

Taiwan Legislature Passes Copyright Law Amendments

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August 18 2003

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On July 9 2003 Taiwan's president promulgated amendments to the Copyright Law, which will:

- increase some penalties for infringement, but decrease others;
- make optical media piracy a public crime but decriminalize parallel importation;
- expand copyright protection concerning the Internet; and
- grant increased powers to the judicial police and prosecutors.

In short, the amendments are a mixed bag.

Background

The amendments were enacted in response to US pressure, particularly in light of Taiwan's admittance to the World Trade Organization in January 2002 and the desire of many for an eventual US-Taiwan free trade agreement. Last October, at a US-Taiwan Trade and Investment Framework Agreement conference, the US trade representative presented a number of requests for changes to Taiwan's IP laws. While Taiwan rejected many of the changes, the Executive Yuan accepted others when it passed the latest amendments to the Copyright Law in March this year. The Legislative Yuan modified the amendments slightly before ratifying them, and President Chen Shui-Bian promulgated

them last month. The amendments now await promulgation by the president before they will become effective. Some of the key provisions are outlined below.

Temporary Reproduction

The definition of 'reproduction' was amended by adding the words "directly, indirectly, permanently or temporarily", so that infringement will now include the temporary reproduction of videos, images, music and text by a computer, even when not saved to a hard disk or hard drive. As with other infringement, however, such uses will still be subject to the fair use exception.

Right of Public Transmission

The amendments grant to authors and performers a new right - the right of public transmission of their works or performances. 'Public transmission' is defined as any means of making sounds or images available to the public by wire or wireless network, or other means of communication, including enabling members of the public to receive such sounds or images at times or places individually determined by such members. This amendment is meant to refer to the Internet, giving authors the exclusive right to transmit their works over the Internet.

Parallel Importation

Article 87(4) of the Copyright Law classifies as infringement any importation of copies of a work without authorization of the owner. Prior to the amendments, Article 93 stated that any person who violated Article 87(4) could be punished with a fine and up to two years' imprisonment. Inexplicably, Article 93 was amended so that such a violation is no longer a criminal act (although a civil action for damages should still be available).

Penal Provisions

While the amendments raise various ceilings on penalties, they also remove floors on prison sentences. Previously, anyone who committed copyright infringement by reproducing a work could be punished with between six months and three years in prison, and a fine of up to NT\$200,000. If the infringer did so with intent to sell or rent the work, he faced between six months and five years in prison and a fine of up to NT\$300,000.

As amended, anyone who reproduces a work with "intent to profit" shall be punished with no more than five years in prison and a fine of between NT\$200,000 and NT\$2 million. One who infringes "without the intent to profit," where there are fewer than five copies or the market value of the infringing goods is less than NT\$30,000, shall be punished by no more than three years in prison and/or a fine of up to NT\$750,000. The minimum jail terms have been eliminated. Therefore, while the changes could result in harsher sentences, they could also result in greater leniency, depending on judicial discretion.

In certain cases the law will allow judges to disregard the upper limits on fines altogether. According to the new Article 96(3), the financial ability of the offender and the benefit obtained from the infringement shall be taken into account when imposing a fine, and if the benefit exceeds the maximum fine, the fine may be increased to the amount of the benefit obtained.

Optical Media Piracy

The amendments add new penal provisions aimed specifically at illegal manufacturers and distributors of optical media. Reproduction of an optical disk with intent to profit will now be punishable by imprisonment of not more than five years and a fine of between NT\$500,000 and NT\$5 million. Distribution of infringing disks with intent to profit will be punishable by up to three years' imprisonment and a fine of up to NT\$1.5 million. While these provisions increase potential penalties for optical media infringement, like the other provisions discussed above they fail to establish a minimum term of imprisonment.

Vocational Infringers

Both before and after the amendments, the law reserved its toughest penalties for vocational infringers - those who earn a living by infringing. Article 94 already provided that all vocational copyright infringers were subject to imprisonment of between one and seven years. As amended, the potential fine for vocational piracy of optical media has been increased to between NT\$800,000 and NT\$8 million, although the prison term remains unchanged.

Seizure of Equipment and Proceeds

The judicial police will now have the authority, under the new Article 98(2), to seize not only any "thing" used in the manufacture of infringing disks, but also any "thing" acquired through the commission of such offence. While the latter clearly refers to money, it also seems to apply to a car, house or other property acquired through the unauthorized manufacturing of optical disks. However, unlike US law, which allows for public auctions of seized property, Article 98(2) states that the thing seized shall be destroyed unless it is money, in which case it shall be submitted to the National Treasury.

Public Crime

Finally, optical media infringement will now be a public crime, pursuant to Article 100. Specifically, the prosecutor will now have the right to initiate an infringement action for any unauthorized reproduction or distribution with intent to profit of optical media, without a civil complaint being filed. Previously, the prosecutor had such a right only with regard to vocational copyright infringement; now the right will exist for both vocational infringement and intent-to-profit optical media infringement. Other forms of infringement still may not be prosecuted unless a private action has been filed.

Comment

Taiwan's government passed the amendments largely due to US pressure, although it failed to make all of the requested changes. Notably, Taiwan refused to extend the term of copyright protection from 50 years to 70 years. In addition, some of the changes that it made were later removed. For example, the Executive Yuan's version of the amendments granted increased powers to customs officers to inspect for and confiscate counterfeit goods. However, the Legislative Yuan removed those provisions based on assurances from Taiwan customs that internal guidelines will be enacted to accomplish the same purpose. Moreover, the amendments take a couple of steps backwards by decriminalizing parallel importation and allowing for shorter prison sentences.

Consequently, US officials were less than happy with the amendments. The president of the US Chamber of Commerce in Taipei, Gus Sorensen, called the amendments "a lost opportunity to strike a broad blow against IP right violations", and the Office of the US Trade Representative decided to suspend high-level talks with Taiwan due to disappointment with the amendment and other trade issues. Regardless of that dissatisfaction, copyright holders and US authorities should be pleased with the new rights granted to copyright holders concerning the Internet, and the increased fines and forfeiture powers. As always, however, the effectiveness of the amended law will depend on the nature of its enforcement.