

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 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: The creative industries make considerable contributions to Taiwan's economy, but online piracy and other barriers continue to limit access to Taiwan's market for the U.S. creative industries. Once a regional leader in establishing policies that fostered and rewarded creativity, Taiwan has done little in recent years to address its online piracy problems. Instead, Taiwan's government has mostly shrugged off the issue as industry's problem, too controversial, or the problem of other jurisdictions. Yet data suggests that the public in Taiwan would support more effective protection of creative content online, which would also further the Taiwanese Government's stated interest in negotiating a bilateral trade agreement with the U.S.

Online piracy is a serious problem in Taiwan, where laws and local enforcement agencies are struggling to address a growing and complex piracy ecosystem. Piracy websites and software applications (apps) are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of Piracy Devices (PDs). Illegal camcording has reemerged as a significant concern. 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. One bright spot in 2019 was that Taiwan amended its Copyright Act to provide a clear legal basis for taking action against the proliferation of piracy apps and devices. It is now incumbent upon Taiwan's enforcement authorities to use these new tools to their maximum effect and take action against these unlawful activities, as well as against other forms of piracy that pollute Taiwan's online marketplace.

Taiwan's government needs to update its legal framework to combat its evolving and mounting piracy problems, and should remove other barriers to its market. The government should take the opportunity presented by its legal reform process to draft and pass amendments to the Copyright Act to provide the statutory tools necessary to effectively address Internet piracy. Unfortunately, two separate sets of draft amendments to the Copyright Act under consideration not only fail to address deficiencies in Taiwan's legal framework, but would further weaken it and raise questions regarding Taiwan's commitment to its existing international obligations. While neglecting to take adequate measures to restrict infringing content from its marketplace, Taiwan has been increasingly erecting barriers to its market for legitimate U.S. audiovisual content. These barriers should be removed, and Taiwan should refrain from imposing any new barriers, including proposed regulations of Over-the-Top (OTT) services that require permanent local establishments or mandate local content quotas. IIPA urges the Government of Taiwan to change course and take the steps necessary to address the growing threats to the creative industries, 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2020

Enforcement:

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should continue to prosecute more online piracy cases and cases involving PDs under the amended Copyright Act.
- Ensure that the CIB focuses on online piracy cases and that the 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.
- Take effective action against rising unauthorized camcording incidents.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to all websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

Legislative:

- Enact legislation to:
 - provide for a clear legal basis for rights holders to obtain 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 framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
 - further amend Article 87 of the Copyright Act to: 1) clarify that the list of acts setting out “an infringement of copyright” is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping; and 2) remove the pre-condition for liability that infringers “receive benefit” from the infringement;
 - extend term of protection in line with international best practices (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 or 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., that exceptions to and limitations on copyright are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Eliminate the growing slate of market access barriers that discriminate against U.S. audiovisual content (including investment restrictions in the Cable Radio and Television law, the rate cap for basic cable TV service, local discriminatory content quotas on television content, and television program classification regulations that require display of Taiwanese ratings and warning messages); and ensure that any new OTT regulations do not require foreign OTT service providers to set up local permanent establishments or mandate local content quotas.

TAIWAN'S DIGITAL MARKETPLACE AND PIRACY AND ENFORCEMENT UPDATES

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.² Moreover, Taiwan, the 25th largest music market in the world in 2019 by revenue, is a hub of music production for the Chinese speaking world and a major exporter of "C-pop." Unfortunately, Taiwan's online marketplace is dominated by unlicensed services and mass access to infringing content. 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.³

Piracy Continues to Grow, Especially Online: Online and mobile device piracy in Taiwan continued in 2019 in the absence of adequate and effective government action to address the problem. Foreign websites that provide illegal content remain a significant problem and undermine the ability of legitimate rights holders to survive commercially in Taiwan. Examples of such websites include *8maple.ru* (ranked 38th in Taiwan according to SimilarWeb), *bowan.su* (ranked 635th), and *gimy.tv* (ranked 45th), which offer access to thousands of infringing movie and television series titles and make money through advertising. Particularly popular are streaming, forum,⁴ 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 foreign-hosted infringing services. This has left Taiwan unable to effectively combat online video piracy syndicates and their products and services, which have expanded from China into Taiwan.

"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. The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator). In other jurisdictions, courts have found such services to infringe the reproduction and/or making available rights, and/or to unlawfully circumvent technological protection measures (TPMs), but in Taiwan no such cases have been brought. While it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used, this has not been tested yet. As discussed below, Article 87 should be amended further to clarify that the list of acts setting out "an infringement of copyright" is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping.

