

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

TAIWAN

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Taiwan remain on the Priority Watch List with an out-of-cycle review at an appropriate point to review (a) Taiwan's adoption of legislation correcting the deficiencies in the copyright amendments adopted in July 2003 and (b) to assess whether its improved enforcement against OD factories, CD-R and DVD-R labs, wholesale distributors, retailers/night markets, copyshops and against growing Internet piracy has continued at a high level of success and become more institutionalized, with concomitant reductions in the high piracy rates in Taiwan.¹

Overview of key problems in Taiwan: Over the last 5 years, with the exception of piracy rates for business software, piracy rates have increased to the point of severely threatening the economic health of other local and international copyright-based businesses. This has been due to OD factory piracy spinning out of control, the ongoing presence of organized criminal elements involved in pirate production, and enforcement against piracy in the distribution chain not being effective and deterrent. Taiwan continues to be world's largest supplier of blank recordable media to pirate operations globally. However, with the adoption of new copyright amendments in July 2003 (which made piracy a public crime), the copyright industries have so far witnessed welcome improvements in the overall enforcement climate in Taiwan, though gaps and deficiencies persist throughout the system. As a result, pirates have moved their operations increasingly to CD-R and DVD-R burning and to the Internet and in turn Taiwan has been somewhat successful in moving its enforcement activities to match this shift, but much more needs to be done. Enforcement against OD factory piracy has improved significantly and so has enforcement against the wholesale and retail pirate trade through *ex officio* actions permitted under the new amendments. Enforcement against copyshops has improved significantly, but takes place only at the request of the copyright owner. Enforcement against end user piracy has also improved and piracy rates have declined by 10% from 2002 to 2003 and the government has taken laudable action against organized crime syndicates engaged in software counterfeiting. While the copyright amendments made many salutary changes in the level of protection and made possible more effective protection, the law must be further amended and deterrent enforcement, including against growing Internet infringements and on-campus photocopying, must be significantly strengthened for Taiwan to return the place it had achieved in the late '90s.

Actions to be taken by the Government of Taiwan: In order to lower the high piracy rates which still persist in most copyright industries, in order to meet Taiwan's obligations under the WTO/TRIPS Agreement, to which it is now a party, and in order to put the tools in place to

¹ For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

deal with Internet piracy and growing on-campus photocopying, the government needs to take the following actions immediately:

- Adopt the EY-approved amendments to the copyright law that the LY refused to adopt when the law was amended in 2003. This must include more effective and deterrent enforcement tools, including protection against circumvention of technological protection measures, clear liability for secondary infringements online and an effective notice and takedown system to fight all traditional, digital and Internet piracy. This must be done immediately after the election;
- Continue a sustained copyright enforcement campaign throughout 2004 against all pirates, particularly against the organized criminal syndicates that control piracy in the manufacturing, distribution, and retail sectors, and impose truly deterrent penalties;
- Bring effective enforcement against Internet piracy generally and make significant enforcement inroads against peer-to-peer piracy, beginning with closing the notorious P2P pirate services, Kuro and EzPeer;
- Make permanent the now temporary IPR Special Task Force;
- Increase enforcement against illegal photocopying on and around university campuses, including government-initiated actions;
- Continue the effective enforcement against corporate end user piracy of business software and against software counterfeiting by organized criminals;
- Amend the Optical Media Management Statute (2001), including amending it to increase penalties and overall deterrence, by expanding its coverage to deal with the real threat of massive commercial production of CD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, are imposed.

TAIWAN
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	42.0	44%	42.0	44%	35.0	30%	30.0	30%	20.0	20%
Records & Music	58.0	42%	98.6	47%	51.7	48%	60.5	44%	60.0	35%
Business Software Applications ³	NA	NA	91.2	43%	106.8	53%	123.9	53%	97.6	54%
Entertainment Software ⁴	261.8	42%	596.1	56%	119.4	70%	319.3	90%	115.7	68%
Books	20.0	NA	20.0	NA	20.0	NA	20.0	NA	21.0	NA
TOTALS	NA		847.9		332.9		553.7		314.3	

Copyright Enforcement in Taiwan

Despite enforcement improvements, Taiwan’s market continues to be plagued by optical media piracy of all kinds, including growing CD-R and DVD-R “burning” in operations run by organized criminal syndicates, by wholesale and retail piracy, and by increasing Internet piracy.

In its 2003 submission, IIPA again noted that pirate optical disc production in Taiwan remained among the highest in Asia. Pressed by industry and the USG to take more effective action against this problem, Taiwan has to date done a much better job of inspecting suspected plants, closing down lines and reducing overall factory production of pirate product which now must be sustained. The enforcement authorities have also undertaken numerous *ex officio* raids, now permitted under the new copyright amendments, against wholesalers, retailers and night markets, making a significant dent in piracy in this sector. Unfortunately, IIPA members report that this has forced piracy underground and onto the Internet, with the result that piracy rates have as yet not begun to come down in all sectors. At the same time, enforcement against corporate end user piracy has been singularly effective, with the result that Taiwan had

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

the biggest drop in this piracy rate in all of Asia. Similarly, there appears to have been a drop in the piracy rate for PC entertainment software products as compared to prior years. Piracy of console entertainment software, however, remains very high as does piracy at Internet cafés, where the use of pirated entertainment software is prevalent.

