

# On-line Music Industry and Copyrights in Taiwan

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## 1. Music Industry Moving away from CDs toward On-line

The Taiwan music industry plays a vital role in the Chinese-speaking countries and regions in the world, especially in the field of popular music. Countless popular songs, melodies and singing stars come from Taiwan. However, like its counterparts in other countries, the music publishing industry in Taiwan has suffered great setbacks since around 2000. According to IFPI, the sale of music CDs in Taiwan more than halved from NT\$(New Taiwan Dollars<sup>1</sup>)12.4 billion in 2000 to NT\$4.4 billion in 2004<sup>2</sup>. The sale further dropped to about 3,2 billion in 2005<sup>3</sup>. The music publishing industry is quick to blame the illegal reproduction of optical disks<sup>4</sup> and the peer-to-peer (P2P) file-sharing and downloads of music via the Internet for its loss. After suing the P2P file-sharing services for copyright infringement, the music publishing industry in Taiwan came to realize that it will have to go on-line as well, following the path taken by the American music industry. However, the music publishing industry is not familiar with the on-line environment and its working method, so beside setting up official websites to continue the promotion and sale of CDs, it relies on Internet Service Providers (ISP) and possibly also on collecting societies to make the recorded music works readily available to the general public for download or listening

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<sup>1</sup> The exchange rate between NT\$ and US\$ is roughly 32:1.

<sup>2</sup> Yi-Shin Lin, Pricing Strategies and Social Welfare Analysis in the On-line Music Industry (in Mandarin), 16 Fair Trade Quarterly 2 (2008), 124.

<sup>3</sup> Sin-Jun Lin, Dynamic Report on the Sound Publishing, Software and other Publishing Industry for the 4<sup>th</sup> Quarter of 2006 (in Mandarin), 4, available at: <http://tie.tier.org.tw> (last visited 11 October 2008)

<sup>4</sup> 2006,2007 and 2008 Enforcement Summary of the Joint Optical Disk Enforcement Taskforce Ministry of Economic Affairs (MOEA), and Intellectual Property Rights Police Inspection Results 2008 show that there were 136,744 pirated music disks (out of 810,508 seized illegal disks) seized in 2006, the number of which dropped significantly to 35,346 (out of 396,889 seized illegal disks) in 2007. In the first five (5) months of 2008 alone, however, 42,500 pirated music disks (out of 265,052 seized illegal disks) have been confiscated. 2006,2007 and 2008 Enforcement Summary of Joint Optical Disk Enforcement Taskforce and Intellectual Property Rights Police Inspection Results 2008 are available: <http://www.tipo.gov.tw> (last visited 4 September 2008)

in return for fees or royalties. The development trend of copyright law is to evolve along the same line as the music industry. In the following, this paper will analyze the rise and fall of P2P file-sharing services, the burgeoning on-line music industry in Taiwan, and the legislative response to these two developments.

## **2. The Rise and Fall of P2P File-sharing Services**

It is estimated that the on-line music industry began in around 2000, starting with P2P file-sharing services: the provision of file-sharing software, website, web server, etc., so that its users could swap among themselves MP3 format files via transmission and downloads. P2P file-sharing services were first provided by Kuro ( started servicing in July 2000 ) and later also by ezPeer (started servicing in October 2000), with both deploying a centralized file-index server. Unlike KaZaA, one of the most popular Internet P-to-P (P2P) software makers, which provided its product for free, Kuro users had to pay a monthly fee of NT\$99, while Ezpeer users had either to pay a monthly fee of NT\$100 or buy points ( virtual units calculated by successful downloads ) . Both companies promoted the use of their software and service by emphasizing the possibility of getting unlimited downloads of MP3 music files. Kuro and Ezpeer were sued by the Taiwan International Federation of the Phonographic Industry (IFPI) and prosecuted by the Taipei District Prosecutors Office and Taipei Shihlin District Prosecutors Office for violating the Copyright Act<sup>5</sup>. The judicial decisions were divergent.

