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Motion Picture Piracy: Controlling the Seemingly Endless Supply of Counterfeit Optical Discs in Taiwan

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Motion Picture Piracy: Controlling the Seemingly Endless Supply of Counterfeit Optical Discs in Taiwan

ABSTRACT

Annually, Hollywood loses roughly \$3.5 billion dollars in revenue to optical disc piracy in Taiwan. Optical disc piracy involves the camcording or copying of motion pictures onto laser discs, digital versatile discs, or video compact discs. Through the U.S. Trade Representative's satellite enforcement offices in Taiwan and coordination with the Taiwanese legislature and enforcement agencies, the U.S. motion picture companies have been able to influence some change in the frequency and severity of optical disc piracy in Taiwan. This can be mainly attributed to the Motion Picture Association of America's alliance with the U.S. Trade Representative in placing Taiwan on numerous "Special 301" lists, which can have a negative effect on the Taiwan's trade relationship with the United States, public image, and ability to attract foreign investors. The reduction of optical disc piracy in Taiwan is impeded by accession to the World Trade Organization, cultural hurdles, weak domestic film industry and self interest. Nevertheless, U.S. Copyright industries can still influence change externally, by continued pressure under "Special 301"; and, internally, by incentivizing Taiwan businesses and building relationships with governmental and independent intellectual property organizations.

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I. INTRODUCTION

Piracy is “the unauthorized taking, copying or use of copyrighted materials without the authorization of the” copyright owner.¹ The Motion Picture Association of America (MPAA)² reports that Hollywood lost \$3.5 billion in revenue to piracy in 2002.³ This does not include revenues lost by non-major studios or through internet piracy, which are difficult to track.⁴

Optical disc piracy involves the illegal copying of motion pictures onto an optical disc, a term which encompasses laser discs, digital versatile discs (DVDs),⁵ and video compact discs (VCDs),⁶ a lower quality optical disc format popular in Asia.⁷ Pirates may “copy movies by cracking the digital copyright codes built into DVDs.”⁸ They may also camcord motion pictures⁹ obtained from industry screening copies and film prints sent to theatres, often before the

1. RespectCopyrights.org, What is Piracy?, <http://respectcopyrights.org> (last visited Feb. 12, 2006).

2. The Motion Picture Association of America (MPAA) serves as the representative for the U.S. motion picture industry. See MPAA, 2003 FULL TEN COUNTRY PIRACY FACT SHEET 1 (2003) (on file with VAND. J. TRANSNAT'L L.) [hereinafter 2003 FULL TEN COUNTRY PIRACY FACT SHEET]. “MPAA” will also refer to the Motion Picture Association of America’s international arm, the Motion Picture Association, often referred to as the MPA.

3. *Id.*

4. *Id.*

5. The DVD is a commonly used medium for digital video. Peter Moore, *Steal This Disk: Copy Protection, Consumer's Rights, and the Digital Millennium Copyright Act*, 97 NW. U. L. REV. 1437, 1438 n.9 (2003). It is “a superior alternative to VHS videotapes or laserdiscs.” *Id.* The DVD is a “5.25-inch optical disk[], very similar in appearance to CDs.” *Id.* It “can store much more data [including] a full-length motion picture . . . , something never before possible. Although laserdiscs were available before DVDs, the disks were physically large and the medium was analog.” *Id.*

6. “[VCD] technology was developed by Sony and Philips in 1993, and allows around 70 minutes of compressed MPEG-1 video/audio to be stored on a CD.” Monster ISP, VCD Definition, <http://www.monster-isp.com/glossary/VCD.html> (last visited Feb. 12, 2006). “Typically VCD movies are [copied onto] two CDs. VCDs were very popular in Asia, and were available before DVD.” *Id.* However, “VCDs will probably eventually succumb to the higher quality of DVD.” *Id.*

7. See David Spark, Telling Tales of DVD Piracy (May 1, 2003), <http://www.emedialive.com/Articles/ReadArticle.aspx?CategoryID=44&ArticleID=5094> (discussing DVD piracy); Respectcopyrights.org, Optical Disc and Videocassette Piracy, <http://respectcopyrights.org> (last visited Feb. 12, 2006).

8. Geoffrey A. Fowler, *Movie Pirates Go Mobile*, FAR E. ECON. REV., Sept. 25, 2003, at 44, 44.

9. This is when a pirate uses a “hand-held video camera to record the film directly from the screen.” Brent T. Yonehara, Note, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 63, 68 (2002). This is also known as camcorder piracy. MPAA, Theatrical Camcorder Piracy, http://www.mpa.org/piracy_theatrical_cam.asp [hereinafter Theatrical Camcorder Piracy].

movie is released to the public.¹⁰ Fifty major movie titles were stolen by camcorder recording prior to their U.S. theatrical release between May 2002 and May 2003.¹¹

With pirated disc production from Taiwan found all over the world¹² and estimated annual motion picture piracy losses of \$67.8 million in 2005,¹³ the MPAA is greatly interested in reducing optical disc piracy in Taiwan. Internationally, the MPAA exerts pressure on the Taiwanese government to increase Intellectual Property Rights (IPR) enforcement and penalties.¹⁴ Domestically, the MPAA lobbies Congress and also influences the U.S. Trade Representative (USTR) to pressure Taiwan into increasing copyright legislation and enforcement under "Special 301."¹⁵ It also aids in anti-piracy enforcement in Taiwan.¹⁶

Through "Special 301," the USTR identifies countries that have problematic IPR protection policies or restrict market access to U.S. intellectual property.¹⁷ Recognition by the USTR harms a country's international reputation and discourages foreign investment;¹⁸ additionally, such recognition may lead to trade sanctions.¹⁹ Until recently, Taiwan has spent the previous four years on the USTR's Priority Watch List, the second most severe designation under "Special 301."²⁰ Despite the efforts of the MPAA and the USTR,

10. Theatrical Camcorder Piracy, *supra* note 9.

11. *Id.*

12. SHUJEN WANG, FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION IN GREATER CHINA 157–58 (Rowman & Littlefield 2003).

13. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 23.

14. Bill Heaney, *Software Industry Walks Copyright Tightrope*, TAIPEI TIMES, May 8, 2003, at 11, available at <http://www.taipeitimes.com/News/biz/archives/2003/05/08/205167> [hereinafter Heaney, *Software Industry Walks Copyright Tightrope*].

15. See Int'l Intell. Prop. Alliance (IIPA), Member Associations, <http://iipa.com/memberassociations.html> (last visited Feb. 12, 2006) (noting that the MPAA is a member of the International Intellectual Property Alliance [hereinafter Member Associations]; IIPA, Description of the IIPA, <http://iipa.com/aboutiipa.html> (last visited Feb. 12, 2006) (discussing IIPA involvement in "Special 301") [hereinafter Description of the IIPA].

16. See 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 1 (noting the MPAA's international piracy efforts).

17. JEAN HEILMAN GRIER, SECTION 301 OF THE 1974 TRADE ACT § IV (2005), <http://www.osec.doc.gov/ogc/occcic/301.html>.

18. See Bill Heaney, *Seizures of Fake Discs Rise in Asia*, TAIPEI TIMES, Feb. 4, 2004, at 10, available at <http://www.taipeitimes.com/News/biz/archives/2004/02/04/2003097440> [hereinafter Heaney, *Seizures of Fake Discs Rise in Asia*]; *International Development—Taiwan Amends Copyright Law*, 15(10) J. PROPRIETARY RTS. 22, 23 (2003).

19. Facts and Figures, *The U.S. Special 301 Process*, 3(3) ECON. PERSP. 32, 32 (1998), <http://usinfo.state.gov/journals/ites/0598/ijee/ijee0598.pdf> (last visited Feb. 12, 2006).

20. IIPA, 2004 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT app. d at 3 (2004) (covering Taiwan's "Special 301" list placement up to

Taiwan still finds itself on the USTR's Watch List.²¹ Taiwan's continued listing, although now with a better designation, suggests that many IPR problems remain and may raise doubts concerning the ability of U.S. copyright industries and their affiliates to influence large scale IPR change in Taiwan.

This Note will focus on optical disc piracy in Taiwan generally from the perspective of the U.S. motion picture industry.²² Part II of this Note provides a background on the motion picture industry and optical disc piracy. Part III describes the MPAA's role in strengthening copyright law and enforcement in Taiwan, directly and through other entities such as the International Intellectual Property Association (IIPA)²³ and the USTR. Part IV describes Taiwan's history of being on the USTR's "Special 301" lists, the concessions that have followed, and the MPAA's current demands for IPR protection in Taiwan. Finally, Part V discusses the reasons why Taiwan may or may not concede to the motion picture industry's demands and recommends an approach for the motion picture industry to reduce optical disc piracy through the strengthening of copyright law and enforcement in Taiwan.

II. OPTICAL DISC PIRACY

A. *Optical Disc Piracy*

1. *Moviemaking: A "Hit or Miss" Industry*

Moviemaking is a very "risky business."²⁴ "[O]nly one out of ten films recoups its investment from domestic exhibition."²⁵ Four out of

2003) [hereinafter 2004 IIPA SPECIAL 301 REPORT]; USTR, 2004 SPECIAL 301 REPORT 20 (2004) (placing Taiwan on the 2004 "Priority Watch List"), [hereinafter 2004 USTR SPECIAL 301 REPORT].

21. See USTR, 2005 SPECIAL 301 REPORT 47 (2005) (placing Taiwan on the 2005 "Watch List") [hereinafter 2005 USTR SPECIAL 301 REPORT].

22. Although, many MPAA actions ultimately involve the USTR, this Note does not seek to focus on international trade law.

23. The IIPA is a "coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials." Description of the IIPA, *supra* note 15. The "IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community [and a total of] 1900 U.S. companies." *Id.* One of these associations is the MPAA. See Member Associations, *supra* note 15.

24. MPAA, ANTI-PIRACY, WHO PIRACY HURTS, ENTERTAINMENT INDUSTRY, http://www.mpa.org/piracy_EntInd.asp (last visited Feb. 6, 2006) [hereinafter ANTI-PIRACY].