In 2003 there were reportedly 61 (same as in 2002) known optical disc plants in Taiwan (not including underground plants) engaged in the manufacture of finished optical disc products, including CDs, CD-ROMs, VCDs, and DVDs. There are 12 dedicated DVD lines. Taiwan now has 310 production lines producing OD product containing copyrighted content with an estimated production capacity of 1.085 billion units (990.5 million in 2002). IIPA members report a decrease in the production of pirate product in the factories, due principally to more aggressive enforcement by JODE (the Joint Optical Disc Enforcement Taskforce), including increased night raids (reportedly up from 33 in 2002 to 385 in 2003—a significant and welcome gain), increased seizures of lines and continued arrests and seizures of pirate product. While these gains are significant and IIPA hopes this positive trend continues, more needs to be done. In addition, Taiwan continues to be the world's largest supplier of blank OD media product to pirate syndicates worldwide. There is anecdotal evidence that organized crime operators and factory owners intentionally sell blank CD-Rs/DVD-Rs to known and affiliated criminal organizations in Latin America and other regions throughout the world. IIPA and its members have regularly asked Taiwan authorities to use its investigative machinery to wiretap suspects and bring conspiracy or similar actions against those knowingly selling to pirates.

Pressure on the factories producing pirate disks has led to a major growth in CD-R “burning,” much of it carefully organized and managed from the production through ultimate sale cycle. MPA reports that 98% of the seizures in 2003 of pirate OD product was of “burned” CD-Rs. This “burned” pirate product, including movies, compilations of music (including MP3 audio files), computer programs, console-based entertainment software, etc., continue to flood the domestic markets in Taiwan. We continue to receive reports of some pirate CD-Rs emanating from licensed factories as well.

As a result of the production and sale of pirate OD product in Taiwan, sales of legitimate U.S. and local audio and video product have decreased substantially over the last 5 years, which has threatened the viability of Taiwan as a vibrant market. RIAA/IFPI reports that sales have dropped off 18% in the first 9 months of 2003 (and fell 13.4% in the first 6 months of 2002) with revenues dropping from \$306 million in 1999, to US\$170 million in 2001 and to US\$81.5 million in the first 9 months of 2003. As of 2002, Taiwan had dropped from the second largest music market in Asia in 1999 to the fourth largest today, after Japan, South Korea and India.⁵ Taiwan's status as the creative center of Chinese music has been threatened; it has been the source of 80% of Mandarin music worldwide. The piracy rate for video product has increased more than 35% in the last 5 years.

The piracy rate for entertainment software also remains high. While the availability of pirate PC product has declined in the past several years, pirate console and cartridge-based entertainment software products continue to dominate the market. Much of the console product is made in factories in locations such as Malaysia, but controlled by syndicates with operations in Taiwan and easily imported into the country. Some production also appears to be taking place in Taiwan. Pirated console product is sold in regular retail shops, where it is made available to a customer who inquires after “cheaper” products. Catalogues are then furnished and the product is either pulled from a back room, under the table, or burned to order and

⁵ 2003 data are not yet available.

delivered shortly thereafter. China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market.

Because the July amendments to the copyright law permitted *ex officio* actions against retailers and street vendors, particularly in night markets,⁶ it has become more difficult for the syndicates and these vendors to successfully ply their illegal trade. IIPA reported in last year's submission that in 2002 various techniques were used to avoid being raided and prosecuted, including using the "Conscience Vending Box" tactic (used by 90% of night markets in that year). Fortunately, increased pressure through these *ex officio* raids has made it more difficult to sell product in this way and sale is now more "to order" and over the Internet. The use of juveniles continues. Mail order and Internet advertising of hard goods for sale has now taken over in the pirate video and audio marketplace. Advertisements are regularly placed in newspapers or on the Internet. Accounts are then opened at the Post Office and the pirate product is mailed to the consumer, with the money collected by the post office. Courier services are also used to deliver pirate product and collect payment.⁷ Pirate product catalogues are printed with untraceable mobile phone numbers and spread around office buildings throughout major cities, with couriers doing the rest. Sometimes product is transferred between courier services en route to avoid detection and arrest. While these techniques have continued in 2003, increasingly the Internet, where enforcement remains difficult, has been used for the sale of pirate product, as hard goods, or through downloading and streaming.

Hard goods piracy over the Internet affects particularly the video, music, entertainment software and business software sectors, and has become far more prevalent and serious in 2003. The absence of clear secondary liability of Internet service providers has severely hampered enforcement in this area as well as Internet downloading, primarily of music but other products as well. MPA has found that in the last quarter of 2003 there has been a significant move to the Internet as a means of distributing pirate product: Advertising inserts in newspapers have decreased, the number of mobile phone disconnections has dropped precipitously (used by couriers of pirate product) and the number of pirate sites detected has increased from 3 in August 2003 to 18 in November 2003.

