

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Taiwan was once a regional leader in establishing policies that fostered and rewarded creativity. But at least since 2013, Taiwan has failed to recognize and address a growing online piracy problem that has hampered the creative industries, casting off the issue as industry's problem, too controversial or difficult to explain, or the problem of other jurisdictions. Yet data suggests that the public in Taiwan would support more effective protection of creative content online. The creative industries make considerable contributions to Taiwan's economy. A 2017 Oxford Economics study shows local film and television sectors directly contribute US\$5.9 billion to Taiwan's GDP, support 104,200 jobs, and generate approximately US\$490 million in tax revenues. Moreover, Taiwan is a hub of music production for the Chinese speaking world and a major exporter of "C-pop."

Piracy websites and software applications (apps) are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of Piracy Devices. One bright spot in 2018 is that TIPO issued guidance that Piracy Devices are prohibited under the Copyright Act, and, in August, an IP Court decision confirmed this interpretation, which should help to combat this problem if enforcement authorities take action. Online piracy of reading materials has overtaken the longstanding problem of unauthorized photocopying of textbooks. In addition to e-book piracy, copyrighted teaching materials are increasingly made widely available without authorization on university digital platforms, and are often downloaded, printed, and/or disseminated by students without authorization.

Taiwan's government needs to do more to combat these mounting problems. Unfortunately, the government has indicated opposition to proposals for a narrowly tailored remedy to disable access to flagrantly infringing websites through no-fault orders directed at ISPs. The steps Taiwan's government has taken can only be described as missed opportunities. For example, draft amendments to the Copyright Act under consideration by the Legislative Yuan fail to provide the statutory tools necessary to effectively address Internet piracy; would not bring Taiwan's term of protection in line with evolving global norms to protect creators; would not correct unfair practices regarding collective management; and would raise questions regarding Taiwan's commitment to its existing international obligations by, among other things, broadening already overbroad exceptions and limitations, limiting protections for sound recordings incorporated into audiovisual works, and diluting sanctions for criminal infringement. Additional amendments under consideration intended to meet the standards of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also do not effectively address Taiwan's piracy problems, and would weaken its enforcement framework regarding pirated optical discs. IIPA urges the Government of Taiwan to change course and take the steps necessary to address the growing threats to the creative industries (including authorized distributors in Taiwan), which contribute so significantly to Taiwan's economy and culture.

¹For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2019

Enforcement:

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should accept and prosecute more online piracy cases and cases against Piracy Devices now that these devices have clearly been found to be illegal under the Copyright Act.
- Ensure that the Criminal Investigation Bureau (CIB) focuses on online piracy cases and that the Criminal Investigation Brigade (CIBr) is provided with sufficient training, funding, manpower, and equipment to investigate online piracy cases.
- Increase trainings for judges and prosecutors on specific issues related to online copyright infringement, and the application of procedural requirements to the online environment.
- Take action against infringement of reading materials at educational institutions, including the making available of on-demand printouts of pirated e-books or teacher resource materials, and against digital infringement occurring on online education platforms.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

Legislative:

- Enact legislation to:
 - provide for no-fault injunctions to order Internet Service Providers (ISPs) to disable access to flagrantly infringing websites (including, as necessary, amending the Civil Procedure Code and the Intellectual Property Adjudication Act to overcome potential civil procedure restrictions).
 - make all criminal copyright infringement, including Internet piracy, “public crimes” to permit *ex officio* action against infringement;
 - clarify ISP liability provisions to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notice of infringement, ISPs are required to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
 - amend Article 87 of the Copyright Act to ensure this provision may be more effectively used in copyright infringement cases by, for example, removing the condition “and to receive benefit therefrom” under Article 87(7);
 - extend term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years);
 - make unauthorized camcording of motion pictures in theaters a criminal offense;
 - make unauthorized camcording of live musical performances a criminal offense;
 - correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a fair-market based royalty rate and eliminate delays in fixing the rate;
 - provide exclusive rights for public performance and retransmissions of sound recordings.
- Ensure amendments to the Copyright Act do not reduce criminal liability standards, and do not extend exceptions beyond what is permissible under Taiwan’s TRIPS and Berne obligations (i.e., ensure exceptions are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Revise the Communication Security and Surveillance Act to eliminate overly restrictive requirements for investigators to obtain a court order to solicit essential information, such as IP addresses, from ISPs.

