

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY

Special 301 Recommendation: Taiwan should remain on the Watch List.

Priority Actions Requested in 2006

- **Concentrate Efforts on Rapidly Growing Internet Piracy Threat:** Taiwan is now beset by rapidly increasing instances of Internet piracy, especially through unauthorized peer-to-peer (P2P) file sharing services. As the problem grows, so must the response. Enforcement is coordinated by the Joint Internet Infringement Inspection Special Taskforce (JIST), and executed mainly by the IPR Police (IPRP). JIST and IPRP must expand their enforcement activities if they are to make headway against the Internet piracy wave in Taiwan.
- **Eradicate Online Infringements from TANet:** The Taiwanese Government-owned TANet network is being used widely throughout Taiwan for Internet piracy, including unauthorized P2P file sharing. The Ministry of Education (MOE) oversees TANet but due to the lack of explicit ISP liability provisions in Taiwan's copyright law, TANET insists it has no lawful obligation to impose controls over the illegal transmission of files over its network. TIPO/MOEA should coordinate efforts to enact legislation clarifying ISP liability and move to exert control over enforcement on the network.
- **Provide Needed Training, Equipment, and Manpower to JIST and IPRP:** Unfortunately, only a few IPRP personnel are well trained to handle Internet piracy cases. In addition, there is not sufficient equipment, both in quality and quantity, provided for the use in combating Internet piracy. Finally, recent manpower cuts to IPRP seriously curtail their ability to effectively function. IIPA calls upon the Taiwan Government to provide JIST and IPRP with the training, equipment, and manpower they need to carry out their functions effectively.
- **Enact Controls Outlawing P2P File-Sharing and Create an Effective Notice and Takedown System:** The cases of *ezPeer* and *Kuro* demonstrate that guidance is needed to clarify secondary liability for copyright infringement in Taiwan. In addition, copyright owners will not be able to compete in the digital marketplace without the cooperation of ISPs, whose profits include payments by those engaged in Internet piracy. It is fair to ask ISPs to cooperate; they should do so voluntarily, but the law should also be amended to clarify the scope of secondary liability of ISPs. The amendment should also include an effective statutory notice and takedown regime which provides incentives for ISPs to cooperate with right holders, both with respect to pirate content residing online (stored on websites) as well as in the P2P environment.
- **Effectively Tackle Book Piracy:** The Government of Taiwan must do more to significantly reduce illegal photocopying of academic textbooks and journals, English language teaching (ELT) materials and professional reference books. In addition to continued enforcement by the Justice and Interior Ministries, IIPA requests that the Ministry of Education adopt policies prohibiting illegal photocopying and use of unauthorized materials on campus, backed with sanctions for violations. University officials should also build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those caught engaging in infringing conduct. Any fair use guidelines considered by the government must comply with international norms and not run afoul of the Berne three-part test.

- **More Effectively Monitor Exports of Counterfeit Cartridge-Based Videogames and Components:** There is incontrovertible proof that key components of infringing Nintendo products continue to be manufactured in Taiwan and exported to China for assembly. Taiwan Customs and the Aerial Police Bureau must take effective measures to monitor the exports of component parts of counterfeit cartridge-based games.
- **Enhance Foreign Coordination on Enforcement:** Despite their dedicated efforts within Taiwan, the paucity of diplomatic relations with other jurisdictions hinders the full effectiveness of Taiwan agency's investigations. Creative solutions to ensure greater international coordination are required.
- **Devote Sufficient Resources to Enable the New IP Court to Hear Copyright Cases on First Instance:** The Judicial Yuan has proposed establishing an intellectual property court to handle all copyright infringement cases, both civil and criminal, for which it should be congratulated. However, because the IPR court will initially operate in a single geographic location the Judicial Yuan has expressed concern regarding the practicality of absorbing the entirety of IPR-related litigation and prosecution in Taiwan without additional training, manpower, and district offices.
- **Prohibition on "Tiering" of Cable Channels and Other Onerous Restrictions on Pay TV Right Holders Should be Lifted**
- **Lengthy Copyright Royalty Rate Reviews Should Cease:** The Copyright Examination and Mediation Committee (CEMC) is no longer responsible for review of royalty rates proposed by collecting societies. However, the Taiwan Intellectual Property Office (TIPO) still insists that all collecting societies submit their proposed royalty rates for review and approval by CEMC in advance. Delays in these reviews, and the unfair outcomes, are causing serious harm to right holders; TIPO should no longer require them.
- **Pass Copyright Term Extension Legislation:** The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and 95 years from publication for sound recordings and other works of juridical entities.

