

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** Taiwan has recently taken some positive steps to improve its digital marketplace for legitimate (licensed) audiovisual content, including outlawing Piracy Devices (PDs) and software applications in 2019 and taking enforcement actions in 2020 against certain notorious piracy sites, such as *8maple.ru* (and related domains). However, online piracy, legal framework deficiencies, and other barriers continue to stifle the potential of the Taiwanese market and limit market access for the U.S. creative industries. To further its stated interest in negotiating a bilateral trade agreement with the U.S., Taiwan's government should address the copyright protection, enforcement, and market access concerns discussed in this report.

Piracy websites and software applications (apps), especially those operated or based outside of Taiwan, are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of PDs. Illegal camcording remains a concern. E-book piracy and the making available of copyrighted teaching materials without authorization on university digital platforms likewise remain problematic.

In 2019, Taiwan amended two articles of its Copyright Act to provide a clear legal basis for taking action against the proliferation of piracy apps and devices. Taiwan's government should further improve the legal framework for copyright protection and enforcement to combat remaining and growing online piracy problems. For example, Taiwan should provide an effective remedy such as no-fault injunctions against foreign-hosted piracy sites. This is essential to address the fact that most forms of piracy affecting the Taiwanese market are operated by or involve services based outside of Taiwan. Data suggests that the public in Taiwan would support more effective protection of creative content online. 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 damage local and worldwide investment in the production and legitimate distribution of copyrighted content and raise questions regarding Taiwan's commitment to its existing international obligations.

The Government of Taiwan should move swiftly to remove market access barriers negatively impacting the audiovisual sector, and Taiwan should refrain from imposing any new barriers, including proposed regulations of Over-the-Top (OTT) services. IIPA urges the Government of Taiwan to take the steps necessary to address the persistent threats to the creative industries, which contribute so significantly to Taiwan's economy and culture.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should continue to investigate and prosecute more online piracy cases (including those involving PDs and piracy apps under the amended Copyright Act), with the goal of seeking deterrent level punishment against commercial piracy operations.
- Ensure that the CIB, TPB, and CIBr remain focused on combatting online piracy and are provided with sufficient training, funding, manpower, and equipment to investigate online piracy cases.

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<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Increase training for judges and prosecutors on global best practices in the area of online copyright enforcement, 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 to deter unauthorized camcording incidents, including issuing deterrent penalties.
- 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 infringing websites, including foreign 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 70 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 in dispute settlement cases; and
  - 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 WTO 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 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 disincentivize foreign investment by, for example, requiring foreign OTT service providers to set up local permanent establishments or mandating local content obligations.

## **TAIWAN’S DIGITAL MARKETPLACE AND PIRACY AND ENFORCEMENT UPDATES**

A 2016 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.<sup>2</sup> Moreover, Taiwan,

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<sup>2</sup>See 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/MCAA\\_Taiwan\\_2016\\_WEB.pdf](https://www.mpa-apac.org/wp-content/uploads/2018/03/MCAA_Taiwan_2016_WEB.pdf).

the 27<sup>th</sup> 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 permits unhampered access to unlicensed services, which compete with and undermine legitimate digital services. Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those prior reports and is not to be considered an exhaustive review of all issues.<sup>3</sup>

**Piracy Continues to Grow, Especially Online:** Online and mobile device piracy in Taiwan continued in 2020. Foreign websites that provide illegal content remain a significant problem and undermine the ability of legitimate rights holders and services to survive commercially in Taiwan. Examples of such websites include *gimyvod.com* (ranked 36<sup>th</sup> in Taiwan according to SimilarWeb) and *99kubo.tv* (ranked 45<sup>th</sup> in Taiwan), which offer access to thousands of infringing movie and television series titles and make money through advertising. Particularly popular are streaming, forum,<sup>4</sup> blog, deeplinking, peer-to-peer (P2P) (e.g., *Rarbg*), BitTorrent, and cyberlocker sites (e.g., *Mega* and *Katfile*), which are used to infringe or facilitate infringement of 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 stop online video piracy syndicates and their products and services, which have expanded from China into Taiwan. Notorious piracy sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* allegedly have their servers located in Taiwan.<sup>5</sup> While these sites remain under investigation, Taiwan should take effective action by imposing deterrent level punishments against the operators of these sites and services, as discussed below.