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 all issues.²

Mounting Piracy, Especially Online: Rampant online and mobile device piracy in Taiwan continued to worsen in 2018 in the absence of any effective government action to address the problem. Foreign websites, such as U.S.-hosted *eyny.com*, (the 19th most accessed site in Taiwan according to Alexa), *youtaker.com* (ranked 228th in Taiwan), *plus28.com* (ranked 286th in Taiwan), and *123kubo.com* (ranked 38th in Taiwan), that provide illegal content remain a significant problem, putting enormous pressure on the ability of legitimate rights holders to survive commercially in Taiwan. Particularly popular are streaming, forum,³ blog, deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites, which are used to infringe copyright in movies and television content, music, video games, and books and journals. There is still no effective means to combat P2P sites, and sites such as *jivod* and *xfplay*, hosted in China and elsewhere, are popular with local users. “Stream-ripping,” where users of legitimate online music platforms use tools, such as an app or a website, to illegally “rip” the streamed content, is a growing problem impacting primarily the music industry.⁴ Social media platforms have become a popular way to share pirated content. Apps for Piracy Devices and mobile devices, such as *Mixerbox 3*,⁵ have become a significant platform for disseminating illegal content. Infringement of “over the top” (OTT) content is a growing problem. OTT platforms stream copyrighted content online to subscribers. There is currently no direct legal basis to combat infringement of this content, and rights holders are urging TIPO to revise current law or issue a new administrative explanation to make Article 87 of the Copyright Act and anti-circumvention provisions applicable to OTT infringement.

The publishing industry has long reported 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 prior inspections merely consisted of self-assessment by universities. In late 2015, MOE finally included publishing industry representatives in the limited number of campus inspections, which found that while some of the universities inspected had policies in place regarding copyright protection, student and faculty compliance was low. MOE should conduct campus inspections on a consistent basis and continue to allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. In 2018, MOE began a process to revise its Campus Intellectual Property Protection Action plan to account for piracy in the digital environment. The publishing industry has submitted recommendations for MOE to take the following actions: 1) set up an Internet portal for rights holders to communicate with MOE regarding piracy concerns; 2) implement certain measures to ensure university online learning platforms are not used to facilitate piracy; and 3) address online piracy in MOE’s awareness raising efforts. MOE appears to have adopted some of these recommendations, issuing guidelines that: 1) require the creation of an online reporting portal (the Portal) for rights holders, and providing the contact information for the university employee charged with administering the Portal; 2) warn universities to adopt cautionary language (or “warnings”) on university platforms advising students and professors to comply with the law in their use of copyrighted materials; and 3) require warnings against “illegal photocopying, downloading, and dissemination” in student manuals and on student bulletins.

While the problem of unauthorized photocopying of textbooks at universities is slowly diminishing, this is not due to improved efforts by university administrators, but rather to unabated digital piracy, which has worsened the overall piracy situation in Taiwan. An on-campus copy shop equipped with computers and multi-function printers

²See, e.g., *IIPA, Taiwan, 2018 Special 301 Report*, (February 8, 2018), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301TAIWAN.pdf>.

³Forums are a serious problem, including *eyny.com* and *plus28.com*, as just two examples. The flow of infringing music and audiovisual content through these forums is enormous.

⁴The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator), but it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used. IIPA urges Taiwan Intellectual Property Office (TIPO) to issue an administrative statement (regulation) clearly specifying that Article 87(7) provides a legal basis for liability against apps or websites that facilitate copyright piracy, including stream-ripping.