### **2.1 Conflicting Judicial Decisions on the Legality of P2P file-sharing Services<sup>6</sup>**

#### **2.1.1 In favor of P2P file-sharing service providers**

##### **2.1.1.1 Shihlin District Court**

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<sup>5</sup> Different terminology is used for centralized and decentralized P2P systems: the modified P2P system and the pure P2P model. See Huei-ju Tsai, *Media Neutrality in the Digital Era – A Study of the Peer-to-Peer File Sharing Issues*, 5 Chi.-Kent J. Intell. Prop 57 (2005).

<sup>6</sup> The two cases caught international attention, see Lynda Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 Am. Bus. L. J. 277-279 (2008) .

In the first ruling of its kind in Taiwan, Shihlin District Court ruled on 30 June 2005 and cleared the defendant of all charges of being an accomplice in illegal reproduction and public transmission and also of facilitating and agitating illegal reproduction and public transmission.

**1. The way of searching P2P files, whether centralized or non-centralized, is irrelevant for the determination of copyright infringement**

It is characteristic of the P2P system that users of the Internet store data or files on their computers and share directly among themselves, using their computers at the same time as central servers without actually going through traditional central servers. The P2P system can be divided into two kinds, “centralized” if a centralized file-index server was used and “decentralized” if no centralized file-index server was used. However, the way of searching P2P files, whether centralized or decentralized, is irrelevant for the determination of copyright infringement, because it concerns technical details of the software provided to users and shall render no different legal judgment. Decisive is the way in which ezPeer was run.

**2. Admitting a loophole in the Copyright Act that cannot be filled by interpretation**

Shihlin District Court concluded by pointing out:

The defendant himself has in fact not committed unauthorized reproduction or public transmission of works of others. It was the users of ezPeer software. It is not to infer that the users and the defendant are accomplices. It can only be said that the behavior of the defendant fundamentally shatters the definition of copyright infringement of the current Copyright Act and that in the old system of the Copyright Act there appears to be a loophole, which clearly resulted from the gap between the objects of legal rules of the real world and the way of life caused by technology and the Internet. What remains to be asked is can the loophole be filled by interpretation? Given the fact that penal punishment imposes the severest deprivation of basic rights of citizens, the instrumentation of Criminal Law for the pursuit of a specific social purpose must therefore be

the last choice.... The interest that Criminal Law protects must be commonly accepted by human consciousness as ‘clear and without any doubt’ We cannot but point out that the understanding of copyright in Taiwanese society is not yet mature, and that the newly introduced concepts of provisional reproduction on the Internet and public transmission are especially obscure. The interest (behind the new concepts) is far from being “clear and without any doubt” and shall in principle be addressed by the market operation that dominates the distribution of wealth. The loophole in the criminal punishment of Copyright Act cannot be filled by analogy or expansive interpretation.... The Rule of Law cannot but mandate that.

#### **2.1.1.2 Taiwan High Court: P2P file-sharing service poses an acceptable legal risk**

The Taipei Shihlin District Prosecutors Office appealed the decision of Shihlin District court. Taiwan IFPI settled with ezPeer, dropping criminal charges against ezPeer, and on 15 May 2006 called on the Prosecutors Office to call off the appeal<sup>7</sup>. But given the fact that the case is a public offence, the Prosecutors Office did not withdraw the appeal. The appeal was rejected by the Taiwan High Court on 23 January 2008. The Taiwan High Court concurred with Shihlin District court in saying that the way of searching P2P files, whether centralized or decentralized, is irrelevant for the determination of copyright infringement. In addition, the High Court reasoned:

According to the objective accountability doctrine, a person can be held accountable for his act when through his infringing act risks that are legally not admissible were inflicted on the object of the act. Whether risks are legally not admissible depends on whether they are prohibited or restricted by legal norms. In order to benefit from the advantages of technology and civilization... a certain degree of risk must be admitted and adequately distributed among participants of social activities. Therefore, acts that result in “admissible risks” are first to be excluded from the determination of objective accountability.... So far, there are no specific substantive rules on defendant’s actions.... The defendant’s act of maintaining the ezPeer website platform via P2P is not prohibited or restricted by legal norms. The development of P2P software and

