

Report on copyright protection in Taiwan



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Each April, the US Trade Representative (USTR) issues its Special 301 Report, listing the world's worst countries for the protection of IP rights. In the months leading up to issuance of the report each year, the Taiwan government enacts legislation, raids suspected manufacturers and vendors of infringing products, and announces its progress fighting IP piracy in an attempt to stay off the list. Those efforts failed in 2001 and 2002 when Taiwan was placed on the Special 301 Priority Watch List. Despite some progress, this year is a repeat of the last, with copyright protection being especially problematic.

Scope of the problems

In a February 12 2003 Performance Report on IPR Protection in Taiwan, the Taiwan Intellectual Property Office (TIPO) of the Ministry of Economic Affairs stated that approximately 80 percent of the IP prosecutions and 80 percent of the value of the infringing goods seized in Taiwan in 2002 involved cases of copyright infringement. The total value of goods seized in copyright infringement cases was estimated at US\$230 million. While Taiwan's government touts the amount of those seizures as a success, foreign entities interpret the numbers differently.

According to a USTR report that is expected to serve as a basis for this year's Special 301 Report, 'minimal progress was made in strengthening [Taiwan's] intellectual property rights protection regime during the past year.' The USTR report was based in part on a report of the International Intellectual Property Alliance (IIPA), which comprises various media and software associations, including the Business Software Alliance, the Recording Industry Association of America, the Interactive Digital Software Association and the Motion Picture Association of America. The IIPA report called Taiwan 'one of the world's worst pirate havens' and estimated 2002 losses to US companies from copyright infringement in Taiwan to be more than US\$750 million.

Not surprisingly, the bulk of the problem comes from counterfeit optical media. TIPO confesses in its Performance Report that, 'due to the rapid development of technology, pirated optical discs have become the major source of copyright infringement in Taiwan.' Industry groups estimate that more than half the movie, music and business software disks sold in Taiwan are fake. The USTR report notes that the manufacturing and exporting of counterfeit optical media, and the government's failure to shut down pirating manufacturing facilities continue to be significant problems.

The problem is particularly bad regarding counterfeit entertain-



ment software. According to the IIPA report, estimated US trade losses due to such counterfeit software from Taiwan jumped from US\$119.4 million in 2001 to US\$596.1 million in 2002. In addition, music industry losses due to piracy in Taiwan almost doubled to nearly US\$100 million. Business software losses have hovered around US\$100 million per year for the past several years. And peer-to-peer file sharing on the Internet has increased dramatically with no clear strategy to deal with it. Users of one Taiwan peer-to-peer service, Kuro, increased from 50,000 in 2001 to 300,000 in 2002. Estimated US trade losses due to counterfeit goods from Taiwan, as stated in the IIPA report, are shown below.

Trade Losses Due to Counterfeits from Taiwan
(in millions of US Dollars)

INDUSTRY	1998	1999	2000	2001	2002
Entertainment Software	103.2	115.7	319.3	119.4	596.1
Records/Music	55	60	60.5	51.7	98.6
Motion Pictures	15	20	30	35	42
Business Software	112.1	97.6	123.9	106.8	----
Books	19	21	20	20	20

Nature of the problems

The problems with copyright protection in Taiwan fall into four areas. Procedures for investigating and prosecuting suspected infringement are too cumbersome and slow. Enforcement has been ineffective. Penalties and provisions for confiscation of equipment used to manufacture pirate goods are inadequate. And Taiwan's border control system for preventing the export and transshipment of infringing products is ineffective.

Investigation and prosecution

The first hurdle IP owners face in Taiwan is that police may not raid the factory or warehouse of a suspected infringer without a search warrant signed by a judge. Due to Taiwan's burdensome requirements concerning Power of Attorney (POA), signature, legalisation and notarisation of the complaint, a warrant generally cannot be obtained in less than a month, and by that time the infringing goods are often gone and the matter is moot.

Unlike other countries, Taiwan's law requires an IP owner to grant to its attorneys a separate POA for each suspected act of infringement rather than a general POA covering all future infringements. The problem is compounded by Taiwan's requirement that the POA must be signed by the IP owner's CEO, before being notarised and legalised at the Taiwan representative's office.

