Enforcement has improved significantly in these areas and to date it has been sustained, and has, for the most part, included the imposition of stronger penalties, though the lack of deterrent penalties continues to be a problem. Export piracy of OD products containing pirated content has significantly decreased, though export of blank media, knowingly used for pirate purposes in the importing country, continues and action must be taken against this problem over the very near term. Enforcement has also targeted the newer type of CD-R and DVD-R "burning" conducted in smaller venues and labs. These actions must also continue at a high pace if piracy rates are to come down significantly.

Enforcement against end-user piracy of business software has also been effective in reducing piracy rates in Taiwan to 43%, among the lowest in Asia. Pressure must be kept on, however, or this rate will easily rise again.

Authorities in Taiwan have continued to cooperate with book publishers in targeting photocopy centers making illegal copies of textbooks, especially off-campus. Raids in the spring and fall signal a continuing commitment by Taiwan enforcement officers to diminish the effect of this type of blatant book piracy, although government self-initiation of those raids has yet to come to fruition. This type of commitment must continue and be coupled with increased efforts to enforce mandates for use of legal materials on university and school campuses. AAP studies show that nearly half of all photocopying in Taiwan takes place on campus. It is important for enforcement and education authorities to work together to try to reduce the scope of this problem. In addition, book pirates are increasingly moving their operations underground, necessitating changes in procedure for effective enforcement actions. The authorities need to ensure that their operations are sufficiently adaptable to keep up with the evolving nature of illegal photocopy operations.

Despite these significant improvements, overall, piracy rates continue to remain too high in Taiwan. As the chart below illustrates, much work remains to be done.

**Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars)
and Levels of Piracy in Taiwan: 2003⁴**

INDUSTRY	2003	
	Loss	Level
Records & Music	58.0	42%
Business Software ⁵	83.0	43%
Motion Pictures	42.0	44%
Book Publishing	20.0	NA
Entertainment Software	261.8	42%
TOTAL	\$ 464.8	

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2004spec301methodology.pdf. For more details on Taiwan's Special 301 history, see IIPA's Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) as well as Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>). Previous IIPA Special 301 filings on Poland are posted at <http://www.iipa.com/countryreports.html>.

⁵ BSA's 2003 piracy statistics for business software piracy were not available as of the February 13, 2004 filing of IIPA's 2004 Special 301 report to the U.S. Trade Representative. In May 2004, BSA's 2003 preliminary statistics were posted on the IIPA website. In October 2004, BSA and IDC provided IIPA with the U.S.-publishers' share only of its global piracy losses, and these revised, now final, statistics for 2003 – which comport more closely to BSA's traditional methodology for 301 purposes -- appear above. Historically, BSA's trade loss estimates reported in the Special 301 context represent losses due to piracy which affect only U.S. computer software publishers, and differ from BSA's piracy loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in a country (including U.S. publishers) and (b) losses to local distributors and retailers in that country. In July 2004, the BSA and IDC issued a new Annual Global Piracy Survey. Unlike prior surveys, this 2004 BSA Global Survey now includes more computer applications, such as operating systems and consumer applications such as PC gaming, personal finance, and reference software, all of which were not reflected in prior BSA surveys. See BSA's Global Piracy Survey at <http://www.bsa.org/globalstudy>.

While IIPA is recommending that Taiwan be upgraded to the Watch List, we look to that government to undertake a sustained and aggressive enforcement campaign against all levels of the piracy chain, including against the criminal syndicates and in all copyright sectors, including against online piracy, book piracy, piracy of entertainment software chips used in cartridge-based videogames, the production and distribution of high-quality counterfeit business software, and against unauthorized end-user software use by large, medium and small enterprises throughout Taiwan. Taiwan's failure to follow through to achieve substantial reductions in piracy rates in all sectors will ensure that IIPA again recommends Taiwan's return to the Priority Watch List.