But perhaps even more dangerous is the explosive growth of Internet downloading, and particularly peer-to-peer file sharing by Taiwan operations such as Kuro and EzPeer. Both these services charge their customers—Kuro charges a monthly fee of NT\$99 and EzPeer NT\$100 (about US\$3). In December 2003, in a much-praised development, both were indicted for copyright infringement. Unfortunately, two events transpired which are causing grave concern. First, while both these P2P software and download services were indicted, they continue to operate openly, to advertise publicly and to continue to generate huge profits from their illegal conduct. Secondly in an action that defies explanation, the Industrial Development Bureau of the MOEA awarded Kuro its "Digital Content Creative Software Award of 2003" even though, reportedly, the IDB actually knew that Kuro was about to be indicted. The recording industry and the U.S. government protested this inexplicable action vigorously. RIAA/IFPI

⁶ There remains a legal question whether the *ex officio* authority under the new amendments can be used where a sale is not witnessed. The Taiwan Intellectual Property Office issued "interpretations" that it could and reportedly one court has upheld this interpretation. This remains an issue, however, and should be resolved finally by adopting the EY-approved amendments as urged in this submission and by the U.S. government.

⁷ Last year, the Taiwan Minister of Justice has specifically told courier companies that they will be arrested as accomplices. This announcement was made following the well reported "Catch me if you can" incident reported below. On February 14, 2003, the police arrested the owner of a courier company. On December 9, 2003, he was sentenced to one year's imprisonment with a probation period of five years.

reports⁸ that together Kuro and EzPeer generated estimated income of close to NT\$1 billion (US\$30 million) in 2003, 90% of which is generated by these monthly charges permitting unlimited downloads of illicit MP3 music files. Kuro reports that its users have increased from 50,000 in 2001 to 500,000; EzPeer now has 300,000 users. Total users of both these services increased even after they were indicted. The local legitimate market in Taiwan in 2002 was only NT\$4.9 billion (US\$148 million) (down precipitously from NT\$12 billion (US\$362 million in 1997, when piracy rates were under 15%): These two illegal services alone earn 20% of the income earned by the entire legitimate music industry in Taiwan. Because a large percentage of this downloading activity occurs at universities, in addition to aggressive criminal enforcement, it is critical for the Ministry of Education to respond quickly with policies preventing their servers from being used for illegal activities.

In addition, there are a number of sites that continue to deal in infringing files that have been traced to the servers of Taiwan educational institutions or government agencies. Another version of this phenomenon occurs at “cyber-café,” of which there are 3,000 throughout Taiwan. Entertainment software is particularly hard hit at these cyber-café. Some ESA member companies suspect that a large number is operated by criminal syndicates and obtain their pirate product from local optical disc factories or burning operations.

Piracy of business software by corporate end users continues as a serious problem, but the piracy rate has dropped significantly in 2003 due to improved enforcement. Taiwan continues to be a hub for software counterfeiting.

In June 2003, BSA reported that the piracy rate for business software showed the second largest drop in Asia, from 53% to 43%. While this drop is due to the effectiveness of enforcement by the Taiwan authorities and to a government-backed, high profile public education campaign, the use of unlicensed software in companies remains unrelenting. BSA remains pleased with the cooperation it is getting with Taiwan enforcement authorities and that the prosecutors have successfully convicted corporate end use infringers. BSA has also praised the government for its reward program and for the significant number of seminars (15) held to train police, prosecutors and the judiciary in 2003. BSA continued its own enforcement and educational activities in 2003 to promote the legal use of software.

The counterfeiting of software, controlled to a large extent by Taiwan-based syndicates involved on a worldwide basis, remains a serious problem. Two key actions were taken against major Taiwan counterfeiters in 2003, which are discussed in more detail in the enforcement sections below. Dismantling these sophisticated criminal syndicates must be a key objective of the Taiwan government in 2004 and will require the long-term investment of enforcement resources to halt it permanently.

Illegal photocopying of textbooks continues as a major problem.

Illegal photocopying of entire books and journals, primarily academic textbooks and journals, English language materials and professional reference books, is the biggest piracy problem facing the publishing industry in Taiwan. This type of piracy, occurring primarily on and around

⁸ Interview with IFPI Taiwan’s Secretary General, Robin Lee, *Taipei Times*, October 27, 2003, p. 11; <http://www.taipeitimes.com/News/biz/archives/2003/10/27/2003073603>.

university campuses, is decimating the market for legitimate publishers. Profit-based photocopy shops, located on the perimeters of all major college campuses actively carry out photocopying and binding services both for students and teachers. While the authorities have been extremely helpful in running raids against these commercial photocopy shops at copyright owners' requests, self-initiated action by the government remains rare. In addition, government authorities have shown strong reluctance to enter the campuses to raid university bookstores where such illegal conduct is now rampant.

Commercial photocopying affects both local and foreign publishers. The local and foreign publishing industry, represented by the Taiwan Book Publishers Association, has been particularly concerned about the government's unwillingness to deal with on-campus infringements. The Ministry of Education should adopt policies prohibiting this kind of illegal conduct, backed with internal sanctions for violations. Furthermore, the government must create the political will not to permit this blatant illegality going on at its educational institutions by being willing to run raids and commence prosecutions.

