

A Model or a Symbol? Criminal IP Judicial Reforms of Taiwan under U.S. Special 301

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Abstract

A Model or a Symbol? Criminal IP Judicial Reforms of Taiwan under U.S. Special 301

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This research examines the criminal intellectual property (IP) judicial reforms of Taiwan under the U.S. Special 301 framework. These reforms targeted the sole intermediate appellate court specializing in IP, the Intellectual Property Court (IPC). Following twenty years of judicial reforms trying to raise criminal punishment against IP infringers, Taiwan finally established the IPC in 2008 and transferred jurisdiction over appellate criminal IP cases to it. Due in part to these twenty years of reforms, the United States lifted its long-term Special 301 oversight from Taiwan in 2009, and named Taiwan as a successful model of fighting IP piracy.

In spite of U.S. efforts, Taiwan's judiciary continued to follow existing sentencing patterns. This resistance to change appears to be due to the creation of a judicial culture surrounding the sentencing of criminal IP defendants and gradually increasing judicial independence in general. Because the institutional context within which judges sentence criminal IP defendants remained largely unchanged after the reforms, the reforms had little impact. Long-term conflicts between the reforms resulting from U.S. pressure and the local context of judicial practice were the reality behind what the United States claimed was a successful model of IP law reform to reduce piracy in Taiwan.

The termination of the U.S. oversight in 2009 provides an opportunity to explore this so-called successful model. This research answers the following questions with respect to the

conflicts: What is the U.S. Special 301 framework which shaped Taiwan's judicial reforms toward a punishment regime for IP protection? What are the contexts of Taiwan's judicial independence and judicial culture that protected and reinforced judges' existing sentencing patterns? How, and why, did the judiciary resist the pressure of judicial reforms toward a harsher punishment regime for IP infringement?

This research outlines the legal framework within which the United States imposed pressure on Taiwan to reform its IP laws, evolution of Taiwan's IP laws during the period of intense U.S. pressure, and analysis of statistical data and individual cases with respect to judges' sentencing patterns before and after the establishment of the IPC. Based on these analyses, this research finds: (1) the rise of judicial independence following Taiwan's democratization blunted the impact of judicial reforms in the IP criminal sanctions area; (2) the long-term development of a local judicial culture reinforced the sentencing patterns favoring lenient sentences in the area of criminal IP law; and (3) in spite of the 2008 judicial reforms aiming to raise criminal punishment for IP protection there is no evidence to support the idea that judges changed their existing sentencing patterns and became harsher.

In light of these findings, it appears that Taiwan cannot be held up as an example of success for the U.S. anti-piracy policy based on harsher criminal sanctions. In Taiwan, domestic judges' lenient sentences for IP infringements were unchanged by the judicial reforms under the U.S. Special 301 framework because growing judicial independence weakened the impact of the judicial reforms and within the judiciary local judicial culture reinforced the existing sentencing patterns.

Key Words: Taiwan, Special 301, intellectual property piracy, criminal sentencing, judicial independence, judicial culture, judicial reform

To my mentor Prof. Jane K. Winn and my wife Dr. Catherine Kai-ling Chi:

Without your persistence, this work would never be done.

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Chapter 1 Introduction

1.1. Motivation

In January 2009, Taiwan won another boost to its international reputation in addition to its fame for its rapid economic development and peaceful democratization. The United States Trade Representative (USTR) announced the removal of its Special 301 oversight of Taiwan because of Taiwan's success in establishing a regime for strong intellectual property (IP) protection. The removal of U.S. monitoring for IP violations came after two decades of Taiwanese effort to fight IP piracy.

Since 1989, the USTR has announced its Special 301 report every year. Following its investigation, the USTR lists foreign countries that do not provide enough IP protection in the report and the United States threatens unilateral trade retaliation against those countries that do not agree to cooperate in improving their IP enforcement regimes. Due to rampant IP piracy Taiwan was listed on the first Special 301 report in 1989 and came under pressure from the United States to provide stronger criminal IP protection. With its close political and economic ties with the United States, Taiwan was vulnerable to the U.S. Special 301 demands. Therefore, Taiwan launched judicial reforms toward a punishment regime for IP protection from 1990s.

The theory behind the Special 301 framework is straightforward: more criminal punishment will bring more deterrence and compliance. To establish a strong legal framework for IP protection, Taiwan first enacted and then enhanced criminal IP provisions in its copyright and trademark laws. Using criminal punishment as the main vehicle to protect IP rights and prevent IP piracy, Taiwan's criminal IP law criminalized almost all copyright and trademark infringements and stiffened the statutory punishment for IP offenses. Following the changes to its statutory framework, Taiwan devised and implemented judicial reforms to create a judicial

environment friendly to IP protection. To unify and increase criminal sentencing patterns, specialization was introduced to the judicial system. Finally, the Intellectual Property Court (IPC), the sole intermediate appellate court specializing in IP with jurisdiction over appellate criminal IP cases, was established in 2008. This was the culmination of two decades of reforms that helped Taiwan advance to a new era. In response the United States lifted its Special 301 oversight from Taiwan and recognized Taiwan's experience as a successful model.

Operating in parallel to reform efforts spurred by the U.S. Special 301 framework was the development of judicial independence and the emergence of a distinct local judicial culture. After the long-term authoritarian rule of the Kuomintang (KMT, Nationalist Party) came to an end, Taiwan started to transform into a democratic country during the mid-1980s. As this democratization progressed, Taiwan's judiciary became more independent, beginning in the early 1990s. Under authoritarian rule, political interference with the judiciary had been widespread; as a result of democratization judicial independence increased. Judges were given more power to resist interference and make their decisions autonomously. However, inside the judiciary, due to the stability in judicial personnel, organization, and ideology, a strong culture of following internal rules remained. With this protection of judicial independence, the long-term judicial culture survived the transformation and continued to influence judges' decision making. The social practice of the judiciary in Taiwan was thus shaped by the two influences of judicial independence and a strong local judicial culture.

During this time the judiciary stood at the intersection of the Special 301 framework, the rise of judicial independence, and the persistence of local judicial culture. Judges were required by the Special 301 framework to enforce harsh criminal IP law. The framework expected them to use criminal punishment to fill the gap between IP laws and local social norms regarding IP

piracy. However, in a democratic country where judges can make their decisions autonomously, a judge's mission is to enforce the law fairly and consistently to achieve justice. If criminal law and punishment is excessively harsh, it gives rise to injustice. Under such circumstances, judges may become less likely to sentence severely.¹ When the criminal IP law under the Special 301 framework was applied to Taiwan where the society was unfamiliar with IP rights, the broad criminalization and harsh punishment meant judges were being asked to impose punishment on a large criminal population that might appear disproportionate to many in Taiwan. The harshness of the criminal IP law might lead to judges being sympathetic for defendants as well as being resistant to increased punishment.

While the Special 301 framework was intended to enhance criminal punishment, the judiciary in Taiwan appears to have followed their own sentencing patterns. This resulted in ongoing conflicts. On one hand, the Special 301 framework promoted extensive prosecutions and convictions; but on the other, the judiciary responded with lenient sentences. The United States then responded with demanding judicial reforms designed to change judges' lenient sentencing. The jurisdiction of the IPC over appellate criminal IP cases was established as the final measure to end judges' resistance to the Special 301 framework.

Whenever judicial reforms do not overcome judicial independence and local judicial culture, judges may persist in their existing sentencing patterns and disregard the reforms. In Taiwan the existing sentencing patterns for IP piracy were lenient. In the context of Taiwan's growing judicial independence and long-term judicial culture, judges were increasingly able to make their own decisions. Unless reforms overcomes these factors existing patterns may remain unchanged. If that is true in this case, this "successful" model of strengthening strong criminal IP

¹ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

laws to fight IP piracy might be purely symbolic.

The judicial reforms of Taiwan under the guidance of U.S. Special 301 were intended to strengthen punishments for IP infringement; and have been held up by the United States as a successful law reform strategy. However, the Taiwanese experience in dealing with the Special 301 framework suggests that the U.S. version of events may be an over-simplified one. The characterization of the judicial reforms in Taiwan as a successful model for anti-piracy law reforms may have more to do with ideology than practical consequences.

1.2. Research Question

Based on the hypothesis that the Taiwanese judiciary, shielded by judicial independence, might follow their own existing sentencing patterns reinforced by the long-term local judicial culture to reject the judicial reforms toward a harsher punishment regime for IP protection, the following research question is therefore developed:

Under what circumstances would domestic judges reject judicial reforms promoting a harsher punishment regime for IP protection spurred by foreign pressure?

This research question raises the following sub-questions:

- What is the U.S. Special 301 framework that shaped Taiwan's criminal IP judicial reforms?
- What are the local institutional contexts of Taiwan's judicial independence and judicial culture that have influenced judges' sentencing patterns?
- What judicial reforms were erected in Taiwan to promote a harsher punishment regime for IP protection?
- How did Taiwanese judges, in light of local institutions of judicial independence and judicial culture, respond to the judicial reforms?

1.3. Methodology

This research focuses on a contemporary phenomenon within a real-life context. Relying on the following research methods, this research will explore the relationship between the intervention of the judicial reforms and the development of local institutions of judicial independence and a strong local judicial culture, and then explain how they relate to the judiciary's resistance to the judicial reforms.

The literature review will first provide background information about the U.S. Special 301 framework and analyze Taiwan's susceptibility to the U.S. Special 301 framework. It will then explore the emergence of judicial independence and a local judicial culture, and explain judges' autonomous decision making within those contexts. Next, Taiwan's judicial reforms promoting a harsher punishment regime for IP protection will be detailed and analyzed. The manner in which resistance to the judicial reforms was manifested will be explored and possible explanations offered. Special attention will be given to the most important reform, the establishment of the IPC and related procedures in 2008.

Following the literature review, the pre-reform and post-reform analysis of ROC data on IP court cases will be used to describe judges' sentencing patterns from 2002 to 2011 in order to look for any differences before and after the 2008 judicial reforms. In this empirical study, two sets of data will be analyzed. The statistical data covering sentences of all district courts and intermediate appellate courts from 2002 to 2011 will reveal the overall sentencing patterns among judges. Moreover, an independent samples t-test is conducted to compare the 2002-2007 data with the 2009-2011 data to see if there is any significant difference in judges' sentences before and after the 2008 judicial reforms. To see judges' considerations for deciding sentences in individual criminal IP cases and any significant change occur after the 2008 reforms, the

empirical study will analyze individual criminal copyright and trademark cases decided in 2007 and 2011. After an analysis of court decisions delivered by three representative district courts, the IPC and its predecessor's court decisions will be explored. By comparing and contrasting general and specific evidence of judicial practice before and after the 2008 judicial reforms, this research will try to find evidence with regard to the change in the severity of judges' sentences. If there is no evidence that sentencing for IP crimes after the 2008 reforms became harsher, then the so-called successful model of judicial reform to enhance IP enforcement in Taiwan will need to be reconsidered.

The data used in this research was not collected through interviews or other direct contact with individuals in Taiwan. All statistics and cases collected are publicly available. The statistical data were collected from the Judicial Statistics Yearbook, which is published by the Judicial Yuan on its official website.² All criminal IP cases are collected from the on-line database of the Judicial Yuan. According to the first paragraph of Article 83 of the Court Organization Act of Taiwan,³ all court decisions shall be publicized. The Judicial Yuan has publicized all court opinions on its official website since 2000 and anyone can search any case through the on-line database.⁴ Since the data collection and use of this research falls within the "Public Data Sets" category, this research is not subject to the review or approval by the University of Washington Institutional Human Board.⁵

1.4. Thesis Organization

This dissertation has the following seven chapters.

² *Judicial Statistics*, JUDICIAL YUAN, <http://www.judicial.gov.tw/juds/> (last visited Jun. 28, 2013).

³ *Fayuan Zuzhi Fa* (法院組織法) [Court Organization Act], Dec. 22, 1989, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5184, 1989, at 1.

⁴ *Search for Court Decisions*, JUDICIAL YUAN, <http://jirs.judicial.gov.tw/FJUD/> (last visited Jun. 28, 2013).

⁵ *Public Data Sets*, HUMAN SUBJECT DIVISION OF UNIVERSITY OF WASHINGTON, <http://www.washington.edu/research/hsd/topics/Public+Data+Sets> (last visited Jun. 28, 2013).

Chapter 1 describes the motivation for this research. The development of the research question and the explanation of the research methodology are provided.

Chapter 2 presents how the U.S. Special 301 framework shaped Taiwan's criminal IP policy beginning in the late 1980s. This chapter analyzes the origin and operation of the framework, Taiwan's susceptibility to the framework, and Taiwan's compliance with the framework.