In 2020, Taiwan’s enforcement authorities took some notable enforcement actions against key websites that infringed film and television content. For example, the CIB successfully took action against a major streaming website, *8maple.ru*, responsible for 32.5 million piracy visits per month. In March 2020, the CIB seized the primary and related domain names (*8maple.com*, *8drama.com*, *8drama.ru*, *8duck.ru*, *8video.tv*, *eyny.is*, and *eyny.tv*), arrested two suspects, and seized computer equipment, property and approximately US\$1.9 million in illegal funds.<sup>6</sup> In addition, in July 2020, the Intellectual Property Court upheld a lower court’s criminal sentence of the operator of a linking site *ishowfile*, which offered dozens of U.S. motion pictures without permission.<sup>7</sup>

“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.<sup>8</sup> 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, in part because operators are located outside Taiwan. 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 and would not provide a solution in cases in which the server, the website, and the service operator are based outside of Taiwan. As discussed below, Article 87 should be amended further to clarify that it can be used against foreign-

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<sup>3</sup>See, e.g., IIPA, *Taiwan, 2020 Special 301 Report*, (February 6, 2020), available at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301TAIWAN.pdf>.

<sup>4</sup>Forums 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.

<sup>5</sup>USTR identified *Dytt8.net* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (“2020 Notorious Markets Report”). *Dytt8.net* is a consistently high-ranking pirate website in China with local rankings of 480 and 328 on Alexa and SimilarWeb, respectively, and it receives around 9.5 million visits per month. With a very user-friendly interface and the provision of direct links to third party storage providers, this website remains a particular threat to legitimate services in greater China. *Dytt8.net* is part of a group of related sites, including *dy2018.com*, *dygod.net*, and *ygdy8.com*. These sites are under investigation.

<sup>6</sup>The case has been transferred to the Taoyuan District Prosecutor’s office for further investigation. See <https://www.taipeitimes.com/News/taiwan/archives/2020/04/09/2003734279>.

<sup>7</sup>In September 2019, The Taiwan Shilin District Court sentenced the defendant to 22 months imprisonment. 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. It is expected that the defendant will make a final appeal to the Supreme Court.

<sup>8</sup>Popular websites that enable stream-ripping include *YouTubeTo.com*, which receives over 4.4 million visits per month from Taiwan, and *Y2Mate*, which receives 1.2 million visits per month.

based services and 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.

A new type of piracy emerged in 2020 involving a mobile app for use with karaoke machines that allows consumers to access and download content from a cloud database located overseas. The app provides access to a vast amount of unauthorized karaoke audiovisual content. In a recent case in Taiwan, the owner of a karaoke audiovisual content cloud database provided an app for download by Taiwanese consumers that permitted them to access and use content on the database licensed only for the China territory. Rights holders of the karaoke audiovisual content in Taiwan suffer significant losses from this form of piracy but are unable to pursue either the machine manufacturer or the Taiwanese distributor under existing law (i.e., Article 87(1-8) of the Copyright Law or the new OTT legislation) because the content is legally licensed in China.

Social media platforms have also become a popular way to share pirated content. Apps for PDs and mobile devices, such as *Mixerbox 3*,<sup>9</sup> have become a significant platform for disseminating illegal content. Illegal camcording continues to be a problem, with ten video matches forensically matched to Taiwan cinema locations (including in Kaohsiung) during 2019 (up from five in 2018), and six audio matches.<sup>10</sup> 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.<sup>11</sup>

Unauthorized photocopying and use of infringing materials at universities continues to be problematic. A “Campus Intellectual Property Protection Action” plan was incorporated into the Ministry of Education’s (MOE) Campus Inspection program in 2006, but it is unclear whether the required inspections continue to be conducted. These campus inspections will only be effective if they are conducted on a consistent basis and allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. Based on recommendations submitted by the publishing industry regarding measures to better address piracy of reading materials, in 2018 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.

While unauthorized photocopying remains a concern, the availability of unauthorized copies of textbooks on online sites has overtaken this problem. Online shopping forums, such as *www.shopee.com* and *www.ruten.com/tw* host numerous vendor accounts that sell or re-sell unauthorized copies of textbooks, test banks, and solutions manuals in both pdf and print form.<sup>12</sup> Copy shops on and around university campuses may be equipped with computers and multi-function printers to allow students to select the desired textbook to be printed on demand (from pirated digital files stored on in-store computers),<sup>13</sup> while computer labs at universities also appear to be venues for downloading and printing infringing materials by students.