⁵*Mixerbox 3* is a popular app that provides unauthorized music video content by directly streaming content from YouTube stripped of advertisements.

appears to allow students to download and print copyrighted materials, while computer labs at universities also appear to be venues for downloading and printing infringing materials. Unfortunately, the universities do not appear to be acting against infringing conduct. Copy shops near universities use digital files to provide on-demand printouts of pirated digital textbooks and teacher-resource materials.⁶ The MOE and university administrators may have inadvertently contributed to infringement online through a “Teaching Excellence Program,” which encourages teachers to make teaching materials they have created available on a university digital platform freely accessible to students. Unfortunately, it appears that in addition to original content generated by the instructors themselves, a significant amount of materials—such as textbook content, PowerPoint slides, exercises, or test banks and the like—on these platforms consist of unauthorized copies of copyrighted content created and owned by publishers. Without access to these university platforms, publishers are unable to determine the full extent of the infringement. Another problem is that universities also make “Open Courseware” available in Taiwan and around the world for free without any authentication to ensure it is available only to authorized users. In 2018, the publishing industry found several so-called “open course” platforms providing unauthorized access to proprietary content and resources. Unauthorized copies of textbooks in digital form proliferate online, through hosted and non-hosted (P2P) platforms,⁷ and through a number of services that sell unauthorized copies of digital textbooks on optical media.

Piracy in “cram schools” is also a serious problem.⁸ These schools use pirated copies of textbooks, even placing the name of the school and the teacher on the pirated copy, misleading students to believe that the materials are authorized. This piracy is difficult to detect because the pirated materials are distributed after students have registered. Although a few enforcement actions were taken in 2016 against cram schools, much more is needed to meet the growing challenge of book piracy in educational settings.

Piracy Devices: The sale of Piracy Devices (i.e., media boxes, set-top boxes, or other devices and their corresponding apps and services), which facilitate piracy, has increased considerably in Taiwan. Piracy Devices originating mostly from China are available openly throughout Taiwan, including at so-called “3C” shops that sell computers, software, and peripherals, and via online retailers, and facilitate unauthorized streaming of motion pictures and television content through apps that direct users to pirated content. These devices often contain, or can connect to, a hard disk to store the downloaded content, and may have an SD card slot, which helps novices connect to foreign piracy sites. More than 30 different brands of such devices are now available in the marketplaces in Taiwan.

TIPO has previously indicated that Piracy Devices can be addressed through current provisions of the law, but legislation is needed to address this growing problem.⁹ TIPO issued an administrative explanation in February 2018, indicating that a Piracy Device may violate Article 92 of the Copyright Act. In August 2018, the IP Court issued a ruling reversing a lower court decision and holding that Piracy Devices violate Articles 87(7) and Article 92.¹⁰ In June 2018, the TPB initiated a successful action against a Piracy Device called QBox, but other devices continue to be sold. In 2017, the motion picture industry initiated a case against a Piracy Device known as “terminator.” That case involved a raid by CIBr and is currently being investigated by the Taiwan Prosecutors Office. The local motion picture industry has worked well with enforcement authorities on Piracy Device cases, and IIPA is hopeful enforcement authorities continue to pursue such cases.

⁶Copy shops have unauthorized PDF files of textbooks on their in-house computers, where students can easily search and select titles and request shop clerks print them out and bind with color title pages.

⁷For example, *PDFDrive* provides downloads of millions of PDFs, including more than 18 million ebooks; *iss.net* is a web server that hosts pirated content; *taodocs.com* is a file sharing site providing pirated content to read for free and selling downloads; and *Taobao* sells pirated textbooks.

⁸Cram schools are specialized schools that help students meet a specific goal such as passing an English language proficiency test.

⁹Actions could be brought under Articles 87(7) or 92 of the Copyright Act, as aiding or abetting cases under the criminal law, or through other measures. It would also appear that allowing devices to use apps that provide access to infringing content is a violation of the anti-circumvention provisions in Taiwan's Copyright Act.

¹⁰See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (2nd accused)*, Taiwan IP Court, 2018, Case Number 7 (29 August 2018). The case significantly held that Article 87(7) is not restricted to peer-to-peer (P2P) technology, and can be applied to other technologies that enabled access to unlicensed programs and copying of copyrighted works through apps installed on the Piracy Device.