Chapter 3 highlights the emergence of Taiwan's judicial independence and the persistence of a local judicial culture. Following the brief introduction to Taiwan's criminal law and criminal procedure law, this chapter focuses on the contexts of Taiwan's judicial independence and judicial culture within which the judiciary adhered to its existing sentencing patterns.

Chapter 4 describes and analyzes Taiwan's judicial reforms toward an increased punishment regime for IP protection before 2008. In addition to the development of Taiwan's criminal copyright and trademark legislations, those measures devised and implemented by the Judicial Yuan to improve judges' lenient sentences are specified. More importantly, this chapter discusses how and why judges in the contexts might reject these judicial reforms.

Chapter 5 articulates the most important judicial reform under the Special 301 framework, the establishment of the IPC and related procedures in 2008. After illustrating the 2008 judicial reforms this chapter presents the conflicts between these reforms and the rising independence of the judiciary along with its unique culture; and it hypothesizes that the 2008 judicial reforms, like their predecessors, may not be able to bring significant changes to judges' sentencing patterns.

Chapter 6 presents the results of the analysis of the IP enforcement data published by the ROC government. The analysis of the statistical data and individual cases describes and compares judges' sentencing patterns before and after the 2008 judicial reforms. The pre-reform and post-reform comparison tries to find any differences and then explains whether the

differences are consistent with the hypothesis.

Chapter 7 presents the conclusion of this research. In addition to the findings of this research, this chapter points out the implications of the research and recommends some directions for future research.

1.5. Terminology and Romanization

Because Taiwan is a civil law country and has its distinct government organization, the definitions of the following terms with respect to Taiwan's legal system are given in advance for clarification:

- Republic of China: The Republic of China (ROC) is commonly known as Taiwan. It is the official name for the government that has ruled Taiwan and its affiliated islands after the Second World War.
- Judicial Yuan: The Judicial Yuan (Sifayuan 司法院) is the judicial branch of the central government of Taiwan. It exercises the power of judicial administration over all courts under it. The Judicial Yuan is authorized by the Constitution of the ROC to propose legislation to the Legislative Yuan.
- Legislative Yuan: The Legislative Yuan (Lifayuan 立法院) is the legislative branch of the central government of Taiwan. The Legislative Yuan exercises the legislative power. After a law is passed by the Legislative Yuan, the law will usually come into force as soon as the President promulgates it by publicizing a new issue of the Presidential Office Gazette.
- Executive Yuan: The Executive Yuan (Xingzhengyuan 行政院) is the executive branch of the central government of Taiwan. The Premier is appointed by the President and is approved by the Legislative Yuan. Most bills are proposed by the Executive

Yuan.

- Ministry of Justice: The Ministry of Justice (Fawubu 法務部) is part of the Executive Yuan and is responsible for the administration of all prosecutors' offices.
- Council of Grand Justices of the Judicial Yuan: The Council (Sifayuan Dafaguan Huiyi 司法院大法官會議) is the *de facto* constitutional court of Taiwan. It reviews constitutional issues only.
- Supreme Court Selected Case Excerpt: As a civil law country, Taiwan does not recognize *stare decisis* or precedents. Nevertheless, to unify interpretation of law, the Supreme Court of Taiwan sometimes selects and publishes a case excerpt with respect to application of law from its previous opinion as a Selected Case Excerpt (*panli* 判例).
- High Court: The High Court (Gaodeng Fayuan 高等法院) is the intermediate appellate court of Taiwan. In Taiwanese criminal procedure, the intermediate court must retry an appellate criminal case before it. This includes findings of fact and sentencing.
- Intellectual Property Court: Parallel to the High Court, the Intellectual Property Court (Zhihui Caichan Fayuan 智慧財產法院) is the intermediate appellate court established in 2008 solely for IP cases. The criminal jurisdiction of the IPC is one of the themes of this research.
- Criminal Detention: Criminal detention (*jüyi* 拘役) is one of the five primary penalties provided by the Criminal Code of the ROC. Criminal detention is imprisonment less than 60 days.

- Imprisonment: As one of the five primary penalties, imprisonment (*youqi tuxing* 有期徒刑) lasts at least two months.
- Conversion into a Fine: According to the Criminal Code, a sentence to criminal detention or imprisonment not more than six months can be converted into a fine (*yike fajin* 易科罰金), if the maximum punishment for the offense is not more than five years imprisonment.
- Probation: In Taiwan, when the court sentences a defendant to a fine, criminal detention, or not more than two years imprisonment, it can place the defendant on probation (*huanxing* 緩刑) from two years to five years to suspend execution of that sentence. If the probation is not revoked, the sentenced punishment will be suspended during the probationary period and the sentence will eventually be discharged at the end of the probationary period.

This dissertation uses the Hanyu Pinyin (漢語拼音) romanization system as the default when citing Chinese language materials in both running text and citations. The Hanyu Pinyin romanization system was introduced by the People's Republic of China (PRC) in the 1950s and is now the standard system for romanizing Chinese.⁶ Nevertheless, given the established romanization commonly applied to names of particular places and persons, for example, Kuomintang or Chiang Kai-shek, this dissertation still uses the established romanization when referring to these particular terms to prevent confusion.

1.6. Significance

To date, there have been no empirical studies of the practical impact of U.S. pressure on its

⁶ The CHICAGO MANUAL OF STYLE ¶ 11.102 (16th ed. 2010).

trading partners like Taiwan to make the enforcement of their IP laws harsher as an anti-piracy strategy. Thus, this study is both original and significant. The present research with respect to the U.S. Special 301 framework focuses mainly on the effectiveness of the framework to strengthen IP legal protection in foreign countries such as Taiwan. Some commentators have praised the Special 301 framework's ability to eliminate foreign trade barriers and establish global IP protection network,⁷ while others have argued that the framework's approach of using threatening unilateral trade retaliation might backfire.⁸ Several have discussed Taiwan's judicial reforms under the Special 301 framework.⁹ After Taiwan was removed from the Special 301 oversight and named by the United States a successful model in 2009, no further research looked into the implementation of Taiwan's judicial reforms spurred by the Special 301 framework. Nor has any research targeted the ROC judges' response to these reforms.

Taiwan's progress toward democratization and constitutionalism beginning in the mid-1980s has been widely noted in favorable terms by academic commentators.¹⁰ Several Taiwanese scholars have reviewed Taiwan's development of judicial independence¹¹ and

⁷ See, e.g., Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259 (1989); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); 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 (1995); I. M. DESTLER, AMERICAN TRADE POLITICS (4th ed. 2005).

⁸ See, e.g., Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000).

⁹ See, e.g., Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67 (1998); Y Kurt Chang, Comment, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206 (1994).

¹⁰ See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

¹¹ See, e.g., Wang Jinshou (王金壽), *Sifa Duli yu Minzhu Kewenzexing: Lun Taiwan de Sifa Renshi Quan* (司法獨立與民主可問責性：論台灣的司法人事權) [*Judicial Independence and Democratic Accountability*], 12 TAIWAN ZHENGZHI XUEKAN (台灣政治學刊) [TAIWAN POL. SCI. REV.], no.2, 2008, at 115; *Taiwan Sifa Gaige Ershi Nian: Maixiang Duli zhi Lu* (台灣司法改革二十年：邁向獨立之路) [*Judicial Reform in Taiwan in the Past Twenty Years: On the Road to Independence*], 46 SI YU YAN (思與言) [THOUGHT & WORDS], no.2, 2008, at 133; *Taiwan de*

Taiwan's long-term judicial culture.¹² This previous research has provided a generalized image of Taiwan's judicial independence and its judicial culture. However, none of these studies have yet been tied to the development of Taiwan's IP laws.

In addition, sentences in criminal IP cases have not been well-explored due to the lack of empirical data. In 1998, one researcher noted the difficulty in collecting empirical data in the field of criminal IP law:

Unfortunately, discovering the effect that the 1992-93 legislative amendments have had on Taiwanese court decisions is a difficult, if not impossible, task. Taiwan is a civil law state, with a legal system that operates very differently from British or American common law. Court verdicts are not a part of the public record, and court opinions are generally available only to the parties in dispute. There is no official case reporter. In addition, precedents have a diminished persuasive value and almost no binding effect on the courts. Research on Taiwanese court cases thus tends to depend largely on insider knowledge, word of mouth, and news reports about significant cases. In interpreting Taiwanese law, then, the first and most basic step is to look at the plain language of the statute and at highly publicized cases. Such cases may not give a full picture or have complete predictive power on how the courts would generally react to a given copyright issue, but they should still provide insight into how the Taiwanese copyright statutes operate.¹³

About 15 years ago researchers engaged in the empirical study of criminal IP law relied on secondary resources. Today, thanks to the progress of judicial transparency, all court decisions and statistical data within the past ten years are publicly available on the Internet. This change has made this empirical study possible.

This research will integrate the previous research in different fields including the U.S.

Sifa Duli Gaige yu Kuomintang Shicong Zhuyi de Bengkui (台灣司法獨立改革與國民黨侍從主義的崩潰) [*Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism in Taiwan*], 10 TAIWAN ZHENGZHI XUEKAN (台灣政治學刊) [TAIWAN POL. SCI. REV.], no.1, 2006, at 103.

¹² See, e.g., Liu Hengwen (劉恆姮), *Zhanhou Taiwan Sifaren zhi Yanjiu—Yi Sifaguan Xunlian Wenhua Weizhu zhi GuanCha* (戰後台灣司法人之研究—以司法官訓練文化為主之觀察) [*A Study of the Judges and Prosecutors in Postwar Taiwan—An Observation Focused on Their Training Culture*], 40 SI YU YAN (思與言) [THOUGHT & WORDS], no.1, 2002, at 125, 132.

¹³ Nelson C. Lu, Note & Comment, *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, 290 (1998).

Special 301 framework, Taiwan's criminal IP law, Taiwan's judicial independence, and Taiwan's local judicial culture. It will present a more complete picture of the development of legal institutions in Taiwan by revealing the external and internal factors that influence judges' sentences for criminal IP defendants. It will explore the conflicts among these various factors and provide insights to the so-call successful model of Taiwan. In addition, this research highlights the judiciary's resistance to the judicial reforms spurred by the Special 301 framework. This analysis will help establish a more complete theory about the impact of the U.S. Special 301 framework from the perspective of a U.S. trade partner. Moreover, given the availability of the empirical data, this research will increase the understandings to the complex social phenomena and move beyond the polarized perspectives sometimes reflected in previous research.

Chapter 2 Genesis of the Criminal IP Legal System under the Special 301 Framework

This chapter focuses on the U.S. Special 301 framework and Taiwan's susceptibility to the framework, especially how the framework influenced Taiwan's criminal intellectual property (IP) policy. Attributing its economic recession in the 1970s to unfair foreign trade barriers and making use of its advantages in IP to restore its competitiveness, the United States started using the unilateral trade retaliation mechanism in its domestic law to force foreign countries to protect U.S. IP rights. Under the Special 301 framework, Taiwan used criminal punishment as the main vehicle to combat IP piracy. This criminal IP policy in turn guided the establishment of a specialized criminal legal system in Taiwan. From the U.S. perspective compliance with the trade retaliation mechanism of Special 301 successfully demonstrates Taiwan's commitment to establish a Western-style intellectual property regime. Not all of America's trading partners adopted the same strategy, however. Some developing countries not only tried to resist Special 301 but they also challenged the way that the United States promotes it. For example, both Thailand and China tried to ignore or even counterattack the United States.¹ Taiwan's commitment to achieving full compliance, in contrast, makes Taiwan a unique Special 301 case.

2.1. Where did the Special 301 Framework Come from?

The so-called "Special 301" is a yearly based program under the U.S. domestic trade law, Section 301 of the Trade Act.² Section 301 addresses unfair foreign trade practices and fuels bilateral negotiation with American trading partners that violate their trade law obligations by

¹ See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 136-154 (2000) (describing China's responses to American trade retaliation threats); Donald P. Harris, *The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 106-107 (2008) (describing the U.S. WTO complaint against China); Thomas N. O'Neill III, Comment, *Intellectual Property Protection in Thailand: Asia's Young Tiger and America's "Growing" Concern*, 11 U. PA. J. INT'L BUS. L. 603, 616-623 (1990) (describing Thailand's intellectual property legislation under U.S. pressure led to a re-election which produced a new government against the United States).

² See Judith H. Bello & Alan F. Holmer, "*Special 301*": *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259, 261-263 (1990) (describing the legal history of Special 301).

employing trade retaliatory threat as leverage. Under the Section 301 framework, the so-called “Special 301” program specializes in overseas protection of American intellectual property rights.