The “Teaching Excellence Program” encouraged teachers to make available teaching materials they created on a university digital platform freely accessible to students. Unfortunately, the universities do not appear to audit their

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<sup>9</sup>*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 623 thousand monthly visits, with 91.71% 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.

<sup>10</sup>Two video matches were traced to Taiwan in 2020, but this data is anomalous due to the pandemic impacting cinema openings and the availability of theatrical releases.

<sup>11</sup>It 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.

<sup>12</sup>Vendors on these online forums purchase DVD-ROMs containing pirated content from vendors on *Taobao* (China) or download infringing copies from other high traffic piracy sites (such as *Libgen* or *ThePiratebay*) and upload the infringing copies to their seller accounts.

<sup>13</sup>Copy shops store unauthorized pdf files of textbooks on in-house computers, which are available for students to search and select files for printing and binding by the shop.

platforms, and 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. The full extent of the infringement remains unknown, as publishers are not permitted access to the university platforms, even for evaluation purposes. Where publishers become aware of infringing content stored on the platforms, they notify MOE, which in turn forwards the notifications to the university. Though university response has been largely inconsistent, there have been instances of university cooperation, resulting in consultations between the university and the domestic publishers' association regarding guidelines for uploading teacher resources.<sup>14</sup>

**Piracy Devices:** Notwithstanding specific legislative reforms, the proliferation of PDs remains a problem in Taiwan, and enforcement against operators of PDs to effectively deter them has been insufficient.<sup>15</sup> Two separate criminal investigations involving the Qbox and the Chuang Yi TV Box, which date back to 2017, are pending prosecution and trial hearings. As discussed below, the 2019 amendments to Articles 87 and 93 of the Copyright Act now provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs, but authorities have yet to invoke the amended provisions and courts have yet to interpret them. In 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.<sup>16</sup> These are very positive developments, and IIPA hopes that Taiwan's enforcement authorities strictly enforce these new prohibitions and impose deterrent level penalties to address the proliferation of PDs and infringing apps.

Taiwan's government should clarify that the amended 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 TPMs 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 PDs in the marketplace. In light of the amended 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 audiovisual industry has recently worked well with enforcement authorities (including CIB, TPB, and CIBr) on PD cases, and IIPA is hopeful enforcement authorities continue to pursue such cases, using the amended 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. In 2020, the music industry initiated eight actions against sellers of pirate USBs by filing complaints with the CIBr, which has been working proactively with the music industry on this issue.

**Online Piracy Enforcement Hampered by Inadequate Legal Framework:** 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

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<sup>14</sup>Two universities located in Taoyuan City have been in consultations regarding guidelines for uploading teacher resources, and one is improving its i-learning platform, including by adopting a monitoring scheme.

<sup>15</sup>Piracy Devices (PDs) refer to media boxes, set-top boxes, or other devices and their corresponding apps and services. Mostly originating from China, 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. Manufacturers of popular PDs in Taiwan include Unblock Tech, EVPAD, and SVI Cloud.

<sup>16</sup>The 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.

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. Taiwanese 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. Meanwhile massive online piracy continues to cause significant damage to American creators and businesses, which have invested in production, distribution, and exportation of copyrighted content.

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. 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, but also because most piracy websites are hosted outside Taiwan, where CiBr does not have jurisdiction.

**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.<sup>17</sup>

**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 are drawn out and do not result in deterrence. In the criminal context, prosecutors have settled for "suspension of indictment" in digital piracy cases and judges have commuted prison sentences to a fine or suspended 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 following: 1) technical particularities of Internet and new technology-based copyright infringement cases; 2) aspects of the civil and criminal system that are not operating smoothly for rights holders; and 3) ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

## **COPYRIGHT LAW AND RELATED ISSUES**

**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 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 or are required to adopt approaches to halt illegal services from being accessed from across their borders. IIPA believes the Taiwanese government should propose 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.

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<sup>17</sup>For more details on IIPA's concerns with CiBr, see IIPA 2019 at 81-82.