25. *Id.*

ten “never recoup [their] original investment.”²⁶ The average film costs over \$98 million to produce and advertise.²⁷ To recoup this cost, the motion picture “industry relies [on] a . . . sequential release of the movie.”²⁸ First, the film is theatrically released, then to home video, then to video on demand, then to pay per view, then to pay television, then to terrestrial television, and then to syndication.²⁹ This release sequence provides the best financial return for studios, but also “provides consumers with choices as to how they wish to view movies and when.”³⁰

Piracy affects all stages of the release sequence.³¹ When film piracy occurs, it negatively affects subsequent markets for each interval in the release sequence.³² For example, retailers cannot compete fairly with pirate businesses that do not have the typical expenses associated with the cost of doing legitimate business.³³ Further, pirates siphon away revenue from studios that invest in the film, distributors, and foreign and local filmmakers.³⁴

2. Growing Optical Disc Piracy

Optical disc piracy “obliterates the value and vitality of the American film and TV industries.”³⁵ In 1997, worldwide piracy losses were estimated to be \$2.2 billion, primarily related to pirated material in VHS and VCD format.³⁶ Today, pirated materials are found on optical discs, primarily in DVD and VCD format, and piracy losses now hover around \$3.5 billion.³⁷ The rate of DVD piracy has shocked the movie industry.³⁸

The fate of the music industry makes optical disc piracy a real threat to Hollywood. The music industry saw an explosion of burnt blank recordable compact discs (CD-Rs), from 400 million in 1998 to over one billion in 2003.³⁹ Similarly, “[t]he marketplace is quickly

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 1.

30. ANTI-PIRACY, *supra* note 24.

31. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 1.

32. ANTI-PIRACY, *supra* note 24.

33. *Id.*

34. *Id.*

35. Press Release, MPAA, *MPA Commends USTR “Special 301” Report: Taiwan, Russia, and Poland on “Priority Watch List,” Thailand on “Watch List”* (May 1, 2003) (quoting Jack Valenti, MPA’s Chairman and CEO), available at http://www.ftac.net/6-MPAA_and_301.pdf [hereinafter 5/1/03 MPAA Press Release].

36. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 2.

37. *Id.* at 1.

38. Spark, *supra* note 7.

39. Fowler, *supra* note 8, at 45.

transitioning to optical disc more quickly than anybody ever anticipated.”⁴⁰ In 1998, the MPAA did not seize any “illegal DVDs anywhere in the world.”⁴¹ In 2002, the MPAA seized seven million illegal DVDs and twenty-six million VCDs worldwide.⁴²

3. The Worldwide Reach of Optical Disc Piracy

Optical disc piracy does not just disrupt sales in the country in which optical discs are produced. In the United States, illegal DVDs from Taiwan costing one-fourth the price of other illegal DVDs have flooded the New York market.⁴³ In Asia, 90% “of the fake audio and video products sold” in mainland China have been imported and most “come from Hong Kong and Taiwan.”⁴⁴

The allure of optical disc piracy can be attributed to high profitability, low production overhead and low risk.⁴⁵ In the United States, a CD-R can cost less than fifteen cents,⁴⁶ and a blank recordable DVD (DVD-R) can cost less than twenty-five cents.⁴⁷ Pirated optical discs can sell for \$10 or more.⁴⁸

Companies are not the only parties hurt by piracy. Consumers can waste money in buying poor quality or non-functional optical discs, which lack the quality guarantees associated with legitimate optical discs.⁴⁹ Countries affected by piracy are also hurt by “decreas[ed] tax revenues and deter[ed] investment.”⁵⁰ Not only do pirates not pay any taxes or duties, they do not “comply with basic manufacturing standards for health and safety of workers, . . . product quality, or performance.”⁵¹

40. Spark, *supra* note 7 (quoting Ken Jacobsen, the “MPAA’s director for Worldwide Anti-Piracy Operations”).

41. *Id.*

42. *Id.*

43. Dom Serafini, *DVD Piracy in the U.S. Becomes an Industry*, VIDEO AGE INT’L, March/April 2003, at cover.

44. Irene Wang, *Most Fake DVDs ‘Imported Into Mainland,’ 90 Percent of the Pirated Video Products Come from Overseas, Authorities Claim*, S. CHINA MORNING POST, Mar. 31, 2004, at 4.

45. See WANG, *supra* note 12, at 150 (discussing overproduction and the counterfeit optical disc enterprise).

46. Shop4Tech, 52X High Speed Branded CD-R 80min/700mb, <http://www.shop4tech.com> (last visited Feb. 12, 2006) (selling 500 CD-Rs for \$75.00).

47. Shop4Tech, DVD Media, http://www.shop4tech.com/z/DVD_Media/1_88 (last visited Feb. 22, 2005) (selling 100 DVD-Rs for \$22.00).

48. CDRInfo.com, Showtime on Street for Pirated DVDs, July 8, 2002, <http://www.cdinfo.com/Sections/News/Details.aspx?NewsId=6595>.

49. 2005 USTR SPECIAL 301 REPORT, *supra* note 21, at 3.

50. *Id.*

51. *Id.*

B. Optical Disc Piracy in Taiwan

In 2004, motion picture piracy within Taiwan cost the motion picture industry almost \$40 million.⁵² Taiwan's annual motion picture piracy losses for 2005 are estimated at \$67.8 million.⁵³ Much of this can be attributed to optical disc piracy, which "makes up [a] majority of pirated product being traded in Taiwan."⁵⁴ Taiwan's technological, geographic, and commercial advantages—as opposed to its market size—makes it a target for the reduction of optical disc piracy.⁵⁵

Optical disc piracy affects all aspects of the motion picture schedule in Taiwan. The legitimate film market is struggling as a result of piracy, as seen in annual screen counts dropping an average of 7% each year from 2000 to 2003.⁵⁶ Consumer spending on legitimate home entertainment products (VHS, VCD, and DVD) has "suffered tremendously," averaging an annual consumer spending reduction of 16% from 1996-2003.⁵⁷ Video rental has also seen a continuous decline for the past two or three years.⁵⁸

1. Mass Producer and Trans-shipment Capital

Taiwan has been seen as "the traditional cent[er] of [worldwide] DVD piracy."⁵⁹ Considered the "piracy export and transshipment capital of the world," Taiwan's pirated product can be found all over the world, harming transnational copyright industries far beyond the country's border, such as "South America, Europe and even Africa."⁶⁰ In 1999, Taiwan was the largest source of counterfeit CDs and DVDs

52. IIPA, USTR 2005 "SPECIAL 301" RECOMMENDATIONS: 2003-2004 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY AND 2003-2004 ESTIMATED LEVELS OF PIRACY—ASIA PACIFIC (2005), http://iipa.com/pdf/2005_Feb10_ASIA_PACIFIC_LOSSES.pdf (last visited Feb. 12, 2006) [hereinafter IIPA 2003-2004 ESTIMATED TRADE LOSSES].

53. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 23.

54. IIPA, IIPA 2005 SPECIAL 301: TAIWAN 455 (2005), <http://www.iipa.com/countryreports.html> [hereinafter 2005 IIPA SPECIAL 301: TAIWAN].

55. WANG, *supra* note 12, at 148.

56. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 22.

57. *Id.* at 23.

58. Amber Chung, *Piracy Driving Down Video Rentals*, TAIPEI TIMES, Feb 14, 2004, at 11, available at <http://www.taipetimes.com/News/biz/archives/2004/02/14/2003098740>.

59. *Toughest Job in China?*, S. CHINA MORNING POST, May 7, 2004, at 14.

60. WANG, *supra* note 12, at 147, 157-58, 160.

found in the United States,⁶¹ accounting for 43% of all pirated products in the United States, up 490 % from the year before.⁶²

Taiwan is one of the top countries in Asia for total seizures of pirated DVDs and DVD-Rs⁶³ and may be one of the world's three largest sources of pirated optical discs.⁶⁴ Annual production of pirated CDs and DVDs in Taiwan is estimated at more than \$300 million.⁶⁵ In 2002, the number of seized pirated DVDs and seized pirated VCDs increased 229% and 25%, respectively, from the year before.⁶⁶

2. Night Markets

Night markets⁶⁷ in Taiwan have been a large source of pirated optical disc commerce. There are over 1000 night markets in Taiwan,⁶⁸ which likely sell thousands of infringed MPAA titles in VCD and DVD format.⁶⁹ Pirates typically employ juveniles, who are exempt from criminal responsibilities and serve to shield criminal organizations.⁷⁰ In most cases, the juveniles are reprimanded without criminal penalty.⁷¹ In addition, pirates attempt to avoid prosecution by employing a "conscience vending box," whereby pirated disc purchasers place money in a box.⁷² In the event of a police raid, vendors could abandon both the box and goods without

61. *Id.* at 158. The second top exporter was China accounting for 16% of the pirated product in the United States. *Id.*

62. *Id.*

63. Winnie Chung, *DVD Pirates Storm Through Asia*, 380 HOLLYWOOD REPORTER, Aug. 19, 2003, at 118.

64. See Flor Wang, *Taiwan More Effective in Crackdown on Pirated Compact Disks*, CENT. NEWS AGENCY—TAIWAN, Oct. 7, 2003 (discussing a media report supporting the assertion).

65. *EU Trade Envoy Says Piracy is Top Issue*, SAN JOSE MERCURY NEWS, Apr. 17, 2003, at 2C.

66. 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 22.