The first time that the United States took government action to respond to unfair foreign trade practices dates back to 1794. At that time, President Washington was authorized by Congress to restrict imports and exports detrimental to U.S. commerce.³ Congress has also addressed unfair foreign trade practices such as dumping,⁴ subsidization,⁵ and patent infringement.⁶

The United States has both national and international mechanisms to protect domestic industries from unfair foreign competition. Nationally, the U.S. government can impose an anti-dumping duty⁷ or a countervailing duty⁸ upon foreign merchandise. The importation of infringing goods can also be embargoed.⁹ However, all of these devices have to follow formal

³ An Act to authorize the President of the United States to lay, regulate and revoke embargoes, 1 Stat. 372 (1794). See *Field v. Clark*, 143 U.S. 649, 683 (1891); *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 476 (C.C.P.A. 1959). Bart S. Fisher and Ralph G. Steinhardt III, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL’Y INT’L BUS. 569, 573 n.18 (1982).

⁴ Tariff Act of 1930 § 731, 19 U.S.C. § 1673 (Supp. IV 1980).

⁵ Tariff Act of 1930 § 701, 19 U.S.C. § 1671 (Supp. IV 1980).

⁶ Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (1976 & Supp. IV 1980).

⁷ See 19 U.S.C. §§1673-1673h, 1675-1675a, 1677-1677n (2006). Besides, “U.S. antidumping law provides that if foreign merchandise is sold in the United States at less than its fair value, resulting in injury to a U.S. industry, an antidumping duty shall be imposed upon such merchandise in an amount equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise.” Fisher & Steinhardt, *supra* note 3, at 571 n.5. For a general discussion of U.S. antidumping law, see Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357 (2009); Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 HARV. INT’L L.J. 1 (2012).

⁸ See 19 U.S.C. §§1671-1677 (1982). See also, “U.S. countervailing duty law provides that if a country is providing a subsidy with respect to the manufacture, production or exportation of merchandise which causes material injury to a U.S. industry, there shall be imposed upon such merchandise a countervailing duty equal to the amount of the net subsidy.” Fisher & Steinhardt, *supra* note 3, at 571 n.6. For a general discussion of U.S. countervailing duty law, see Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

⁹ See 19 U.S.C. § 1337. Besides, “[s]ection 337 of the Tariff Act of 1930, as amended, designates a remedy against the importation of infringing goods... Under section 337, private citizens can petition to proceed before the U.S. International Trade Commission, which has the power to exclude the importation of infringing articles.” Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 291 (1991).

procedures and require proof of injury to U.S. industries or infringement to patent or trademark holders.¹⁰ Moreover, they may restrict harmful imports but cannot go beyond U.S. borders. In other words, no foreign counterfeiting factory could be shut down as a result of resort to these processes.

Another way to deal with unfair foreign competition including intellectual property piracy is international negotiation. There are several international conventions on intellectual property signed by many foreign countries such as the Berne Convention¹¹ and the Paris Convention.¹² Under the framework of traditional multilateral international negotiation, countries are supposed to cooperate with each other to establish and enforce domestic law to protect intellectual property. However, in consideration of the self-interest in economic development, developing countries often implement traditional intellectual property conventions in a lax way. Besides, traditional intellectual property conventions like the Berne Convention and the Paris Convention have had a significant drawback for lack of an effective dispute resolution mechanism. Since no effective enforcement mechanism can be provided, foreign countries, for their best interests, are strongly tempted to disregard their obligations under international conventions.¹³

In spite of the insufficiency of importation restrictions and international negotiation, no new public international law device was urgently needed while U.S. industries could maintain their economic advantage in world markets by relying primarily on market power. After the Second

¹⁰ Leaffer, *supra* note 9, at 292-293.

¹¹ Berne Convention for the Protection of Literary and Artistic Works, 828 U.N.T.S. 221 (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971). The United States joined the Berne Convention on March 1, 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.).

¹² Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305 (Mar. 20, 1883, revised at Stockholm Revision Conference Jul. 14, 1967).

¹³ "The Conventions have proven to be ineffective when countries simply do not enforce their laws. The agreements do not contain effective mechanisms for challenging countries that ignore their obligations." Leaffer, *supra* note 9, at 294.

World War, the United States became the largest and richest country in the world. For example, total U.S. exports grew rapidly to \$10.2 billion in 1950, \$20.4 billion in 1960, and \$42.6 billion in 1970.¹⁴ The parallel figures for imports were \$8.9 billion in 1950, \$14.7 billion in 1960, and \$40 billion in 1970.¹⁵ This trade expansion was a prime contributor to a remarkable era of world prosperity.¹⁶ Until the 1970s, the United States had been the largest exporting country in the world. During the Cold War, the United States not only made use of its military force to reinforce its alliance against communists, but also strengthened ties with its allies by expanding international trade. At this period of time, the United States focused on free trade, instead of fair competition, because no country could really compete with the United States.

Yet a dramatic change came to the United States in the 1970s. The period was characterized by low economic and productivity growth, high inflation, and a high unemployment rate. The economic, geopolitical, commercial, technological, and cultural dominance of the United States was being steadily eroded by foreign competitors. The U.S. supremacy in international trade faded away while its trade deficit reached record high levels.¹⁷ Americans attributed the recession to unfair foreign competition, and turned to forcing foreign trading partners to open their markets and remove trade barriers. This view is clearly reflected in comments made by Paul Freedenberg, the former Undersecretary of Commerce for Export Administration, in 1989:

For too long, our trading partners have profited from America's open borders, while hiding behind their own trade barriers. It is high time for countries like Japan to become full-fledged members of the world trading community.¹⁸

Meanwhile, the United States recognized its competitive advantage in technology and

¹⁴ I. M. DESTLER, *AMERICAN TRADE POLITICS* 13 (4th ed. 2005).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The decline of the United States, *see id.* at 48-51.

¹⁸ Paul Freedenberg, *The 1988 Omnibus Trade Bill: Issues and Perspectives*, 1989 B.Y.U. L. REV. 365, 366-367 (1989).

started to use intellectual property as leverage to reverse its economic distress from the 1970s. Professor William Landes and Judge Richard Posner describe how Americans tried to link trade and intellectual property to offset the trade deficit:

Throughout the 1970s and well into the 1980s (and in some quarters into the 1990s), there was a widespread belief in the United States that the nation was in decline, that it was being outcompeted by other nations, particularly Japan, and that the decline could be halted only by a renewed emphasis on technological innovation as a stimulus to economic growth.¹⁹

This particular attention concerning intellectual property rights was a response to two types of unfair trading practices. One was the failure of other countries, particularly certain East Asian countries, to protect U.S. intellectual property which resulted in a flood of counterfeit products; the other type of unfair practices was the denial of fair market access to owners of U.S. intellectual property.²⁰ American exporters that were heavily reliant upon intellectual property such as computer, entertainment, and pharmaceutical industries were growing more frustrated with both legitimate competition and proliferating piracy.²¹ To maximize profits from its intellectual property, the United States started to require foreign governments to provide access to markets and protection of intellectual property rights.

Given that the United States was one of the biggest markets in the world and many developing countries heavily relied on the United States as an export market, the United States decided to connect intellectual property with trade more forcefully. Congress amended the Trade Act of 1974 by passing the Omnibus Trade and Competitiveness Act of 1988 to target foreign trade barriers on American intellectual property.²² Despite using the same unilateral trade

¹⁹ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 2 (2003); *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 24 (2004).

²⁰ Freedenberg, *supra* note 18, at 367.

²¹ William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-FLY's View*, 1992 COLUM. BUS. L. REV. 97, 99 (1992).

²² Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as

retaliatory mechanism, the new law dealt with trade retaliation in a much more aggressive and effective way than the prior one. The new law transferred to the United States Trade Representative (USTR) what had been the President's power to retaliate against trading partners for unfair trade practices.²³ It also set a strict timeframe to facilitate USTR's negotiation with foreign countries.²⁴ The decision of whether or not to initiate unilateral retaliation by the United States hinged on the results of bilateral negotiation and any prior commitments made by foreign countries. This continuous oversight pressed foreign countries to act. Ultimately, the trade retaliation was not only a protectionist policy but also a handy tool to negotiate with foreign countries.

2.1.1. Prior Law

Section 301 of the Trade Act, since its enactment in 1974, has been the principal legal mechanism for addressing unfair practices of foreign trading partners.²⁵ Section 301 evolved from Section 252(c) of the Trade Expansion Act of 1962,²⁶ which, in turn, was derived from provisions in the basic Reciprocal Trade Agreements Act of 1934.²⁷ The 1934 Act was an

amended in scattered sections of 19 U.S.C.).

²³ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), sec. 1301, § 305. Kenneth J. Ashman, Note, *The Omnibus Trade and Competitiveness Act of 1988—The Section 301 Amendments: Insignificant Changes from Prior Law?*, 7 B.U. INT'L L.J. 115, 130-131 (1989).

²⁴ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), sec. 1301, § 304. Ashman, *supra* note 23, at 137-138.

²⁵ Freedenberg, *supra* note 18, at 366.

²⁶ Trade Expansion Act of 1962, Pub. L. No. 87-794. It is repealed by the Trade Act of 1974. Section 252(c) of the 1962 Act provided: "Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may... (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or (2) refrain from proclaiming benefits of trade agreement concessions to products of such country or instrumentality." Fisher & Steinhardt, *supra* note 3, at 571-572 n.19. President Lyndon B. Johnson, under the authorization of the Trade Expansion Act of 1962, made his famous Presidential Proclamation No. 3564 in 1963 to impose "chicken tax" on imports.

²⁷ Section 252 had replaced, in 1962, Section 350(a)(5) of the Tariff Act of 1930. Fisher & Steinhardt, *supra* note 3, at 572 n.20.

amendment to Section 350(a) of the Tariff Act of 1930.²⁸ After its enactment, Section 301 of 1974 was later amended by the Trade Agreements Act of 1979,²⁹ and then by the Omnibus Trade and Competitiveness Act of 1988.

Before the 1970s, the Trade Act dealt primarily with direct trade measures such as tariffs and quotas, instead of targeting broader national policies that had an important trade impact.³⁰ Following the success of multilateral negotiation under the General Agreement on Tariffs and Trade (GATT) framework, the trade tension stemming from tariffs and quotas was eased. The protectionist trade retaliatory mechanism of the Trade Act that might result in restraining trade also conflicted with the pervasive liberal trade policy after the end of World War II.³¹ The political and economic situations had made the old Section 301 idle until the 1970s.³²

The old system was under attack when U.S. firms and workers became much more exposed to foreign competition in both home and overseas markets in the 1970s.³³ The United States started to shift from liberalism to protectionism due to the rise of new competitors and stagflation in the economy. In response, Section 252 of the 1962 Act was expanded and became Section 301 of the 1974 Act.³⁴ Section 301 of the 1974 Act created a basic legal mechanism that permitted

²⁸ “The Tariff Act of 1930 is also called Smoot-Hawley Act, which raised U.S. tariffs on over 20,000 dutiable items to record levels and contributed to the deepening of the Great Depression.” DESTLER, *supra* note 14, at 352; “In October 1929, the stock market crashed and the most severe depression in U.S. history began. Protectionist sentiment, already strong in the Congress, was increased by the Depression. The result was that the bill, as enacted, contained very high rates of duty on many items.” 1 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 114-115 (1991). As amended in 1934, the Tariff Act of 1930 provided in section 350(a): “The President, whenever he finds as a fact that any existing duties or other import restrictions... are unduly burdening or restricting the foreign trade of the United States, ...is authorized from time to time—(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; ...and (2) To proclaim such modifications of existing duties and other import restrictions, ...of existing customs or excise treatment of any article covered by foreign trade agreements...”

²⁹ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 295 (1979).

³⁰ DESTLER, *supra* note 14, at 33.

³¹ *Id.* at 34.

³² “The Trade Expansion Act of 1962 authority to retaliate was used only in the chicken war.” 1 CLUBB, *supra* note 28, at 232 (1991).

³³ DESTLER, *supra* note 14, at 41.

³⁴ 1 CLUBB, *supra* note 28, at 232.