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<sup>7</sup> According to the then Article 94 Copyright Act:” A person who commits a crime specified in paragraph 1 or 2 of Article 91, Article 91bis, Article 92, or Article 93 as a vocation shall be imprisoned for not less than one year and no more than seven years, and in addition thereto, may be fined not less than three hundred thousand and not more than three million New Taiwan Dollars.” In 2006, Article 94 Copyright Act was deleted because the Criminal Code has done away all provisions concerning vocational offences.

maintenance of the ezPeer website platform poses a risk as they could be used by certain people as tools to infringe on economic (copyright) rights. However, undoubtedly, a majority of lawful files can be used to enhance the flow of information via the development of such software and R&D of Internet technology, and enable net users to enjoy the convenience of information flow and the advancement of technology.... Given the fact that the development of computer networks is making positive and important contributions to the progress of social culture, and the risk of its being used as a tool to infringe on economic (copyright) rights can be controlled by Copyright Act norms, it can be concluded that the defendant's act of maintaining the ezPeer website platform via P2P poses risks that are within the limits of "admissible risk".

## **2.1.2 Against P2P file-sharing service providers**

### **2.1.2.1 Taipei District Court<sup>8</sup>**

#### **1. There is a connection of intention and separation of labor between Kuro and X (user of Kuro) , making them copyright infringement accomplices**

Taipei District Court came to a totally opposite decision, finding Kuro violating the Copyright Act by being an accomplice with another defendant X (a user of Kuro, randomly picked up by Taiwan IFPI), who downloaded 970 MP3 files, exceeding fair use. It ruled that:

Kuro knowingly provides others with technology that could be used as an instrument for committing crimes and infringing interests protected by law to pursue its own commercial interest, promotes the use of this technology by making the function of reproduction the main selling point, and seduces others to pay to use or buy the technology. Kuro thus foresees that actual users would in deed use the technology as an instrument for committing crime, that legal interest would be infringed as a result, which does not run counter to its original intention of using the users of the technology as its tool to committing crime....Kuro could foresee X would probably use its software and service to download and reproduce copyrighted files, Kuro sees this happening not counter to its original intention and allows X to use its software, and X had a subjective awareness of cooperating with Kuro while using the software and service to illegally download. Consequently, there is a connection of intention and separation of labor between

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<sup>8</sup> Taipei District Court 2003 Su -Z No. 2146, available at: <http://jirs.judicial.gov.tw> (last visit 8 October 2008)

the Kuro and X, which makes them accomplices.

## **2. By instructing people to make MP3 formatted files from CDs and upload them to phony users' computers Kuro committed copyright infringement**

In order to make its service more attractive for people to use, Kuro had people working for him to format MP3 files from CDs and upload them to computers of phony users that were in fact established by Kuro for other users to transmit and download. That constitutes vocational illegal reproduction.

### **2.1.2.2 Taiwan High Court**

The same three judges<sup>9</sup> who rendered the Taiwan High Court 2005 San-Sut-Z No. 3195 decision in favor of P2P file-sharing service providers grossly contradicted themselves in upholding in essence the decision of Taipei District Court<sup>10</sup>. This time the three wise men joined the opposite front and emphasized that the provision of software and services by Kuro is not only causal to the illegal reproduction and transmission by members, but also a positive act to the realization of illegal public transmission, download and reproduction by members.

## **2.2 The uncertainty led to the fall of P2P file-sharing services**

The uncertainty about the legality of P2P file-sharing services and the tremendous legal consequences that may ensue led Taiwan IFPI to settle with ezPeer and Kuro on 29 June 2006 and 14 September 2006, respectively. Taiwan IFPI will license its members' repertoire to ezPeer and Kuro for fees in exchange for ezPeer and Kuro to give up providing P2P file-sharing services.

## **3. Burgeoning on-line music industry in Taiwan**

### **3.1 Willingness to pay for on-line music on the rise**

According to one survey taken in 2008, among services that broadband users in Taiwan are

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<sup>9</sup> The three judges are Bing-Chen Yang, Bo-Chih Chen and Chun-Ti Li ( the commissioned judge ) .