For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

TAIWAN
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

| INDUSTRY | 2005 | | 2004 | | 2003 | | 2002 | | 2001 | |
|-------------------------------------|--------------|-------|--------------|-------|--------------|-------|--------------|-------|--------------|-------|
| | Loss | Level | Loss | Level | Loss | Level | Loss | Level | Loss | Level |
| Motion Pictures ² | 98.0 | 51% | 40.0 | 40% | 42.0 | 44% | 42.0 | 44% | 35.0 | 30% |
| Records & Music | 21.5 | 26% | 49.4 | 36% | 58.0 | 42% | 98.6 | 47% | 51.7 | 48% |
| Business Software ³ | 77.5 | 42% | 88.0 | 43% | 83.0 | 43% | 91.2 | 43% | 106.8 | 53% |
| Entertainment Software ⁴ | 161.9 | 42% | 123.0 | 63% | 261.8 | 42% | 596.1 | 56% | 119.4 | 70% |
| Books | 18.0 | NA | 20.0 | NA | 20.0 | NA | 20.0 | NA | 20.0 | NA |
| TOTALS | 376.9 | | 320.4 | | 464.8 | | 847.9 | | 332.9 | |

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Internet Piracy: With over 60% of Taiwan's population (13.8 million) using the Internet,⁵ and with roughly 61% of households in Taiwan having broadband connections,⁶ it is not surprising that Internet piracy has become the predominant form of piracy for most industries in Taiwan.⁷

As an example of the scope of the problem and how it has grown, in 2004, the number of online infringements involving business software (mainly P2P) traced to Taiwanese ISPs was 49,539. This number had risen to 344,157 in the first 10 months of 2005. By year's end it was expected that the number of infringements would increase by 700% year on year.⁸ For the music

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Taiwan, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The piracy level in 2005 does not reflect handheld piracy rates, which were not available for 2005. In 2004, handheld piracy rates were upward of 95%.

⁵ Internet Usage and Population in Asia, at <http://www.internetworldstats.com/stats3.htm> (updated November 21, 2005, with demographic numbers based on data contained in [world gazetteer](http://www.worldgazetteer.com), and usage numbers from various sources, mainly from data published by [Nielsen/NetRatings](http://www.nielsen.com), [ITU](http://www.itu.int), and other sources).

⁶ Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

⁷ The problem of Internet piracy is accompanied by the opportunity of the growth of new powerful business models for legitimate distribution. Similar to Japan and South Korea, the digital music market in Taiwan has developed quickly since 2004. Online music operators including iMusic, HiMusic, KKBox, and Qband separately concluded licensing agreements with recording and music companies and started to provide legal online music downloads and/or streaming services. All of these operators either charge their customers a fee of approximately US\$1 per download or require a monthly flat rate of around US\$36. In 2005, the online music market in Taiwan experienced some consolidation, with iMusic terminating its service but HiNet (the major telecommunication company and largest ISP in Taiwan) reaching agreement with KKBox to provide online music.

⁸ The number of infringements found in Taiwan alone in 2005 was more than double the number in 12 other Asian countries for which the business software industry has data. Surprisingly but of great concern, in the course of

industry,⁹ over 500 pirate websites offering illegal downloads are available to Taiwanese consumers, located either in Taiwan or greater China. Academic journal publishers report a high level of unauthorized access, and P2P file sharing of scanned academic texts is on the rise in Taiwan. The Taiwanese Government-owned TANet (a network designed for “educational” uses at college campuses throughout Taiwan) is being used widely for Internet piracy including unauthorized P2P file sharing. The Ministry of Education (MOE) oversees TANet but, because of the lack of explicit ISP liability provisions in Taiwan’s copyright law, TANet insists it has no lawful obligation to impose control over the illegal transmission of files through its network and MOE’s oversight is necessarily compromised.¹⁰

Other forms of Internet piracy are quite damaging. Entertainment software publishers now face the problem of so-called “offline server” piracy in Taiwan. The offline server essentially makes a publisher’s online game readily available without authority from the legitimate publisher and without adherence to terms or conditions set forth in a licensing agreement. In this form of piracy, an “offline server” operator creates a “mirror” server to the legitimate servers operated by entertainment software companies to run their online games, not only diverting traffic and subscription revenue from the legitimate site but also allowing the play of pirated games, as there is no authentication or verification process carried out at the server level (i.e., to verify that the game software being used is not a pirated copy) as would be done with a legitimate online gaming site. Another problem faced by the videogame industry is piracy at Internet cafés, especially involving unlicensed use of entertainment software. Of the approximately 1,000 Internet cafés in the country, only about 25% are licensed by entertainment software publishers.

Publishers also experience some problems with piracy over the Internet. Academic journals publishers report a high level of unauthorized access, and that peer-to-peer file sharing of scanned academic texts is on the rise. Another form of Internet-based piracy that remains prevalent is the selling of pirated copyright content through Internet auction sites, and other forms of advertising the sale of pirate product. Unfortunately, many of these websites are registered in foreign countries, which makes tracing these sites and enforcement against them quite a challenge (though access to these sites can be blocked). Anecdotally, it has been noted that the predominant number of illegal products sold on websites, as well as sold at retail, are sent directly from mainland China. Because Taiwan does not maintain diplomatic relations with the majority of the world’s governments, the IPRP’s ability to coordinate cross-border investigations on websites registered outside of Taiwan requires creative solutions outside the sphere of normalized inter-government relations.