Online Piracy Enforcement Hampered by Inadequate Legal Framework and Lack of Will: While the takedown rate remains extremely high for domestically hosted content, Taiwan's Internet users obtain unauthorized content primarily from websites located overseas. Cooperation with ISPs is ad hoc, and it is generally good for domestically-hosted infringement. One problem, however, is that the law penalizing repeat infringers has never been properly implemented so ISPs do not enforce against repeat infringers as required by the Copyright Law.

Regarding infringing websites, however, Taiwan's legal framework is wholly inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites may in fact be available, but it remains untested. Taiwan government officials and stakeholders have had discussions with major ISPs about the severe problem of online piracy, and ISPs are generally sympathetic. Taiwan has a mechanism to report and take down content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Unfortunately, ISPs take the position that they will not take action without an order by a court or government agency. Government involvement and support is, therefore, essential. Unfortunately, in 2018 the government indicated an unwillingness to implement any mechanism to disable access to infringing websites. This in the face of proposals by members of the Legislative Yuan and industry to provide narrowly tailored injunctive relief in the form of no-fault orders to disable access to flagrantly infringing websites. Such relief has been shown in many jurisdictions to reduce online piracy, but mere introduction at the Legislative Yuan of the proposal led to protest by a vocal minority, and the bill was eventually withdrawn. As a result, Taiwan has become an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem. Taiwan's government should reverse itself and support efforts by rights holders and ISPs to take action against growing online piracy.

In a positive development, rights holders have been working with advertisers on an Infringing Website List (IWL) initiative to eliminate advertising on piracy websites. The Taiwan Intellectual Property Alliance (TIPA) has so far signed a Memoranda of Understanding (MOU) with the Taipei Association of Advertising Agencies (TAAA), representing 135 ad agencies, and the Taiwan Advertisers Association (TAA), representing 27 Taiwanese companies. Under the MOU, TAAA and TAA will forward TIPA's notices to their members advising them to stop placing ads on the listed websites. TIPO has assisted in this effort by sending letters to government agencies, the Chinese National Federation of Industries, and the General Chamber of Commerce. TIPA continues efforts to seek cooperation from other essential stakeholders, including Google, Yahoo, and Skupio, a local ad network.

Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. The implementation of the amendments to the Communication Security and Surveillance Act in 2014 has negatively impacted investigations into online infringement because these amendments restrict the information investigators can obtain from an ISP without a court order.¹¹ Investigations are few and far between, underscoring the need for a remedy to disable access to infringing sites through no-fault injunctions. The music industry reports that CIBr actions against music piracy have been significantly reduced in part because domestic takedown notice recipients have become more responsive.¹²

Priority of Copyright Cases Should be Elevated: The reorganization of the IPR Police (IPRP) into CIBr resulted in decreased human resources, funding, and de-prioritization of copyright infringement cases. At its peak, CIBr was supposed to have 218 officers. In October 2018, 30 new police college graduates joined CIBr, but the average age of the current force is 40 and, as a result, CIBr has been slow to adopt new technologies and knowledge. Another factor inhibiting digital piracy investigations is that current equipment is antiquated, making it difficult to investigate advanced digital piracy in real time. IIPA believes the CIBr needs to re-staff to at least 185 officers; elevate IPR protection as the chief priority within the division; and assign a commander and supervisors who understand IP and have the know-how to take effective action against physical and Internet/mobile piracy. The

¹¹The amended law requires officers to obtain court orders before soliciting further information from Internet Service Providers (ISPs) such as IP address account information. It is estimated that only about 30% of applications for such orders are approved by the courts. In one case, the IP Court found a defendant not guilty because the IP address of the defendant was not solicited with a court order in violation of the Act.