<sup>10</sup> Taiwan High Court 2005 Tsu San Su Z No. 5, available at: <http://jirs.judicial.gov.tw> (last visited 8 October 2008). It rescinded the decision of Taipei District Court only to render a milder criminal sentencing which was necessitated by the amendment of the Copyright Act and Criminal Law.

most willing to pay for, on-line music ranks No. 2 (27.91%) only after Internet phone (30.60%), jumping from 22.11% in the previous year<sup>11</sup>. This is good news for the on-line music industry.

unit : %

	2004	2005	2006	2007	2008
Internet phone	20.91	31.50	39.08	32.06	30.60
On-line music	26.21	24.51	25.87	22.11	27.91
On-line learning	29.19	29.10	26.76	23.84	25.33
Web movie and TV	24.33	27.48	24.48	21.15	25.01
On-line banking	17.63	17.21	17.03	17.64	19.79
On-line games	11.93	11.57	9.08	8.62	12.09

### 3.2 Collecting societies are too weak to help the on-line music industry

However, there is also bad news for the on-line music industry. Musical works in Taiwan are under-managed therefore music copyright remains a right in the law and not in action. Collecting societies in Taiwan are weak in terms of members, revenues, and managed repertoire and can offer little help to the on-line music industry. As of now, there are seven (7) collecting societies in existence, three (3) of them in the category of musical works, one (1) in audiovisual works<sup>12</sup>, two (2) in sound recording works, and one (1) in literary works<sup>13</sup>. In other words, the other six categories of works, i.e. dramatic and choreographic works, artistic works, photographic works, pictorial and graphical works, architectural works and computer programs, remain uncharted territory for collective management of copyrights. The Copyright Intermediary Organization Act (CIOA) governing collecting

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<sup>12</sup> There used to be another collective society managing audiovisual works, the Audi-video Copyright Disseminated Society of Chinese Taipei (VAST), which got its approval of association on October 31, 2001 and was dissolved by the TIPO on 23 April 2006 (Tzetz09600027023) on the ground that it never had concluded a collective management contract with its members (except one contract in 2003) and is therefore unable to effectively execute its management activities.

<sup>13</sup> The Chinese Oral & Literary Copyright Intermediary Association (COLCIA) has been approved by the TIPO on 8 August 2006 and completed registration on 20 November 2006. It has no website and is presumably not yet operational.

societies imposes heavy-handed regulations<sup>14</sup>. The competent authority, Taiwan Intellectual Property Office (TIPO), is required to conduct regular annual inspections and thereby check "business reports" of collecting societies<sup>15</sup>. Strangely enough, it is not required of collecting societies to publish annual reports and make them easily available. It is therefore fair to say that transparency for the outside world is lacking. In 2004 a total of NT\$150 million was collected by all collecting societies.<sup>16</sup> The collected royalties reached NT\$266 million in 2007<sup>17</sup>.

### **3.2.1 Musical Works**

#### **3.2.1.1 The Music Copyright Association of Taiwan (MCAT)**

The MCAT has as its area of activity the management of public broadcast rights, public performance rights and public transmission of musical works. It got its approval of association on January 20, 1999. As of 3 September 2008, it had 27 corporate members (mainly record companies) and some 200 individual members (creators and their heirs). The MCAT manages a repertoire of about 25,069 works, declining from 42,750 works in 2004<sup>18</sup>. It does not publish an annual report and no statistics about the collected license fees are officially available. In 2004, approximately NT\$50 million was collected<sup>19</sup>. The MCAT collected NT\$57 million in 2007. The management fee is between 25% and 30% of the collected royalties; in addition, non-members must pay an extra 10% for data processing.

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<sup>14</sup> CIOA prescribes membership, form of association and licensing, prior approval and possible withdrawal of approval for a collective society, compulsory management and licensing of copyrights, and even controls license fees. For more details, see Christopher Heath/Kung-Chung Liu (ed.), *Copyright Law and the Information Society in Asia*, 2007, Hart Publishing, 111-112 (by Kung-Chung Liu).

<sup>15</sup> 2(2) Operational Guidelines for Guiding and Supervising Copyright Intermediary Organization (Issued by the TIPO on 28 July 2004).