In both on-campus and off-campus scenarios, the government must be willing to adapt to the nature of the infringers' business. While the government often relies on large stockpiles of infringing product to guarantee effective prosecution, this approach does not reflect the realities faced by publishers. Infringers of books and journals rarely keep large amounts of infringing stock. In fact, publishers are seeing pirates shift to "made to order" business models, in which infringers wait for an order before making infringing product. The orders are then distributed as soon as they are completed, often away from storefronts by means of delivery vans or cars on campus. Thus, it is extremely important for government authorities to maintain vigilance in tracking these increasingly secretive and underground operations, to make sure enforcement actions keep up with the ever-evolving nature of pirate operations.

The publishing industry is also disappointed by failures at the prosecutorial level. As discussed later in this submission, procedural hurdles continue to hinder effective prosecution, including the discriminatory POA requirements imposed on foreign publishers. In addition, the evidentiary burden imposed on publishers in proving copyright ownership remains onerous. For instance, recent raids have resulted in court cases involving over 500 different titles, from various publishing companies and bearing a number of different imprints. Finally, it is important that penalties serve to deter would-be infringers, and that cases be brought to a timely conclusion. U.S. publishers currently have 33 cases pending in the courts as a result of actions commenced in 2002 and 2003, and the government should take immediate action to bring these cases to completion in an expeditious manner.

Finally, public and business misunderstanding of the limits of fair use and other exemptions in the copyright law have continued through 2003 and resulted in significant damage to publishers. First, publishers have come across instances where teachers and businessmen have cited fair use as justification for copying up to one-half of a work without permission. Second, publishers report that pharmaceutical companies are increasingly photocopying medical textbooks and clinical reference works for client doctors, without appropriate permission. IIPA and AAP again urge the government to clarify the scope of permissible copying by working with publishing representatives and affected third parties to draw up useful and equitable fair use guidelines. This should be followed by judicial and prosecutorial training on fair use and on book piracy generally.

Piracy of cartridge-based entertainment software

China continues to be the primary source of pirate videogame cartridges coming into the Taiwan market, though it is believed that much of this production is controlled from Taiwan. For several years, Nintendo has been investigating and pursuing a major Taiwanese counterfeiter who has been involved in the manufacture of over 35 million counterfeit semiconductor chips—components which usually find their way to factories in China where the assembly of counterfeit cartridge-based entertainment software takes place. Through Nintendo's joint efforts with Taiwanese law enforcement authorities, this notorious counterfeiter has been indicted on copyright and trademark violations. If convicted, the defendant could face up to six years in prison. The company continues to work closely with the prosecutor to further support the government's prosecution.

COPYRIGHT ENFORCEMENT IN TAIWAN

Taiwan must significantly increase the number of actions, prosecutions and convictions for OD pirate production, distribution and sale (including burning activities) and for commercial photocopy operations.

Taiwan must fully use the tools provided by the 2001 Optical Media Management Statute to continue to raid, particularly at night, optical disc factories, both licensed and unlicensed. While this law remains deficient in many respects, in comparison to the laws on the books in other jurisdictions, the government has promised to use it effectively. 2003 saw some improvements in factory raiding, and convictions were obtained, some with welcome deterrent sentences. But many cases remain pending and these must be concluded if the syndicates are to fully respond to the message (by legalizing their business or getting out of the business) that piracy will be punished severely.

The Digi-Gold convictions at the beginning of 2003 were a first step in the right direction. MPA reports that 11 of its factory cases (down slightly from 12 at the beginning of 2003) remain pending in the courts, and five of these from 2000-2001 have either not been filed nor had a first instance decision. In 2003, MPA conducted 13 factory raids with 4 reported as "successful," including the sealing of lines. Four unlicensed plants were closed down; 1,719 stampers were seized along with 300,849 pirate discs; eight VCD production lines and 11 printing/packaging machines were sealed. JODE reported 1,088 inspections through December 2003, with 385 of these at night, a welcome tenfold increase over 2002. IIPA reported few seizures of replicating equipment in 2002 but the addition of three new warehouses in 2003 resulted in a reported seizure of 11 lines through December. MPA recently reported on a joint raid with JODE on a factory "Lead Data" in which 2 DVD lines were sealed, 2 persons arrested, and 152 stampers seized.

RIAA/IFPI reports that it was involved in 16 raids against factories and large CD-R labs in 2003 and received a total of 671 convictions (including guilty pleas) involving pirate music product. MPA reports 3 factory convictions in 2003.⁹ MPA reports 11 factory cases still pending

⁹ The three were underground plants located in Tainan, Chung-Ho and Chang-Hua.

following the recent Digi-Gold conviction. While not yet satisfactory, the record is certainly improving. This must continue in 2004.

The recording industry ran a total of 485 raids against night markets, street vendors, mail order centers, distribution centers, retail shops and OD factories and CD burning labs in 2003; 464 raids were against retail piracy and 21 against such factories and labs. In 2003, as in 2002, and as noted above, the number of juvenile offenders far exceeded the number of adult offenders, continuing a very disturbing trend: Out of the 485 cases brought by the recording industry in 2003, 159 involved juveniles and only 326 involved adults. Because juveniles are below the statutory age for criminal responsibility, judges cannot impose criminal penalties on them.

MPA conducted 655 raids (vs. 698 raids in 2002), and initiated 607 cases, 485 of which were street vendor cases, 31 were retail shops cases, 27 against distributors, 4 against factories, 27 against CD-R labs and 31 Internet cases. The authorities seized 40 stampers, 3,431 VCDs, 766 DVDs, 95 DVD-R and 232,817 CD-R pirate copies.

