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## **Copyrights Draft Amendment to Taiwanese Copyright Act**

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The Taiwan Intellectual Property Office of the Ministry of Economic Affairs ("TIPO") published the first draft of the amendment to the Copyright Act on April 3, 2014. The Taiwan Copyright Act has undergone several amendments since its revision in 1998, including the latest amendment made on January 22, 2014. As some provisions of the current Copyright Act still does not reflect current circumstances, amendments on a large scale to the current legislation have been put forward after considering the copyright issues arising from local practice and the copyright laws and regulations of other jurisdictions.

The current Copyright Act consists of 117 articles, while the amendment to the Copyright Act consists of 147 articles. The key provisions from the amending Act are as follows.

### **I. Consolidating and Revising Intangible Rights in a Work**

In response to the advancing development particularly in science and technology, adjustments and revisions are being made to the Copyright Act to address practical needs, including the form of exploitation stemming from the emergence of digital convergence and the vague definition of the scope of right. The definitions of public broadcast and public transmission are also being revised. In view of the development of network and broadcasting equipment, a right of public communication has been added. In respect of the difficulty in distinguishing between a public performance and public recitation, the two terms have been consolidated and the definition of public performance is revised. Furthermore, the definition of public presentation has been simplified for easy understanding (Items 6–10, Article 3 of the amending Act).

### **II. Ownership of Rights in Employee Works, Audiovisual Works**

The current Copyright Act stipulates that if there is no agreement in place, an author's moral rights and the economic rights in a work belong to the employee and the employer, respectively. Such provision may protect the rights and interests of employers, but labor disputes can easily occur in practice.

Therefore, the amendment makes two proposals, under which employees and employers are the authors under different circumstances. As audiovisual works are mostly completed by persons under commission, additional provisions are added to govern the ownership of the copyrights in audiovisual works (Articles 13–15 and 38 of the amending Act).

### **III. Moral Rights for Promoting Circulation and Exploitation**

According to the current Copyright Act, no remedy is available for infringement of the moral rights of a juristic person who has been extinguished. By reference to international conventions and foreign legislation, protection of the moral rights of a juristic person who is extinguished has been deleted. To improve protection over the moral rights of an author, the amendment Act expressly states that the exploitation of a

work in a manner that would infringe upon the author's reputation is deemed infringement of the moral rights thereof.

To promote the circulation and exploitation of a work, the provision of "being presumed to have consented to the public release of a Masters theses or doctoral dissertation" specified under the current Copyright Act is amended to read as "being deemed to have consented to the public release of a Masters theses or doctoral dissertation". In addition, the amendment adds a provision that the work of a deceased author that was not published when the author was living is allowed to be released if certain requirements are met (Articles 17, 19 and 20 of the amendment Act).

#### **IV. Right of Distribution**

No express provisions regarding distribution, importation and the doctrine of exhaustion is provided by the current Copyright Act, for example, on the issue of whether distribution is confined to actual delivery, or the relationship between the doctrine of exhaustion and prohibition of parallel importing. The amendment clarifies the definition of distribution under the Copyright Act. That is, distribution may refer to an act of actual delivery, but an act of public display and possession is still subject to the Copyright Act.

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The amendment also clarifies the international definition of exhaustion, which means that after the economic rights in a work are distributed through transfer of the ownership of such work, no distribution right thereof may be claimed, including the right to distribute the work through transfer or rental of the ownership. Meanwhile, the amendment consolidates and revises the provisions regarding exhaustion of the distribution right and the rental right. It also reserves the provision of parallel importation of genuine products, thus granting the copyright holder with the right to be different in the market (Articles 33, 34, 74 and Item 4, Article 99-1 of the amendment Act).

#### **V. Protection of Performers and Sound Recordings**

Different countries adopt different legislation governing the issue of whether a sound recording should be protected by copyright or a neighboring right. Where a sound recording is protected by copyright, the standards of protection are higher. In Taiwan, a sound recording has been protected by copyright pursuant to the Copyright Act since 1944. In this amendment, a sound recorded work is still protected pursuant to the standards for protection of copyright. However, considering that the current Act provides for protection of performers and sound recordings through scattered provisions, the amendment specifically formulates provisions governing the rights of performers and the rights of sound recordings in separate articles for easy reference.