<sup>16</sup> Kung-Chung Liu, *Critical Reform of IP Regime* (in Chinese), 2007, Angel Publishing, Taipei, 140.

<sup>17</sup> According to the email sent to this author by Ming-Jin Lee (Section Chief, TIPO) on 1 October 2008.

<sup>18</sup> The website of the MCAT: [www.mcat.org.tw](http://www.mcat.org.tw) (last visited 4 September 2008)

<sup>19</sup> Kung-Chung Liu, *ibid.*

### **3.2.1.2 The Music Copyright Intermediary Society of Chinese Taipei (MUST)<sup>20</sup>**

The MUST got its approval of association on 20 January 1999 and became a full member of the CISAC on 1 December 1999. The MUST manages the right of public performance, public broadcast and public transmission in musical works. By May 2007, it had some 814 members, increasing from 69 corporate members (mainly record companies) and 601 individual members (creators and their heirs) in 2004. As of June 2008, the MUST manages a repertoire of about 185,492 musical works in Mandarin, increasing from 60,000 works in 2004. MUST collected approximately NT\$90 million in 2004<sup>21</sup>. The collected royalties in 2007 were NT\$137 million.

### **3.2.1.3 The Music Copyright Intermediary Society of Taiwan (TMCS)**

The TMCS got its approval of association on February 27, 2002. As of 29 September 2008, it had some 4 corporate members (record companies) and 142 individual members (creators). Its repertoire consists of approximately 1898 songs. The TMCS's area of activities focuses on licensing karaoke manufacturers<sup>22</sup>. In 2004 the TMCS collected a royalty of NT\$1.5 million, which was not enough to cover its costs by a difference of 20%. The collected royalties doubled in 2007, reaching NT\$3 million. The level of its management fees is unclear; however, there is a 10% surcharge for non-members<sup>23</sup>.

## **3.2.2 Audiovisual Works: The Audiovisual Music Copyright Owner Association (AMCO)**

The AMCO got its approval of association on 20 January 1999. It manages the right of public broadcasting and presentation of audiovisual musical works owned mostly by its

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<sup>20</sup> <http://www.must.org.tw/search.asp?accept=YES> (last visited 29 September 2008)

<sup>21</sup> Kung-Chung Liu, *Critical Reform of IP Regime* (in Chinese), 141.

<sup>22</sup> The website of the TMCS: [www.tmcs.org.tw](http://www.tmcs.org.tw) (last visited 29 September 2008)

<sup>23</sup> Kung-Chung Liu, *ibid.*

corporate members, which are also members of ARCO and IFPI (International Federation of the Phonographic Industry). As of 29 September 2008, it had 19 corporate members (record companies) and 9 individual members (creators of only 8 works)<sup>24</sup>. In 2004 the AMCO collected royalties of NT\$10 million<sup>25</sup>. The collected royalties remained NT\$10 million in 2007.

### **3.2.3 Sound Recording Works**

#### **3.2.3.1 The Association of Recording Copyright Owners of ROC (ARCO)**

The ARCO got its approval of association on January 20, 1999. As of 29 September 2008, it had 29 corporate members (record companies) and 11 individual members (creators). The ARCO administers the broadcasting right and public performance right of sound recording works. In 2004 the ARCO collected royalties of NT\$25 million<sup>26</sup>. The collected royalties amounted to NT\$ 46 million in 2007.

#### **3.2.3.2 Recording Copyright & Publications Administrative Society of Chinese Taipei (RPAT)**

The RPAT was approved to operate on October 22, 2001. It manages the reproduction (for archival use of TV and radio stations), broadcasting and public performance rights of sound recording works. As of 10 August 2005, the RPAT had 43 corporate members (mainly record companies) and 10 individual members (creators). The collected royalties for 2004 were a nominal amount: NT\$0.85 million<sup>27</sup>. The collected royalties jumped to NT\$13 million in 2007.

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<sup>24</sup>. The website of the AMCO: [www.amco.org.tw](http://www.amco.org.tw) (last visited 29 September 2008)

<sup>25</sup> Kung-Chung Liu, *Critical Reform of IP Regime* (in Mandarin), 142.