Kuro and ezPeer Decisions: The major developments in 2005 with respect to the liability of Internet P2P services in Taiwan occurred in the courts in two long-awaited criminal decisions. In the first, *In re Chuan Cho Shu Ma Technology Co., Ltd.* (the “ezPeer” decision),¹¹ decided in June 2005, the Taiwan Shilin District Court found the defendants, Wu Yih-Dar and Global Digital

investigating infringing websites in Taiwan, the recording industry became aware that the majority of the infringing websites in Taiwan are located in the People’s Republic of China (PRC).

⁹ Infringing music files in various formats such as MP3, midi, WAV and RAM are available from a variety of channels in Taiwan including FTP sites, websites, streaming sites and file-sharing services.

¹⁰ For example, even after Kuro was convicted, TANet continued to facilitate unauthorized music file-sharing and swapping. The MOE leaves each school to control students’ usage of TANet on their own and takes no further action to prevent unauthorized copyrighted materials from being transmitted through TANet. MOE has not done its part to ensure proper implementation of the “Implementation Plan for Strengthening Internet Infringement Preventive Measures,” which was formulated by TIPO TIPO, in force May 1, 2005 to December 31, 2006. According to the Plan, MOE is to report to JIST on its efforts to rid TANet of online infringements, but MOE barely participates.

¹¹ *In re Chuan Cho Shu Ma (“Global Digital”) Technology Co., Ltd.*, 2002 Zhen Zi No. 10786 and No. 4559 (Taiwan Shilin District Court, June 30, 2005).

Technology Co., Ltd. (“ezPeer”), not guilty of copyright infringement.¹² This case threatened to have a devastating effect on the rights of copyright owners in the digital environment, but on September 9, 2005, in the *Kuro* case,¹³ the defendants, an individual subscriber of the P2P service and the managers of Kuro, were found guilty of copyright infringement. Specifically, the court sentenced the subscriber to four months imprisonment for downloading 900 unlicensed songs. Kuro’s managers were found guilty as joint infringers, since they were fully aware of the illegal downloads, earned subscription fees from their advertisements of 100,000 available songs for (unauthorized) download, and could “foresee” that infringements would occur. The court also found the Kuro managers to be “vocational” offenders, since they had hired others to more rapidly expand their pirate catalog. They were sentenced to imprisonments ranging from two to three years. Industry is heartened by the *Kuro* decision, which it hopes establishes that P2P services providing pirate content are liable for their acts.

Provide Needed Training, Equipment, and Manpower to JIST and IPRP: Without significant enforcement efforts in 2006, Internet piracy in Taiwan threatens to wipe out legitimate markets for copyright owners. Acknowledging the severity of the problem and the need to do something about it, TIPO and MOEA came up with an Implementation Plan for Strengthening Internet Infringement Preventive Measures (effective from May 1, 2005 to December 31, 2006), under which a Joint Internet Infringement Inspection Special Taskforce (JIST) is exclusively responsible for tackling Internet piracy. JIST comprises selected personnel with expert knowledge in computers, IT, and technology from the IPR Police (IPRP) (who are chiefly tasked with executing the Plan) and the Joint Optical Disk Enforcement Taskforce (JODE). While IPRP has run raids with some successful results,¹⁴ their efforts would be better enhanced through the provision of: 1) more IPRP personnel who are sufficiently well trained to handle Internet piracy cases; 2) more and better equipment to successfully combat Internet piracy; and 3) reversing recent manpower “reassignments” from IPRP that seriously curtail their ability to function effectively.¹⁵ Such a reassignment of manpower was clearly made without sufficient care or foresight, and IIPA believes the officers should once again be assigned back to IPRP.

Optical Disc Production in Taiwan Shifts From Factory Production to “Burning”: Illegal burning of copyright content onto recordable discs has taken over as the predominant form of optical disc piracy in Taiwan. In 2004 and 2005, more than 2,500 optical disc burners were seized in Foundation for the Protection of Film and Video Works/Motion Picture Association (MPA) raids.¹⁶ Regarding OD production facilities, the Joint Optical Disk Enforcement Task Force (JODE)

¹² Essentially, the court held that there was nothing in the Taiwan statute prohibiting the establishment of file sharing operations, nor is there any law in Taiwan requiring “P2P operators” such as ezPeer to monitor or filter their operations to ensure the content being shared on their networks is legal. The court also found that not only had ezPeer not directly infringed, but ezPeer could not be held criminally liable as an “accomplice” to any illegal acts of its end-users on the network (notwithstanding that such liability might be found in a civil case). The judge in the case looked to the legislature to clear up any ambiguity regarding the legality of file-sharing services.

¹³ *In re S.T. Chen, K.H. Chen, K.X. Chen*, Case No. 2003 Su-Tzu No. 2146 (Taipei District Court, September 9, 2005).