¹²The Criminal Investigation Brigade (CIBr) brought 18 piracy cases in 2016 (2 physical and 16 online), 10 piracy cases in 2017 (3 physical and 7 online), and 3 online piracy cases in 2018.

budget should be increased to make it sufficient to effectively enforce against copyright infringement, including allocating funds to purchase modern equipment and to provide training for investigators. Benchmarks must be maintained for copyright cases, both in terms of the numbers of cases initiated, as well as reasonable targets for successful convictions. It is important that such goals be subdivided by subject matter, such as: Internet piracy, book piracy,¹³ unauthorized camcording, ISD 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 (US\$145,005) 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. The National Police Administration (overseeing CIB and CIBr) subsequently decided to cease the incentive for copyright anti-piracy cases. 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 TIPO will no longer play an important role in the IPR police force as in the past.

Improvements Needed in Court Adjudication of IP Matters: Many reports from copyright and other IP rights holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal prosecutions do not result in deterrence. Although it is technically possible under current law to obtain a no-fault injunction against an ISP to disable access to a flagrantly infringing website, the law has not been tested. A major obstacle is that courts have interpreted the law too narrowly regarding several questions, including: 1) whether a website can be a defendant under the law; 2) whether it is necessary to issue an exceedingly high "performance bond," which deters rights holders from taking steps to protect their rights; and 3) whether the ISPs can be brought into court as a no-fault defendant. Instructions should be issued to courts in Taiwan that, under the Copyright Law, a no-fault application can be brought against ISPs to disable access to flagrantly infringing websites, and, pursuant to such an application, judges may dispense with the issuance of a performance bond.

In the criminal context, prosecutors overwhelmingly settle for "suspension of indictment" in digital piracy cases and judges tend to commute prison sentences to a fine or suspend punishment altogether. The Judicial Yuan may be receptive to trainings 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 rights holders; and primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

COPYRIGHT LAW AND RELATED ISSUES

The dominant concern in Taiwan remains the continued lack of an administrative or judicial remedy against online piracy services targeting Taiwan users. IIPA strongly urges Taiwan to incorporate such a remedy into its copyright reform process, and to improve the draft amendments to the Copyright Act in order to address other pressing needs and bring Taiwan's legal framework in line with international norms and best practices.

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan: It remains the case that many of the online services built on infringing activities of others, and/or facilitating infringement, are located outside of Taiwan. Nonetheless, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. Although ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, the current inadequate legal framework inhibits them from doing so. Around 45 jurisdictions around the world have developed approaches to halt illegal services from being accessed from across their borders. We believe that all organs of the Taiwanese Government (TIPO, the

¹³As noted above, on-demand printouts of pirated digital books (particularly higher education and English language teaching materials (ELT)) and journals has become the primary problem faced by the U.S. publishing industry in Taiwan. 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.

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 included as part of the copyright review process. Governments in the region, including Australia, Korea, Singapore, India, Indonesia, Malaysia, and Thailand, have adopted and/or refined approaches that provide a remedy for ISPs to disable access to sites that are primarily infringing, and draft legislation has been introduced in the Philippines.¹⁴

Draft Digital Communications Act: In October 2017, the Executive Yuan approved the draft Digital Communications Act and forwarded it to the Legislative Yuan where it is pending. This Act is part of a legislative effort to consolidate regulation of telecommunication, Internet, television, and radio platforms; but, unfortunately, the draft does not appear to address the urgent need to authorize disabling access to foreign-hosted infringing sites. Moreover, the draft includes broad ISP safe harbor provisions, which, notwithstanding language indicating that the ISP liability provisions in the Copyright Act supersede those provisions, could have negative implications for copyright enforcement.

Proposed Copyright Amendments Inconsistent with International Norms: In October 2017, the Executive Yuan passed draft amendments to the Copyright Act and forwarded them to the Legislative Yuan for consideration. These draft amendments, unfortunately, do not address many of the criticisms IIPA provided in comments on the previous drafts that TIPO had released for public comment. There is presently no schedule for the Legislative Yuan to consider the draft amendments.