<sup>26</sup> The website of the ARCO: [www.arco.org.tw](http://www.arco.org.tw) (last visited 29 September 2008)

<sup>27</sup>. Kung-Chung Liu, *Critical Reform of IP Regime* (in Mandarin), 143. The website of the RPAT: [www.rpat.org.tw](http://www.rpat.org.tw) (last visited 29 September 2008)

### **3.3 Overall picture of on-line music industry**

The settlement between Taiwan IFPI, ezPeer and Kuro paved way for the birth of a lawful on-line music industry in Taiwan, which took place in the second half of 2006. Four ISPs quickly emerged: Kuro, ez Peer + , KKBox and Yahoo. However, Yahoo quitted the on-line market in March 2007 and transformed into a music portal. The remaining three operators run with (or “on”) two distinct business models: pay-per-download and subscription with flat fee (“all you can eat”). However, in Taiwan music consumers much prefer subscription with flat fee over pay-per-download<sup>28</sup>, a sharp contrast to the United States and Europe. In 2006, pay-per-download services accounted for over 90% of on-lie music spending in European Union., with the downloaded singles stood at roughly one fifth of those in the US<sup>29</sup>. The appetite for “all you can eat” with a fixed fee is caused by the experiences with P2P file-sharing services and causes a great gap between the fees that right holders demand and the fees that consumers are willing to pay. The on-line music market ended with huge demand and only a few people actually paying.

### **3.4 Sampling of on-line music industry**

#### **3.3.1 Kuro and ez Peer +**

Kuro and ezPeer+ seem to cooperate with one another. ezPeer+ is listed on the website of Kuro and vice versa. While Kuro specializes in the pay-per-download model, charging NT\$10, 25 or 35 for every download<sup>30</sup>, ezPeer+ provides subscription service with a monthly flat fee of NT\$ 149. A six-month subscription costs NT\$894, with one extra month prescription as free bonus.<sup>31</sup> Although the websites of ezPeer+ and Kuro both list the to-go service, it seems that ezPeer+ does not yet provide such service.

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<sup>28</sup> Ming-Jun Lou, The Cooperation Between and Business Models of On-line Music Platform Operators and Music Content Providers ( in Mandarin ) , 2007, 115.

<sup>29</sup> Tilman Lüder, First Experience With EU-wide Online Music Licensing, GRUR Int. 2007, 649-658 ( 650 ) .

<sup>30</sup> [http://ecd.kuro.com.tw/exec/single\\_list.php](http://ecd.kuro.com.tw/exec/single_list.php) (last visited 11 October 2008)

<sup>31</sup> [https://secureplus.ezpeer.com/album\\_dev/pay/index\\_web.php](https://secureplus.ezpeer.com/album_dev/pay/index_web.php) (last visited 11 October 2008)

### **3.3.2 KKBox<sup>32</sup>**

KKBox began its services in October 2004. According to the website of the company (Skysoft) running KKBox, KKBox now has licenses for two million music works and about 450,000 paying members,<sup>33</sup> jumping from some 200,000 in 2007<sup>34</sup>.

#### **3.3.2.1 Music on PCs**

KKBox charges a monthly flat rate of NT\$149 for its members to legally download all music works of its repertoire onto their PCs, up to three PCs. However, only one PC can be activated at the same time. Musical works provided by KKBox are subject to digital rights management technology and cannot be legally reproduced, by burning on CDs or MP3 players or otherwise. A discounted rate of NT\$799 is offered for a six-month subscription, instead of NT\$894.

#### **3.3.2.2 To-go music on mobile phones**

In cooperation with the dominant telecom carrier in Taiwan, Chunghwa Telecom, KKBox offers to-go music on mobile phones for a monthly flat rate of NT\$249. During the off-peak hours, from 1 a.m. to 7 a.m., subscribers can listen without having to pay for the transmission fee. During the peak hours, from 7 a.m. to 1 a.m., subscribers can listen without having to pay for the transmission fee for up to 800 minutes/month. If the 800 minutes/month limit is exceeded, a handling fee of NT\$ 5 is charged for every song.