67. Night markets are essentially flea markets that operate late in the evening. They are the most visited place by tourists. See Sofia Wu, *Night Markets Emerge as Taiwan's Top Tourist Attraction*, CENT. NEWS AGENCY ENG. NEWS, Aug. 4, 2004. Vendors sell amongst other items food, souvenirs, gifts, casual clothing, toys, blue movies, CDs, electronics, and traditional handicrafts. Mat Schaffer, *In the Night Kitchen; Taiwan's Street Markets Get Cooking After Dark*, BOSTON HERALD, Sept. 8, 2004, at 38. Shoppers can also "race turtles, buy goldfish and canaries, get a foot massage or play pinball." *Id.* One night market is open every night, from early evening until after midnight. See *id.* Night markets are particularly abundant in Taipei. See *id.*

68. WANG, *supra* note 12, at 156.

69. See *Taiwan Offers Reward for Piracy Tip-offs*, AGENCE FRANCE-PRESSE, Apr. 19, 2003.

70. WANG, *supra* note 12, at 157.

71. *Id.*

72. *Id.*

penalty.⁷³ In 2002, 90% of night markets used this tactic.⁷⁴ Recent amendments to Taiwan's copyright law have reduced pirated optical disc sales at night markets.⁷⁵

3. Adaptation by Pirates

Increased copyright enforcement efforts have forced pirates to evolve their tactics and explore new distribution avenues for pirated optical discs. As law enforcement officials strengthen anti-piracy efforts in certain areas, pirates move to less regulated areas of distribution such as the internet and home delivery.⁷⁶ Pirates have distributed pirated optical discs anonymously by advertising through paper fliers.⁷⁷ "Pirate product catalogues are printed with untraceable mobile phone numbers and spread around office buildings."⁷⁸ Some pirates set up accounts at the post office and have the post office collect the money and send the pirated merchandise.⁷⁹ Pirates also use courier services to deliver pirated products and collect payment because there is a low risk of being caught.⁸⁰

Technological advances have made it more difficult to locate optical disc pirates. Pirates have switched from larger presser⁸¹ operations to smaller, discreet, and more mobile burner⁸² operations.⁸³ About five years ago, optical disc piracy required factory-produced disc-pressing equipment and large amounts of capital.⁸⁴ With old-style pressing, it took only one second to produce an illegal disc.⁸⁵ The discs, however, were large and easy to find.⁸⁶

73. *Id.*

74. See IIPA, 2004 SPECIAL 301: TAIWAN 227 (2004), <http://www.iipa.com/countryreports.html> (recommending that Taiwan be placed on the "Priority Watch" list for 2004) [hereinafter 2004 IIPA SPECIAL 301: TAIWAN].

75. 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 456.

76. Heaney, *Seizures of Fake Discs Rise in Asia*, *supra* note 18.

77. *Id.*

78. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 227.

79. *Id.*

80. *See id.*

81. Presser machines copy films onto optical discs very quickly, in about one second. See Fowler, *supra* note 8, at 45 (comparing optical disc burners with presser machines). However, the machines are large, expensive to purchase and "must be registered and audited." *Id.* The DVDs and CDs presser machines create carry a unique identification code. *Id.*

82. Burner refers to very popular technology allowing movies and other media to be copied onto DVD-Rs and CD-Rs. See *id.* (comparing optical disc burners with presser machines). A copy is made by a laser, which marks light sensitive DVD-Rs and CD-Rs. Compared to presser machines, burners are much slower; however they are generally smaller and less regulated, and thus are harder to find. See *id.*

83. *Id.*

84. *Id.*

85. *Id.*

Further, presser machines in Taiwan must be registered and audited, and the DVDs and CDs they produce carry a unique identification code on their inner rings.⁸⁷ These operations resulted in 87% of the world's seized pirated DVDs, "including most of the videos sold on street corners and alleys in America."⁸⁸

Today, piracy operations are much smaller in size.⁸⁹ Burners are not regulated like presser machines.⁹⁰ Optical disc burners, which make copies by marking light-sensitive discs with a laser, have made operations cheaper, mobile, and easier to set up and hide.⁹¹ Burners, by contrast, are less efficient: the fastest drive takes ten minutes to burn one disc and each disc needs to be labeled with a sticker, then loaded and unloaded by hand.⁹²

III. THE MPAA: STRENGTHENING COPYRIGHT LAW & ENFORCEMENT IN TAIWAN

The MPAA's international anti-piracy program was established in 1976.⁹³ The program's goals are to

implement and strengthen existing copyright legislation, assist local governments and law enforcement authorities in the investigation and prosecution of piracy cases, initiate civil litigation on behalf of its Member Companies against copyright infringers, and conduct education outreach programs regarding the harmful effects of piracy and works to strengthen the copyright law of other nations and suggest appropriate penalties.⁹⁴

The association supports immediate action to address Taiwan's "egregious piracy situation."⁹⁵

A. *The MPAA's Copyright Law Enforcement Efforts in Taiwan*

The MPAA's Taiwan branch has a staff of eleven.⁹⁷ MPAA experts, in partnership with worldwide justice officials, lead

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. ANTI-PIRACY, *supra* note 24.

94. *Id.*

95. *MPA Lauds Congress Washington Urges Taiwan to Crack Down on Piracy*, IN FOCUS, Jan. 2003, <http://www.infocmag.com/.03January/international.htm>.

97. WANG, *supra* note 12, at 156.

investigations, raids and seizures.⁹⁸ On May 25, 2004, the MPAA conducted the largest raid ever in Taiwan on an illegal optical disc burning lab.⁹⁹ The joint operation, involving the Ministry of Justice Investigation Bureau, seized 40 DVD-R burners, 476 CD-R burners, and 250,300 burned CD-Rs.¹⁰⁰ In one year's time, the lab could have generated NT\$645 million (US\$19.56 million).¹⁰¹ The MPAA believes the raid underscores the continuing problem of piracy in Taiwan.¹⁰² The MPAA conducted thirteen factory raids in 2003, which led to the closing of four unlicensed plants.¹⁰³ In addition 1,719 masters,¹⁰⁴ 300,849 pirate discs, 8 VCD production lines, and 11 printing and packaging machines were seized.¹⁰⁵

The MPAA has also organized anti-piracy demonstrations. On April 5, 2002, the MPAA and other entities representing copyright owners organized an anti-piracy protest in Taipei.¹⁰⁶ Participants included major exhibitors, distributors, retailers, and artists. The goal was to influence the government to make piracy a public crime and set up a police task force.¹⁰⁷ Recently, to further promote public awareness, the MPAA has included anti-piracy trailers in its theatrical distributions.¹⁰⁸

The MPAA's Taiwan branch has also made available US\$150,000 in rewards for successful raids, allowed for confidential emails, and opened a national hotline to report factories burning fake DVDs.¹⁰⁹

98. See 2003 FULL TEN COUNTRY PIRACY FACT SHEET, *supra* note 2, at 1.

99. Press Release, MPAA, *Raid Uncovers Largest Optical Disc Source Lab Ever Found in Taiwan—Thousands of Pirated Movies* (May 27, 2004) (on file with VAND. J. TRANSNAT'L L.).

100. *Id.*

101. *Id.*

102. *Id.*

103. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 230.

104. A "master" is an original copy from which copies of motion pictures can be made. MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.m-w.com> (last visited Feb. 12, 2006).

105. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 230.

106. WANG, *supra* note 12, at 140.

107. *Id.* at 140, 148.

108. *Anti-Piracy Move to Target Video Shops*, CHINA POST, Feb. 2, 2005, available at 2005 WLNR 1591468.

109. Bill Heaney, *Lu wants Taiwan off US' 301 list*, TAIPEI TIMES, Feb. 22, 2003, available at <http://www.taipetimes.com/news/biz/archives/2003/02/22/195525> [hereinafter Heaney, *Lu wants Taiwan off US' 301 list*]; Fowler, *supra* note 8, at 45; *MPA Launches Anti-Piracy Rewards Programme*, SCREEN DIG., Mar., 2003, available at http://www.findarticles.com/p/articles/mi_go2637/is_200303/ai_n7470111; Rina Chandran, *Motion Picture Body Cracks Down on DVD Piracy*, HINDU BUS. LINE, Mar. 20, 2004, available at <http://www.blonnet.com/2003/03/20/stories/2003032000950600.htm>.

MPA/IIPA Motion Picture Copyright Enforcement Statistics For Taiwan¹¹⁰					
Actions	2000	2001	2002	2003	2004
Number of raids conducted	283	1,118	698	655	608
Number of VCDs seized				3421	110,000
Number of DVDs seized				766	115,551
Number of CDs and CD-Rs seized				232,617	1,078,474
Number of investigations				1,222	1116
Number of VCD/CD lab factory raids				13	34
Number of cases commenced (adults/juveniles)	150	1,060	671 (367/304)	607	425
Number of indictments				469	256
Number of defendants convicted (including guilty pleas)	69	488	876	435	269
Acquittals and dismissals	4	10	9	3	0
Numbers of cases pending	77	562	574	253	209
Number of factory (and CD-R lab) cases pending				11	
Total number of cases resulting in jail time	57	96	332	132	63
Suspended prison terms	18	49	128	69	
Maximum 6 months	3	25	45	0	0
Over 6 months	4	6	17	0	0
Over 1 year	11	18	66	69	15
Total suspended prison terms	226mths	506mths	1,443mths	2424mths	936mths
Prison terms served (not suspended)	39	47	204	201	

110. 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 464; 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 234; IIPA, 2003 SPECIAL 301: TAIWAN 312-14 (2003), <http://www.iipa.com/countryreports.html> [hereinafter 2003 IIPA SPECIAL 301: TAIWAN]

Maximum 6 months	7	33	132	108	38
Over 6 months	3	3	16	18	2
Over 1 year	29	11	56	75	8
Total suspended prison terms (not suspended)	291mths	386mths	1,800mths	455mths	345mths
Number of cases resulting in criminal fines	6	1	10	10	0
Up to \$1,000	1		1	0	0
Between \$1,000 and \$5,000	4	1	5	8	0
Over \$5,000	1		4	2	0
Total amount of fines levied (in US\$)		\$1,515	\$63,314	\$37,056	0

B. The MPAA's Legislative Reform Efforts in Taiwan

The MPAA and its affiliated organizations are a powerful lobbying group in Taiwan¹¹¹ and have encouraged Taiwan to amend its copyright law.¹¹² Through its membership in the IIPA, the MPAA has influenced the USTR to pressure Taiwan to improve its copyright law and enforcement under "Special 301."¹¹³

1. USTR: "Special 301"

Formed in 1962 as the Special Trade Representative for Trade Negotiations, the USTR makes and administers U.S. trade policy, leads all trade negotiations and represents the U.S. government before international trade organizations.¹¹⁴ The USTR also acts as an international trade agent for U.S. business under "Special 301" of the 1988 Trade Act.¹¹⁵

"Special 301" is an effective tool in "dealing with nations that impose barriers against U.S. film, TV programs and home video

111. See Heaney, *Software Industry Walks Copyright Tightrope*, *supra* note 14.

112. See 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 223 (requesting Taiwan to amend its copyright law).

113. See Description of the IIPA, *supra* note 15 (discussing the role of the IIPA in USTR actions). Every year, the IIPA submits to the USTR a list of suggested countries with IPR problems and detailed explanations. Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L. J. 87, 102 (1994).