Governments in the region, including Australia, South Korea, Singapore, India, Indonesia, Malaysia, Thailand, and Vietnam have adopted and/or refined approaches that provide a remedy requiring ISPs to disable access to infringing sites, and draft legislation has been introduced in the Philippines.<sup>18</sup>

**Proposed Copyright Amendments Inconsistent with International Norms:** In January 2020, following elections to the Legislative Yuan in December 2019, TIPO proposed another draft bill amending the Copyright Act (Draft Bill). The Draft Bill is largely based on earlier proposals. Unfortunately, the Draft Bill does not address many of the criticisms IIPA raised in comments on the previous drafts that TIPO had released for public comment. Prior IIPA submissions have detailed the flaws in the draft amendments.<sup>19</sup> 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 through the availability of no-fault injunctions to disable access to pirated content;<sup>20</sup>
- 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), which would be an effective deterrent and would benefit all rights holders, including those who cannot afford to pursue civil enforcement actions;
- extend the term of protection for copyrighted works, including sound recordings, in line with the international trend;<sup>21</sup>
- make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;<sup>22</sup>
- correct problematic TIPO practices regarding collective management;<sup>23</sup> and
- provide producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings.

In addition, like earlier proposals, the Draft Bill contains a number of provisions that are inconsistent with evolving international norms and raise questions regarding Taiwan’s compliance with its existing international obligations, including the following:

- numerous broad exceptions and limitations to protection, including education<sup>24</sup> and fair use,<sup>25</sup> which would call into question Taiwan’s compliance with its TRIPS obligations;<sup>26</sup>

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<sup>18</sup>IIPA 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.

<sup>19</sup>See, e.g., IIPA 2019 at 83-84.

<sup>20</sup>To 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.

<sup>21</sup>Term 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 70 years.

<sup>22</sup>The music industry reports that infringement through camcording live concerts is increasing.

<sup>23</sup>Corrections should include allowing the setting of fair-market based rates for collectively managed rights (instead of tariffs determined by the Taiwan Intellectual Property Office (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.

<sup>24</sup>These include a broad exception for distance learning and compulsory licenses for the benefit of educational institutions and compilers of “pedagogical texts.”

<sup>25</sup>Article 65(1) of the draft states that all of the enumerated exceptions (Articles 44-63) are subject to fair use without any requirement that they be confined to the fair use factors outlined in Article 65(2). Article 65(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 65(2), which was originally intended to confine the enumerated exceptions to the three-step test. All of these exceptions should be expressly confined to the three-step test (i.e., WTO TRIPS Article 13) to ensure compliance with Taiwan’s international obligations.

<sup>26</sup>Other problematic exceptions include an exception for using “common domestic reception appliances” to retransmit works publicly that have been publicly broadcast, and a broad exception for public performance of works for “nonprofit” activities. To ensure compliance, the three-step test 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.



- 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);<sup>27</sup> 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 previously reported, to further its stated ambition to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which requires compliance with 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.<sup>28</sup> 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,<sup>29</sup> 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.<sup>30</sup> Furthermore, an early draft would have weakened enforcement against pirated optical discs.<sup>31</sup>

**Amendments to Address Piracy Devices and Apps:** As previously reported, in 2019 Taiwan enacted amendments to Articles 87 and 93 of the Copyright Act.<sup>32</sup> This legislation followed 2018 guidance from TIPO that streaming devices are prohibited under the Copyright Act, and an August 2018 IP Court decision confirming this interpretation.<sup>33</sup> 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, which unfortunately propose many changes that would weaken rather than strengthen the scope of substantive copyright protection, continue to languish before the Legislative Yuan. As discussed above, Taiwan should prioritize copyright reform to improve its marketplace for rights holders and move forward legislation to address the serious deficiencies in its copyright law and enforcement regimes.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

**Local Content Quotas:** 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

<sup>27</sup>The 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 37 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.

<sup>28</sup>See IIPA 2019 at 84-85.

<sup>29</sup>Unfortunately, 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.

<sup>30</sup>The 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).

<sup>31</sup>The 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*).

<sup>32</sup>These amendments impose criminal penalties on individuals or entities who: 1) provide software, such as peer-to-peer (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).

<sup>33</sup>See *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 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 PD.



on terrestrial and satellite television.<sup>34</sup> These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports.

**Content Ratings:** 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.

**Additional Barriers Against Audiovisual Content:** Taiwan maintains a number of other discriminatory barriers against U.S. audiovisual content. 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 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.

**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 obligations. In addition, the proposed regulations would require foreign OTT service providers to register with the NCC and disclose sensitive commercial information. 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.

## **TRAINING AND OUTREACH**

The global COVID-19 pandemic unfortunately hampered efforts at physical or in-person training or outreach opportunities. That said, rights holders continue to work with the Government of Taiwan, providing 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 2021, 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 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

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<sup>34</sup>The 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. 40% of these locally produced programs must be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.