AAP and the Taiwan Book Publishers Association initiated two large raids against hundreds of commercial photocopy shops in 2003. These raids resulted in 36 cases against copyshop owners (of which 15 are still pending) and the seizure of 597 different titles, sometimes with multiple copies of each title.

Criminal and civil enforcement against corporate end-user software piracy has succeeded in reducing the piracy rate for 2003 but more needs to be done. Enforcement against software counterfeiting is improving but must be strengthened and accompanied by deterrent penalties.

The Taiwan authorities continued their successful campaign against enterprise end user software piracy in 2003. The many criminal raids made in 2003, combined with a few convictions with fines resulted in sufficient deterrence to cause the significant reduction in the piracy rate noted in the discussion above. All in all, 10 convictions were rung up in 2003 for software piracy, for of which four were for enterprise end user piracy. Fines were meted out of from NT\$80,000-100,000 and the salutary results in the end user cases went a long way to convincing businesses to legalize their software use. Though jail sentences of 7-9 months were imposed, unfortunately, in no case were any jail terms actually served.

The software industry also reported a number of successful actions by the Taiwan enforcement officials against Taiwan-based criminal syndicates involved in global production and distribution of high-quality counterfeit software. A series of raids were conducted by the Criminal Investigation Bureau of the national police and targeted a criminal organization comprising Arex E & J Technology/ATX International and affiliated individuals and companies (E & J) and by the Investigation Bureau, Ministry of Justice against Maximus Technology and related individuals and companies (Maximus). Information obtained indicates that both the E & J and Maximus organizations were responsible for the production and global distribution of high-quality counterfeit software valued in the millions of dollars. Given the scope of the activities of these criminal organizations, these actions will hopefully have a major impact on global software counterfeiting. It is vital, however, that these actions be followed by effective prosecutions and deterrent criminal penalties. While the industry is pleased by this step in Taiwan's larger effort

to enhance protection for IPR, it will require the sustained investment of enforcement resources in addition to deterrent penalties.

BSA and business software companies also filed civil actions against pirates in 2003, many in connection with accompanying criminal actions. BSA reports that damages totaling \$648,000 were assessed in all the actions concluded in 2003. Statistics for civil cases in 2003 appear below.

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	0	9 ¹⁰
Post Search Action	0	20 ¹¹
Cases Pending	0	10
Cases Dropped	0	0
Cases Settled or Adjudicated	0	10
Value of loss as determined by rightholder (\$USD)	0	2,956,631 ¹²
Judgment Amount (\$USD)	0	648,000 ¹³

Taiwan must significantly increase enforcement against Internet piracy, which is growing to be a significant percentage of the pirate market in Taiwan.

As reported in the 2002 and 2003 submissions, the Taiwan enforcement authorities began taking action against Internet piracy in 2001. Since that time, Internet piracy has grown precipitously. That effort has continued in 2003. The motion picture industry conducted 36 raids in 2003 vs. 31 raids in 2002 against pirates distributing infringing works via the Internet, resulting in the seizure of 107 pirate DVDs, 4,597 pirated CD-Rs, 57 CDR-burners, 6 DVD-R burners, 23 computers, and the arrest of 34 pirates in 2003. Prosecutions resulted in 7 convictions in 2003 vs. 16 convictions in 2002. MPA also reports an increase in Internet takedown actions by eBay and Yahoo on source piracy posting—up to 18,059 in December 2003 compared with none in 2002.

The Kuro and EzPeer cases are now at the center of the recording industry's enforcement efforts. Last year we reported no prosecutions for Internet piracy of music through February 2003. In 2003, the recording industry issued a total of 149 warning letters that were sent to infringing FTP sites and websites, as well as 25 letters to related ISPs. As a result, 176 sites were closed down compared to 63 sites in 2002.

BSA reports assisting the Taipei police in obtaining a search warrant in April 2003 against a website (<http://arts888.tripod.com>) selling illegal software. One computer, website advertisement and more than 400 illegal CD-Rs, containing BSA members' software. Many more actions such as this one will be needed to deal with this growing problem.

Other industries report more trouble getting the cooperation of Internet service providers in taking down infringing sites.¹⁴ For example, BSA sent 2,154 cease-and-desist letters to ISPs in 2003 but achieved only some success in getting takedowns.

¹⁰ Represents the number of civil complaints filed during 2003.

¹¹ Represents the number of post actions in 2003 regardless of when such cases were commenced.

¹² Represents the figure of the total losses (not actual losses) as stated in the civil complaints filed in 2003.

¹³ Represents the total amount for which judgments were rendered in the year 2003, regardless of when the cases were commenced.

Effective criminal enforcement continues to be hindered by numerous procedural hurdles.

The government in Taiwan must also work to solve the many procedural hurdles that continue to hinder copyright owners' efforts to protect their works in Taiwan. These include: the transfer of power for issuance of search warrants from prosecutors to courts, which has made obtaining warrants difficult for some industries;¹⁵ continued challenges to powers of attorney (POAs) of U.S. right holders in court cases (though this situation has improved for some industries) and in raids;¹⁶ raiding authorities' failure to seize all pirate product and tools and implements used in piracy;¹⁷ and prosecutorial decisions in some reported cases to summon suspected pirates for questioning, thereby tipping them off to forthcoming raids. And last and most important, commercial piracy offenses must be "public" crimes, without the need for a prior complaint from the right holder—a number one priority of all copyright industries.