¹⁴ Between January 2004 and June 2005, the recording industry was involved with 13 raids were conducted against websites offering either pirate MP3 downloads or unauthorized streaming files. As a result of these raids, a total of 18 people were arrested and 95,785 infringing music files were found. The business software industry was involved in 92 Internet piracy investigations through October 2005, up from only 40 in 2004, leading to three raids against websites selling software over the Internet. The Motion Picture Association coordinated with the IPRP and the Ministry of Justice’s Investigative Bureau (MJIB) on 113 raids against Internet-based pirates throughout 2005, including 88 against Internet auction sites

¹⁵ The IPRP originally consisted of 220 officers, but has been reduced twice, most recently under the instruction of the Ministry of Interior (MOI); 35 officers were permanently reassigned (under the belief that Taiwan would be removed from the 301 list this year). In all, IPRP has seen a 20% reduction in force.

¹⁶ From January 1 through November 30, 2005, the motion picture industry program in Taiwan participated in raids resulting in seizure of 545 CD-R burners and 288 DVD-R burners. According to industry calculations, had these

of the Ministry of Economic Affairs (MOEA) remained active in 2005, running 628 inspections on the plants through November 2005. There are an estimated 89 optical disc factories, containing 58 mastering machines, 237 VCD/CD lines and 104 DVD lines in Taiwan.¹⁷ The estimated capacity of all the optical discs plants in Taiwan amounted to approximately 10.7 billion units annually. While pirate factory production was less of a problem in 2005, it is crucial that Taiwan continue to monitor the plants vigilantly to avoid backsliding. It is particularly worrisome that, of the cases brought against plants engaged in pirate production, several of the key cases, including the "DigiGold" case, remain pending after all these years (in part because of a loophole in the Optical Media Management Statute).¹⁸

Book Piracy: The most damaging activity to U.S. publishers in Taiwan in 2005 remained the illegal photocopying of academic textbooks and journals, English language teaching (ELT) materials and professional reference books. This type of piracy, occurring primarily on and around university campuses, continues to cut heavily into sales by both foreign (primarily U.S.) and Taiwan publishers.¹⁹ While the authorities have been extremely helpful in running raids against these commercial photocopy shops at copyright owners' requests, self-initiated action by the Taiwan Government remains rare. Because photocopy shops do not generally keep stockpiles of copies, but copy to order, and since the print runs are often at night or after hours, and delivery is offsite to avoid detection, the government must adopt investigative techniques that will permit them to detect this form of piracy.²⁰ Furthermore, the Ministries of Justice and the Interior should revisit incentive schemes for officers conducting raids on photocopy shops. Putting a scheme into place that adequately rewards officers for successful book piracy raids is imperative for the continued success of Taiwan's book piracy enforcement program.

The industry also suffers from procedural inconsistencies in raiding and prosecution. First, cooperation varies with geography, with good cooperation in Taipei and relatively poor cooperation in Tainan, for instance.²¹ Search warrants have been occasionally denied arbitrarily, or refused on bogus arguments.²² Issues relating to Powers of Attorney continue to plague the attempts at convictions, especially in Tainan.

operations remained in business for one year they would have generated in excess of US\$55,000,000 in revenues for the pirates. In a raid that just occurred on January 19, 2006, Taiwan's National Highway Patrol Police, in collaboration with IPR Police, raided five pirate optical disc manufacturing and distribution facilities in Taoyuan County, seizing a total of 147 DVD-R and CD-R burners, 118,961 pirate optical discs, and arresting five people on suspicion of infringing Taiwan's Copyright Law. The seized burners were capable of producing as many as 7,416,000 burned CD-Rs and 950,400 burned DVD-Rs in one year, yielding pirates revenues of US\$9,557,664, all without an optical disc plant ever becoming involved. See Motion Picture Association, Police Seize 147 DVD-R, CD-R Burners in Raids on Street Vendor Suppliers in Taiwan, January 19, 2006 (press release on file with IIPA).

¹⁷ This is an industry estimate. JODE reports the existence of 57 optical disc manufacturers operating in Taiwan as of December 2005, operating the 89 plants.

¹⁸ The judicial interpretation of "criminal intent" has apparently become a loophole that optical disc manufacturing plants have exploited to avoid criminal liability. The defense that a plant was "unaware" of the infringing activity is being employed by registered plants with overseas customers.

¹⁹ Profit-based photocopy shops, located on the perimeters of all major college campuses, actively carry out photocopying and binding services both for students and teachers.

²⁰ Some shops, in areas of dense student population, have display racks and catalogs featuring covers of foreign textbooks, arranged by course number and available for copying. Students can choose the course, the text, and the color for the custom cover, and the book is then copied while the student waits.

²¹ To add insult to injury, the copyshop owners in Tainan have banded together to form their own "trade association" specifically aimed at frustrating enforcement efforts. They have been at least somewhat successful to date, and the government must take action to ensure that justice is conducted despite delay and harassment tactics employed by the infringers.

²² One argument defendants often make in challenging warrants is that the "test buys" required of the rights holder in order to satisfy the very requirements for the warrant are somehow entrapment or somehow indicate "consent" by the copyright owner for the copy, invalidating the enforcement action. It should be clarified that such test buys are not only

Given that the overwhelming percentage of copying takes place on or near university and school campuses, it is imperative that the Ministry of Education adopt and implement policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations (including, for instance, making IPR protection on campus a criterion for universities' annual assessments by MOE). University officials should also build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those facilities caught engaging in illegal activity. The local publishing association, the Taiwan Book Publishers Association, and the Association of American Publishers (AAP) had productive meetings with MOE in September 2005, in which the Ministry promised action on the organizations' request. As publishers approach the March high copying season, IIPA looks forward to the Ministry's implementation of the programs discussed at that September meeting.