U.S. citizens to assert their right to export when certain acts of foreign governments limited U.S. commerce.³⁵ It directed the President to take all appropriate and feasible action to enforce U.S. rights under any trade agreement and to counter any foreign trade practice that was unjustifiable, unreasonable, or discriminatory and burdened or restricted U.S. commerce.³⁶ Section 301 served a dual purpose. First, it allowed private parties to take a significant and public step to enforce existing international trade agreements.³⁷ Second, it could be used unilaterally by the President to signal displeasure to a foreign government over a present or pending foreign trade practice.³⁸ In essence, the 1974 law was an expansion of the authority that had been vested in the President for almost two centuries to retaliate against discriminatory foreign trade policies that unduly burdened U.S. commerce.³⁹

In the 1974 law, Congress provided specific time limits for the USTR and the President to consider and act on petitions.⁴⁰ When a petition was filed, the USTR was required to review the petition within 45 days to determine whether to initiate an investigation.⁴¹ If the USTR elected not to initiate an investigation, he or she had to inform the petitioner and specify his or her reasons, as well as publish notice of the decision and a summary of the reasons in the Federal Register.⁴² If an investigation was initiated and a hearing was requested, the USTR had to hold a hearing within 30 days.⁴³ Similarly, the USTR had to make its recommendation to the President

³⁵ Bart & Steinhardt, *supra* note 3, at 571; 1 CLUBB, *supra* note 28, at 234-235.

³⁶ Bart & Steinhardt, *supra* note 3, at 573.

³⁷ *Id.* at 575.

³⁸ *Id.*

³⁹ *Id.* at 573.

⁴⁰ 1 CLUBB, *supra* note 28, at 236.

⁴¹ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 302, 93 Stat. 295, 297, codified as 19 U.S.C. § 2412(a). Bart & Steinhardt, *supra* note 3, at 602; 1 CLUBB, *supra* note 28, at 232 n.2.

⁴² Trade Agreements Act of 1979, Pub. L. No. 96-39, § 302, 93 Stat. 295, 297, codified as 19 U.S.C. § 2412(b)(1). Bart & Steinhardt, *supra* note 3, at 603.

⁴³ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 302, 93 Stat. 295, 297, codified as 19 U.S.C. § 2412(b)(2)(A). 1 CLUBB, *supra* note 28, at 236-237.

not later than a certain period (between seven months and 12 months after the initiation of the investigation depending upon the type of foreign practices involved).⁴⁴ Within 21 days of receiving USTR's recommendation, the President had to make his decision and publish notice thereof in the Federal Register, along with a summary of the reasons for his decision.⁴⁵

The USTR had to seek consultations on behalf of the United States with the foreign government or instrumentality involved regarding the allegations in the petition. The USTR had to invoke dispute settlement provisions of applicable international trade agreements, if any, in the event that the matter was not resolved through these informal consultations.⁴⁶ At the negotiation and consultation level, the 1979 Act created two substantial improvements over the 1974 Act. First, the 1979 Act established firm deadlines for a negotiation process.⁴⁷ Second, the U.S. government was required to take account of the views of those affected industries, effectively establishing a cooperative relationship between public and private sectors.⁴⁸

The President had to take all appropriate and feasible action within his power to enforce U.S. rights or to obtain the elimination of any offensive act, policy, or practice. Potential responses included but are not limited to suspension of concessions under trade agreements, imposition of duties or other import restrictions, and use of any diplomatic, political, or economic leverage that the President might possess.⁴⁹

Section 301 of the Trade Act of 1974 was amended by the Trade and Tariff Act of 1984 to

⁴⁴ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 304, 93 Stat. 295, 297, codified as 19 U.S.C. § 2414(a)(1). 1 CLUBB, *supra* note 28, at 237.

⁴⁵ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 301, 93 Stat. 295, 296, codified as 19 U.S.C. § 2411(c)(2). Bart & Steinhardt, *supra* note 3, at 605; 1 CLUBB, *supra* note 28, at 237.

⁴⁶ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 303, 93 Stat. 295, 297, codified as 19 U.S.C. § 2413. Bart & Steinhardt, *supra* note 3, at 603.

⁴⁷ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 304, 93 Stat. 295, 297, codified as 19 U.S.C. § 2414(a)(1).

⁴⁸ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 304, 93 Stat. 295, 298, codified as 19 U.S.C. § 2414(b). Bart & Steinhardt, *supra* note 3, at 605.

⁴⁹ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 301, 93 Stat. 295, 296, codified as 19 U.S.C. § 2411. Bart & Steinhardt, *supra* note 3, at 606.

include submission of USTR reports to Congress identifying foreign trade barriers, making an estimate of the trade-distorting impact on U.S. commerce, and providing information with respect to action being taken by the United States to eliminate such foreign government practices. These reports were called National Trade Estimates (NTE).⁵⁰ It also addressed inadequate intellectual property protection within the scope of unjustifiable and unreasonable trade practices.⁵¹ Another change made in 1984 was to include intellectual property protection as a criterion in the determination of a country's eligibility for status as a beneficiary developing country for the purposes of the U.S. generalized system of preferences (GSP).⁵²

2.1.2. Omnibus Trade and Competitiveness Act of 1988

2.1.2.1. Overview

Section 301 of the 1974 Trade Act was broadly directed at foreign restrictions on U.S. trade and used to enforce trade rights as conferred by GATT and by bilateral treaties, if necessary through retaliation against those judged to have violated these rights, with authority to undertake such actions conferred on the President.⁵³ Despite changes made to the original Section 301 through the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984, deep dissatisfaction existed within Congress with the failure of Section 301 during the 1980s, as used by the President, to gain access for U.S. goods and services in foreign markets where barriers allegedly existed.⁵⁴ Coupled with this dissatisfaction was the growing trade deficit of the United

⁵⁰ Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 303(a), 98 Stat. 2948, 3001, codified as 19 U.S.C. § 2241. 1 CLUBB, *supra* note 28, at 237.

⁵¹ Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 302, 98 Stat. 2948, 3005, codified as 19 U.S.C. § 2416. Ted L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90, 107 n.144 (1992).

⁵² Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 501, 98 Stat. 2948, 3018, codified as 19 U.S.C. § 2461. McDorman, *supra* note 51, at 107 n.144.

⁵³ Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1, 2 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

⁵⁴ McDorman, *supra* note 51, at 95.

States and the perception that foreign markets remained relatively closed to U.S. goods and services while the U.S. market was open to all.⁵⁵ Section 301 of the Omnibus Trade and Competitiveness Act of 1988⁵⁶ substantially stiffened the process and enhanced the probability of complaints and retaliation.⁵⁷

The 1988 changes to Section 301 address several areas. The amendment transfers authority from the President to the USTR to determine whether a foreign practice is actionable and whether to take an action.⁵⁸ Congress also attempted to circumscribe the discretion to undertake retaliatory action, and expanded and clarified the trade practices that would lead to Section 301 action.⁵⁹ The 1988 Act set an abbreviated time period to identify an unfair foreign trade practice and implement a retaliatory action.⁶⁰ The new Super 301 requires the USTR to facilitate trade liberalization on a country-by-country basis.⁶¹ The new Special 301 requires the USTR, on a yearly basis, to identify and initiate Section 301 actions against foreign countries that deny adequate and effective protection of IP rights to U.S. persons and products.⁶²

2.1.2.2. Section 301

In general, under Section 301, whenever the USTR receives a petition against a foreign trade practice or voluntarily identifies a foreign trade practice, the USTR may initiate

⁵⁵ *Id.*

⁵⁶ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

⁵⁷ Bhagwati, *supra* note 53, at 1, 3.

⁵⁸ Omnibus Trade and Competitiveness Act of 1988, § 1301, amending the Trade Act of 1974, § 301(a)(1), codified at 19 U.S.C. § 2411. 1 CLUBB, *supra* note 28, at 240.

⁵⁹ Omnibus Trade and Competitiveness Act of 1988, § 1301, amending the Trade Act of 1974, § 301(d), codified at 19 U.S.C. § 2411(d)(3)-(5). McDorman, *supra* note 51, at 95-96.

⁶⁰ Omnibus Trade and Competitiveness Act of 1988, § 1301, amending the Trade Act of 1974, § 305(a)(1), codified at 19 U.S.C. § 2411. Ashman, *supra* note 23, at 138.

⁶¹ Omnibus Trade and Competitiveness Act of 1988, § 1302, § 301(a)(1), codified at 19 U.S.C. § 2411. Ashman, *supra* note 23, at 147.

⁶² Omnibus Trade and Competitiveness Act of 1988, § 1302, § 301(a)(1), codified at 19 U.S.C. §§2242(a), (b)(1)(A) (1988). McDorman, *supra* note 51, at 96.

investigation to determine whether the practice is actionable.⁶³ During the investigation, the USTR must negotiate with the foreign country regarding the trade practice.⁶⁴ If a foreign trade practice is found actionable and no progress can be made by bilateral negotiation, the USTR must determine whether to take a retaliatory action against the foreign country.⁶⁵ Once determined, the USTR must implement the retaliatory action.⁶⁶

Prior to 1988, Presidents' reluctance to use their retaliatory authority constituted a major problem as one commentator noted:

The Executive Branch was aware that the unilateral response by the President was considered by most countries to be illegal under international trade law, since the response did not emanate from a proceeding under Article XXIII or XXVIII of the GATT. Such a proceeding could thus have an adverse effect on foreign relations. Moreover, the country or countries against which the President acted might retaliate against U.S. exports. Consequently, successive presidents were reluctant to use their authority and permitted cases to drag on.⁶⁷

To overcome the President's scruples, Congress transferred the authority from the President to the USTR by enacting the 1988 amendments.⁶⁸ As a member of the administration, the USTR would not act without consulting the rest of the administration, but putting the USTR at the center of the process would further enhance the stature of the position.⁶⁹ On the other side, by expressing its dissatisfaction with the indecisiveness of prior Presidents and calling for a more decisive responses going forward, Congress compelled the USTR to implement more effective courses of action. This transfer of authority was intended to make the U.S. government action

⁶³ 19 U.S.C. § 2412.

⁶⁴ 19 U.S.C. § 2413.

⁶⁵ 19 U.S.C. § 2414.

⁶⁶ 19 U.S.C. § 2415.

⁶⁷ Martha A. Echols, *Section 301: Access to Foreign Markets from an Agricultural Perspective*, 6 INT'L TRADE L.J. 4, 16 (1980-1981).

⁶⁸ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

⁶⁹ GREG MASTEL, *AMERICAN TRADE LAWS AFTER THE URUGUAY ROUND* 18 (1996).

more routine and more certain.⁷⁰

One of the significant changes made to Section 301 by the 1988 amendments dealt with when the USTR may or must take action. Prior to 1988, action under Section 301 was entirely discretionary regardless of the nature of an allegation or the origin of a petition. Now action is mandatory on two occasions.⁷¹ One is when the USTR finds a denial of U.S. rights under a trade agreement;⁷² the other is when the USTR finds that an act, policy, or practice of a foreign country violates or denies benefits to the United States under any trade agreement, or is unjustifiable and burdens or restricts U.S. commerce.⁷³ A foreign act, policy, or practice is “unjustifiable” if it violates any international legal right of the United States, including denial of national or most-favored-nation (MFN) treatment, and the right of establishment or protection of intellectual property rights.⁷⁴ There are, however, some exceptions to the mandatory action. The USTR may refuse to act if the United States receives an unfavorable ruling under dispute settlement resolution on the denial of trade agreement benefits.⁷⁵ In addition, if the USTR finds that the foreign country is making progress in granting to the United States its trade agreement rights, or taking a retaliatory action would have an adverse impact on the U.S. economy or would be detrimental to national security, retaliation under Section 301 may be postponed or rejected.⁷⁶ Since the USTR still has leeway, the amendment is mandatory in form, but not in substance.⁷⁷

The USTR can take discretionary action when he or she finds a foreign act, policy, or

⁷⁰ 1 CLUBB, *supra* note 28, at 240.

⁷¹ Fred H. Jones, Comment, *U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets*, 14 N.C. J. INT'L L. & COM. REG. 439, 448 (1989).

⁷² 19 U.S.C. § 2411(a)(1)(A).

⁷³ 19 U.S.C. § 2411(a)(1)(B).

⁷⁴ 19 U.S.C. § 2411(d)(4).

⁷⁵ 19 U.S.C. § 2411(a)(2)(A).

⁷⁶ 19 U.S.C. § 2411(a)(2)(B).

⁷⁷ 1 CLUBB, *supra* note 28, at 241.

practice that burdens or restricts U.S. commerce is unreasonable or discriminatory, and such action is appropriate.⁷⁸ An unreasonable act, policy, or practice is an “unfair and inequitable” one but does not necessarily violate international legal rights of the United States.⁷⁹ One example is a foreign measure that denies fair and equitable provision of adequate and effective protection of intellectual property rights.⁸⁰ The USTR may base his or her finding of unreasonableness on the overall advancement by the foreign country.⁸¹ For the purpose of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account.⁸² A discriminatory act, policy, and practice policy includes denial of national or MFN treatment to United States goods, services, or investment.⁸³ Without regard to whether the action is characterized as mandatory or discretionary, the USTR’s action is still subject to the specific direction of the President.⁸⁴

For purposes of carrying out its new duties, the USTR is authorized to retaliate by suspending, withdrawing, or preventing benefits of trade agreement concessions.⁸⁵ The USTR can also impose duties or other import restrictions on goods or foreign countries, or fees or restrictions on services of foreign countries.⁸⁶ In taking import restriction actions, the USTR must give preference to the imposition of duties over the imposition of other import restrictions.⁸⁷ Any restriction imposed by the USTR is not limited to the specific sectors involved in the foreign trade barriers.⁸⁸ The USTR must limit his or her action in an amount

⁷⁸ 19 U.S.C. § 2411(b).