Social media platforms have also become a popular way to share pirated content. Apps for PDs and mobile devices, such as *Mixerbox 3*,⁵ have become a significant platform for disseminating illegal content. Illegal camcording is on the rise, with ten video matches forensically matched to Taiwan cinema locations (including in Kaohsiung) during 2019, up from five in 2018. In addition to improving the legal framework (discussed below), the government should take actions under current law, and work with industry to persuade exhibitors to provide staff with more training and to take proactive security measures.⁶

The publishing industry has long reported continued problems with unauthorized photocopying and use of infringing materials at universities. A "Campus Intellectual Property Protection Action" plan has been incorporated into

²See Oxford Economics, *The Economic Contribution of the Film and TV Industry in Taiwan in 2016*, 5, available at https://www.mpa-apac.org/wp-content/uploads/2018/03/MPAA_Taiwan_2016_WEB.pdf.

³See, e.g., IIPA, *Taiwan, 2018 Special 301 Report*, (February 8, 2018), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301TAIWAN.pdf>.

⁴Forums are a serious problem, including, for example, *eyny.com*, one of the most popular infringing websites with 33.45 million monthly visits, and 82.25% of its traffic from Taiwan (according to SimilarWeb data). Users can easily share unlicensed content (including movies, TV dramas, and music) in the forum. In addition, *eyny* has a sub-streaming service, *video.eyny.com*, which receives 9.43 million monthly visits and 73.54% of traffic from Taiwan, where users can share unauthorized content (including movies, TV dramas, and music videos) directly with each other.

⁵*Mixerbox.com* is a website that allows users to watch embedded YouTube clips stripped of advertisements, providing a service similar to a streaming service like Spotify or KKBOX, except with unlicensed content. *Mixerbox.com*, which has seriously disrupted the local music streaming market, has 835 thousand monthly visits, with 91.49% of its traffic from Taiwan. The website also disseminates the popular mobile app *Mixerbox 3*, which also provides unauthorized music video content streamed from YouTube, stripped of advertisements.

⁶It 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.

the Ministry of Education's (MOE) Campus Inspection program since 2006, but it is unclear whether the required inspections are being conducted. These campus inspections should be conducted on a consistent basis and continue to allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. In 2018, the publishing industry submitted recommendations to MOE regarding measures it should adopt to better address piracy of reading materials. To that end, MOE issued guidelines: 1) requiring 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) warning 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) requiring that warnings against "illegal photocopying, downloading, and dissemination" be included in informational materials provided to students.

Unauthorized photocopying of textbooks at universities is slowly diminishing, but unfortunately, unabated online piracy of textbooks has risen, worsening the overall book piracy situation in Taiwan. An on-campus copy shop equipped with computers and multi-function printers 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.⁷ The unmonitored "Teaching Excellence Program," which encourages teachers to make teaching materials they have created available on a university digital platform freely accessible to students, may have inadvertently contributed to the piracy of textbook and related content. Unfortunately, it appears that in addition to original content generated by the instructors themselves, a significant amount of the materials—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.

Piracy Devices: The sale of PDs (i.e., media boxes, set-top boxes, or other devices and their corresponding apps and services), has increased in Taiwan. Mostly originating from China, these PDs are available openly throughout Taiwan, including at so-called "3C" shops, 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.

As discussed below, recent amendments to Article 87 and 93 of the Copyright Act provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs. In addition, on July 31, 2019, the IP Court ruled against a company that operated an app that facilitated access to unauthorized television content. Although the Court issued fines against the company that were relatively low and non-deterrent, the Court also issued prison sentences against two officers of the company.⁸ These are very positive developments, and IIPA hopes that Taiwan's enforcement authorities strictly enforce these new prohibitions to address the proliferation of PDs and infringing apps. It should also be clarified that the new law applies to resellers of devices that do not have piracy software or apps pre-loaded, but who are well equipped (either by the manufacturer or by middleware providers) to install the software or apps or to enable users to do so, or who circumvent technological protection measures used by rights holders to avoid unauthorized access to their works. Such a clarification would ensure the law accomplishes its goal of deterring the sale of piracy streaming devices in the marketplace. In light of the new law, local associations, including the Taiwan Over-the-Top Media Services Association, are asking the government to set up a specialized enforcement unit to handle cases involving unlawful PDs. The local motion picture industry has recently worked well

⁷Copy 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.