Critics argue that requiring the CEO's signature for every complaint of infringement violates the TRIPS agreement's requirement that WTO members may not impose overly burdensome IP procedures. Additionally, the signature requirement has been criticised as violating the TRIPS national treatment requirements, as local companies generally do not require the CEO's signature but may simply use a name chop. For those reasons, it is expected that Taiwan will eventually abandon the CEO signature requirement. Taiwan joined the WTO in January of 2002 and has been steadily amending its laws to bring it into compliance.

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Only after the IP owner's attorney has obtained the signed POA may it submit a complaint for infringement to the police, who will forward it to the prosecutor, who will forward it to the judge, who will hopefully grant a search warrant. Assuming the raid is successful, the owner may then proceed with a lawsuit against the infringer, but that process is equally frustrating. Not only do Taiwan's burdensome requirements concerning documentary formalities continue, but many feel that Taiwan's judges are reluctant to hear IP matters, and cases often drag on for years. In addition, Taiwan law provides for only minimal discovery procedures, so IP owners are often unable to obtain the information needed for a successful prosecution.

For the above reasons, copyright owners are often reluctant to initiate a private action for infringement. But infringement is not a public crime in Taiwan, so officials may not prosecute without a private complaint. Fortunately that may change in the near future, as a draft amendment to the Copyright Act is being considered that would make copyright infringement a public crime and allow the government to prosecute suspected violations *ex officio*, as further explained later in this report.

Government enforcement

Taiwan's government ushered in year 2002 as the IP Action Year, and looking back has proclaimed it a success. But the government's own statistics paint a different story. According to the TIPO report, the total number of cases brought for infringement of all IPR dropped from 5,270 in 2001 to 5,118 in 2002. The number of convictions dropped from 3,238 to 2,636. The number of suspects sentenced to imprisonment dropped from 1,916 to 1,498. For copyright infringement TIPO reported that the value of infringing goods seized almost doubled, from about US\$120 million to US\$230 million. But the number of new copyright infringement cases dropped from 4,511 to 4,032, and the number of suspects dropped from 5,091 to 4,824.

Predictably, many feel the government's efforts in 2002 were not a success. In its Special 301 recommendations to the USTR, the

International Anti-Counterfeiting Coalition (IACC), an organisation of 150 corporations with total revenues of over US\$650 billion, noted, 'Simply stated, the activities of Taiwan's enforcement authorities have had no impact in reducing pirate production and export,' and theorised that perhaps the goal is to generate statistics rather than meaningful reductions in the rate of piracy. Even Taiwan's Justice Minister, Chen Ding-nan stated, 'we are doing the best we can. But given the current size of the police force and the number of prosecutors that we have, it is difficult to launch an all-out effort against piracy.'

It has been stated that the government's enforcement strategies are misguided. The IIPA report claims that Taiwan's authorities conducted 242 inspections of optical media factories in 2002, but only 11 inspections at night when most pirate production is thought to occur. While counterfeit discs were seized in various raids, the replicating equipment was often left in place because authorities claim to lack sufficient warehouse space. According to the TIPO report, factory raids uncovered 16 instances of large-scale copyright infringement, but only eight sets of manufacturing equipment were seized. The government highlights its efforts to crack down on night-market vendors of counterfeit goods. But such efforts are fairly ineffective, as vendors have taken to selling such goods *in absentia* – with the pirate CDs or DVDs laid out on a table with a bucket into which customers deposit the purchase money – or through juvenile vendors who are too young to face prosecution.

The TIPO report states that customs authorities seized less than 40,000 counterfeit optical discs in 2002. But Nintendo alone seized almost one million counterfeit video games in China last year. And in the US, in just one case in 2001, authorities discovered hundreds of thousands of counterfeit business software discs that were smuggled from Taiwan to California. A Taiwanese woman who was arrested in connection with the operation was sentenced by a US federal court in November 2002 to nine years in prison.

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The point in mentioning the above figures is to show the scope of the problem. Night market vendors are small fish; the seizure by customs authorities of a few tens of thousands of pirate CDs is a failure, not a success. It has repeatedly been noted that the global counterfeit IP industry is dominated by organised crime groups. On March 13 2003, US Deputy Assistant Attorney General John Malcolm testified before the House Subcommittee on Courts, the Inter-

net and Intellectual Property that many, if not most, of the optical disc production facilities in Malaysia are owned and operated by organised crime syndicates, specifically very wealthy and powerful criminal gangs or triads from Taiwan that control a significant number of facilities not just in Malaysia but across Asia generally.