114. MICHAEL P. RYAN, *PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC* 31 (1995).

115. *Id.*; 19 U.S.C. § 2411 (2005).

material, or permit these exports to be pirated.”¹¹⁶ It is designed to enhance the United States’ ability to negotiate IPR improvement with foreign countries.¹¹⁷

By April 30 of each year, the USTR must identify foreign countries that deny “adequate and effective” protection of intellectual property rights or “fair and equitable market access” to U.S. persons relying upon IPR protection.¹¹⁸ A country can be found to deny adequate and equitable intellectual property protection even if it is in compliance with its obligations under the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.¹¹⁹

The USTR conducts preliminary investigations to determine whether countries have IPR problems,¹²⁰ which may be self-initiated by the USTR or through petition by “interested persons,”¹²¹ such as the IIPA. A petition by an “interested person” allows U.S. industries to directly communicate with the USTR.¹²² Petitions describe how domestic industries are economically affected by foreign piracy, the volume of trade affected, the manner in which the practice is unreasonable, and the specific intellectual property right being violated.¹²³ Further, it allows the USTR to present specific demands in its negotiations with other countries.¹²⁴

Countries identified by the USTR may be placed into a hierarchy of categories.¹²⁵ The Priority Foreign Country designation is reserved for countries “that have the most onerous or egregious acts, policies, or practices that have the greatest adverse impact” on intellectual property rights.¹²⁶ A Priority Foreign Country may be subject to further investigation and trade sanctions.¹²⁷

116. 5/1/03 MPAA Press Release, *supra* note 35; See 19 U.S.C. § 2411.

117. GRIER, *supra* note 17.

118. *Id.*

119. *See id.* The TRIPS agreement established minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. See WTO, Intellectual Property (TRIPS), http://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Feb. 12, 2006) [hereinafter TRIPS].

120. Preeti Sinha, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 PAC. RIM L. & POL'Y J. 281, 287 (1993).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Press Release, Office of the USTR, *U.S. Announces Results of IPR Out-of-Cycle Reviews for Poland and Taiwan* (January 18, 2005) available at <http://www.ustr.gov> (follow “Press Releases” hyperlink) [hereinafter 1/18/05 USTR Press Release].

126. Allison Cychosz, *The Effectiveness of International Enforcement of Intellectual Property Rights*, 37 J. MARSHALL L. REV. 985, 1001 (2004).

127. *International Development—USTR “Special 301” Report Released*, 16(8) J. PROPRIETARY RTS. 19, 19 (2004).

A Priority Watch designation is the second most severe designation¹²⁸ and signifies that the country's acts, intellectual property laws, or enforcement practices are of major concern to the United States, but are not quite to the level of a Priority Foreign Country.¹²⁹ Countries on the Priority Watch list are subject to increased bilateral attention.¹³⁰ The Watch List is the least severe designation and indicates that the country "warrant[s] special attention because they maintain intellectual property practices or barriers to market access that is of particular concern."¹³¹

If the country identified under "Special 301" does not negotiate with the federal government within six months or if such negotiations are ineffective, unilateral trade sanctions may be imposed.¹³² In the past, U.S. retaliatory acts have included tariffs, mirror legislation, and import quotas.¹³³ The effect of "Special 301" is dependent on the country's political economy.¹³⁴ Retaliatory acts are most effective when a country relies heavily on exports to the United States,¹³⁵ which is the case for Taiwan.

Moreover, being on any one the USTR's "Special 301" lists hurts a country's international image. Designation on any list "serves both to warn foreign countries of the USTR's concerns and impending consultations and to warn U.S. investors that their intellectual property rights may not be adequately protected."¹³⁶ A country can be added or removed from the Priority Foreign Country, Priority Watch or Watch Lists during the annual review or out-of-cycle reviews.¹³⁷

128. Tim Culpan, *Copycat Crime*, S. CHINA MORNING POST, May 8, 2003, at 11.

129. See Cychosz, *supra* note 125, at 1001-02; see GRIER, *supra* note 17.

130. Facts and Figures, *supra* note 19. The bilateral trade-based approach involves direct trade negotiations between the United States and the foreign country. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 295 (1991). If intellectual property protection is adequate in the foreign country, U.S. direct investment will occur and export to the United States will be facilitated. *Id.* If not, economic sanctions are imposed on the foreign country until there is an agreement over intellectual property matters. *Id.*

131. Cychosz, *supra* note 125, at 1002.

132. See Leaffer, *supra* note 129, at 295-96 (citing the Omnibus trade and Competitiveness Act of 1988 amending the 1974 Trade Act.); *Taiwan Offers Reward for Piracy Tip-offs*, *supra* note 69.

133. Fusae Nara, *A Shift Toward Protectionism Under S 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law*, 19 HOFSTRA L. REV. 229, 236-40 (1990).

134. ANDREW MERTHA, *THE POLITICS OF PIRACY INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 38 (2005).

135. Nara, *supra* note 132, at 240.

136. Ronald J. T. Corbett, *Protecting and Enforcing Intellectual Property Rights in Developing Countries*, 35 INT'L L. 1083, 1088 (2001).

137. Facts and Figures, *supra* note 19.

2. Influencing the USTR

There is a strong correlation between IIPA recommendations and the USTR's annual list of countries with IPR problems.¹³⁸ With the core copyright industry,¹³⁹ which has played a dominant role in the creation of "Special 301," accounting for an estimated 6% of the U.S. gross domestic product (\$626.6 billion),¹⁴⁰ and the IIPA's provision of credible data and recommendations to the USTR, which are comparatively better prepared and more influential than the reports of other intellectual property associations,¹⁴¹ this correlation may be of little surprise. Since 1996, the USTR has agreed with the IIPA's recommendations for Taiwan eight times, or 73% of the time.¹⁴² There has also been a strong resemblance in allegations against and requests for improvement in Taiwan in the IIPA's recommendations and the USTR's explanations for a country's "Special 301" placement.

138. Liu, *supra* note 112, at 102.

139. Core copyright industries are those industries whose primary purpose is to produce or distribute copyright materials. Press Release, IIPA, *IIPA's New Economic Study Reveals the Copyright Industries Continues to be a Driving Force in the U.S. Economy* (Oct. 7, 2004), <http://www.iipa.com/pressrel.html>. These industries include newspapers, book publishing, recording, music, and periodicals, motion pictures, radio and television broadcasting, and computer software (including business application and entertainment software). *Id.*

140. STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2004 REPORT i (2004), available at http://www.iipa.com/pdf/2004_SIWEK_FULLL.pdf

141. See MERTHA, *supra* note 133, at 60–61 (suggesting that the data and conclusions submitted by the IIPA to the USTR are quite influential on the USTR).

142. 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, app. d at 3; 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 223; Letter from Eric H. Smith, President, IIPA, to Sybia Harrison, Special Assistant to the Section 301 Committee, Office of the USTR (Nov. 4, 2004), available at http://www.iipa.com/rbi/2004_Nov4_IIPA301_OCR_Recommendation_Taiwan.pdf [hereinafter Letter from Eric H. Smith]; 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 453; 2004 USTR SPECIAL 301 REPORT, *supra* note 20, at 20; 1/18/05 USTR Press Release, *supra* note 124; 2005 USTR SPECIAL 301 REPORT, *supra* note 21, at 47.

	IIPA "Special 301" Recommendations: Taiwan 1989–2005 ¹⁴³	USTR "Special 301" Decisions: Taiwan 1989–2005 ¹⁴⁴
Year	IIPA Recommendation	USTR "Special 301" Decision
1989		Priority Watch List
1990		Watch List
1991		Watch List
1992		Priority Foreign Country
1993		Priority Watch List
1994		Watch List
1995		Watch List
1996	Watch List	—
1997	Watch List	—
1998	Watch List	Watch List
1999	Watch List	Watch List
2000	Priority Watch List	Watch List (with an out-of-cycle review)
2001	Priority Watch List	Priority Watch List
2002	Priority Watch List	Priority Watch List
2003	Priority Watch List	Priority Watch List
2004	Priority Watch List (with an out-of-cycle review)	Priority Watch List (with an out-of-cycle review)
(out of cycle review)	Watch List	Watch List
2005	Watch List	Watch List

IV. TAIWAN: A LONG HISTORY OF BEING ON THE USTR'S "SPECIAL 301" LISTS

A. IPR Problems from the Very Beginning: Taiwan's Stall Tactics

Historically, Taiwan has followed a policy of making concessions to the United States only after being placed on one of the USTR's

143. 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, app. d at 3; 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 223; Letter from Eric H. Smith, *supra* note 141; 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 453.

144. 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, app. d at 3; 2004 USTR SPECIAL 301 REPORT, *supra* note 20, at 20; 1/18/05 USTR Press Release, *supra* note 124.