⁸The case was the result of a claim brought by cable television network Sanlih E-Television (SET) against a company that operated the illegal app *OH!COOL*. The company was fined NT\$200,000 (US\$6,550) and its director and Chief Technology Officer were each sentenced to three months imprisonment and 50 days criminal detention. The Taiwan Shilin District Court delivered another criminal sentence in September 2019 regarding a linking site *ishowfile*, which offered dozens of U.S. motion pictures without permission. The defendant was sentenced to 20 months imprisonment and the case is on appeal. While the sentence was encouraging, the length of the proceedings (4 years and 4 months) is far too long to have a significant deterrence in the marketplace.

with enforcement authorities (including CIB, TPB, and CIBr) on Piracy Device cases, and IIPA is hopeful enforcement authorities continue to pursue such cases, using the new law to its maximum extent.

Pirated USBs: USB devices loaded with thousands of pirated songs are becoming more popular in Taiwan. Sold online at a very cheap price (NT\$200–NT\$800, or ~US\$7–US\$27), investigations indicate that these USBs are being manufactured in mainland China and delivered by local couriers in Taiwan, with the money going into Taiwanese bank accounts. Taiwan’s notice-and-takedown mechanism is inapplicable to this kind of infringement because these are physical products and there is no list of infringing content available to identify in a notice. The music industry has initiated four actions against sellers of pirate USBs by filing complaints with the CIBr, and many other cases are being considered, but it appears that CIBr is unwilling to prioritize this kind of infringement. CIBr passed two of four cases directly to the District Attorney offices without conducting any raid actions against the related couriers and bank account owners. CIBr should prioritize these actions and handle them directly.

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 generally good for domestically-hosted infringement. One problem, however, is that the provision of the Copyright Act penalizing repeat infringers has never been properly implemented so ISPs do not enforce against repeat infringers as is legally required.

Regarding overseas infringing websites, however, Taiwan’s legal framework remains inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites does not appear available under current law. Taiwan government officials and stakeholders have had discussions with ISPs about the severe problem of online piracy. While ISPs are generally sympathetic, they require the government to direct them or courts to order them to act. Taiwan has a mechanism to report and ensure permanent removal or blocking of content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Government involvement and support is essential to expand this cooperation to content that infringes copyrights. Without such a remedy, Taiwan is becoming 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.

Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. 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.⁹

Provide Adequate Resources for and Prioritize Copyright Cases: As previously reported, The Government of Taiwan should provide CIBr with adequate human resources, funding, and equipment necessary to investigate digital piracy cases; and CIBr should prioritize copyright cases, with appropriate benchmarks and goals, to ensure it is effectively addressing Taiwan’s piracy problems. In addition, as previously reported, it is critical to reinstate an award budget so that CIBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. TIPO should also play an important advisory role.¹⁰

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. 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 would benefit from and 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

⁹The Criminal Investigation Brigade (CIBr) brought nine piracy cases in 2019 (four physical and five online).

¹⁰For more details on IIPA’s concerns with CIBr, see IIPA 2019 at 81-82.

for rights holders; and ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

Infringing Website List (IWL): In a positive development, in September 2019, the Taiwan Intellectual Property Alliance (TIPA) concluded a Memorandum of Understanding (MOU) with the Taiwan Digital Media and Marketing Association (DMA), representing major online ad networks (e.g., Google and Yahoo in Taiwan) to join an Infringing Website List (IWL) initiative to eliminate advertising on piracy websites. As previously reported, rights holders had agreed on several MOUs with Taiwanese advertisers, including members of the Taipei Association of Advertising Agencies (TAAA) and the Taiwan Advertisers Association (TAA) on the IWL initiative; however, those advertisers had only the minority of the market and any ads removed were quickly replaced by ads from non-participating online advertising companies. It is hoped that DMA's joining the IWL MOU will change this situation and the IWL will start producing meaningful results.

COPYRIGHT LAW AND RELATED ISSUES

Amendments to Address Piracy Devices and Apps: Another positive development was Taiwan's enactment in April 2019 of amendments to Articles 87 and 93 of the Copyright Act. These amendments impose criminal penalties on individuals or entities who: 1) provide software, such as P2P software, or apps that enable members of the public to access unauthorized copies of films and television programs on the internet; 2) assist members of the public to access such unauthorized copies of films and television programs; or 3) manufacture or import devices with such pre-loaded software or apps. The penalties that may be imposed by a court are a sentence of up to two years imprisonment and/or a maximum fine of NT\$500,000 (~US\$16,600). This legislation follows 2018 guidance from TIPO that streaming devices are prohibited under the Copyright Act, and an August 2018 IP Court decision confirming this interpretation.¹¹ Unfortunately, revised Article 87 maintains the condition that violators must "receive benefit" from their actions. This requirement is unnecessary and should be removed, because proving infringers have received a benefit from their illicit activities is often difficult and onerous for rights holders, thereby limiting the effectiveness of the prohibition. In addition, as noted above, it should be clarified that the list of acts setting out "an infringement of copyright" is non-exhaustive to allow the provision to be applied to other acts of infringement, such as stream-ripping. IIPA hopes that Taiwan's enforcement authorities vigorously use these new tools to better address piracy in the country.