Enforcing Against Pirate Imports: Following the enactment of copyright amendments in 2004, an Executive Order was issued, "The Customs Operation Guideline Concerning the Protection of Copyright Law and Patent and Trademark Law" that sets out procedures to be followed by Customs to curtail pirate exports. In furtherance of this objective, Customs even made space available in its offices at CKS Airport to industry representatives. While these measures have proven effective to control the outward flow of some infringing goods,²³ the importation of infringing product into Taiwan, particularly due to Internet auction sites located and operating in neighboring jurisdictions, merits the further allocation of resources in order to adequately coordinate cross-border enforcement.

Piracy of Cartridge-Based Videogames: There is incontrovertible proof that key components of infringing Nintendo products continue to be manufactured in Taiwan and exported to China for assembly.²⁴ The investigative efforts of Nintendo's anti-piracy program have identified several Taiwan semiconductor design houses involved in the design and development of infringing chips, as well as in ordering the manufacture of such chips from semiconductor plants in Taiwan. These companies have been involved in the design, fabrication and distribution of over 40 million semiconductor chips over several years, and cases against some of these companies remain pending.²⁵ Now that the Export Monitoring System (EMS) has been abolished, Taiwan Customs and/or the Aerial Police Bureau (APB) must step up and take effective measures to monitor the exports of component parts of counterfeit cartridge-based games, such as those manufactured for Nintendo handheld devices.²⁶ Though concerns remain about the ability of Customs to effectively

permitted but required, and they should not be problematic as long as the buyer makes no representation that he/she is the copyright representative. Another argument defendants make is that commercial copyshops are only providing a "service" to students (presuming, incorrectly, that students themselves are perhaps permitted to make entire copies under the fair use provisions of the law), and thus they are not liable for the students' actions. This argument should be dismissed. Copyshops are operating for-profit businesses based on illegal activity.

²³ The motion picture industry reports some success, being called upon for assistance in inspections at the Taipei airport. The following is a record of inspections the MPA has been involved in:

| Year | # of investigations | # of parcels checked | Cases of OD piracy | # of units seized |
|------|---------------------|----------------------|--------------------|-------------------|
| 2004 | 53 | 22 | 18 | 2,418 |
| 2005 | 453 | 133 | 57 | 5,899 |

²⁴ Over 1,800 infringing semiconductor chips and PC boards bound for Shenzhen in Guangdong Province were seized by Taiwan Customs, with support from the Aerial Policy Bureau (APB), in mid-December, 2004. In addition, analysis of infringing products sold in the United States under the name Power Player established that the semiconductor chips embedded in the products and containing illegal copies of Nintendo copyright games were designed and manufactured in Taiwan, demonstrating once again that the export of infringing products from Taiwan remains a current and damaging problem to Nintendo.

²⁵ A detailed account of Nintendo of America's enforcement activity against these factories is provided in that company's 2006 Special 301 Submission dated February 1, 2006.

²⁶ The Taiwan government also promised that it would provide its Customs authorities with the requisite training so that they may adequately assume export-monitoring functions, but recent experience indicates that the training provided thus

police and halt the export of infringing Nintendo videogame components and products,²⁷ the Taiwan government appears to be trying to strengthen and improve its border measures, as well as provide its Customs authorities with the requisite training to adequately perform its functions. Taiwan Customs and APB efforts at apprehending imports of counterfeit products into the country increased in 2005.²⁸

End-User Piracy of Business Software: The use of unlicensed or pirate software in the workplace causes the greatest revenue losses for the business software industry. The Business Software Alliance (BSA) reports good enforcement cooperation from the police and prosecutors' offices. In 2005, the police ran one end-user piracy raid, and BSA filed five successful criminal complaints against end-user targets. Problems include unclear guidance on the information needed to secure a search warrant for police raids, as almost all cases have required informants to testify before the prosecutors and judges. Further, the processing time for considering search warrant applications has been unreasonably long pending consideration of informants' written testimonies by the prosecutors and judges.

Government Tenders: Reportedly, a business software company's request to a Taiwan Government department during a government building tender for bidders to use only authorized software was turned down. The Government of Taiwan should establish or tighten up requirements in public tenders (including government procurement).