“Special 301” lists—the more severe the designation, the greater the concession. In 1989, the first year “Special 301” was enacted, Taiwan was placed on the Priority Watch List.¹⁴⁵ Less than one month later, Taiwan promised to pass intellectual property legislation and comply with the 1989 U.S.–Taiwan Bilateral Copyright Agreement, which provides greater protection to U.S. copyright holders.¹⁴⁶ Taiwan also made unprecedented concessions related to counterfeiting, becoming the only country at that time to have such stringent requirements.¹⁴⁷ For the next two years, Taiwan was designated a Watch List country.¹⁴⁸

In 1992, Taiwan had failed to fully abide by the 1989 Agreement and was named a Priority Foreign Country.¹⁴⁹ In May 1992, Taiwan amended its copyright law.¹⁵⁰ Just seven days after the USTR began its investigation following the designation,¹⁵¹ Taiwan promulgated the “Protecting the Intellectual Property Rights Action Plan” and negotiated with the USTR for resolution.¹⁵² An agreement was reached in June 1992 that involved the drafting, amending, and enforcement of IP laws.¹⁵³ Before the USTR review in April 1993, the Taiwan legislature held a last minute session to implement commitments made pursuant to the 1992 agreement¹⁵⁴ and the 1989 Bilateral Agreement, and passed the Agreement for the Protection of Copyright between the Coordination Council for North American Affairs and the American Institute in Taiwan.¹⁵⁵

In 1993, the USTR took Taiwan off the Priority Foreign Country list, but still placed Taiwan on the Priority Watch List because it felt that the legislation was “watered down” and did not fully incorporate the 1989 agreement.¹⁵⁶ Despite resentment towards the United States for this designation,¹⁵⁷ Taiwan proposed “Guidelines on the Full Administration of Intellectual Property Protection” and began negotiations with the USTR.¹⁵⁸ Two months later, a memorandum of understanding for the protection of intellectual property rights was

145. Liu, *supra* note 112, at 113.

146. Kim Newby, *The Effectiveness of Special 301 In Creating Long Term Copyright Protection For U.S. Companies Overseas*, 21 SYRACUSE J. INT'L. L. & COM. 29, 39 (1995).

147. *Id.*

148. Liu, *supra* note 112, at 113.

149. Newby, *supra* note 145, at 39–40.

150. WANG, *supra* note 12, at 180.

151. *Id.*

152. Liu, *supra* note 112, at 113.

153. *Id.*

154. *Id.*

155. Newby, *supra* note 145, at 40.

156. *Id.*

157. *Id.*

158. Liu, *supra* note 112, at 113.

signed in Washington D.C.,¹⁵⁹ with the guidelines being implemented in July 1993.¹⁶⁰ From 1994–1999, Taiwan found itself on and off the “Special 301” Watch List.¹⁶¹

B. *The Return of the Priority Watch List (2000–2004)*

In 2000 and 2001, Taiwan was again placed on the Priority Watch List.¹⁶² Taiwan’s return to the Priority Watch List has been attributed to “optical media production operations get[ting] completely out of control.”¹⁶³

1. 2002: The Action Year of the Protection of Intellectual Property Rights

Continued placement on the Priority Watch List led Taiwan to implement the “2002 Action Year for IPR Protection campaign.”¹⁶⁴ The goals of this campaign were heightened education programs, adequate and effective legislation, and substantial enforcement actions.¹⁶⁵ This was followed by a three-year Comprehensive IPR Protection Action Plan, designed to continue and build upon this campaign.¹⁶⁶

As part of Taiwan’s heightened education programs, schools at all levels were required to introduce concepts of IPR protection into their curriculum.¹⁶⁷ Teachers and students were reminded to watch for unauthorized use of copyrighted materials.¹⁶⁸ Policies and penalties related to IPR protection were also presented on school

159. *Id.*

160. *Id.*

161. See WANG, *supra* note 12, at 152 (describing 301 decisions in Taiwan from 1989–2001); 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, at 3.

162. See WANG, *supra* note 12, at 152 (describing 301 decisions in Taiwan from 1989–2001); 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, at 3.

163. *Taiwan Should Stay on the U.S. IPR List: Expert*, CHINA POST, Feb. 7, 2004, available at 2004 WL 64367964.

164. REPUBLIC OF CHINA: GOVERNMENT INFORMATION OFFICE, TAIWAN’S COMMITMENT TO PROTECT INTELLECTUAL PROPERTY RIGHTS: JANUARY–AUGUST 2003 SUPPLEMENTAL REPORT ON TAIWAN’S INTELLECTUAL PROPERTY RIGHTS PROTECTION (discussing the Action Year of the Protection of Intellectual Property Rights), available at <http://www.gio.gov.tw/taiwan-website/5-gp/Ipr/ipr.htm> [hereinafter JANUARY–AUGUST 2003 SUPPLEMENTAL REPORT].

165. REPUBLIC OF CHINA: GOVERNMENT INFORMATION OFFICE, TAIWAN’S COMMITMENT TO PROTECT INTELLECTUAL PROPERTY RIGHTS: INTELLECTUAL PROPERTY RIGHTS PROTECTION IN TAIWAN, Mar. 14, 2003, available at <http://www.gio.gov.tw/taiwan-website/5-gp/Ipr/ipr.htm> [hereinafter INTELLECTUAL PROPERTY RIGHTS PROTECTION IN TAIWAN].

166. *Id.*

167. *Id.*

168. *Id.*

campuses, which were subjected to regular and random inspections to determine the progress of IPR protection.¹⁶⁹

The government also made available “public and campus seminars, two-dimensional and television advertisements and public displays, large outdoor promotions and concerts, and a series of television and radio shows.”¹⁷⁰ Taiwanese industries and the Ministry of Economic Affairs held public destructions of pirated optical discs, often in locations where optical disc piracy has been the most prevalent.¹⁷¹ During a three-day demonstration, approximately 200,000 pirated optical discs were destroyed.¹⁷² Taiwan has promised the deployment of additional policies and programs.¹⁷³

2. Prosecuting Optical Disc Pirates Becomes Easier

Taiwan’s return to the Priority Watch List led to the amendment of Taiwan’s copyright law to further target CD, DVD, software, and other digital media piracy.¹⁷⁴ The amendments also made prosecuting pirates easier.¹⁷⁵ For example, the manufacture and sale of pirated optical discs for profit became a “public crime,” which allowed law enforcement officials to prosecute copyright infringements even in the absence of a filed complaint.¹⁷⁶ Other infringements remain complaint-based.¹⁷⁷

The amendments also increased penalties for copyright infringement. Prison sentences were increased to seven years.¹⁷⁸ The maximum criminal fine was increased to NT\$8 million (US\$230,000),¹⁷⁹ up from NT\$450,000 in 2002.¹⁸⁰ Further, if the infringing party’s profits exceeded the maximum fine, the fine could be increased beyond NT\$8 million.¹⁸¹ In civil actions, the statutory

169. *Id.*

170. *Id.*

171. MINISTRY OF ECONOMIC AFFAIRS, INTELLECTUAL PROPERTY OFFICE, 2002 PERFORMANCE REPORT ON INTELLECTUAL PROPERTY RIGHTS IN TAIWAN 18 (2003).

172. *Id.*

173. INTELLECTUAL PROPERTY RIGHTS PROTECTION IN TAIWAN, *supra* note 164.

174. *International Development—Taiwan Amends Copyright Law*, *supra* note 18, at 22–23.

175. *Software Piracy in Taiwan Decreased by 10%, Nearing Global Average*, TAIWAN IPR NEWS, Jun. 16, 2003 (on file with VAND. J. TRANSNAT’L L.)

176. *International Development—Taiwan Amends Copyright Law*, *supra* note 18, at 23; *Software Piracy in Taiwan Decreased by 10%, Nearing Global Average*, *supra* note 174.

177. *Software Piracy in Taiwan Decreased by 10%, Nearing Global Average*, *supra* note 174.

178. *International Development—Taiwan Amends Copyright Law*, *supra* note 18, at 23.

179. *Id.*

180. *See Taiwan Offers Reward for Piracy Tip-offs*, *supra* note 69.

181. JANUARY–AUGUST 2003 SUPPLEMENTAL REPORT, *supra* note 163.

compensation increased to NT\$5 million (US\$143,000),¹⁸² up from NT\$1 million in 2002.¹⁸³ The 2003 amendments also eliminated a minimum six month jail term.¹⁸⁴

3. Failure to Adopt the Executive Yuan's 2003 Amendments

The 2004 IIPA recommendation to the USTR praised Taiwan's improvement in combating optical disc piracy:

Taiwan has . . . 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.¹⁸⁵

However, the IIPA noted that “[d]espite 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.”¹⁸⁶ The motion picture industry recommended that Taiwan’s copyright law be further amended and that enforcement be strengthened.¹⁸⁷ Much of the IIPA and USTR’s discontent stems from the Legislative Yuan’s¹⁸⁸ failure to adopt the Executive Yuan’s¹⁸⁹ 2003 Amendments to the copyright law, which represented the recommendations of the IIPA membership and the U.S. government.¹⁹⁰ The USTR’s “Special 301” report, placing Taiwan on the Priority Watch, incorporates most of IIPA’s aforementioned points and endorses the IIPA’s recommendation that Taiwan be subject to an out-of-cycle review later in the year to determine whether any progress had been made in IPR protection.¹⁹¹

Although not mentioned in the USTR’s “Special 301” Report, the 2004 IIPA report recommended a number of immediate actions from

182. *Id.*

183. *Id.*

184. *Id.*

185. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 225.

186. *Id.*

187. *Id.* at 223.

188. The Legislative Yuan is the highest legislative organ in Taiwan, and the laws enacted by the Legislative Yuan are applicable throughout Taiwan. HANBAO MA, TRADE AND INVESTMENT IN TAIWAN 7 (Herbert H.P. Ma & In-Jaw Lai eds., 2d ed. 1997).

189. The Executive Yuan is the highest IPR policy-making body. WANG, *supra* note 12, at 155. It is also one of five government departments having administrative power. MA, *supra* note 187, at 5. The other four departments are the Legislative Yuan, Judicial Yuan, Examination Yuan, and the Control Yuan. *Id.*

190. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 234–35.