⁷⁹ 19 U.S.C. § 2411(d)(3)(A).

⁸⁰ 19 U.S.C. § 2411(d)(3)(B)(i)(II).

⁸¹ 19 U.S.C. § 2411(d)(3)(C).

⁸² 19 U.S.C. § 2411(d)(3)(D).

⁸³ 19 U.S.C. § 2411(d)(5).

⁸⁴ 19 U.S.C. § 2411(a)(1); 19 U.S.C. § 2411 (b)(2). *See Jones, supra* note 71, at 448-449.

⁸⁵ 19 U.S.C. § 2411(c)(1)(A).

⁸⁶ 19 U.S.C. § 2411(c)(1)(B).

⁸⁷ 19 U.S.C. § 2411(c)(5)(A).

⁸⁸ 19 U.S.C. § 2411(c)(3)(B).

equal to the trade burden on U.S. commerce.⁸⁹

In addition, Section 301 sets strict time limits. Upon receiving a petition, the USTR must determine whether to initiate an investigation in 45 days.⁹⁰ If the USTR makes an affirmative determination with respect to the petition, he or she must initiate an investigation regarding the issues raised in the petition.⁹¹ In the case of voluntarily identifying a foreign country, the USTR must initiate an investigation within 30 days after the identifying.⁹² If the investigation involves a trade agreement, the USTR must determine whether a foreign practice is actionable within 30 days after any dispute settlement procedure is concluded, or within 18 months after the investigation is initiated.⁹³ If no trade agreement involved, the time limit is 12 months after the investigation is initiated.⁹⁴ Once the USTR determines a practice at issue is actionable and what action will be taken, he or she must implement the determined action within 30 days after the determination is made.⁹⁵ The USTR may delay the implementation up to 180 days if requested by petitioners or domestic industries,⁹⁶ or the USTR determines substantial progress is being made or a delay is necessary or desirable.⁹⁷

To make the whole framework more efficient and effective, the 1988 Act establishes the “Super 301” and “Special 301” provisions. Both are designed to increase leverage for U.S. trade negotiators seeking to promote international trade liberalization.⁹⁸ Super 301 concerns overall foreign market access; Special 301 specializes in the protection of intellectual property rights.

⁸⁹ 19 U.S.C. § 2411(a)(3).

⁹⁰ 19 U.S.C. § 2412(a)(2).

⁹¹ 19 U.S.C. § 2412(a)(4).

⁹² 19 U.S.C. § 2412(b)(2)(A).

⁹³ 19 U.S.C. § 2414(a)(2)(A).

⁹⁴ 19 U.S.C. § 2414(a)(2)(B).

⁹⁵ 19 U.S.C. § 2415(a)(1).

⁹⁶ 19 U.S.C. § 2415(a)(2)(A)(i).

⁹⁷ 19 U.S.C. § 2415(a)(2)(A)(ii).

⁹⁸ Bello & Holmer, *supra* note 2, at 263.

2.1.2.3. Super 301

In the Trade Act of 1984, Congress directed the USTR to annually make national trade estimates and identify significant unfair foreign practices.⁹⁹ Congress then added the so-called “Super 301” provisions in 1988.¹⁰⁰ Super 301 is a unique tool that does not have a counterpart in prior law. Its principal aim is to strengthen U.S. access to international markets by systematically eliminating the entire web of market access impediments.¹⁰¹ The Super 301 provision requires the USTR, before the specified date, to identify and report trade liberalization priorities.¹⁰² These priorities include the elimination of priority practices which would most likely increase U.S. exports, an identification of priority foreign countries, and an estimation of the increase in U.S. exports which have occurred in the preceding year had the priority and practices not existed.¹⁰³ Within 21 days of submitting the report to the Congress, the USTR is required to initiate a Section 301 investigation with respect to the priority practices in the priority countries.¹⁰⁴ The USTR is then required to undertake negotiations with the priority countries to remove all such practices within three years of the beginning of the investigation.¹⁰⁵ Failing to reach an agreement, the USTR is required to take retaliatory action.¹⁰⁶

The original Super 301 provisions expired in 1990 when the Bush Administration declared

⁹⁹ 19 U.S.C. § 2241. MASTEL, *supra* note 69, at 17.

¹⁰⁰ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176-79, codified as 19 U.S.C. § 2420.

¹⁰¹ Howard Russell, Comment, *Overview of Amendments in the 1988 Omnibus Trade Bill: Section 301, “Super 301” and 337*, 1989 B.Y.U. L. REV. 729, 737 (1989).

¹⁰² Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176, codified as 19 U.S.C. § 2420(a). Ashman, *supra* note 23, at 147.

¹⁰³ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176-77, codified as 19 U.S.C. § 2420(a)(1). Ashman, *supra* note 23, at 147.

¹⁰⁴ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1177, codified as 19 U.S.C. § 2420(b). 1 CLUBB, *supra* note 28, at 243.

¹⁰⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1177-78, codified as 19 U.S.C. § 2420(c). 1 CLUBB, *supra* note 28, at 244.

¹⁰⁶ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1178, codified as 19 U.S.C. § 2420(d)(1)(C). 1 CLUBB, *supra* note 28, at 244.

there were no trade problems to justify the naming of priority foreign countries or priority foreign practices.¹⁰⁷ President Clinton revived Super 301 for 1994 and 1995 by his Executive Order No. 12901.¹⁰⁸ The Super 301 process was again extended through 1996 and 1997 by President Clinton's Executive Order No. 12973, but was not in operation in 1998.¹⁰⁹ On March 31, 1999, President Clinton reinstated Super 301 for another three years, 1999, 2000 and 2001 in his Executive Order No. 13116.¹¹⁰ Super 301 was fully implemented in only 1989 by the Bush Administration and was partially implemented in 1994.¹¹¹ Although Taiwan was considered a likely candidate, Taiwan was not named because agreements were struck to address many key trade problems.¹¹²

The establishment of the World Trade Organization (WTO) in 1994 and the revised Dispute Settlement Mechanism (DSM) under the WTO framework made Super 301 less significant. It is widely agreed that the revised DSM is the most important part of the new WTO.¹¹³ The critical element of the revised DSM is the absence of single country veto power to block the formation of a dispute settlement panel or the adoption of panel findings.¹¹⁴ Now panels can be formed without interruption and panel findings are generally adopted unless the WTO Council decides otherwise by consensus. Under the WTO framework, all countries, instead of resorting to unilateral action, have to go through the DSM. Since the revised DSM has become a more effective channel to resolve trade liberalization disputes, the need to use Super 301 for bilateral

¹⁰⁷ MASTEL, *supra* note 69, at 33.

¹⁰⁸ Exec. Order No. 12,901, 59 Fed. Reg. 10,727 (Mar. 3, 1994), *available at* <http://www.archives.gov/federal-register/executive-orders/pdf/12901.pdf>.

¹⁰⁹ Exec. Order No. 12,973, 60 Fed. Reg. 51,665 (Sep. 27, 1995), *available at* <http://www.gpo.gov/fdsys/pkg/FR-1995-10-02/pdf/95-24649.pdf>.

¹¹⁰ Exec. Order No. 13,116, 64 Fed. Reg. 16,333 (Mar. 31, 1999), *available at* <http://www.gpo.gov/fdsys/pkg/FR-1999-04-05/pdf/99-8433.pdf>.

¹¹¹ MASTEL, *supra* note 69, at 33-34.

¹¹² *Id.* at 35.

¹¹³ James Bacchus, *Lone Star: The Historic Role of the WTO*, 39 TEX. INT'L L.J. 401, 408 (2004).

¹¹⁴ JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO* 123 (2000).

trade agreements declined. Perhaps owing to the success of the revised DSM, Super 301 expired in 2002 and has not been reinstated since.

2.1.2.4. Special 301

The Omnibus Trade and Competitiveness Act of 1988 not only reiterated the U.S. concerns with intellectual property but also installed a more aggressive mechanism, Special 301, to protect intellectual property overseas.¹¹⁵ The Special 301 provisions are designed to use the threat of unilateral retaliation by the United States to pressure its trading partners to reform their currently deficient intellectual property practices.¹¹⁶

The Act's approach to the protection of intellectual property rights is very similar to the approach in Super 301.¹¹⁷ On a yearly basis, the USTR must, concurrently with its report under Super 301, file the NTE (National Trade Estimates) report to the President and Congress on significant foreign trade barriers.¹¹⁸ The NTE is to be completed by the USTR on or before March 31 of each year.¹¹⁹ Within 30 days after the issuance of the NTE, the USTR must identify those foreign countries that deny "adequate and effective protection of intellectual property rights,"¹²⁰ or deny "fair and equitable market access to United States persons who rely upon intellectual property protection."¹²¹ The USTR is further required to name as "priority foreign countries" those countries: (1) whose acts, practices, or policies are the most onerous or egregious and have the greatest adverse economic impact on the United States,¹²² and (2) that

¹¹⁵ Freedenberg, *supra* note 18, at 367.

¹¹⁶ Y. Kurt Chang, Comment, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206 (1994).

¹¹⁷ Freedenberg, *supra* note 18, at 367.

¹¹⁸ 19 U.S.C. § 2241(a).

¹¹⁹ 19 U.S.C. § 2241(b).

¹²⁰ 19 U.S.C. § 2242(a)(1)(A).

¹²¹ 19 U.S.C. § 2242(a)(1)(B).

¹²² 19 U.S.C. § 2242(b)(1)(A).

are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.¹²³ The USTR at any time may revoke or make an identification of a priority country, but must include in the semiannual report submitted to Congress a detailed explanation of the reasons for a revocation.¹²⁴

Within 30 days after the identification of priority foreign countries, the USTR must initiate Section 301 investigation.¹²⁵ If the USTR considers that rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹²⁶ are involved, the USTR is required to determine whether a foreign trade practice at issue is actionable within 30 days after the dispute settlement procedure is concluded;¹²⁷ if the USTR does not consider that a trade agreement, including TRIPS, is involved, the USTR has six months to complete the investigation and to seek to negotiate bilateral solutions.¹²⁸ The subsequent procedures for determination of investigation and implementation of retaliatory actions are the same as any Section 301 case.

In addition to periodical reports and negotiations, the USTR is required by Section 306 of the Trade Act to “monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution.”¹²⁹ If a foreign country is not satisfactorily implementing a measure or agreement, the USTR must, pursuant to Section 306, determine whether it is actionable and if the answer is affirmative, what action should be

¹²³ 19 U.S.C. § 2242(b)(1)(B).

¹²⁴ 19 U.S.C. § 2242(c).

¹²⁵ 19 U.S.C. § 2412(b)(2)(A).

¹²⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994). The TRIPS imposed a comprehensive set of relatively high international minimum standards governing IP rights and mandated a detailed set of enforcement procedures. J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 442 (2000).

¹²⁷ 19 U.S.C. § 2214(a)(3)(A)(i).

¹²⁸ 19 U.S.C. § 2214(a)(3)(A)(ii).

¹²⁹ 19 U.S.C. § 2416(a).

taken.¹³⁰

In practice, the USTR, according to the degree of inadequate intellectual property protection, classifies foreign trading countries into four categories, Priority Foreign Countries, Priority Watch List, Watch List, and Special Mention.¹³¹ As previously stated, priority foreign countries are defined in Section 301 and are subject to further Section 301 investigation. Both the Priority Watch List and Watch List were included in the first Special 301 report on May 25, 1989. Foreign countries that “maintain acts, policies, or practices that satisfy some or all of the statutory criteria for priority country identification” but “have made progress in recent bilateral or multilateral negotiations” are placed on Priority Watch List,¹³² and countries that “maintain intellectual property-related practices or barriers to market access that are of particular concern” are placed on the Watch List.¹³³ In 1994, the USTR created the Special Mention category to encompass countries that have made progress in improving the level of intellectual property protection but still need greater effort or further improvement.¹³⁴

A carrot and stick strategy is embodied in the classification. The carrot is the possibility that market access will be increased if a lower level is found, while the stick is the threat of retaliation if a higher level is found.¹³⁵ In addition, with ongoing oversight and new issues, trading partners are constantly reminded to attend to domestic intellectual property protection.