¹⁴ For example, the entertainment software industry reports that many ISPs are refusing to take down pirate sites, many of which are mirror sites with the server located in Hong Kong.

¹⁵ The Legislative Yuan transferred the power to issue search warrants from prosecutors to the courts effective July 1, 2001. The system prior to the amendment worked well, because prosecutors could issue warrants immediately upon request and were familiar with the timing needs and operational difficulties encountered during raids by enforcement authorities.

¹⁶ In years past, judges, prosecutors or defendants challenged POAs granted to right holders' court representatives because the documents were not signed by the CEO of the rightholder company, were not consularized, were not translated into Chinese, were too old (more than six months), or because the Chinese translation was not signed by the CEO. In some of these cases, the failure to meet these burdensome procedural hurdles (which run contrary to general international practice and U.S. law) led to the dismissal of open-and-shut cases against blatant pirates. Two recent Supreme Court cases, in February 1999 and in January 2000, demonstrated progress toward resolving these problems, as the courts held that the validity of a POA is to be determined in accordance with the law of the country from which the POA holder comes. In the most recent case, the court determined that according to Article 6 of the "Treaty of Friendship, Commerce and Navigation with the Accompanying Protocol" between the U.S. and Taiwan, the authority and qualification of a person to represent a U.S. corporation in a litigation proceeding shall be determined by the laws applicable in the U.S. While these cases must be deemed "precedential" by the Supreme Judicial Yuan in order to have any binding effect on lower courts, reports indicate that instances of judges and prosecutors challenging foreign POAs waned somewhat in 2000. Nonetheless, courts are still requiring that POAs be legalized and consularized (only notarization should be required), thus imposing burdensome requirements and costs on right holders to exercise and enforce their rights in Taiwan. We also continue to receive reports that several prosecutors and judges have insisted that the chairman of the foreign company participating in the case personally sign the complaint and the POA authorizing the industry representative to initiate the case. The Supreme Judicial Yuan should act quickly to make its decisions in 1999 and 2000 precedential, so that this problem can be solved throughout Taiwan. A separate but related problem for the recording industry and others involves the *ad hoc* requirements imposed by police involved in raids on distributors and warehouses of massive numbers of pirated copies of copyrighted works (many intended for export). In some instances, police require POAs from copyright owners for every work seized, and other onerous proof requirements in order for the authorities to seize suspected pirate goods. The effectiveness of such raids necessarily depends on the authorities seizing all suspected pirated copies as well as materials and implements used in the infringement, applying presumptions of ownership in line with international practice.

¹⁷ One console-based video game software maker reports that Taiwan authorities sometimes fail to seize games containing pirate "initialization code" (the copyright for which is owned by the maker of the consoles). If Taiwan authorities find pirate CDs containing games with illegally copied initialization code, those should be seized, whether or not the copyright in the game itself is owned by the maker of the console or not. It is totally unreasonable to require all right holders in the software to participate in the raid. Taiwan authorities must not leave software found in raids that includes pirate initialization codes in the hands of the pirates.

TAIWAN CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING	TOTALS
Number of raids conducted	655	4	485	2	1,146
Number of VCDs seized	3,431		632	N/A	4,063
Number of DVDs seized	766		39	N/A	805
Number of CDs and CD-Rs seized	232,817		697,095	N/A	929,912
Number of book titles seized				597	597
Number of investigations	1,222		NA	N/A	1,222
Number of VCD/CD lab/factory raids	13		16	N/A	29
Number of cases commenced	607	7	359	36	1,009
Number of Indictments	469		255	27	751
Number of defendants convicted (including guilty pleas)	435	10	671	37	1,153
Acquittals and dismissals	3		15		18
Number of cases Pending	253	26	126	15	420
Number of factory (and CD-R lab) cases pending	11		8	N/A	19
Total number of cases resulting in jail time	132	5	226	20	383
Suspended prison terms	69	5	74	19	167
Maximum 6 months	0	0	35	0	35
Over 6 months	0	5	5	0	10
Over 1 year	69	0	34	19	122
Total suspended prison terms	2424mths	39 months	915 months		3378 months
Prison terms served (not suspended)	201	0	152	1	354
Maximum 6 months	108	0	89	1	198
Over 6 months	18	0	13	0	31
Over 1 year	75	0	15	0	90
Total prison terms served (not suspended)	455mths		1431	0	1886 months
Number of cases resulting in criminal fines	10	5	18	0	33
Up to \$1,000	0	1	2	N/A	3
\$1,000 to \$5,000	8	4	14	N/A	26
Over \$5,000	2	0	2	N/A	4
Total amount of fines levied (in US\$)	US\$37,056	US\$12,286	US\$66,285	N/A	US\$115,627

THE COPYRIGHT LAW MUST BE IMMEDIATELY AMENDED, FOLLOWED BY AMENDMENTS TO THE OPTICAL MEDIA LAW

The deficient copyright amendments adopted by the Legislative Yuan in July must be rectified by immediate adoption of the original amendments proposed by the Executive Yuan.