191. Compare *id.* at 223, with 2004 USTR SPECIAL 301 REPORT, *supra* note 20, at 20–21.

Taiwan relating to optical disc piracy. The IIPA desired the immediate adoption of the amendments approved by the Executive Yuan as soon as possible after March 2004.¹⁹² Amongst other demands, the IIPA sought clarification on whether customs officials have ex officio authority to seize goods.¹⁹³ The IIPA also sought the reinstatement of minimum penalties for violations and mandatory jail time for violations of the copyright law.¹⁹⁴

In addition, the IIPA sought to amend the Optical Media Management Law (OMML), which regulates the plants engaged in the production of optical discs by requiring producers to have permits, place codes on discs, and produce reports.¹⁹⁵ The IIPA sought increased penalties and overall deterrence by expanding the OMML's coverage to deal with the "massive commercial production of CD-Rs, and by ensuring that deterrent penalties, including immediate license withdrawal, [were] imposed."¹⁹⁶

C. Continued Improvement Leads to a Downgrade to the Watch List (Late 2004–Present)

In November 2004, the IIPA recommended that Taiwan be downgraded to the USTR's Watch List. Even though Taiwan did not amend the OMML as the IIPA had requested, it made significant improvements in amending the copyright law and increasing enforcement of the OMML.¹⁹⁷ The Legislative Yuan did not fully adopt the Executive Yuan's amendments to the copyright law, but it "substantially followed" the Executive Yuan's recommendations.¹⁹⁸ The Legislative Yuan also did not reinstate minimum penalties and jail time for certain offenses.¹⁹⁹ Nevertheless, the IIPA was satisfied with the current amendments to the copyright law but was fearful that more deterring penalties may be necessary.²⁰⁰

On January 18, 2005, the USTR agreed with the IIPA and downgraded Taiwan to the Watch List due to the progress it had achieved in "strengthening enforcement and copyright protection."²⁰¹ In spring of 2005, the USTR again agreed with the IIPA's recommendation to keep Taiwan on the Watch List.²⁰² However, the

192. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 235.

193. *Id.*

194. *Id.*

195. *Id.* at 236.

196. *Id.* at 224.

197. Letter from Eric H. Smith, *supra* note 141, at 2.

198. *Id.*

199. *Id.*

200. *Id.* at 2–3.

201. 1/18/05 USTR Press Release, *supra* note 124.

202. 2005 USTR SPECIAL 301 REPORT, *supra* note 21, at 47–48.

USTR's report failed to adopt the IIPA's recommendations as to optical disc piracy, which included the targeting of burner and blank disc operations, the reinstatement of minimum penalties for certain copyright violations and amendment of the OMML.²⁰³ In fact, the USTR's near silence and continued failure to adopt the IIPA's recommendation concerning optical disc piracy suggests that the USTR may be generally satisfied with Taiwan's improvement as it pertains to optical disc piracy. The 2005 USTR "Special 301" Report notes:

During the past year, Taiwan's IPR task force increased inspections of optical media factories and retail distribution centers, and the number of raids and inspections conducted by the National Police also increased sharply. The U.S. copyright industry reports that Taiwan's increased enforcement efforts resulted in a significant drop in estimated trade losses from a high of \$847.9 million in 2002 to \$315.5 million in 2004.²⁰⁴

For the time being, it appears the USTR's efforts have shifted to Internet piracy of copyrighted works, corporate end-user business software piracy, and the illegal copying of textbooks.²⁰⁵

V. ANALYSIS

The fate of the optical disc piracy in Taiwan is unclear. In the big picture, optical disc piracy is one of many U.S. interests in Taiwan. Fortunately for the MPAA, "Special 301" provides a means by which the motion picture industry can influence IPR change in foreign nations. In fact, the United States is the most influential player in shaping IP policy in Taiwan.²⁰⁶ However, although the copyright industry as represented by the IIPA generates significant revenue in the United States and has significant influence on the USTR, motion picture companies wishing to address optical piracy will still have to compete with other intellectual property interests, such as patent and trademark. Further, the MPAA must also compete with other copyright interests.

The IIPA represents the interests of six copyright trade associations in addition to the MPAA. These other trade associations include the American Association of Publishers, the Business Software Alliance, the Entertainment Software Association, the Independent Film & Television Alliance, National Music Publishers'

203. See *id.*; 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 453, 456, 467-69.

204. 2005 USTR SPECIAL 301 REPORT, *supra* note 21, at 47-48.

205. *Id.* at 48.

206. WANG, *supra* note 12, at 148.

Association, and the Recording Industry Association of America.²⁰⁷ Given the potential barrage of requests and demands from many intellectual property interests, Taiwan and the USTR can only realistically address so many at once. Optical disc piracy may potentially become low priority.

Nevertheless, both the IIPA and USTR have made specific requests related to the minimizing of optical disc piracy in Taiwan. There are many reasons to believe Taiwan will concede to the optical disc demands of the United States. Yet, there are many reasons why Taiwan may not fully concede. Some of the more salient reasons will be discussed in the following paragraphs.

A. Why Taiwan May Concede

1. Internal Pressure: Rise of Domestic Intellectual Property

As a developing industrialized nation with much economic power, local development may provide an internal push to increase IPR protection. For example, Taiwan has exhibited great strength in the high-technology area.²⁰⁸ Taiwan's information technology, semiconductors, and electronic components account for 35–40% of its total exports.²⁰⁹

Naturally, these local industries will seek IPR protection. Their combined power will create a domestic push for increased protection and enforcement. Although Taiwan's high-technology advancements generally concern patent rights, a push for increased patent protection may have copyright implications or spark a broad push for increased IPR protection.

Also, "Taiwan's own copyright owners have become greater in number and more vocal," and will likely advocate the strengthening of copyright law and enforcement.²¹⁰ There is a significant domestic industry in software development.²¹¹ For example, developers licensed by Microsoft have created Chinese versions of Microsoft software.²¹² Such developers will want their works protected. In fact, local Taiwanese companies such as Kenex, Acer, and Ta-t'ung have lobbied the Legislative Yuan to amend the copyright law.²¹³

207. Member Associations, *supra* note 15.

208. Andy Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 77 (1998).

209. WANG, *supra* note 12, at 154.

210. Nelson C. Lu, *To Steal a Book Is No Longer Such an Elegant Offense: The Impact of Recent Changes in Taiwanese Copyright Law*, 5 ASIAN L.J. 289, 308 (1998).

211. *Id.* at 311.

212. *Id.*

213. *Id.*

Given that copyright industries seek a similar goal, individual action pushing for increased fines or prison time for copyright violations will likely effect optical disc pirates. At the very least, Taiwan's development may inspire confidence in competing fairly in the global market.

Moreover, the traditional justification for piracy may no longer apply to Taiwan. Historically, Taiwan justified lenient intellectual property laws because it allowed the country to develop. It adhered to the notion that lesser developed countries often lack the resources to create their own intellectual property. Copying intellectual property would give Taiwan the time, tools, and edge to compete industrially with other nations. Both private and public resources would be required to independently research and develop similar intellectual property or to license products or replicate methods already developed.²¹⁴ Copyright enforcement would protect foreign interests at the expense of their own producers.

Taiwan's traditional justifications, however, have little application in the case of motion picture theft. The development of a nation is not necessarily tied to the efficiencies and cost savings involved in allowing motion pictures to be counterfeited onto optical discs. As opposed to technology that is integral to economic development and advancement and has practical applications, motion pictures fall within the realm of entertainment. Although society as a whole greatly benefits from the promotion of the arts in the form of a motion picture, it is not vital to Taiwan's economic development.

2. External Pressure: Trade Leverage by the United States

Despite being a newly industrialized country with a historically uncertain political status, Taiwan is "a major global economic player."²¹⁵ Taiwan's economic power ranks approximately fifteenth in the world.²¹⁶ In the second half of 2003, the nation recovered from a recession that began that year as a byproduct of the Iraqi war and the SARS epidemic.²¹⁷ Demand for Taiwan's exports and foreign investment produced GNP growth of 3.2% in 2003, one of the highest rates in the region.²¹⁸ It was estimated that "strong foreign demand

214. See Sinha, *supra* note 119, at 282–83 (discussing justifications for lenient intellectual property laws in developing countries).

215. Sun, *supra* note 207, at 71.

216. *Id.*

217. USTR, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 450 (attributing Taiwan's economic status to exports and foreign investment), available at <http://www.ustr.gov> (follow "Document Library" hyperlink; then follow "Reports/Publications" hyperlink). [hereinafter 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS].

218. *Id.*

should continue to drive growth for Taiwan's export-oriented economy in 2004, and GNP should reach 4.5 to 5 percent."²¹⁹

Overall, Taiwan is the ninth-largest trading partner of the United States²²⁰ and second-largest to Japan in Asia.²²¹ The USTR's 2005 National Trade Estimate notes:

The U.S. trade deficit with Taiwan was \$12.9 billion in 2004, a decrease of \$1.3 billion from \$14.2 billion in 2003. U.S. goods exports in 2004 were \$21.7 billion, up 24.6 percent from the previous year. Corresponding U.S. imports from Taiwan were \$34.6 billion, up 9.6 percent.²²²

In 2004, Taiwan's trade surplus was \$6.14 billion—the lowest since 1999.²²³ Exports grew 20.7% and imports 31.9%.²²⁴ Taiwan's economic power is impressive, especially in light of its population of approximately twenty-one million located within 14,000 mostly mountainous square miles.²²⁵

Taiwan's economy, however, is dependent on exports and foreign investment from the United States²²⁶ Much of Taiwan's trade surplus is the result of trading with the United States²²⁷ U.S. foreign direct investment stock in Taiwan in 2004 was \$11 billion, up from \$10.2 billion in 2002.²²⁸

In addition, many countries rely on the USTR's "Special 301" report to address IPR concerns in their country and in making IPR demands on Taiwan. A negative report from the USTR may mean that other countries may encourage similar policies toward Taiwan. To upset the United States may be the equivalent of upsetting the rest of the world. Further, placement on the USTR's "Special 301" lists tarnishes Taiwan's international reputation.²²⁹

219. *Id.*

220. *Id.*

221. WANG, *supra* note 12, at 109.

222. USTR, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 591, available at <http://www.ustr.gov> (follow "Document Library" hyperlink; then follow "Reports/Publications" hyperlink). [hereinafter 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS].

223. *Taiwan's International Trade Hit Record High in 2004*, ASIA PULSE, Jan. 10, 2005, WESTLAW, ASIAPULSE database.

224. *Id.*

225. INTELLECTUAL PROPERTY LAWS OF EAST ASIA 376 (Allan Guterman and Robert Brown eds., 1997).

226. 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, *supra* note 216, at 450.

227. MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF CHINA (TAIWAN), FOREIGN POLICY (2001), <http://www.mofa.gov.tw/webapp/ct.asp?xItem=11153&ctNode=289>.

228. 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, *supra* note 221, at 591.