According to the current Act, a performer enjoys the exclusive rights in his/her unfixed performances or in the performances fixed in "sound recordings". In response to the Beijing Treaty on Audiovisual Performances passed by WIPO in June 2012, the amendment adds that performers enjoy the exclusive rights in unfixed live performances and in the performances recorded in audiovisual recordings, and also expressly adds that

performers and sound recordings have an attached right to remuneration in respect of the public performances and the manner of exercising such right (Articles 35–37 of the amendment Act).

## **VI. Limitations and Exceptions to Economic Rights in a Work**

“Items applicable to fair use” specified under the current Copyright Act no longer satisfy the demands in today’s network and digital arena. As such, the amending Act not only makes revisions specifically for regulatory or administrative purposes, in relation to judicial and administrative procedures, for educational purposes, works, citations and non-profit purposes of public juristic persons, regarding sharing antenna systems, computer program backups and reprint of current events, etc, but also adds fair use in respect of distance learning, digitalized collections of national libraries, comedic parodies and frame-in by referring to foreign legislation.

According to Articles 44–63 of the current Copyright Act regarding limitations and exceptions to economic rights, the application thereof, in addition to compliance with the respective requirements of the articles, must examine if the use also complies with the “reasonable scope” pursuant to the four factors under Article 65. To more clearly define the limitations and exceptions to economic rights, the amendment particularly addresses the requirements for the application of Articles 44–63 of the current Trademark Act and deletes the term “with the reasonable scope” (except for Article 61 of the amendment Act about private reproduction). According to the amendment, examination of fair use pursuant to Article 65 of the Copyright Act is no longer required (Articles 53–58, 60, 62–64, 66–68, 70, 73, 75 and 78 of the amendment Act).

## **VII. Compulsory Licensing Where Identity of Economic Rights Holder Unknown**

The Act for the Development of the Cultural and Creative Industries of Taiwan provides for a compulsory licensing system for a work over which the identity of the economic rights holder is unknown. However, such compulsory licensing is applicable only within the cultural and creative industries.

To promote the circulation and exploitation of works, it is submitted that there needs to be channels to exploit orphan works, whether for profit or non-profit purposes. Therefore, the amendment Act provides for the compulsory licensing of a work for which the identity of its economic rights holder is unknown. With the term of exploitation of such a work in mind and with a view to improving the efficiency of examination by the competent copyright authorities, the amending Act allows the exploitation of the relevant works by the payment of a deposit during the examination process (Article 81 of the amendment Act).

## **VIII. Border Control Measures**

According to the current Copyright Act, the customs authorities may seize goods upon an application, which places emphasis on copyright owners or plate right owners who have immediate concerns to exercise their rights to claim prevention of the infringement. However, whether the goods to be seized are actually infringing goods are unknown.

By referring to the Code of Civil Procedure that allows a debtor to cancel provisional seizure or provisional injunction after furnishing a security, the amendment adds a provision that the party whose goods are seized may apply to the competent customs authorities for withdrawal of the seizure by providing two times the deposit or a security equivalent thereto.

In view of the need to investigate the infringement or to initiate litigation, the amending Act, by referring to Articles 76-2 and 76-3 of the Trademark Act, adds a provision that allows the competent customs authority to provide, upon application, the right holder with the information about the alleged infringing goods and restricts the use of the relevant information in the hope of thoroughly protecting the rights and interests of the copyright holder or the plate right holder (Article 106 of the amendment Act).

## **IX. Review of Inappropriate Criminal Liabilities**

The criminal liabilities under the existing Act mainly deal with pirated copies of physical objects and the rampant sale of pirated CDs in night markets or by freestanding inserts in the past. However, due to the rapid changes in technology over recent years and the impact of the global economic recession, CD manufacture has gradually decreased in Taiwan. Moreover, the government imposes strict controls over local CD manufacturers to ensure that they engage only in the production or manufacture of original CDs. As such, no major cases of illegal activity in this context has been uncovered of late.