Although the draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. For example, the draft amendments, if enacted, would not strengthen Taiwan's enforcement framework to address non-hosted infringements, nor would they address the urgent problem of foreign rogue websites directed at Taiwanese users. A new mechanism, such as judicial authority to issue injunctions disabling access to foreign hosted-infringing sites, is needed to deal with rogue websites that are specifically built to induce and encourage infringement and foreign hosted piracy sites that target users in Taiwan.¹⁵ In addition, the draft should clarify Taiwan's ISP liability framework to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notification of infringement, ISPs are required to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

The draft also fails to address many of Taiwan's other pressing needs, including: 1) deeming all criminal copyright infringement, including Internet piracy, "public crimes" (as was so successfully done regarding optical disc piracy); 2) extending the term of protection for copyrighted works, including sound recordings, in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 75 years); 3) making it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters;¹⁶ 4) making it a criminal offense to engage in unauthorized camcording of live musical performances;¹⁷ and 5) correcting problematic TIPO practices regarding collective management.¹⁸

¹⁴IIPA also encourages Taiwan to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

¹⁵To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property Case Adjudication Act.

¹⁶It has been reported that actions against camcording as "unauthorized duplication" have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording. Camcording is a growing problem in Taiwan; the motion picture industry detected nearly a dozen camcording incidents occurring in just the second half of 2018.

¹⁷The music industry reports that infringement through camcording live concerts is increasing.

¹⁸Corrections 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 Collective Management Organizations (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

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 provides an exception to the rights of sound recording producers (including the exclusive rights regarding reproduction, distribution by sale or rental, and the remuneration right for public performance or "re-public communication") for sound recordings "which have been fixed on audiovisual works." There is no justification for this exclusion, which is inconsistent with Taiwan's obligations under the TRIPS Agreement and with the obligations of the WIPO Performances and Phonograms Treaty (WPPT), which Taiwan claims to meet notwithstanding that it cannot independently join the treaty.¹⁹

In addition, the proposed draft includes numerous other overbroad exceptions and limitations to protection, which would call into question Taiwan's compliance with its TRIPS obligations.²⁰ These include:

- a broad exception for distance learning;
- compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts";
- an exception for using "common domestic reception appliances" to retransmit publicly works that have been publicly broadcast;
- a broad exception for public performance of works for "non profit" activities; and
- a further broadening of Taiwan's "fair use" exception.²¹

The draft also reduces criminal liability standards (e.g., requiring participation in collective management organizations as a prerequisite for criminal enforcement, exempting a broad range of uses of copyright works from criminal liability, and removing the minimum prison sentence of six months for making and distributing infringing copies);²² and requires rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement. Further, Taiwan should bring its law up to the emerging international standard by providing producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings, as many other countries around the world have done. Exclusive rights are important to enable producers and performers to effectively enforce their rights against infringement, and to negotiate fair market terms for the exploitation of their works.

To further its stated ambition to join the CPTPP, which requires compliance with the standard of protection of the WPPT and the WIPO Copyright Treaty (WCT), Taiwan has been considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards. Although the draft has not been released for public comment, we understand it would make Internet piracy a public crime where the "whole" work is exploited "for consideration" and the infringement value exceeds NT\$1M (about US\$32,169); and would weaken enforcement against pirated optical discs.²³ This draft is a priority bill in the Legislative Yuan, and is expected to be passed before

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 rights holders to collect royalties. A detailed discussion of the shortcomings of the Act appears in previous IIPA filings.

¹⁹See TRIPS Article 14 and WIPO Performances and Phonograms Treaty (WPPT) Article 2(b). The definition of "phonogram" under WPPT Article 2(b), the corresponding Agreed Statement Concerning Article 2(b) in WPPT Footnote 2, as well as numerous judicial decisions worldwide make clear that a blanket exception for sound recordings fixed in an audiovisual work is inconsistent with the WPPT.

²⁰To 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.

²¹Article 77(1) of the draft states that all of the enumerated exceptions (Articles 53-75) are subject to fair use without any requirement that they be confined to the fair use factors outlined in Article 77(2). Article 77(2) instead appears to function as an additional "catch all" fair use exception. As a result, the draft sets out a sweeping exception regime that is largely exempt from the safeguards set out in Article 77(2), which was originally intended to confine the enumerated exceptions to the three-step test. As noted, *supra* footnote 20, all of these exceptions should be expressly confined to the three-step test to ensure compliance with Taiwan's international obligations.