229. Sun, *supra* note 207, at 141.

Moreover, although rare,²³⁰ trade sanctions are a realistic threat. The United States has imposed \$75 million in trade sanctions on imports from the Ukraine because of “repeated failure” to “enact and enforce adequate optical disc media licensing legislation.”²³¹ In the past, Taiwan has demonstrated a similar reluctance to amend copyright legislation. The United States has also threatened trade sanctions on China because of piracy.²³² Historically, Taiwan has been on the same “Special 301” lists as China including being designated a Priority Foreign Country in 1992.²³³ Given these similarities, Taiwan could also be a recipient of trade sanctions. Regardless of the argument concerning the overall effectiveness of trade sanctions,²³⁴ they stand to directly harm Taiwan’s economy.

It would be in Taiwan’s economic interest to eliminate optical disc piracy. Pirated products constitute a very small portion of Taiwan’s overall exports.²³⁵ In addition, optical disc piracy has been associated with organized crime. Any revenues generated from these illegal sales likely will not be distributed to the public or legitimate industries, but rather, may concentrate with illegitimate sources and fund other illegal activities.

3. Past Practice

Taiwan’s history suggests that it fears the ramifications of “Special 301” identification and that Taiwan will likely concede to future demands by the United States. Generally, every time it has been placed on a “Special 301” list, Taiwan has made concessions to the United States in hopes of being removed from the list or being upgraded the following year. Taiwan is incentivized to make concessions when it is given a more severe designation. These concessions have taken the form of promises to increase copyright legislation and enforcement. Taiwan, however, also deliberately delays the implementation of these promises as long as possible. This has been termed the “clever concession” strategy.²³⁶ This suggests

230. Matthew Pietsch, *International Copyright Infringement and the Internet: An Analysis of The Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273, 308 (2002) (noting the infrequency of Priority Foreign Country designation and, therefore, sanctions).

231. 2004 USTR SPECIAL 301 REPORT, *supra* note 20, at 11.

232. Lu, *supra* note 209, at 310 (noting that trade sanctions were threatened on China for software, music and video tape piracy).

233. *Id.*; Newby, *supra* note 145, at 41–42.

234. The general convention is that trade sanctions are not effective. See MERTHA, *supra* note 133, at 6.

235. Sun, *supra* note 207, at 8 n.19.

236. MICHAEL P. RYAN, *PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC* 50 (1995).

that only when Taiwan feels sufficiently threatened will it implement, ever so sparingly, past promises.

For example, after being placed on the Priority Watch list in 1989, Taiwan entered into negotiations with the U.S just one month later. One result of the negotiations was the 1989 U.S.-Taiwan Bilateral Agreement. By 1992, Taiwan had failed to implement the agreement and the USTR identified Taiwan as a Priority Foreign Country. At that point Taiwan made further concessions, but only some aspects of the 1989 agreement were passed by the legislature in 1993. Partial passage of the agreement, however, was sufficient to earn Taiwan a downgrade to the Priority Watch list.²³⁷

Another example involves amendments approved by the Executive Yuan in 2003. The MPAA believed these amendments, which adopted most of the recommendations of the motion picture industry and the U.S. government, would be passed by the legislature.²³⁸ Instead, 2003 led to the adoption of a different set of copyright law amendments.²³⁹ As a result, Taiwan remained on the Priority Watch list in 2004. Three months later, Taiwan amended its copyright law to adopt many of the amendments approved by the Executive Yuan, and since then the USTR has recently downgraded Taiwan to the Watch list.²⁴⁰

B. *Why Taiwan May Not Concede*

1. Cultural hurdles

Although Taiwan's copyright law may at one time provide the framework in which optical disc piracy could be eliminated, Taiwanese culture will be an impediment to perfect enforcement. The Chinese view society from a community perspective, where each person has an obligation to everyone else in the community.²⁴¹ Within the community are distinctions between superior members of society, and the inferior owners who owe a duty of loyalty and support.²⁴² When a community member informs law enforcement officials about instances of optical disc piracy by those within the community, it may be seen as an act of disloyalty, not only to the party, but to the rest of the community at large. This would be particularly disruptive if the pirate was someone of superior status.

237. IIPA, 2004 IIPA SPECIAL 301 REPORT, *supra* note 20, app. e.

238. 2004 IIPA SPECIAL 301: TAIWAN, *supra* note 74, at 234.

239. *Id.*

240. 2005 IIPA SPECIAL 301: TAIWAN, *supra* note 54, at 453.

241. Yonehara, *supra* note 9, at 77-78.

242. *Id.*

Also, many Taiwanese, including law enforcement officials, believe that "copyright infringement is a minor moral offense, if it is even an offense at all."²⁴³ The foundation for this belief can be attributed to mainland Chinese culture and traditional Chinese concepts of intellectual property, which include encouragement by the society's intellectual elite to copy each other's work and the Confucian derogation of most creative works.²⁴⁴

Further, Taiwan is very sensitive to foreign pressure. Taiwan's distrust and resentment of foreign pressure stem from actions of European countries and Japan in the nineteenth and twentieth centuries and also from diplomatic and political oppression.²⁴⁵ The "Anti-Anti-Piracy Alliance," formed by students across numerous college campuses, has opposed increased IP protection and has accused "the government of collaborating with foreign powers in oppressing its own people."²⁴⁶ Many students are part of global internet piracy networks and download, burn, and sell motion pictures.²⁴⁷ Many have become patriotic and nationalistic in response to the government's anti-piracy measures.²⁴⁸ They protest "American imperialism" and oppose making piracy a public crime.²⁴⁹ Many students believe that IPRs are private rights and that violations should be treated as civil, not criminal, offenses.²⁵⁰

Also, many foreign nations believe that U.S. industries exaggerate the severity of the piracy problem.²⁵¹ Taiwan could easily interpret USTR actions as "carrot and stick" tactics. It could see the USTR as the representative of intellectual property industries, not an independent government entity. It could also interpret the USTR's upgrading and downgrading of Taiwan on the USTR "Special 301" lists as game playing and disingenuous attempts at being the intermediary between Taiwanese and U.S. industries. Taiwan could see this game-playing as futile, in that U.S. industries will never be satisfied.

2. Weak Domestic Film Industry

Taiwan's weak film industry does not incentivize the prevention of optical disc piracy. Taiwan has a small local film industry, which

243. Lu, *supra* note 209, at 299.

244. *Id.*

245. *Id.*

246. WANG, *supra* note 12, at 149.

247. *Id.* at 161.

248. *Id.*

249. *Id.* at 162.

250. *Id.*

251. Liu, *supra* note 112, at 92.

creates a strong market and demand for Hollywood films.²⁵² The presence of Hollywood films creates a rich content source.²⁵³ Taiwanese film began its worst decline ever in the 1990s, which can be attributed to increased popularity for Hong Kong films and capital flight to Hong Kong.²⁵⁴ Further, the exhibition of Hollywood films has reduced demand for local films.²⁵⁵ Locally produced films dropped from eighty-two per year in 1980 to sixteen in 1999.²⁵⁶ There were 100 fewer theatres in Taiwan in 1995 than there were in 1990.²⁵⁷ In 1999, 4% of films released in Taiwan were from Taiwan. In 1998, .4% of total box office revenue was from local films.²⁵⁸ Ultimately, the Taiwanese film industry collapsed and has only been slightly counterbalanced by government funding to promote local films.²⁵⁹

Further, U.S. film distribution in Taiwan is not facilitated through local businesses.²⁶⁰ Unlike practice in other countries, most major U.S. film companies do not work with local subdistributors or licensees in Taiwan.²⁶¹ This may discourage copyright law improvement and enforcement for three reasons. First, it does not enable local distributors an opportunity to profit from U.S. films. Second, without an attached Taiwanese interest, it does not incentivize a domestic business side push for the copyright protection of U.S. films. Lastly, it does not bridge the gap between the Taiwanese people and the conception of capitalistic U.S. businesses. Psychologically, potential pirates and counterfeit optical disc purchasers may be less inclined to engage in such acts if they know they are harming a Taiwanese distributor as opposed to a studio branch office. U.S. studios have tried to offset this effect by employing a "localization" strategy and hiring Taiwanese personnel.²⁶²

3. Self Interest & WTO Accession

Taiwan's copyright reforms can be construed as a product of self-interest. Taiwan has long desired WTO membership, which requires

252. Taiwan has been a top ten market for major Hollywood movies. WANG, *supra* note 12, at 107.

253. *Id.* at 164.

254. *Id.* at 102.

255. *Id.* at 103.

256. *Id.* at 102.

257. *Id.* at 103.

258. *Id.* at 104.

259. *Id.* at 103.

260. *Id.* at 105-06.

261. *Id.*

262. *Id.* at 112.

a nation to comply with TRIPs.²⁶³ To demonstrate that Taiwan could comply with international standards concerning IPR protection, Taiwan has increased copyright regulation and enforcement.²⁶⁴ On January 1, 2002, Taiwan joined the WTO as its 144th member.²⁶⁵ Now that this goal has been met, Taiwan may have lost its incentive to further improve copyright regulation and enforcement.

WTO accession has transformed Taiwan from a politically isolated country to a member in the global trade arena. Taiwan may argue that its IPR protection is sufficient in that it complies with the TRIPs agreement. Taiwan may be hesitant to grant the greater IPR protection requested by U.S. copyright owners, which include strengthening border controls, strengthening anti-piracy efforts and further amending laws. Further, Taiwan may argue that IPR related concerns should be handled by WTO dispute settlement mechanisms as opposed to unilateral USTR action under "Special 301."

Taiwan has not always acted in interest of the United States. Taiwan's industry had successfully lobbied for several provisions contrary to the U.S. industry in the copyright law and in the passage of the Cable Television Act.²⁶⁶ Taiwan's reluctance to fully adopt the Executive Yuan's 2003 amendments to the copyright law is another example.

C. Recommendation for the Abatement of Optical Disc Piracy in Taiwan

Effective regulation of optical disc piracy in Taiwan will require the combination of external and internal pressure. First, the motion picture industry has a very powerful ally in the USTR and is able to use U.S. trade power to leverage a legislative and enforcement structure in which optical disc piracy can be prevented. Taiwan, however, is also a very strategic ally in Asia, and the United States should be careful not to exert too much pressure and generate resentment. Second, the demands of the motion picture industry stand the highest likelihood of being met when Taiwan has the internal will to comply. An internal will to protect copyrights within Taiwan can be encouraged through the local distribution of U.S. film and public education. Taiwan's recent concessions to the U.S. motion picture industry in light of WTO accession suggest that the nation is not entirely averse to further strengthening of its copyright law and enforcement.