Taiwan's effort to modernize its copyright law began in 2001 and was the subject of many bilateral consultations between the U.S. and Taiwan governments and much exchange of correspondence between IIPA and its members (and the U.S. government) and the Taiwan government. On March 26, 2003, these discussions essentially came to an end when the Executive Yuan agreed on a set of amendments which came close to adopting most (though not all) of the recommendations of IIPA and the U.S. Government. On June 6, 2003, the Legislative Yuan, at the last minute and with little notice, adopted a different set of amendments that failed to adopt some of the key recommendations of its own government. These amendments became effective in July 2003. From that day the U.S. government and IIPA and its members

have been clear that Taiwan must further amend its law to reflect, at the very least, the EY approved amendments. Efforts were made by various legislators to do this but the election season has so far stood in the way of securing these corrective amendments. IIPA and its members' position is clear: The EY approved amendments must be adopted as soon as possible after the election in March 2004.

While the LY amendments contain many of the improvements made by the EY, such as making many serious infringements a “public” crime without the need for a formal complaint to the authorities and adopting some, but not all, of the critical amendments necessary to ready Taiwan for the Internet (provisions contained in the two WIPO “Internet” treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), the amendments remain seriously deficient in a number of key respects. These include:

- The LY amendments divided criminal offenses into those “for profit” and those not for profit creating a number of serious difficulties. Among these is the creation of an ambiguous “threshold” of 5 copies/NT\$30,000 (US\$904) before “not for profit” offenses are not criminalized. This creates difficulties for enforcement of Internet offenses, photocopying and other areas. TIPO has since issued formal interpretations of the law stating that photocopying by copyshops, even at the instance of students, is a for-profit crime;¹⁸
- A provision prohibiting circumvention of technological protection measures, per the WIPO treaties, was deleted. These provisions must be restored for Taiwan to provide adequate protection for e-commerce and content on the Internet;
- Minimum penalties were deleted, thereby significantly reducing deterrence. These must be restored and the prosecutors must issue guidelines preventing “buy-outs” of six-month jail sentences in cases of more than *de minimis* acts of piracy. Maximum penalties were also reduced in certain cases, and, most critical, the LY changed the wording of the EY amendments ensuring that virtually no jail term would be mandatory—again severely reducing the deterrence so important to reducing the escalating piracy rates in Taiwan;
- The LY amendment left ambiguous whether the authorities could treat acts by street vendors and others as public crimes even where the infringer was not caught in the act of selling pirate product. This was initially viewed as one of the most serious deficiencies in the amendments. Fortunately, TIPO issued an interpretation denying this narrow reading, the authorities have followed this line and conducted *ex officio* raids in all cases, and it has been reported to IIPA that this reading has been upheld by a lower court in Kiaoshung District;
- The LY dropped the amendment giving Customs formal *ex officio* authority. While the Customs and TIPO have argued that Customs has been exercising such authority, the amendment clarifying this important enforcement tool should still be made;
- Parallel importing was decriminalized, again reducing deterrence and harming the local distribution of authorized product;
- The LY made a further change in the retroactivity provisions—already TRIPS incompatible, exempting the rental of copies of works which will come under

¹⁸ However, recent cases suggest that judges may interpret the new amendments differently, and it is critical that the EY approved amendments be adopted.

copyright protection. This further exacerbates the TRIPS violations and must be eliminated in returning to the EY version.

Making these further changes to the copyright law is critical for IIPA and its members. We have stated unequivocally that the copyright industries would oppose any commencement of TIFA or FTA discussions with Taiwan until, at least, the EY amendments were adopted.

Taiwan must also immediately begin consideration of further amendments that would clearly establish secondary liability of service providers and other intermediaries in the Internet, as well as other environments. An amendment providing for an exemption from any such liability was fortunately deleted from an earlier version of the EY proposed amendments. Taiwan's law is now unclear on this topic. Given the increasing threat of Internet piracy in Taiwan, clear liability plus a quick and efficient notice and takedown system, backed by the potential of clear liability for failing to takedown infringing material is a necessity in the Internet world.

The Optical Media Management Statute Must Be Amended

On October 31, 2001, Taiwan's Legislative Yuan passed the Optical Media Management Statute (2001) (the "OD Law" was promulgated on November 14, 2001). Unfortunately, this law represented a weakened version of the draft law that had been approved by the Executive Yuan (EY) earlier in 2001. The Law brings under regulatory control (of the Ministry of Economic Affairs, MOEA) plants now engaged in the production of optical discs in Taiwan, employing a system of: granting permits to persons/entities engaged in the production of "pre-recorded optical discs"; otherwise regulating production of stampers/masters (through SID code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of "blank" media. Failure to obtain a permit, the unauthorized manufacture of "pre-recorded optical discs," and other infractions, can result in criminal fines and the remote possibility of imprisonment against plants (and their "responsible person[s]"). Seizure of unauthorized pre-recorded discs and equipment used in such unauthorized production is also possible, though it is a major flaw that this is not made mandatory. In addition, it is highly unfortunate that seizure of unauthorized stampers/masters, or equipment used for manufacturing stampers/masters or blank media, is not expressly provided for in the law.