Notwithstanding this recent legislative achievement, other longstanding draft copyright amendments continue to languish before the Legislative Yuan. Taiwan should prioritize copyright reform and move forward legislation to address the serious deficiencies in its copyright law regime, as discussed below.

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan: While many of the online services built on infringing activities of others and/or facilitating infringement are located outside of Taiwan, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, but 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. IIPA believes the Taiwanese Government should propose urgently needed legislation to provide 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 such proposals have been included as part of the copyright reform process. Governments in the region, including Australia, Korea, Singapore, India, Indonesia, Malaysia, and Thailand, have

¹¹See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (second 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.

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.¹²

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. Unfortunately, these draft amendments do not address many of the criticisms IIPA raised 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. Prior IIPA submissions have detailed the flaws in the draft amendments.¹³ These include failing to address a number of deficiencies in Taiwan's existing legal regime, including the need to:

- provide a mechanism to address the problem of foreign hosted piracy websites that target users in Taiwan;¹⁴
- clarify ISP liability framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
- deem all criminal copyright infringement, including Internet piracy, "public crimes" (as was so successfully done regarding optical disc piracy);
- extend the term of protection for copyrighted works, including sound recordings, in line with the international trend;¹⁵
- make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;¹⁶ and
- correct problematic TIPO practices regarding collective management;¹⁷ and
- provide producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings.

In addition, the draft amendments contain a number of provisions that are inconsistent with evolving international norms and raise questions regarding Taiwan's commitment to comply with its existing international obligations, including the following:

- an unjustified exception to the rights of sound recording producers for sound recordings "which have been fixed on audiovisual works";¹⁸

¹²IIPA 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.

¹³See, e.g., IIPA 2019 at 83-84.

¹⁴To 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.

¹⁵Term should be extended 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.

¹⁶The music industry reports that infringement through camcording live concerts is increasing.

¹⁷Corrections 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 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.

¹⁸This exception 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 even though it cannot independently join the Treaty). See 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.

- numerous other overbroad exceptions and limitations to protection, including regarding education¹⁹ and fair use,²⁰ which would call into question Taiwan's compliance with its TRIPS obligations;²¹ and
- a reduction of 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
- requiring rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement.

As reported last year, to further its stated ambition to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which requires compliance with the standard of protection of the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), Taiwan is considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards.²³ There is no timeline for passage at this stage. While the draft includes some positive aspects, such as establishing digital piracy as a public crime,²⁴ it does not address most of the deficiencies in Taiwan's legal framework outlined above, including the lack of an effective remedy against flagrantly infringing websites and an inadequate term of protection,²⁵ and an early draft would have weakened enforcement against pirated optical discs.²⁶

MARKET ACCESS UPDATES AND RELATED ISSUES

Taiwan maintains a number of discriminatory barriers against U.S. audiovisual content. In January 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.²⁷ These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports. In 2016, NCC issued regulations on Television Program Classification that 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

¹⁹These include a broad exception for distance learning and compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts."

²⁰Article 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.

²¹Other problematic exceptions include an exception for using "common domestic reception appliances" to publicly retransmit works that have been publicly broadcast, and a broad exception for public performance of works for "nonprofit" activities. To ensure compliance, the three-step test (i.e., TRIPS Article 13) should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

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.

²³See IIPA 2019 at 84-85.

²⁴Unfortunately, to qualify as a public crime, the "whole" work must be exploited "for consideration" and the infringement value must exceed NT\$1M (about US\$32,169). These are unnecessary obstacles that should be removed, particularly the high threshold 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.

²⁵The 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).

²⁶The 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*).

²⁷The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Production 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.

rate cap for cable TV service of NT600 (US\$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.

In 2019, NCC proposed amendments to restrict channel-premier programs to no more than five years from nationwide first release, linking compliance to the renewal of cable and satellite television licenses. NCC subsequently scrapped this proposal in response to complaints from rights holders, but is working on a revised draft. IIPA is hopeful that the revised draft will not include this proposal, which is out of step with international best practices and, if enacted and implemented, would raise significant uncertainties for foreign investment.

OTT Regulations: The Ministry of Culture (MOC) and NCC are considering OTT regulations that would require foreign OTT service providers to set up local permanent establishments and potentially mandate local content quotas. Although these agencies state they are primarily concerned with regulating OTT services and streaming content originating from China, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry. IIPA understands that a draft may be available for public consultation soon, and there are a number of other issues that could be included, including registration and licensing of curated video services.

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 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. Industry provides 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 2020, 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.