Night Markets Improved: All the industries note some improvement in the level of pirate activity in the night markets. The number of night market stalls reached its peak in 2001 when an estimated 300 stalls sold pirate optical discs all over Taiwan each day. After vigorous enforcement actions and legislative amendments to Copyright Law in 2003 and 2004, the average number of stalls operating each day in Taiwan has declined to not more than 50.²⁹ We believe this improvement is directly attributable to the 2003 and 2004 amendments to Taiwan's copyright law elevating copyright offenses to the status of "public crimes," which allows the police to act without a formal complaint, and which empowers the authorities to confiscate pirated goods. Another factor has been the formation and activity of the IPRP.³⁰ A recent phenomenon is home delivery, whereby pirate product catalogues are provided to pirate consumers or available via the Internet.³¹

far has been insufficient. In December 2004, a shipment of over 1,800 counterfeit Game Boy Advance[®] PC boards, die and integrated circuits passed through the Chang Kai-Shek Airport destined for China's Guangdong Province. Customs officers at the airport showed no interest in the package and approved it to be shipped by air to China, though the only information on the package identifying the shipper was "Spider." Only when the Aerial Police Bureau (APB) noticed the incomplete information was it suggested that the package be examined, whereupon it was discovered that it was full of infringing product.

²⁷ Jurisdictional issues exist between Customs and the Aerial Police Bureau that have yet to be fully resolved. IIPA encourages the Taiwan government to ensure that both agencies cooperate fully so as to effectively address the ongoing export problems.

²⁸ A total of 12 inspections by both agencies resulted in the seizure of 500 counterfeit Game Boy cartridges and 6,600 infringing components being shipped from China.

²⁹ Motion picture industry investigators reported 428 cases of pirate activity in the night markets in 2004, as opposed to only 355 instances through December 31, 2005.

³⁰ Night market stall piracy appears to be under control except at the Xinmin Night Market in Taoyuan, Taipei. Various teams of IPR Police including Taoyuan, Taipei, Taichung and Kaohsiung teams have been dispatched to conduct raids against the pirates in Xinmin Night Market. There are six to ten pirate stall vendors on average every night; most stalls are manned by minors or are equipped with a "Conscience Box" (unmanned stalls with pirate product where buyers choose on their own to place money in a box in exchange for the pirate discs). Due to the fact that the police started to confiscate pirate products on display even when no stall operator was arrested, the number of pirate products on display has decreased country-wide.

³¹ In 2004, the Anti-Counterfeiting Committee (ACC) under the Ministry of Economic Affairs circulated a warning to newspapers, dispatch agencies and express delivery services to be careful in handling product catalogue and

Since 2003, almost 100% of pirate discs in these markets are burned CD-Rs and DVD-Rs.³² One point of concern in enforcement in general, including the night markets, is the Ministry of Interior's promulgated rules to evaluate police performance based on the market value of seized goods.³³ While this was undoubtedly issued with good intentions, this may lead to discrimination as to whose products receive proper enforcement (i.e., the market value of optical discs may be less than the market value of many other goods, e.g., counterfeits). IIPA will continue to monitor whether these new rules have any detrimental effect on enforcement by the police.

Specialized IPR Court to be Established in 2006: The Judicial Yuan has proposed establishing an intellectual property Court to handle all copyright infringement cases, both civil and criminal (as well as patent and trademark cases). However, IIPA understands that the JY proposal is that this new court would hear copyright cases only on appeal. IIPA contends that if the purpose of setting up the IP Court is to allow expert judges to handle IP cases, careful consideration should be given to extending coverage to initial trials as well as appeals. The court system continues to handle copyright cases with varying degrees of success,³⁴ although the industries continue to note delays in adjudicating even straightforward piracy cases against night market operators.³⁵

TRAINING AND PUBLIC AWARENESS

The copyright industries were actively involved in training and raising public awareness about copyright in 2005. The industries participated in a number of government seminars and trainings, including:

- Five seminars held by IPO for the interns of judges and prosecutors, discussing IPR enforcement activities and policy (each seminar involved around 20 interns), were held in Taipei: (1) January 17 to February 6, 2005; (2) May 16 to June 12, 2005; (3) June 13 to July

merchandise. Ministry of Economic Affairs, *Quarterly Report on Taiwan's Intellectual Property Rights Protection*, April - June 2004.

³² In 2005, the average price of most physical pirate products was NT50 per disc (US\$1.55).

³³ The point system was re-evaluated in March 2005. At present, a successful raid against copyright infringement not resulting in the capture of any suspected criminals is worth 2 points, whereas a successful raid leading to the capture of a suspect is worth 10 points. If the market value of the pirated goods seized is more than NT\$10 million (US\$310,318), the police can be awarded 10 additional points for every NT\$10 million (US\$310,318) worth of value (if no market value can be determined, each VCD is valued at NT\$300 (US\$9.31) and each DVD at NT\$600 (US\$18.62). In each instance, the points are split equally between all the police participating in the raid. By way of comparison, the police get 30 points for the seizure of each handgun, 40 points for each shotgun or machine gun, and 3 points for each illegal immigrant.

³⁴ For example, in 2005, the Motion Picture Association initiated 458 judicial cases involving 541 suspected defendants, obtaining 268 favorable decisions resulting in the conviction of 301 defendants (there were no acquittals). Of these 301 convictions, 81 defendants were adults and 220 were juveniles. Of the adults, 25 defendants were sentenced to imprisonment not exceeding 6 months, 46 defendants were sentenced to imprisonment of between 6 months to 1 year, and 10 defendants received prison sentences in excess of 1 year. Of the juveniles, 206 were given probation, 3 were placed into reformatory education, and 11 received a suspended sentence. For the recording industry, the following indicates the criminal case record. The record reflects that there are still too many cases in which the sentence included a jail term but the sentence was commuted to fines or was suspended (excluding juvenile offenders).