263. *Id.* at 154; TRIPs, *supra* note 118.

264. WANG, *supra* note 12, at 154; Lu, *supra* note 208, at 307-308.

265. WANG, *supra* note 12, at 99.

266. Sun, *supra* note 207, at 77-78.

1. Externally Influencing Structural Change in Taiwan

The support of the USTR allows the motion picture industry to use the U.S. trade position with Taiwan as a large bargaining chip for the amendment of the copyright law, increased penalties, and the creation of enforcement entities to fight optical disc piracy. Although change in Taiwan has been prompted by the "Special 301" process, these changes have come about slowly.

Without the USTR, the MPAA, having little leverage alone, probably would not be able to influence any change in Taiwan. Taiwan's economic standing or reputation does not hinge on the opinion of the U.S. motion picture industry. Further, for the most part, only the motion picture industry is the direct beneficiary of optical disc piracy enforcement. On the other hand, Taiwan's international standing is directly related to its position on the USTR's "Special 301" lists.

Given the effectiveness of "Special 301" and the correlation between IIPA and USTR recommendations, the motion picture industry should continue to influence structural change in Taiwan by allocating substantial resources to petitioning the USTR in "Special 301" actions. Under "Special 301," interested parties may be able to influence investigations into a country's IPR practices. The motion picture industry should continue to support its belief that optical disc piracy in Taiwan is of significant concern and has worldwide ramifications with credible research, findings, reports, and accountings. Further, the motion picture industry should carefully frame their concerns so that unilateral action under "Special 301" can be imposed if necessary, bypassing the WTO dispute settlement procedures.

It is also important that the motion picture industry demonstrate that optical disc piracy is not only a problem that greatly affects the motion picture industry but is also a product of a weak copyright law and enforcement structure, which can hurt other U.S. industries. At the same time, the motion picture industry should unite other copyright industries in mutually beneficial goals, such as intellectual property rights reform, while also demonstrating that the issue of optical disc piracy takes precedence over other claims by other copyright industries. To further this goal, the MPAA should independently petition the USTR in addition to the IIPA petition.

The "Special 301" is not a perfect instrument for immediate and complete change. The motion picture industry's demands to amend the copyright law, enforcement structure, and penalty system in Taiwan may not be realistic. As demonstrated by Taiwan's history, it has made concessions to the U.S, albeit slowly and sparingly. Given that Taiwan is a strategic ally in the Pacific, U.S. trade relations are important and trade leverage must be exerted carefully. Increasing

threats or imposing trade sanctions in response to Taiwan's "clever concession" strategy is not advocated as a remedy. The United States should not appear oppressive, colonial or patriarchal because it may jeopardize long term relationships and create resentment. Instead, the motion picture industry may be better off fostering an internal interest within Taiwan to eliminate optical disc piracy.

2. Breeding Change from Within

The motion picture industry's demands will most likely be met when it is supported by the Taiwanese constituency. Cultural views are not static. The motion picture industry can alter traditional preferences by (a) incentivizing Taiwanese businesses to seek copyright protection, (b) increasing its public awareness campaign, and (c) building relationships with domestic organizations that support IP reform.

a. Incentivizing Taiwanese Businesses

The motion picture industry should place all film distribution in the hands of local distributors, not studio offices in Taiwan. Ideally, each studio should contract with a separate local distribution entity to reduce distributor conflict as to which studio's film the distributor will promote. That may not be possible, however, because there are only a handful of successful film distribution entities in Taiwan.²⁶⁷

Nevertheless, there are two notable effects of local distribution. First, U.S. film distribution will be by Taiwanese businesses, thus giving U.S. film a Taiwanese face. Pirates or consumers may be less inclined to conduct an illegal act when they are hurting local businesses. Second, it gives Taiwanese industries an interest in copyright protection. The profits of Taiwanese businesses will be directly hurt by pirates, and therefore, local distributors will be inclined to join the fight in increasing copyright protection and enforcement. In addition, these local industries may have local ties that may be effective in increasing enforcement. Further, given the strong presence of U.S. film, Taiwan will benefit from increased tax collection as legitimate optical disc sales increase.

This outcome could be maximized by the deliberate licensing of different rights (e.g., theatrical, DVD and VCD, or cable) to different Taiwanese distributors within reason. Because optical disc piracy affects the entire motion picture schedule, this diversification would increase the overall pool of newly interested industries that will

267. WANG, *supra* note 12, at 129–30.

advocate a stronger copyright law and enforcement. It would also create a system of checks and balances, where one distributor not only checks the others to see that they are adhering to the motion picture schedule, but where all businesses may ally together to discourage and fight piracy.

Given the lack of a Taiwanese film industry, placing distribution in local business is a practical way to empower and incentivize Taiwanese business to strengthen copyright law and enforcement. At least one major U.S. motion picture studio has found it more advantageous to have local distribution than to set up its own office.²⁶⁸ There are signs of successful local distribution. For example, Deltamac, a local Taiwanese film distributor has had much success, particularly with DVD and VCD distribution.²⁶⁹ Also, local distributors may have stronger connections to distribution outlets.²⁷⁰

b. Increased Public Awareness Campaigns

The motion picture industry should employ a public awareness and education campaign similar to the one in effect in the United States. The MPAA should extend public service announcements²⁷¹ concerning piracy to Taiwan. The MPAA should include trailers in all theatrical exhibitions and purchase airtime on major cable and television channels to inform the Taiwanese public about the moral and legal implications of piracy. The MPAA should also advertise in major Taiwanese magazines and newspapers. The U.S. public awareness campaign is premised on the loss of U.S. jobs as a result of piracy, which will have little persuasive value on the Taiwanese public. Instead, the MPAA's Taiwan campaign can connect piracy to organized crime, which is responsible for much optical disc piracy and other illegal activities.

Changing the cultural mindset may be easier with the younger generation. The MPAA should expand its student education program²⁷² to Taiwan and oversee the incorporation of IPR protection concepts as part of the government's campaign of "heightened education programs."²⁷³

The MPAA should continue to schedule demonstrations and protests to further remind the public of the need to respect

268. *Id.* at 133.

269. *Id.* at 132.

270. *Id.*

271. Press Release, MPAA, *Film/TV Industry Launches Public Service Announcement as Part of the Nationwide Awareness Campaign on the Impact Digital Piracy* (July 22, 2003), available at <http://www.timewarner.com>.

272. *Id.*

273. *Id.*

copyrights. Like the MPAA has done in the past,²⁷⁴ it should enlist the aid of local Taiwanese actors, artists, exhibitors, distributors, and retailers, which will grow in number as Taiwan further develops.

c. Building Relationships with Governmental and Independent IP Organizations

The substantial revenue loss derived from counterfeit optical discs has made optical disc piracy a major issue on the MPAA, IIPA and USTR agenda. This is demonstrated by significant reference to optical disc piracy in IIPA recommendations to the USTR, and its subsequent incorporation in USTR "Special 301" reports.

There may come a time, however, when optical disc piracy may no longer be at the forefront of IPR protection in Taiwan. Time and technology may create substantial losses in other intellectual property areas, such as internet piracy. Time and technology may make optical discs obsolete, much like the VHS format.

There may also come a time when the USTR ceases to be the voice of the motion picture industry in Taiwan. Recently, although the USTR has agreed with the IIPA's "Special 301" recommendation for Taiwan, the USTR failed to adopt any of the IIPA's numerous recommendations to reduce optical disc piracy, which suggests that the USTR is satisfied with the current infrastructure in place to fight optical disc piracy. The USTR may no longer feel the need to pressure Taiwan to further reduce optical piracy. If the USTR reports continue to be silent towards the optical disc piracy problem in Taiwan, the motion picture industry should divert resources towards further building relationships and allying with lobby government entities, organizations, and officials responsible for IP protection within Taiwan, such as the Ministry of Economic Affairs.

The motion picture industry should complement its push for structural change in Taiwan with continued enforcement actions. The motion picture industry should continue to initiate investigations and raids, and continue working with local law enforcement. The motion picture industry can benefit greatly from this. Cooperation may create unity and camaraderie between Taiwanese law enforcement officials. Also, enforcement actions will conserve the resources of the Taiwanese law enforcement. More importantly, it will contribute to stronger enforcement. Further, such participation demonstrates the motion picture industry's seriousness and commitment to its anti-piracy campaign.

274. WANG, *supra* note 12, at 140.

VI. CONCLUSION

Optical disc piracy in Taiwan reduces worldwide revenues made through the motion picture release schedule. Counterfeit optical discs from Taiwan containing U.S. motion pictures are found all over the world. In the United States, most counterfeit optical discs seized were from Taiwan. The motion picture industry deals with this problem by encouraging the strengthening of copyright law and enforcement in Taiwan. The MPAA's international arm maintains an office in Taiwan and helps in the enforcement of the copyright law. Also, the MPAA has been able to enlist the aid of USTR in using the U.S. trade position with Taiwan to achieve these goals under "Special 301."

Taiwan has slowly and sparingly strengthened copyright legislation and enforcement. Taiwan's hesitation can be seen as the result of being pulled by two often opposing forces—the interests of U.S. copyright industry and its own self interest. On one side, Taiwan is dependent on U.S. trade and values its international reputation. However, Taiwan's cultural history, limited resources, economic status, and lack of copyright industry, in contrast to the United States, do not support strong copyright law and enforcement.

To achieve its goal, the motion picture industry must find a way to effectively use U.S. trade leverage and create self-interest within Taiwan. Therefore, the MPAA should avoid encouraging overly forceful "Special 301" recommendations to the USTR. It also should inspire copyright protection within Taiwan by demonstrating that stronger protection can benefit Taiwanese industries and by educating the Taiwanese public. If there is no change to the copyright law and annual losses related to piracy remain the same, Taiwan can expect to remain on the USTR's "Special 301" lists.

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