¹³⁰ 19 U.S.C. § 2416(b)(1).

¹³¹ Timothy C. Bickham, *Protecting U.S. Intellectual Property Rights Abroad with Special 301*, 23AIPPLA Q.J. 195, 200 (1995).

¹³² Office of the United States Trade Representative (USTR), *Fact Sheet “Special 301” on Intellectual Property, May 25, 1989*, reprinted in 6 INT’L TRADE REP. (BNA) 718 (May 31, 1989), available at http://keionline.org/sites/default/files/ustr_special301_1989.pdf.

¹³³ *Id.*

¹³⁴ Office of the USTR, *US Announces Three Decisions: Title VII, Japan Supercomputer Review, Special 301, Apr. 30, 1994*, reprinted in 11 INT’L TRADE REP. (BNA) 722 (May 4, 1994), available at http://keionline.org/sites/default/files/ustr_special301_1994.pdf.

¹³⁵ See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limit Case for Section 301*, 23 LAW & POL’Y INT’L BUS. 263, 264 (1992); Kevin M. McDonald, *The Unilateral Undermining of Conventional International Trade Law via Section 301*, 7 J. INT’L L. & PRAC. 395, 400 (1998).

2.2. Taiwan's Comparative Advantage

2.2.1. Taiwan's Natural and Human Resources

Taiwan is over-populated and resource poor. As an East Asia island, Taiwan is 100 to 150 miles (160 to 240 kilometers) off the southeastern coast of China across the Taiwan Strait.¹³⁶ Taiwan is about one-third the size of the U.S. state of Ohio or Virginia.¹³⁷ Taiwan measures 13,892 square miles (35,980 square kilometers),¹³⁸ slightly larger than Belgium (11,787 square miles (30,528 square kilometers))¹³⁹ but smaller than Switzerland (15,937 square miles (41,277 square kilometers)).¹⁴⁰ Taiwan has a population of nearly 23.2 million,¹⁴¹ much more than Belgium (10.4 million)¹⁴² and Switzerland (7.9 million).¹⁴³ Taiwan's population density is around 1,670 per square mile (645 per square kilometers),¹⁴⁴ higher than Belgium (882),¹⁴⁵ Switzerland (495),¹⁴⁶ South Korea (1270),¹⁴⁷ and Japan (873).¹⁴⁸

The location on the boundary between the Philippine Sea Plate and the Eurasian Plate makes Taiwan mountainous and prone to earthquakes. Taiwan is a mountainous island with a

¹³⁶ See DENNY ROY, *TAIWAN: A POLITICAL HISTORY 2* (2003); Ronald G. Knapp, *The Shaping of Taiwan's Landscapes*, in *TAIWAN: A NEW HISTORY 4* (Murray A. Rubinstein ed., 1999).

¹³⁷ ROY, *supra* note 136, at 2; Knapp, *supra* note 136, at 4.

¹³⁸ *Taiwan, the World Factbook*, CENTRAL INTELLIGENCE AGENCY (CIA), <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (last visited Jun. 28, 2013).

¹³⁹ *Belgium, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/be.html>

¹⁴⁰ *Switzerland, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> (last visited Jun. 28, 2013).

¹⁴¹ *Taiwan, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (last visited Jun. 28, 2013).

¹⁴² *Belgium, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/be.html> (last visited Jun. 28, 2013).

¹⁴³ *Switzerland, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> (last visited Jun. 28, 2013).

¹⁴⁴ 23.2 million/13,892 square miles.

¹⁴⁵ 10.4 million/11,787 square miles.

¹⁴⁶ 7.9 million/15,937 square miles.

¹⁴⁷ 48.9 million/38,502 square miles. *South Korea, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last visited Jun. 28, 2013).

¹⁴⁸ 127.4 million/145,913 square miles. *Japan, the World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Jun. 28, 2013).

prominent north/south longitudinally trending backbone and divided by central mountains range into two parts, the western and eastern Taiwan.¹⁴⁹ Around 90 percent of the population lives on the western side. Crossed by the Tropic of Cancer and lying between the Pacific Ocean and the Asia Continent, the tropical island's climate is heavily influenced by both. Taiwan's summer is noted by its heat, humidity, and typhoons.¹⁵⁰

With only one-third of its land arable,¹⁵¹ Taiwan is not suitable for large-scale farming or ranching. In spite of its warmth and rainfall, its agriculture industry can supply its own large population fairly well. On the other hand, Taiwan has a small deposit of natural resources. Due to intensive exploitation, mineral resources such as coal, gold, and wild animal reserves such as deer are virtually exhausted. Much of its forestry resources were harvested during Japanese rule and have only recovered slightly since. To this day, forests do not contribute to significant timber production.

Given a large population and poor natural resources, it is inevitable that Taiwan has to base its development on its human resources and mostly rest on commerce with foreign countries. Among foreign countries, the United States is the most important because of its unique political and economic ties with Taiwan.

2.2.2. Taiwan's Political Ties with the United States

Due to China's defeat in the First Sino-Japanese War in 1895, Taiwan was ceded by China's Qing Dynasty to Japan. Taiwan was then ruled by Japan until the end of World War II.¹⁵² The Qing Dynasty was overthrown in 1911 and the Republic of China (ROC) was established. Under

¹⁴⁹ Knapp, *supra* note 136, at 5.

¹⁵⁰ See ROY, *supra* note 136, at 2; Knapp, *supra* note 136, at 6-8.

¹⁵¹ ROY, *supra* note 136, at 2.

¹⁵² See *id.* at 32.

the ROC regime, Chiang Kai-shek's Nationalist Party, Kuomintang (KMT), was the major ruling party. At the end of World War II, Taiwan was returned by Japan to ROC.¹⁵³ Later, the civil war between nationalists and communists resumed. Following the defeat of KMT, the ROC government under Chiang's leadership fled to Taiwan in 1949; meanwhile, communists established the People's Republic of China (PRC) in mainland China.¹⁵⁴ Both ROC and PRC have claimed sovereignty over China including mainland China and Taiwan.

Taiwan's unification under the PRC sovereignty has been a fundamental policy of the Chinese Communist Party (CCP) since 1949. In its Constitution, it is so written, "Taiwan is the sacred territory of China."¹⁵⁵ Since the establishment of PRC in 1949, Taiwan has been considered by the CCP as a rebellious province. Under PRC's "One China" policy, anything to do with Taiwan is China's domestic affairs. PRC hopes to undermine ROC resistance to reunification by interfering with its relationships with foreign countries. Since 1949, the CCP has tried to oust Taiwan from the United Nations (UN).¹⁵⁶ With the support of the United States and its allies, Taiwan was able for many years to avoid losing its seats at the UN.¹⁵⁷ During the Cold War, the United States viewed Taiwan as an indispensable ally thanks to Taiwan's geographic position to block a gradual expansion of communism.¹⁵⁸ Through the 1954 Treaty of Mutual Defense, the United States increased military cooperation with the Chiang regime.¹⁵⁹ In

¹⁵³ See *id.* at 56.

¹⁵⁴ See *id.* at 81.

¹⁵⁵ "Taiwan shi Zhonghua Renmin Gongheguo de shensheng lingtu de yibufen. Wancheng tongyi zuguo de daye shi baogua Taiwan tongbao zainei de quan Zhongguo renmin de shensheng zhize." (台湾是中华人民共和国的神圣领土的一部分，完成统一祖国的大业是包括台湾同胞在内的全中国人民的神圣职责。) [Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.] XIANFA (宪法) [CONSTITUTIONAL LAW] Qianyan (前言) [Preamble] (1982) (PRC), available at http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372962.htm.

¹⁵⁶ See CZESLAW TUBILEWICZ, TAIWAN AND THE SOVIET BLOC, 1949-1991, 16-17, 20 (2005).

¹⁵⁷ See ARTHUR I. CYR, TAIWAN: THE COMMERCIAL STATE 39, 42 (2005); ROY, *supra* note 136, at 134.

¹⁵⁸ See ROY, *supra* note 136, at 113.

¹⁵⁹ Mutual Defense Treaty between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T.

addition, the United States provided Taiwan with substantial financial and material support to help it rebuild its economy after 1949.¹⁶⁰

The U.S. policy on Taiwan started to change in the late 1960s, however.¹⁶¹ In November 1969, the United States withdrew the Seventh Fleet from the Taiwan Strait. In 1971 Taiwan lost its “China seat” at the UN to the PRC. Nixon’s historic trip to China and Joint US-China Communiqué in 1972 affirmed the United States’ ultimate objective of the withdrawal of all its forces and military installations from Taiwan.¹⁶² Without its UN membership, Taiwan was unable to maintain diplomatic relations with most of the countries in the world.¹⁶³ Finally on January 1, 1979, the Carter Administration changed its diplomatic recognition of Chinese government from ROC to PRC. The United States recognized PRC as the sole government of China and acknowledged China’s one-China policy.¹⁶⁴ Nevertheless, for the best interests of the United States in the triangular U.S.-PRC-ROC relations, the United States, pursuant to its domestic Taiwan Relations Act,¹⁶⁵ not only continued de facto diplomatic relations with Taiwan but also kept providing Taiwan with military equipment for self-defense even though this causes problems with its diplomatic relations with PRC.¹⁶⁶

Under PRC’s threat, Taiwan has been heavily dependent on the United States in diplomatic

433, T.I.A.S. No. 3178. *See* TUBILEWICZ, *supra* note 156, at 20.

¹⁶⁰ *See* ROY, *supra* note 136, at 99.

¹⁶¹ “The new decade of the 1960s witnessed a much more unpredictable, uncertain time in this constellation of forces and influences on international relations in Asia and else. The west was steadily losing the reliable anti-Communist majority in the United Nations General Assembly as a range of new nations, primarily former colonial territories, came into the world body.” CYR, *supra* note 157, at 42.

¹⁶² Joint Communiqué between the People’s Republic of China and the United States of America Issued in Shanghai, Feb. 28, 1972, Dep’t St. Bull., Mar. 20, 1972, at 435. TUBILEWICZ, *supra* note 156, at 20. *See also*, ROY, *supra* note 136, at 131.

¹⁶³ *See* CYR, *supra* note 157, at 45.

¹⁶⁴ *See* ROY, *supra* note 136, at 137-142.

¹⁶⁵ Taiwan Relations Act, April 10, 1979, Pub. L. No. 96-8, 93 Stat. 14, codified as 22 U.S.C. § 3301-3316.

¹⁶⁶ Background of the Taiwan Relations Act, *see* Jaw-Ling Joanne Chang, *Managing U.S.-Taiwan Relations: 20 Years after the Taiwan Relations Act*, in UNITED STATES - TAIWAN RELATIONS: TWENTY YEARS AFTER THE TAIWAN RELATIONS ACT 14-17 (Jaw-ling Joanne Chang & William W. Boyer eds., 2000).

spheres. Before democracy came to Taiwan in the late 1980s, President Chiang Kai-shek and his son President Chiang Ching-kuo's "mainlander" regime relied on military and economic support from the United States to sustain their dictatorship based on martial law imposed as a result of the unresolved civil war with China.¹⁶⁷ Providing a classic formulation of what constitutes a democracy was given by Schumpeter as a free vote, free press, and freedom of association,¹⁶⁸ "[p]rior to the lifting of martial law in 1987 and subsequent reforms of the political process in Taiwan, there was no question that ROC could not be classed as a democracy."¹⁶⁹ The transition from dictatorship to liberal democracy began before the death of Chiang Ching-kuo in 1988 and continued through the first administration of Lee Teng-hui, the first "Taiwanese" to lead ROC.¹⁷⁰ After the KMT government arrested and jailed major native opposition elites with treason in 1979,¹⁷¹ Chiang Ching-kuo, during his late presidency, allowed a few seats in Parliament, in which the major of seats were held by mainlander legislators elected before 1949, to be held by the opposition political party, the Democratic Progress Party (DPP); he also lifted the ban on new newspaper media.¹⁷² Fundamental changes came to Taiwan after Chiang's death, including the first elected Taiwanese President in 1990, an election for all seats in Parliament in 1991, and the abolishment of the treason crime against free speech in 1992.¹⁷³

¹⁶⁷ See Peter Chen-main Wang, *A Bastion Created, A Regime Reformed, An Economy Reengineered, 1949-1970*, in *TAIWAN: A NEW HISTORY* 325-328 (Murray A. Rubinstein ed., 1999)

¹⁶⁸ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (3rd ed. 1962).

¹⁶⁹ Jane Kaufman Winn & Tang-chi Yeh, *The Role of Lawyers in Taiwan's Political Transformation*, 20 *LAW & SOC. INQUIRY* 561, 588 (1995).