As for the problem concerning the sale of pirated CDs in night markets and by freestanding inserts, the country has launched a regular project on "implementing IPR protection"(once every 3 years) since 2002, whereby a coordinated structure for IPR law enforcement has been organized, including participation from the National Police Agency (IPR protection squads), customs authorities, Taiwan High Prosecutors Office, Judicial Yuan, Board of Foreign Trade, CD Inspection Taskforce, the Ministry of Education and the TIPO. Educational materials have been disseminated and crackdown actions have also been taken.

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According to the statistics of the National Police Agency of the Ministry of Interiors, the number of seized CDs has sharply decreased. Therefore, some criminal liabilities under the current Copyright Act, such as listing the sales of pirated CDs as a public crime or the penalty of a minimum of 6-month imprisonment for copyright infringement, does not adequately reflect the offense committed and the principle behind the Criminal Code. As such, the relevant provisions are being revised.

As for distribution of the original of a work and any reproduction thereof by the transfer of ownership without authorization, the current Act has different penalties for the distribution of original works and pirated copies. Considering that the requirements and criminal liabilities of each are of no great difference, they are now combined and simplified. Also, additional penalties are provided for infringement "in the form of public display or possession of works with an intention of distribution." Further, considering that the violation of the parallel importing provisions concerning genuine products is subject only to civil liabilities under the current Act, the subsequent distribution of works that violate the parallel importation has been decriminalized (Articles 118, 119, 121, 122 and 130 of the amendment Act).

## **X. Consideration as to Whether Term of Copyright Should Be Extended**

According to the current Copyright Act, the economic rights in a work endure for the life of the author and 50 years after the author's death or for 50 years after the first public release of the work. Although such provision complies with the requirements of the WTO/TRIPS Agreement, some countries have extended the

term of protection of the economic rights in a work to 70 years, such as the US, EU, UK, France and Germany. Meanwhile, Japan has extended the term of protection for cinematographic works to 70 years but maintains the term for other works at 50 years, while Korea still maintains the term of protection at 50 years. As the issue of whether the term of protection of the economic rights in a work should be extended involves consideration as to whether such extension would increase incentives for content creation, whether it will have any influence on which industries, or if it will increase national educational and cultural costs, further discussion is still needed to achieve consensus from all circles.

## **XI. Possibility of Recovering Copyright Registration System**

At present, except for the pledge registration system specified in Article 23 of the Act for the Development of the Cultural and Creative Industries of Taiwan, no copyright registration system is available in Taiwan.

To promote the circulation and exploitation of works and to protect transaction safety, the amending Act adds the public notice system for assignment, exclusive licensing and pledge recordation of the economic rights in works. Despite this, calls for recovery of a copyright registration system continue to arise frequently.

According to Article 5 of the Berne Convention and the provisions of the TRIPS Agreement, the registration of copyright in a work cannot serve as a precondition for acquisition of the copyright. Therefore, countries that adopt a copyright registration system mostly adopt it on a voluntary basis. According to a WIPO survey on its member countries about copyright registration systems, advanced countries that adopt no registration systems or otherwise adopt a voluntary registration system represented a high percentage. Countries that have no copyright registration systems include Israel, Netherlands, Switzerland, Sweden, the UK, Germany, Denmark, Russia, South Africa and Australia, while the countries that adopt voluntary registration systems include the US, Canada, France, India, Japan and Spain.

On this issue, there are both those who support the idea and those opposed. Those in support are of the view that a voluntary registration system is convenient for searching information on right holders, reducing costs arising from the exploitation of works, and promoting circulation. On the other hand, the opponents think that the recovery of a copyright registration system may readily result in a misinterpretation, namely that the "right is being granted upon registration and that no rights are obtained without registration".

Moreover, because registration would not be compulsory, if a copyright holder fails to make recordation of changes after his/her contact information, assignment or licensing changes or is incorrectly recorded, would-be users may obtain erroneous information and spend substantial administrative and juridical costs to clarify the same in case of any disputes. Under the circumstances, right holders may not be interested in registering their copyright since there is no incentive for them to do so. The recovery of a copyright registration system is a controversial issue and will be further discussed.