## **4. The Legislative Response**

### **4.1 Introducing Contributory Infringement Liability for ISPs Introduced in 2007: Civil and Criminal**

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<sup>32</sup> [https://ssl.kkbox.com.tw/billing\\_index00.php?tag=](https://ssl.kkbox.com.tw/billing_index00.php?tag=) (last visited 29 September 2008)

<sup>33</sup> <http://www.skysoft.com.tw/about.html> (last visited 11 October 2008)

<sup>34</sup> 19 April 2007 the Liberty Times (in Taiwan, available at: <http://www.libertytimes.com.tw/2007/new/apr/19/today-life2.htm> (last visited 11 October 2008))

In the aftermath of the ezPeer and Kuro cases, the Copyright Act ushered in Articles 87(1)7 and 87(2) to illegalize ezPeer and Kuro-like P2P file-sharing services:

Any of the following circumstances, except as otherwise provided under this Act, shall be deemed an infringement of copyright or plate rights: 7. To provide to the public computer programs or other technology that can be used to publicly transmit or reproduce works, with the intent to allow the public to infringe economic rights by means of public transmission or reproduction by means of the Internet of the works of another, without the consent of or a license from the economic rights holder, and to receive benefit therefrom.

A person who undertakes the actions set out in subparagraph 7 above shall be deemed to have "intent" pursuant to that subparagraph when the advertising or other active measures employed by the person instigates, solicits, incites, or persuades the public to use the computer program or other technology provided by that person for the purpose of infringing upon the economic rights of others.

On top of the civil liability, the newly added Article 93 No. 4 penalizes the violation of Article 87 (1)7: a sentence of up to two years imprisonment or detention shall be imposed, or in lieu thereof or in addition thereto, a fine will be charged of not more than NT\$ 500,000. In addition, the new Article 97b empowers the competent authority to prescribe a period of one month for the enterprise violating Article 93 to take corrective action and order suspension or compulsory termination of the enterprise's business if the enterprise fails to take corrective action within that period<sup>35</sup>.

## **4.2 Highly Deregulated Draft CCMA**

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<sup>35</sup> Article 97bis prescribes: When an enterprise, by means of public transmission, violates the provisions of Article 91, Article 92, or Article 93, subparagraph 4 and is convicted by a court, it shall immediately cease such activities. If the enterprise does not cease those activities, then following the convening by the competent authority of a group of specialists, academicians, and related enterprises who determine that the enterprise's activities constitute a serious infringement and that they materially affect the rights and interests of the economic rights holder, the competent authority shall prescribe a period of one month within which the enterprise shall take corrective action; where the enterprise fails to take corrective action within that period, the competent authority may order suspension or compulsory termination of the enterprise's business.

The heavy-handed regulation of collecting societies resulted in weak collecting societies and poor collective rights management in Taiwan<sup>36</sup>. To alleviate this, the government has come to realize that the CIOA must be reengineered toward deregulation, moving away from ex-ante control and towards ex-post regulation. The Draft Copyright Collective Management Act (CCMA) went through the first reading in the Parliament in 22 April 2008, and awaits further readings. According to the draft:

1. Collective management organizations are free to choose their legal form ( Article 3 No. 2 ) .
2. Collective management organizations still need to be approved by the TIPO prior to operation; TIPO would be authorized to disapprove the establishment of new collective management organizations if existing ones are in the position to fulfill the function of a collective management organization (Article 8(2)). This could help preventing too many collective management organizations operating in the same field of copyrighted works, which can weaken their negotiation power.
3. The prohibition on rights holders as member of a collective management organization to license by themselves or by third parties in addition to by the collective management organization is to be lifted ( Article 14 ). It is left to be dealt with by the management contract or the charter of the organization.
4. There will be more internal checks-and-balances and transparency (Articles 18, 19).
5. The license rates will only have to be reported to the TIPO (Article 24). Prior approval by the TIPO is abolished. However, the reasonableness of such rates can be challenged by users who can file complaints with the TIPO ( Article 25 ) .

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<sup>7</sup> For more details see Christopher Heath/Kung-Chung Liu( ed. ), Copyright Law and the Information Society in Asia, 113.