¹⁷⁰ See ROY, *supra* note 136, at 179-182, 225-226.

¹⁷¹ The "Kaohsiung Incident," see Murray A. Rubinstein, *Political Taiwanization and Pragmatic Diplomacy: The Eras of Chiang Ching-kuo and Lee Teng-hui, 1971-1994s*, in *TAIWAN: A NEW HISTORY* 441-443 (Murray A. Rubinstein ed., 1999); Winn & Yeh, *supra* note 169, at 592.

¹⁷² See Cal Clark, *Successful Democratization in the ROC: Creating a Security Challenge*, in *TAIWAN'S NATIONAL SECURITY: DILEMMAS AND OPPORTUNITIES* 22 (Alexander C. Tan, Steve Chan & Calvin Jillson eds., 2001) (describing that the "removing authoritarian institutions" from 1986 to 1990 is the first period of Taiwan's transition to democracy).

¹⁷³ See *id.* at 22-24 (describing that the "exercising popular sovereignty" from 1991 to 1994 is the second period of Taiwan's transition to democracy).

In 2000, Chen Shui-bian, the candidate of the long-term opposition DPP,¹⁷⁴ was elected as the President of ROC.¹⁷⁵ Because the DPP has often taken a relatively strong position with regard to Taiwan independence, the KMT has switched its original opposition to CCP rule and now advocates closer relations with PRC.¹⁷⁶ Since the KMT's President Ma Ying-jeou came to power in 2008, Taiwan and China have signed several economic and trade cooperation agreements including the Economic Cooperation Framework Agreement (ECFA), which aims to reduce tariffs and commercial barriers between two sides.¹⁷⁷ Given that China has never formally renounced its claim of entitlement to retake Taiwan by force if necessary, the asymmetric nature of PRC and ROC military power, and the fact that the United States remains the only country providing military equipment to Taiwan, Taiwan remains very dependent on the United States.

2.2.3. Taiwan's Economic Ties with the United States

The wealth of Taiwan has come from trade. As a Japanese colony, Japan took advantage of Taiwan to produce rice, sugar and timber for the Japanese Empire's needs. Taiwan's infrastructure in agriculture and industry was therefore established.¹⁷⁸ After the Second World War and the Chinese Civil War, Taiwan recovered from the wartime destruction with the help of U.S. military and economic aid.¹⁷⁹ Taiwan's recovery was based on central planning but the private sector also played a key role.¹⁸⁰

¹⁷⁴ See Winn & Yeh, *supra* note 169, at 591 (describing the founding of the DPP under the authoritarian KMT regime).

¹⁷⁵ See ROY, *supra* note 136, at 179-182, 227-231.

¹⁷⁶ See Dennis V. Hickey, *President Ma Ying-Jeou and Taiwan's Internal and External Challenges*, in *TAIWAN AT A TURNING POINT 23* (Seyom Brown et al. eds., 2009).

¹⁷⁷ Haixia Langan Jingji Hezuo Jiagou Xieyi (海峽兩岸經濟合作架構協議) [Economic Cooperation Framework Agreement]. For a general introduction, *see id.* at 27.

¹⁷⁸ See ROY, *supra* note 136, at 38-40, 99.

¹⁷⁹ *See id.* at 99.

¹⁸⁰ "The number of small businesses increased rapidly in the 1960s and 1970s... These small and medium-sized enterprises continue to play a major role in Taiwan's overall manufacturing capacity, far more than in South Korea,

Taiwan's post-war economic development featured a persistent high growth rate, a stable inflation rate, and an even income distribution that was accompanied by a drastic change in industrial structure.¹⁸¹ With its abundant and cheap labor, labor-intensive industries developed in Taiwan first. Next, light industries such as textiles, shoes and toys gradually developed.¹⁸² During the 1970s, Taiwan's economic structure started to transform into capital-intensive industries, such as electronics and machinery. At that time, "[f]oreign exchange reserves had grown steadily to high levels, which facilitated capital formation by domestic investors and manufacturers."¹⁸³ On account of the rapid growth, Taiwan won its name as one of "Four Asian Dragons."¹⁸⁴ Over the course of the 1980s, Taiwan turned to emphasize strategic high-technology, value-added, and energy-efficient industries.¹⁸⁵

After World War II, Taiwan took advantage of the fruits of GATT's multilateral trading system to expand its exports and achieve remarkable economic success.¹⁸⁶ Taiwan's average per capita income in 1949 was below \$100 a year, about the same as that of India,¹⁸⁷ and rose to over \$7,500 by 1990¹⁸⁸ and over \$20,000 in 2011.¹⁸⁹ "Taiwan's remarkable performance in

where the government encouraged the concentration of business assets in a small number of very large firms." EZRA F. VOGEL, *THE FOUR LITTLE DRAGONS: THE SPREAD OF INDUSTRIALIZATION IN EAST ASIA* 12 (1991); "Reflecting a comparatively high comfort level with public-private cooperation and the use of state resources for commercial purposes, there has been steady evolution of the policies and priorities of the ROC toward the economy since the period immediately after World War II." CYR, *supra* note 157, at 13. *See also*, ROY, *supra* note 136, at 97-98.

¹⁸¹ Chu-Chia Lin, *Economic Development and Structural Change in Taiwan*, in *THE ROC ON THE THRESHOLD OF THE 21ST CENTURY: A PARADIGM REEXAMINED* 85, 90 (Chien-min Chao & Cal Clark eds., 1999).

¹⁸² "From 1952 to 1959 foreign investment had amounted to \$20 million; this increased between 1966 and 1973 to \$950 million." CYR, *supra* note 157, at 15.

¹⁸³ *Id.* at 14.

¹⁸⁴ VOGEL, *supra* note 180, at 1.

¹⁸⁵ CYR, *supra* note 157, at 15.

¹⁸⁶ *See* Da-Nien Liu & Wen-Jung Lien, *The Trade Relationship between Taiwan and the U.S.*, in *UNITED STATES - TAIWAN RELATIONS: TWENTY YEARS AFTER THE TAIWAN RELATIONS ACT* 127 (Jaw-ling Joanne Chang & William W. Boyer eds. 2000).

¹⁸⁷ VOGEL, *supra* note 180, at 12.

¹⁸⁸ *Id.* at 38.

¹⁸⁹ *Taiwan Statistical Data Book*, COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, <http://www.cepd.gov.tw/m1.aspx?sNo=0000200> (last visited Jun. 28, 2013).

trade and success of the export-oriented strategy are frequently cited as a model for other developing countries.”¹⁹⁰ In fact, Taiwan’s export-oriented trade has been deeply rooted in exports to the United States¹⁹¹ and has resulted in a large amount trade surplus with the United States.¹⁹² According to the Office of the USTR, the U.S. goods trade deficit with Taiwan was \$15.4 billion in 2011, a 57.4 % increase (\$5.6 billion) from 2010.¹⁹³ Taiwan was the 10th largest goods trading partner, the 15th largest goods export market, and the 10th largest supplier of goods imports of the United States.¹⁹⁴ The following table shows Taiwan’s overall increasing trade surplus from the United States since 1980.

Table 2-1 U.S. Goods Trade with Taiwan (in billions of dollars)

	1980	1985	1990	1994	2000	2008	2009	2010	2011
Balance	-2.6	-11.7	-11.2	-9.6	-16.1	-11.4	-9.9	-9.8	-15.4
Exports	4.3	4.7	11.5	17.1	24.4	24.9	18.5	26.0	25.9
Imports	6.9	16.4	22.7	26.7	40.5	36.3	28.4	35.8	41.3

Source: Office of the USTR.¹⁹⁵

Since 1949, the United States has always been one of Taiwan’s most important trading partners. According to Taiwan’s Bureau of Foreign Trade, the United States was Taiwan’s third largest trading partner as well as the third largest export market in 2011.¹⁹⁶ Another statistic prepared by Taiwan’s Council for Economic Planning and Development is the following table which indicates that the United States had been Taiwan’s largest export market until 2000. After 2000, China, with its Hong Kong Special Administrative Region, replaced the United States and became Taiwan’s largest export market.

¹⁹⁰ See Liu & Lien, *supra* note 186, at 128.

¹⁹¹ See *id.* at 127.

¹⁹² See *id.* at 127-128.

¹⁹³ Taiwan, OFFICE OF THE USTR, <http://www.ustr.gov/countries-regions/china/taiwan> (last visited Jun. 28, 2013).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Meiguo Guojia Dangan Taimei Shuangbian Guanxi* (美國國家檔案台美雙邊關係) [*The United States Profile for Taiwan-U.S. Bilateral Relations*], JINGJIBU GUOJI MAOYIJU (經濟部國際貿易局) [BUREAU OF FOREIGN TRADE], <http://www.trade.gov.tw/Files/Doc/1010716> 美國國家檔案台美雙邊關係.doc (last visited Jun. 28, 2013).

Table 2-2 Taiwan's Commodity Export Trade with Major Trading Partners (Percentage)

Period	Total	USA	Hong Kong	Japan	Mainland China
1985	100.0	48.1	8.3	11.3	0.0
1986	100.0	47.7	7.3	11.4	0.0
1987	100.0	44.1	7.7	13.0	0.0
1988	100.0	38.7	9.2	14.5	0.0
1989	100.0	36.3	10.6	13.7	0.0
1990	100.0	32.4	12.7	12.4	0.0
1991	100.0	29.3	16.3	12.1	0.0
1992	100.0	28.9	18.9	10.9	0.0
1993	100.0	27.7	21.7	10.6	0.0
1994	100.0	26.2	22.9	11.0	0.1
1995	100.0	23.7	23.4	11.8	0.3
1996	100.0	23.2	23.1	11.8	0.5
1997	100.0	24.2	23.5	9.6	0.5
1998	100.0	26.6	22.6	8.4	0.8
1999	100.0	25.3	21.7	9.7	2.1
2000	100.0	23.4	21.5	11.1	2.9
2001	100.0	22.3	22.7	10.3	3.9
2002	100.0	20.2	24.4	9.1	7.8
2003	100.0	17.6	20.5	8.3	15.2
2004	100.0	15.8	18.0	7.6	19.9
2005	100.0	14.7	17.2	7.6	22.0
2006	100.0	14.4	16.7	7.3	23.1
2007	100.0	13.0	15.4	6.5	25.3
2008	100.0	12.0	12.8	6.9	26.2
2009	100.0	11.6	14.5	7.1	26.6
2010	100.0	11.5	13.8	6.6	28.0
2011	100.0	11.8	13.0	5.9	27.2

Source: Taiwan Statistical Data Book.¹⁹⁷

For decades, Taiwan has enjoyed a large trade surplus with the United States. The U.S. market is so important that Taiwan cannot stand any loss of it. However, from the U.S. perspective, Taiwan is just one of the many foreign markets and Taiwan's many competitors are waiting to replace Taiwan.¹⁹⁸ Taiwan's successful export-oriented policy and high dependence on the U.S. market contribute to Taiwan's unequal bargaining power in trade negotiations with the United States.¹⁹⁹

¹⁹⁷ *Taiwan Statistical Data Book*, COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, <http://www.cepd.gov.tw/m1.aspx?sNo=0000200> (last visited Jun. 28, 2013).

¹⁹⁸ "By contrast, the United States is one of the least trade-dependent countries in the world and its dependency on trade with Taiwan is relatively small." Liu & Lien, *supra* note 186, at 137.

¹⁹⁹ *See id.*

Another factor that aggravates the dependence is Taiwan-China relations. Although China has now become Taiwan's largest trading partner and export market, Taiwan still lacks formal diplomatic relations with the PRC and the PRC continues to push for reunification by force if necessary. The U.S. market provides a safety net for Taiwan's economy because it is an alternative to the China market.

Since 1979, Taiwan has used trade relations both as an economic development strategy and also for national security reasons to help offset its loss of diplomatic recognition. Since its ouster from the UN, Taiwan has failed to join any international organization except the WTO that allows a separated custom territory, not necessary a sovereign state, for its membership.²⁰⁰ Because China is now the world's second largest economy and increasingly assertive in international relations, it is impossible for Taiwan to protect its interests through traditional diplomatic channels. To avoid China's aggression, the most feasible strategy for the small island is to strengthen economic ties with foreign countries. Taiwan's substantive diplomacy based on trade relations can be seen in the following observation:

Diplomatic isolation has forced Taiwan to undertake a so-called "substantive diplomacy" to circumvent the diplomatic siege. It is generally believed that accelerating market openness to foreigners was the best defense for Taiwan's security, and maintaining good economic and trade relations with its trade partners was the best diplomatic strategy. Trade thus has become the center of Taiwan's substantive foreign relations.²⁰¹

2.2.4. Taiwan's Development Strategy

One Taiwanese writer labeled Taiwan the "Orphan of Asia" to express his sentiment that

²⁰⁰ World Trade Organization, Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/L/433 (Nov. 23, 2001). See Qingjiang Kong, *Cross-Taiwan Strait Relations: What are the Legitimate Expectations from the WTO?* 14 MINN. J. GLOBAL TRADE 91 (2004) (describe the relationship and interaction between China and Taiwan under the WTO framework).