²²The draft mandates that rights holders participate in a CMO 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. Parallel imports should not be decriminalized 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 and re-transmission.

²³The provision would eliminate minimum penalties regarding pirated optical discs (Article 91*bis*) and eliminate the legal basis for confiscating pirated optical discs seized (Article 98 and 98*bis*).

the end of June 2019, although it is not clear when or how Taiwan could join the CPTPP. While the draft includes some positive aspects, it does not address most of the deficiencies in Taiwan's legal framework outlined above, including inadequate term of protection²⁴ and the lack of an effective remedy against flagrantly infringing websites. IIPA strongly encourages removal of the NT\$1M threshold requirement for considering digital piracy a public crime because calculating the value of infringement is fraught with uncertainty, and the high bar does little to deter online infringement and may actually encourage it. Similarly, the requirement that the whole work must be exploited for consideration also is an unnecessary obstacle that will undermine deterrence. Moreover, Taiwan should strengthen, rather than weaken, enforcement against pirated optical discs.²⁵

Taiwan is on the verge of squandering this opportunity to update its copyright laws and demonstrate its commitment to the protection of intellectual property rights. Rather than conducting a complicated copyright overhaul that fails to address many of Taiwan's most pressing needs and moves Taiwan further away from international norms and its current international obligations, Taiwan instead should use this opportunity to improve its copyright regime to meet the challenges of the digital age.

MARKET ACCESS UPDATES AND RELATED ISSUES

In 2017, Taiwan instituted a number of regulations that discriminate against U.S. audiovisual content. On January 8, 2017, the National Communications Commission (NCC) issued regulations that included significant local content requirements that limit the broadcasting of U.S. audiovisual content on terrestrial and satellite television.²⁶ These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports. In December 2016, the NCC issued the Television Program Classification Regulations, which require all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages regardless of the content being broadcast. This onerous requirement, which entered into force in 2017, is a significant barrier for non-Taiwanese content. In response to objections from international channels, Taiwan has indicated it will consider requests for waivers but such requests are discretionary on a case-by-case basis and are not always granted. The Cable Radio and Television law limits foreign direct investment in a domestic cable television service to 20% of the operator's total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50%. In 1990 Taiwan set a rate cap for cable TV service of NT 600 (\$20) per month per household, which has never been adjusted to keep up with inflation. Other restrictions on television services include a mandatory carriage requirement of 90-100 channels in the basic cable package, and, for all IPTV offerings above the basic level cable TV services, only *a la carte* pricing is allowed. Such investment restrictions and rigid regulations of retail cable rates by the central and local government have hindered the development of the cable TV industry, satellite operators, and content providers.

TRAINING AND OUTREACH

Rights holders continue to work with the Taiwan 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. In 2018, the local motion picture industry initiated a series of training courses for cinema staff regarding copyright protection and anti-camcording. 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

²⁴The obligation for term of protection in the Trans-Pacific Partnership (TPP) has been suspended in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

²⁵For example, the law should instead make clear that reproduction of optical discs is a "public crime" under Article 100. While digital piracy is the overwhelming concern in Taiwan, hard goods piracy remains a problem. Physical formats represent 27% of the revenues of the Taiwan recorded music market.

²⁶The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Productive Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production Programs require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm; local satellite TV channels to broadcast at least 25% of locally produced children's programs between 5 pm and 7 pm; and at least 25% of locally produced drama, documentaries, and variety programs between 8 pm and 10 pm. Forty percent of these locally produced programs must be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

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 2019, 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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The deficiencies in the Taiwan's enforcement framework outlined above—including de-prioritization of copyright piracy cases at CIBr; inadequate civil procedures that do not result in deterrence; and a judicial system that does not take piracy cases seriously resulting in non-deterrent criminal sentences—are inconsistent with Taiwan's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt the proposed draft amendments to the Copyright Act without significant revisions, Taiwan's copyright laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.