Summary of Case Statistics of the Recording Industry, 2002-2005

| Year | New Cases | Judgments (Juveniles) | Judgment (Sentences Commuted to Fines) | Judgments (Suspended Sentence) | Judgment (Jail Terms) | Not Guilty |
|------|-----------|-----------------------|--|--------------------------------|-----------------------|------------|
| 2002 | 1,524 | 1524 (815) | 352 | 148 | 191 | 18 |
| 2003 | 503 | 482 (159) | 153 | 70 | 84 | 16 |
| 2004 | 262 | 260 (122) | 72 | 36 | 24 | 6 |
| 2005 | 322 | 200 (154) | 17 | 18 | 9 | 2 |

³⁵ For the recording industry, 58% of cases brought in 2002 had yet to be decided, year on year. In 2005 to date, approximately 41% of new cases brought have been concluded, with either fines or jail terms imposed.

10, 2005; (4) October 24 to November 20, 2005; and (5) December 19, 2005 to January 15, 2006.

- Three anti-piracy investigation training events were held by IPO in Taipei for the police (each training involved around 40-100 police officers) at the Taipei Public Service Institute (TPSI): (1) September 5-9, 2005; (2) September 12-15, 2005; and (3) October 17-20, 2005.
- An IPR Training event was held by American Institute in Taiwan for law enforcement authorities (including 4 judges, 25 prosecutors, 41 police officers, and 19 IP officials) at the Judges and Prosecutors Training Institute in Taipei on September 28-29, 2005 (the Motion Picture Association also participated in this training).

BSA also held a press conference and seminar in February 2005 in Taipei to increase awareness and to educate online users on the threats and damage posed by Internet piracy.³⁶ In 2005, the Motion Picture Association sponsored or participated in 11 training programs aimed at IPR police and judicial personnel.³⁷

MARKET ACCESS

“Tiering” of Cable Channels Prohibited and Subscription Rate Capped: Under the Cable Audio and Television Law, the “tiering” of pay television services (providing differential channels and levels of service for differential pricing) is prohibited. Cable operators are required to bundle all 80 channels under a single basic tier and the law caps the subscription rate payable by consumers at NT\$600 (about US\$18.62) per month. Advertising on pay channels is restricted. Foreign investment in pay television services is limited to a maximum 20% equity share and no cable service provider’s potential market share can exceed one-third of the total market. These onerous restrictions on the ability to market content in Taiwan should be lifted.

COPYRIGHT LAW AND RELATED ISSUES

Previous years’ reports have gone through in detail the legislative landscape in Taiwan, including the 2004 copyright amendments. The following is intended to provide a summary of latest developments only. Please see previous years’ reports for more information about past developments at <http://www.iipa.com/countryreports.html>.

ISP Liability: Given the rapid growth of Internet piracy in Taiwan, especially P2P infringements, it is essential that a workable approach to online enforcement be forged between right holders and service providers, who are aware in general and may be able to foresee that

³⁶ The event was supported in person by Jack LU, Deputy Director, IPO Office, C.J. Cherng, Chairman, Taiwan Internet Association and General Manager of SeedNet (an ISP in Taiwan) and Y.S. Lee, Vice President, Chunghwa Telecom (an ISP in Taiwan).

³⁷ The MPA trainings for 2005 were as follows:

| Date in 2005 | Location | Sponsor | Topic | Audience |
|----------------|----------|---------|-----------------------------------|--|
| January 17 | Taipei | TIPO | OD Factory inspections | 50 IPRP officers |
| January 24 | Taipei | TIPO | OD Factory inspections | 50 IPRP officers |
| January 31 | Taipei | MPA | Prosecution of IPR offenses | 20 prosecutors and judges |
| June 10 | Taipei | MPA | Prosecution of IPR offenses | 20 prosecutors and judges |
| July 5 | Taipei | MPA | Prosecution of IPR offenses | 20 prosecutors and judges |
| September 7 | Taipei | CIB | Investigation of online piracy | 111 police officers |
| September 13 | Taipei | TIPO | Investigation of online piracy | 40 police officers |
| October 18 | Taipei | TIPO | Investigation of online piracy | 40 police officers |
| November 15-16 | Hualien | TAPC | Technological developments in IPR | 2 copyright officials, 2 LY members, 2 prosecutors |
| November 17 | Taipei | TIPO | Prosecution of IPR offenses | 20 prosecutors and judges |