In addition to these noted weaknesses, and among the law's most serious deficiency, the OD Law as passed by the LY (in comparison with the EY bill) drastically weakens criminal penalties against plants engaged in unauthorized production (i.e., without a license, at an unauthorized location, or without or with false SID codes) of optical discs. Imprisonment for manufacturing "pre-recorded" discs (which under the EY bill would be mandatory after the first offense) is now possible only after a third offense (and a failure to cure),¹⁹ and in the case of blank media producers, only minimal fines are available for failing to adhere to the transparency requirement. The ability to cure violations (i.e., to avoid further fines after the first offense) eviscerates the effectiveness of the criminal remedies under the OD law.

The following summarizes some of these key deficiencies in the Optical Media Management Statute that must be addressed in amendments:

¹⁹ For example, even after a third offense, imprisonment for manufacturing prerecorded optical discs without a license can be avoided merely by ceasing at that point and "applying" for such license. As another example, even after a third offense of manufacturing prerecorded optical discs without or with false SID code, imprisonment can be avoided by ceasing at that point and merely "applying" for SID code allocation.

- **“Grandfathered” Plants Should Not Be Permitted to Avail Themselves of Cure Provisions:** The OD law requires existing (as of November 14, 2001) producers of so-called “pre-recorded optical discs” to merely apply for a permit within six months of the promulgation date (Art. 26) (and requires producers of such discs as well as stampers/masters who have been separately allocated identification code “by an agency other than” MOEA to report such to MOEA (Art. 27)). An amended law should ensure that the loopholes contained in Arts. 15 and 17 (allowing plants to cure after the first offense) do not apply to existing (“grandfathered”) plants. Therefore, the most severe penalties available for those offenses would immediately be applicable to an existing plant that fails to comply with its Arts. 26 and 27 requirements. MOEA should also be permitted to set forth conditions in permits granted, including, e.g., verifying, through the production of documentary evidence or other means, the rights of its customers to manufacture or reproduce the discs ordered.
- **Seizure of Stampers/Masters and Seizure of Machines/Tools Used for Making Stampers/Masters:** A serious gap in the OD law is the failure to expressly provide for seizure of stampers/masters found without SID code, with false/untrue SID code, or produced with SID code provided to an unauthorized third party. It is imperative that the law be amended to give the authorities the power to seize stampers/masters that fail to meet requirements, as well as machines and tools used to produce such stampers/masters.
- **Seizure of Machines Tools Used to Violate the Law:** IIPA’s translation of Article 15 of the OD law indicates that the machinery used for manufacturing optical disc products in contravention of the provisions may be forfeited or seized when they are found to be “specifically” used for making illegal products. However, an alternate translation indicates that the standard for seizure of such machines/tools may be stricter, requiring proof that the machines/tools are “exclusively used” for illegal purposes. If the alternate translation is correct, manufacturing machines used to make legitimate blank discs in the daytime and unauthorized pre-recorded products at night would not be subject to forfeiture or seizure, making the provision totally meaningless. If that is the correct reading, the OD law must be amended.
- **Transparency of All Applications, Notifications, Permit Information, and Records:** It is imperative that amendments to the law ensure that the Taiwan authorities (MOEA, IDB, BOFT, Customs, and the Bureau of Standards, Metrology and Inspection) are required to provide transparent information to relevant parties, including opening up—

- Applications by prerecorded optical disc manufacturers (Article 4);
- Permits issued pursuant to such applications (a copy of the “Permit Document” as referred to in Article 6);
- “Permit information” (Article 6);
- Filings by blank disc manufacturers (Article 4);
- Amendments to “permit information” filed (Article 6);
- Customer orders for “Prerecorded Optical Discs,” documentation of rights licensing by rights;
- Holders, and content of prerecorded optical discs manufactured (Article 8);
- All SID code allocations (Articles 10 and 11);
- Reports involving export or import of manufacturing machines or tools (Article 12);
- Reports of inspections by “competent authority,” police (art. 13), or other administrative agencies appointed (Article 14);
- Reports of administrative fines and/or criminal penalties meted out against persons/entities under Articles 15-23; also, reports of any seizures of optical discs and machinery and tools under those articles;
- Customs reports of activities with respect to prerecorded optical discs, stampers/masters, and machinery and tools (*cf.* Article 24); and
- Applications or recordations pursuant to Articles 26 and 27.

The Taiwan authorities, realizing that the law as passed has many flaws, have informally indicated that it may amend the law. Since the passage of the OD Law, IIPA and IFPI have prepared a global model template for an OD law and also prepared a set of “key elements” that must be part of any effective OD law. These two documents, representing the views of all the copyright industries, have been provided to the Taiwan authorities. However, no draft has apparently been completed. IIPA urges the authorities to immediately prepare a full range of amendments consistent with these key elements and template—in particular, to increase penalties, to ensure that licenses can be more easily revoked, to ensure coverage of stampers, to adopt a full license requirement for producing blank CD-Rs and to strengthen the authority to seize and forfeit all equipment used in the production of pirate OD product. In the interim, aggressive and deterrent enforcement of the existing provisions, read to give those provisions their broadest scope, must be the highest priority for Taiwan.