It has been known for years that Taiwan is a major source of counterfeit video games and other copyright infringing goods and components that are shipped to China, the US and Latin America, for further manufacture, sale and distribution. The USTR stated in 1998 that, 'Taiwan remains one of the top four sources of infringing goods that US Customs seizes on importation and is also a major source of such exports to Latin American markets . . .' Not much has changed

The IIPA also reports that 'organised criminal syndicates continue to dominate piracy in Taiwan, particularly at the distributor level,' and the Taiwan government has admitted the same. But the government has failed to take any meaningful action to locate and prosecute the high-level operatives or to follow the money trail of those organised crime groups. Many feel that Taiwan must take those steps in order to effect a meaningful reduction in IP piracy.

Penalties and confiscations

Many complain that Taiwan's penalties for IP infringement are inadequate because the fines are too low, the prison sentences too short, and any sentence of six months or less can be 'bought out' to a fine. Justice Minister Chen concedes that 70 percent of CD counterfeiters prosecuted last year received a jail sentence of less than six months and many walked away with a small fine. While the statistics are too unreliable for meaningful analysis, the government claims that judges imposed longer prison sentences in 2002 than 2001, and the maximum fines for infringement may be increased through amendments to the Copyright Law that are awaiting enactment.

Criticism has also been levelled at penalties under the Optical Disk Law. While that law allows for confiscation of equipment used for the manufacture of counterfeit goods, the law allows for such confiscation only if the equipment is used 'exclusively for' illegal production. Much counterfeiting is suspected to occur at night, after legitimate production ceases. Therefore, the US Dept of Commerce has demanded that the law be amended to allow for seizure of such equipment regardless of whether it is used for counterfeiting full-time or part-time. In addition, while the law requires that each optical disc be imprinted with a source ID code (SID), the law has been criticised for failing to authorise confiscation of stampers or masters with false, unauthorised or no SID code. According

to the IIPA report, 99 percent of counterfeit music CDs in the market lack SID codes. Taiwan's Legislative Yuan is presently reviewing a draft amendment to the Optical Disk Law, and it is hoped that both of the above deficiencies will be remedied.

Border control system

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US Deputy Assistant Attorney General Malcolm concurs. In his March 2003 testimony to the House subcommittee, he stated that organised crime groups from Taiwan and other countries control much of the distribution of optical disks into Latin America, and there is ample evidence that Taiwanese triad members import massive amounts of counterfeit software and other pirate products into the US. As Malcolm explains, the importance of international cooperation cannot be overstated. Taiwan's Premier announced in February 2003 that Taiwan's Customs authorities will step up inspections of exported goods and will increase communications with foreign customs and other authorities and legislation is pending to implement those changes. If enacted, those will be steps in the right direction.

Under the Guidelines, the number of random inspections by customs authorities will be doubled; exports from certain high-risk companies will be inspected 100 percent of the time; customs authorities will increase their communications with foreign authorities; and a bonus incentive programme will be initiated for inspectors who detect attempted exports of infringing goods

Actions taken by the Taiwan government

As noted above, Taiwan's government has proclaimed its 2002 efforts fighting IP infringement to be a great success. While the Taiwan Anti-Piracy Coalition and other industry groups disagree, to be fair one should acknowledge what actions the government did take.

Enforcement actions

Taiwan's government reported initiating 4,032 actions against 4,824 suspects for copyright infringement in 2002, seizing counter-

feit movies, games, software and music worth about US\$230 million. Those figures will presumably increase in the future as the government created an anti-piracy task force of 220 officers, in January 2003, for the purpose of investigating suspected manufacturers, intermediaries and vendors of counterfeit IP goods and assisting with their prosecution

Premier Yu Shi-kun held press conferences in February and March 2003, in which he affirmed that the government of Taiwan considers the protection of IP rights to be a high priority, in part because Taiwan hopes to enter into free trade agreements with the US, Japan and other countries, and he understands that such action is a prerequisite. Consequently, Yu announced an assortment of measures that he expects the government to take, including the following:

- the Ministry of Economic Affairs was instructed to increase its oversight of CD manufacturing plants for signs of infringement;
- the Ministries of Finance, Justice and Information were instructed to create a joint task force to assist Customs officials with preventing the exportation of counterfeit IP goods;
- customs authorities were instructed to devise strategies for decreasing the exportation of counterfeit IP goods, including doubling the number of random inspections;
- the Ministry of Economic Affairs was instructed to increase the maximum reward for any tip leading to conviction of a manufacturer of counterfeit IP goods from about US\$28,000 to about US\$280,000; and
- the Ministry of Economic Affairs was instructed to revise Taiwan's IP laws in accordance with the above goals.

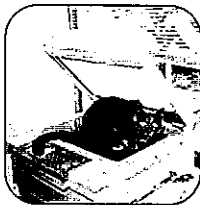
Following the Premier's pep talk, authorities went on a frenzy of IPR raids and enforcement, seizing counterfeit optical media valued at slightly more than US\$26 million in just the first three weeks of March (at that pace authorities would recover US\$450 million in fake goods in a year). The above efforts included one raid of a warehouse that yielded 200,000 pirated computer game disks with a value of US\$11.5 million.

New legislation

Pursuant to Premier Yu's instructions, on March 5 2003, the Executive Yuan passed the draft Guidelines for Taskforce Against Export of Pirated Optical Disks. Under the Guidelines, the number of random inspections by customs authorities will be doubled; exports from certain high-risk companies will be inspected 100 percent of the time; customs authorities will increase their communications with foreign authorities; and a bonus incentive programme will be initiated for inspectors who detect attempted exports of infringing goods. The Guidelines will now be forwarded to the Legislative Yuan for three readings, and if they pass those they are expected to be passed during the current legislative session, which should end in late May.

Also in March, the Executive Yuan passed draft amendments to the Copyright Law, which were also sent to the Legislative Yuan for approval. If approved in their present form, the draft amendments will do the following:

- increase the maximum reward for any tip leading to conviction of a manufacturer of counterfeit IP goods from about



- US\$28,000 to about US\$280,000;
- increase the reward for officers to about US\$57,000. The MPA and IFPI also offer rewards for successful tip-offs but their rewards top out at about US\$4,000 and US\$14,000 respectively;
- increase civil penalties for copyright infringement from about US\$28,000 to US\$144,000; and increase criminal penalties from about US\$13,000 to about US\$230,000;
- make the unauthorised duplication, sale or leasing of copyrighted goods a public crime so the prosecutor may initiate actions against infringers without the need for a private complaint;
- grant increased powers to customs authorities to inspect for and confiscate counterfeit goods; and
- increase the penalties for use of pirate software.

Perhaps most important is the question of whether Taiwan's government has the resources, know-how and determination to locate and prosecute the high level operatives in the organised crime groups that are driving the lucrative global industry of IP piracy

Conclusion

Notwithstanding the claims made by Taiwan's government, 2002 was not a good year for copyright protection and enforcement in Taiwan. However, if the government follows through on the Premier's edicts and the pending legislation is enacted in its present form, Taiwan will have made good steps in the right direction. Copyright infringement will be a public crime and authorities will have the right to initiate legal actions *ex officio*, with the assistance of the new anti-piracy task force. Increased rewards will lead to more tips regarding counterfeit manufacturing facilities; increased border inspection will lead to greater detection of attempted exports; and increased penalties will lead to greater deterrence of IP piracy. Amendment of the Optical Disk Law to allow for confiscation of all equipment used in the manufacture of pirate goods will slow down the production of counterfeit goods.

But all is only conjecture at this point. The legislation is being reviewed by the Legislative Yuan and its fate remains uncertain. The effectiveness of the anti-piracy task force and heightened customs inspections remain to be seen. Whether the burdensome POA and other documentary requirements of IP litigation will be loosened remains unknown. Perhaps most important is the question of whether Taiwan's government has the resources, know-how and determination to locate and prosecute the high level operatives in the organised crime groups that are driving the lucrative global industry of IP piracy. The government answers all of those in the affirmative, and given Taiwan's recent entrance into the WTO and its desire to enter into free trade agreements, there is reason to believe that this time it may be right. ☐

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