Taiwan is to be commended for its enforcement actions over the last year, much of which must be credited to the leadership exerted by the Taiwan Intellectual Property Office, by the Judicial Yuan and the police and prosecutors. However, there are a number of structural and related enforcement issues that must be resolved in the near future, if piracy rates are to decrease. Examples are:

1. IIPA and its members had asked that the Integrated Enforcement Task Force (IETF), set up two or so years ago, be given permanent status with a regular budget and opportunities for internal promotions and incentives to officers. We understand that this formalization has just recently occurred as of November 1. We look forward now to even more enforcement successes from the IETF and urge that the Task Force be given additional resources to do its job.
2. The Ministry of Education should work closely with universities and schools to adopt and enforce policies designed to deter teachers and students from engaging in unauthorized photocopying activities and the creation of unauthorized coursepacks and anthologies, whether on or off campus. University administrations need also to be directly engaged in preventing university-owned or commercial photocopy shops on campus from engaging in illegal activities.
3. The Ministry of Education should also adopt policies and procedures to ensure that government and university-owned servers are not used for illegal P2P filesharing purposes
4. The Ministry of Justice and the public prosecutors should take immediate action to limit the use of the US\$30 daily "buy-out" of jail terms of 6 months or less. We understand this is within the authority of the prosecutors and it is essential that this discretion be used to impose deterrent penalties for piracy.
5. The government should issue an Executive Order on software legalization in government agencies, one of the larger markets for software.

ENFORCEMENT AGAINST KURO AND EZPEER AND PIRACY OVER THE INTERNET GENERALLY

The most pressing issue facing the Taiwan government at this moment is to find a way to take immediate action to halt Kuro and Ezpeer from continuing to profit from the unauthorized filesharing of copyrighted music and other files over the Internet. While the two services have both been indicted and have had injunctions issued against them, nothing has yet happened to change the status quo. Quite apart from the litigation which addresses a limited number of titles, Taiwan's enforcement authorities must take immediate action to stop these services from making available other unauthorized music and other copyrighted materials. It is also our hope that the court cases will be expedited and concluded at the earliest possible time.

IIPA is pleased with the establishment of the new interagency Cybercrime Task Force and urges that its component agencies be given increased resources, increased and more sophisticated training and should undertake aggressive enforcement against growing Internet piracy. A corollary to such enforcement action should be for the Ministry of Education to adopt policies which prevent University

servers from being used for illegal uploading and downloading activities, such as through access to Kuro and Ezpeer.

As IIPA has noted on many occasions, successful enforcement against the night markets has driven the pirates to use the Internet as its newest piracy tool. Taiwan cannot afford to wait before cracking down hard and before this new medium is turned over, much like what happened with OD production, to criminal enterprises and other pirates to profit illegally from the creativity of Taiwan citizens as well as U.S. creators and IIPA members.

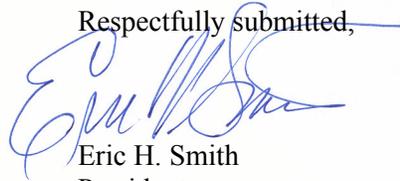
A key objective for IIPA and its members is for Taiwan to adopt a clear regime for assessing liability for secondary infringements (contributory and vicarious) and an effective statutory notice and takedown system for removing infringing material off the Internet. These objectives have not been a part of IIPA's immediate objectives for Taiwan, but given the growth of Internet piracy, have now become of critical importance.

CONCLUSION

IIPA appreciates the opportunity to provide its views on Taiwan. IIPA acknowledges and applauds the progress made by the Taiwan government in amending and modernizing its copyright law reform and in committing to take aggressive enforcement actions against pirates, particularly the criminal syndicates.

IIPA and our members continue to look forward to working with MOEA, TIPO and other agencies of the Taiwan government to bring about major improvements in copyright protection and enforcement in Taiwan—particularly in the on-line environment and in the other areas where we have identified continuing enforcement deficiencies. We look to the Taiwan to quickly address the illegal operations of Kuro and Ezpeer before their activities again threaten to undermine the US-Taiwan political relationship. IIPA also appreciates the efforts made by the U.S. government to assist in the effort to improve copyright protection in Taiwan and worldwide.

Respectfully submitted,



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