infringing activity is occurring over their services,³⁸ but may not be aware of the specifics of each act of Internet piracy. A voluntary Code of Conduct was considered by copyright industry groups in Taiwan and discussed with the Taiwan ISP association, TWIA, starting in late 2004. These negotiations initially failed, but after negotiations, TWIA has at least agreed to transfer the notices from copyright industry groups to users relating to P2P infringement issues. Notwithstanding the beginnings of some cooperation, and despite TIPO's fine efforts to issue "administrative guidelines" for the prevention of Internet infringement, a workable approach to P2P and other fee-based download piracy has been elusive. MOEA's proposed draft "Statute for the Development of the Digital Content Industry" would have mirrored largely the approaches in the DMCA and the EU E-Commerce Directive. However, the most up-to-date version of the draft only addresses a very general principle for ISP's liability but no specific article prescribing the scope of the ISP's liability, and certainly nothing dealing with the most dangerous threat to the copyright industries in the online environment – P2P technologies. IIPA believes the only workable approach is to amend the Copyright Law to clarify the secondary liability of ISPs, and include a statutory notice and takedown regime and other remedies which are effective and provide incentives for ISPs to comply, with respect both to pirate content residing online (stored on websites) and in the P2P environment as well.

Criminal Code: The Legislative Yuan passed several revisions to the Criminal Code which bear on the "vocational" offender provision in the Copyright Law (Article 94). As we understand it, the changes (to Articles 55 and 56, and 12 "vocational" offender Articles of the Criminal Code) will close a loophole whereby a "vocational" offender was able to reduce his sentence as a "successive offender" to that involving only one of the crimes. In addition, the maximum sentence for "combined sentences" was raised from 20 years to 30 years (Article 51(5)). In November 2005, TIPO proposed a conforming amendment of deleting Art. 94 (and other minor conforming changes). As we understand it, and according to TIPO, since the former "vocational" offenders may receive heavier penalties after the new amendment of the Criminal Code is put into force in July 2006, the result is a strengthening of the law. Therefore, IIPA supports the amendment. This would leave optical disc-related offenses (Arts. 91.3 and 91*bis*3) as the only public crime proscribed in the copyright law.

Taiwan Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg "dealers" throughout the world and over the Internet. Taiwan should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

Anti-Smuggling Act: The Customs Anti-Smuggling Act was amended in January 2005, adding a new Article 39*bis* which provides,

Where import or export cargoes [sic], other than genuine goods parallel imported, that have been declared to Customs[,] infringes the patent right, trademark right or copyright, the importer or exporter in question shall be, except otherwise specified in other acts and regulations, imposed with a fine equivalent to one to three times the value of the cargoes [sic], and the cargoes [sic] shall be confiscated.

³⁸ As a result of the *Kuro* decision and past decisions on accomplice liability, awareness and foreseeability of infringing activities occurring over their services could subject service providers to claims for copyright infringement.

While this new administrative fine is welcome as to piratical imports, it leaves aside parallel imports, notwithstanding that the Copyright Law retains criminal penalties against the sale or rental of parallel imports in Taiwan. In addition, the question of the “value” of the cargo is crucial in this case, otherwise fines under this statute will be meaningless. Article 5 of the Customs Anti-Smuggling Act provides, “[w]here a fine, pursuant to this Act, is imposed on the basis of the value of cargoes, the duty-paid value or the FOB value shall be referred for import and export cargoes respectively.” Since the value of the physical media for copyright goods should be the “duty-paid value” in accord with international practice, not the value of the intellectual property contained on the media, the fines would appear to be meaningless under this statute. Thus, it must be ensured (by amendment, if necessary) that the “value” with respect to copyright goods for determining the fine (not the duty) is the legitimate retail price of the good.

Copyright Examination and Mediation Committee Review Process Should be Abandoned: According to Article 82 of Copyright Act, the Copyright Examination and Mediation Committee (CEMC) is no longer responsible for review of royalty rates proposed by collecting societies. However, TIPO still insists that all collecting societies submit their proposed royalty rates for review and approval by CEMC in advance. This review is causing serious harm to right holders and TIPO should no longer require it. For example, ARCO (a collecting society consisting of sound recordings copyright owners, mainly record companies) submitted proposed royalty rates for public performances on September 14 and December 14, 2004, respectively, and while TIPO indicated that CEMC would complete its review process in four months, the process took almost one year, during which ARCO could neither collect remuneration nor bring litigation to collect fees for the use of sound recordings throughout Taiwan.³⁹

Guidelines on Fair Use: TIPO has been instructed to draft guidelines on educational fair use. TIPO has issued two drafts of such guidelines for educators and libraries, and has indicated that it may also put out draft guidelines on distance education at a later time. The Taiwan Book Publishers Association (TBPA) has commented on the drafts issued to date. Publishers remain concerned that these guidelines may exceed the narrow limits and appropriate context for application of fair use. It is as yet unclear when final guidelines will be issued.

Term of Protection: The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and 95 years from publication for sound recordings and other works of juridical entities.

³⁹ Another example of how this procedure interferes unreasonably with current business practices, in 2004, ARCO proposed a rate of remuneration for hotel public performances of sound recordings of NT\$250 (US\$7.75) per guest room. CEMC cut the rate to NT\$40 (US\$1.24) per guest room without reason. Three major collecting societies (ARCO, AMCO and MUST) have reviewed CEMC’s approved rate for 2005 as being too low.