### **4.3 Copyright Act Amendment Draft of 25 September 2008 to Introduce “Safe Harbor Clauses” for ISPs**

The contributory infringement liability for ISPs introduced on 11 July 2007 under the pressure of copyright holders, if rigorously enforced, can be detrimental to the ISP industry. This in turn has led the ISP industry to pressure the TIPO to propose amendment to the Copyright Act that would reduce the liabilities of ISPs. A “safe-harbor” bill was tabled by the TIPO in July 2008, which would allow rights holders to demand that ISPs remove infringing materials from the Internet and exempt the complying ISPs from liability for the infringement of third parties. The Executive Yuan approved the draft on 25 September 2008, following closely the Digital Millennium Copyright Act of 1998 (DMCA) of the United States.

#### **4.3.1. The Exemption of liability**

##### **4.3.1.1 For Internet Access Service Providers (IASP)**

Article 90-5 prescribes that IAPs shall not be liable for infringement of copyright by users if

(1) the transmission of the material was initiated by or at the direction of the user; and (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider.

##### **4.3.1.2 For Fast Storage Service Providers (FSSP)**

Article 90-6 prescribes that intermediate and temporary FSSPs shall not be liable for infringement of copyright by users if (1) the stored information has not been modified, (2) an automation technology will be activated, whenever information providers alter, delete or cut off the original information that was automatically stored, to do the same, and (3) FSSPs

immediately take down the infringing materials or prevent others from accessing the infringing materials upon the notification from rights holders of the infringement..

#### **4.3.1.3. For Storage Service Providers (SSP)**

Article 90-7 prescribes that SSPs shall not be liable for infringement of copyright by users if they (1) do not have actual knowledge that users have infringing activity, (2) do not receive a financial benefit directly attributable to the infringing activity of users, and (3) immediately take down the infringing materials or prevent others from accessing the infringing materials upon the notification from rights holders of the infringement,.

#### **4.3.1.4 For Search Service Providers**

Article 90-8 prescribes that search service providers shall not be liable for infringement of copyright by users if they (1) do not have actual knowledge that the searched or linked materials are infringing, (2) do not receive a financial benefit directly attributable to the infringing activity of users, and (3) immediately take down the infringing materials or prevent others from accessing the infringing materials upon the notification from rights holders of the infringement,.

#### **4.3.2 The Prerequisites for Liability Exemptions**

According to Article 90-4, the liability exemptions provided for by Articles 90-5, 90-6, 90-7, and 90-8 shall only be applicable if service providers have (1) informed users by contract, electronic communication or automatic sensor system about the copyright-protection measures and have effectively implemented such measure, (2) informed users by contract, electronic communication or automatic sensor system about the termination of all or partial services upon repeat infringement by users, (3) publicized information about the contact window for

receiving notice, and (4) implemented the commonly used identification and protection measures adopted by rights holders, excluding however the measures that are causing unreasonable burden to service providers.

#### **4.3.3. Counter take-down mechanism added to protect users' rights.**

In addition to the notice/takedown provisions included in the draft, a counter-notification clause has also been added. According to Article 90-9, storage service providers must notify the alleged infringing party of the take down. The alleged infringing party may claim no infringement has been committed and send a written request to ISPs to restore the material. ISPs must then notify the rights holders of the claim and wait for 10 days for rights holders to take legal action against the alleged infringing party. If no legal action was taken by rights holders within the period, ISPs have to restore the material.

### **5. Concluding Remarks**

Despite the difficulties it is now facing, the Taiwan music industry continues to lead the Chinese-speaking world in popular music. It is a shame that rights in musical works of Taiwanese origin are poorly managed in and out of Taiwan. Going on-line is the only way to go for the music industry. After a period of uncertainty with the P2P file-sharing services, lawful on-line licensing of music is beginning to grow in Taiwan. On the legal front, the first priority is to overhaul the law on collecting societies to allow them more breathing space and bargaining power. The hasty introduction of contributory liability for ISPs and again exemptions from contributory liability will not help the music industry in particular, nor the copyright industry in general, because much more room for doubt is being created and the clarification — if not further confusion — of which can take years of legal process. It is best for the music industry to work out licensing models with its users and the intermediary platforms under the support of effective collective management organizations.