²⁰¹ Y. Kurt Chang, *supra* note 116, at 217.

Taiwanese people are confused with who they are.²⁰² The island of Taiwan was originally settled by Austronesian people before recorded history;²⁰³ a wave of migration from China's Fujian province to Taiwan beginning in the 17th century produced the current population of "Taiwanese" people.²⁰⁴ Occupants of Taiwan have in turn been subjected to Dutch, Chinese Ming Dynasty, Chinese Cheng Kingdom, Chinese Qing Dynasty, Japan, and ROC rule, making their self-identity ambiguous.²⁰⁵ Early Taiwanese elites were educated by KMT to rise up and retake mainland China,²⁰⁶ and modern Taiwanese elites define their mission as surviving isolation. The former President Lee Teng-hui analogized him and Taiwanese people to Moses and the Israelites in the Bible. His wish that one day he would lead Taiwanese people to a promised land reflects Taiwanese elites' vision for an unshackled and prosperous land.²⁰⁷

In light of the economic transformation over the past 50 years, Taiwanese elites have learned that technology is the key to the future. To become a developed country, Taiwan has to

²⁰² ZHUOLIU WU, *ORPHAN OF ASIA* (Ioannis Mentzas trans., 2006) (1946).

²⁰³ See Michael Stainton, *The Politics of Taiwan Aboriginal Origins*, in *TAIWAN: A NEW HISTORY* 37, 38-39 (Murray A. Rubinstein ed., 1999) (describing the origin of Taiwan's aboriginal people and discussing the aboriginal's claim and movement for the land of Taiwan); *Aboriginal Self-Government: Taiwan's Uncompleted Agenda*, in *TAIWAN: A NEW HISTORY* 422-429 (Murray A. Rubinstein ed., 1999) (describing the aboriginal self-government movement since the late 1980s).

²⁰⁴ See ROY, *supra* note 136, at 5 (describing the Fujianese experiences under Japanese colonial rule and Mainlander-dominated postwar Republic of China government forged a strong "Taiwanese" identity). Nevertheless, the recent DNA test revealed that a great number of the present "Fujianese" people in Taiwan are descendants of Fujianese immigrants and Pingpu-Aborigines. See MELISSA J. BROWN, *IS TAIWAN CHINESE? THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES* 10 (2004).

²⁰⁵ "Public opinion polls in recent years consistently demonstrate a stronger preference for a new, indigenous Taiwanese identity over the traditional pan-Chinese identity. This is more so when the PRC heightens its rhetoric and campaign—military, diplomatic or otherwise—to force reunification on Taiwan." Lawrence S. Liu, *New Identity, Old System and the Relevance of Law: Taiwan after Two Decades of the Taiwan Relations Act*, in *UNITED STATES - TAIWAN RELATIONS: TWENTY YEARS AFTER THE TAIWAN RELATIONS ACT* 153 (Jaw-ling Joanne Chang & William W. Boyer eds., 2000)

²⁰⁶ When talking about Taiwan's early "super-technocrats," Vogel indicates, "They had a sense of responsibility for the fate of Taiwan, and they cultivated talented people under them who held most of the important positions in the economy for four decades. . . They were part of the world scientific and development communities, and they believe in growth and progress. Unlike the economists, who stressed market forces, they believed in the importance of social engineering, and particularly in the important role of government in helping to acquire technology, allocate funds for key projects, and guide the development of the economy." VOGEL, *supra* note 180, at 26, 27.

²⁰⁷ See Jennifer Lin, *The Man Behind Taiwan Standoff—Why China Fears President Lee Teng Hui, Saturday's Vote*, *SEATTLE TIMES*, Mar. 20, 1996, <http://community.seattletimes.nwsources.com/archive/?date=19960320&slug=2319954> (last visited Jun. 28, 2013).

do what developed countries have done. Seeing developed countries' innovation based on intellectual property, Taiwanese elites have sought to duplicate the actions of developed countries. Since the Taiwanese elites' attitude toward technology is positive, it is no wonder that the Taiwanese government tended to embrace, rather than defy, the introduction of an IP legal system. Specifically, Professor William P. Alford pointed out one of the factors about Taiwan's compliance with the U.S. Special 301 has to do with Taiwan itself:

Nor was pressure much more effective at mid-century. Many in the room, no doubt, are familiar with the extensive and varied pressure applied by the US to the ROC during the 1950s, 60s, and 70s—including the threat of withdrawing significant portions of American military assistance. Nonetheless, although the ROC was then far more vulnerable diplomatically and economically than it is today, these tactics failed to yield the desired result. Rather, what changed in recent years was the ROC itself. In recent years, both government and industry on Taiwan have come to realize that the engine that propelled the island's great economic growth—the export of inexpensive, labor-intensive products—will not suffice to sustain prosperity in the future, given lower-priced competition elsewhere and a growing concern about the quality of the Taiwan environment. With this has come a growing awareness that Taiwan can no longer afford to rely as heavily as it has on foreign-derived technologies and so consign itself to lagging behind its economic competitors, including the US and Japan. As a consequence, both government and industry have begun to make significant investment in scientific and technological research and development—which, in turn, has created a small, but rapidly expanding constituency that has its own rationale for protecting intellectual property. So it is that organizations such as the august Chinese National Federation of Industries have become earnest backers of intellectual property. Or, on the trademark front, that companies now reaping the benefit of homegrown trademarks—such as Kenex, Acer and Tatung—have joined in the effort to foster a more serious climate for intellectual property protection.²⁰⁸

Thus, Taiwan's scenario is quite different from the other developing countries. When some developing countries were justifying intellectual property piracy or arguing the justification of intellectual property rights from their stand, the Taiwanese government, in contrast, was eager to develop intellectual property and join TRIPS/WTO for the future.

²⁰⁸ Alford, *supra* note 21, at 104-105.

2.3. How Did the Special 301 Affect Taiwan's IP Policy?

2.3.1. Special 301 Reports and Taiwan's Response

Due to Taiwan's heavy dependence on the United States, the Taiwan government always complied with U.S. demands in the Special 301 reports. Whenever demanded by the United States, Taiwan would soon negotiate with the United States, sign bilateral agreements, enact or amend domestic intellectual property laws, and strengthen enforcement to avoid any adverse effects on Taiwan-U.S. relations. The following chronicle will detail the relationship between U.S. demands and Taiwan's compliance.

2.3.1.1. 1989 to 1991 Special 301 Reports

Until 1990, Taiwan's copyright law did not have clear rules regarding copyright protection for audiovisual works. By taking advantage of the legal ambiguity, Taiwan's Movie Television (MTV) centers where a small number of customers could rent and watch movies in separated rooms like mini-theaters started to prosper in the mid-1980s. Upon U.S. demand for protecting American movies from MTV piracy, Taiwan's executive branch of the government, the Executive Yuan, approved the Enforcement Plan on May 4, 1989 to strengthen criminal prosecution against MTV piracy. A memorandum of understandings in which Taiwan agreed to fix its copyright law was also initialed by the representatives of both sides, the American Institute in Taiwan and the Coordination Council for North American Affairs.²⁰⁹

Soon after Taiwan's efforts, the USTR placed Taiwan, along with Brazil, India, the Republic

²⁰⁹ "The so-called American Institute in Taiwan (AIT) was created to take over all functions of former U.S. embassy and consular services in Taiwan. The 'Coordination Council for North American Affairs (CCNAA)' was established to serve as a counterpart of the AIT. All treaties and agreements between the United States and ROC, except the Mutual Defense Treaty, have continued in force. Section 4 of the Taiwan Relations Act declares that 'the absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan'; 'whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with such respect to Taiwan.'" Jaw-Ling Joanne Chang, *supra* note 166, at 16. The CCNAA was renamed the Taipei Economic and Cultural Representative Office in the United States (TECRO) in 1995.

of Korea, Mexico, PRC, Saudi Arabia, and Thailand, on the Priority Watch List in the first Special 301 report on May 25, 1989. The USTR even developed action plans for Taiwan's enforcement of Taiwan's patent, copyright, and trademark laws as measured by: (1) specific and effective actions by Taiwanese enforcement entities, (2) concrete evidence of decreased sales of pirated and counterfeit items, and (3) implementation of measures to fulfill obligations under the recently agreed bilateral copyright agreement and other bilateral intellectual property agreement.²¹⁰

In response, Taiwan immediately signed the Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works with the United States on June 27, 1989 (the Audiovisual Works Agreement).²¹¹ In the agreement, the Taiwanese government agreed to make every effort to incorporate MTV's use of audiovisual works into the definition of "public performance rights" in Taiwan's copyright law,²¹² and conduct frequent and repeated raids on any MTV stores in accordance with the Enforcement Plan.²¹³ Notably, Taiwan promised to provide information about prosecutions including number of prosecutions, settlements, and fines, and jail terms imposed.²¹⁴ On the other side, the United States recognized Taiwan's efforts and commitments, and anticipated effective implementation of Taiwan's commitments would contribute significantly to the improvement of trade relations between two countries.²¹⁵ Later

²¹⁰ Office of the USTR, *Fact Sheet "Special 301" on Intellectual Property, May 25, 1989*, *supra* note 132.

²¹¹ *Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works between the Coordination Council for North American Affairs and the American Institute in Taiwan*, AMERICAN INSTITUTE IN TAIWAN (AIT), <http://www.ait.org.tw/en/tecro-agreement/90.pdf> (last visited Jun. 28, 2013). According to the National Archives and Records Administration (77 Fed. Reg. 20056), the agreement is in force so far.

²¹² Art. I, para. 1, the Audiovisual Works Agreement.

²¹³ Art. I, para. 6, the Audiovisual Works Agreement.

²¹⁴ Art. I, para. 7, the Audiovisual Works Agreement.

²¹⁵ Art. V, the Audiovisual Works Agreement. *See* Office of the USTR, *1990 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://keionline.org/sites/default/files/ustr_special301_1990.pdf (last visited Jun. 28, 2013); Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 113 (1994); Bello & Holmer, *supra* note 2, at 271 n.91.

that year the USTR downgraded the status of Taiwan to a secondary Watch List because of Taiwan's demonstration of a strong commitment to improving the climate for IP protection and to strengthening enforcement.²¹⁶ Subsequently, Taiwan's copyright law was amended on January 11, 1990 to add "public presentation rights" for audiovisual works.²¹⁷ A senior-level public policy statement stressing the importance of IP protection was also issued.²¹⁸

Taiwan was placed on the Watch List rather than the Priority Watch List in 1990 and 1991. No explanation was given by the USTR for Taiwan's downgraded status.²¹⁹

2.3.1.2. 1992 to 1993 Special 301 Reports

On April 29, 1992, the USTR identified Taiwan as one of the priority foreign countries under Special 301 because of the following concerns:

Taiwan is a center for copyright piracy and trademark counterfeiting of U.S. products. Improved intellectual property laws have been under consideration for some time in Taiwan, but prompt enactment is key to improved protection... In Taiwan major problems exist with respect to obtaining effective enforcement of intellectual property rights. While significant improvements in intellectual property laws are either in pending legislation or under review, Taiwan has made little progress in enacting and implementing these improvements. Chronic enforcement problems appear to be the result of the failure to apply penalties that deter further infringement and inadequate levels of enforcement.²²⁰

A few days later, Taiwan's legislature, the Legislative Yuan, passed the extensively revised copyright law on May 22, 1992.²²¹ The main purpose of the revision was to respond to the

²¹⁶ Bureau of National Affairs, *News Highlight: Intellectual Property: Hills Removes Taiwan, Korea, Saudi Arabia from Priority List, Five Countries Remain*, 6 INT'L TRADE REP. (BNA) 1436 (Nov. 8, 1989).

²¹⁷ "Public presentation means to use single- or multiple-unit audiovisual devices, or other methods of transmitting images, to simultaneously communicate the content of a work to the public at the place of transmission or at a specified place outside the place of transmission." Art. 3(a)(30) of the 1990 Copyright Act. *Zhonghua Minguo 79 Nian Zhuzuoquan Fa (中華民國 79 年著作權法)* [Copyright Act of 1990], Jan. 24, 1990, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5199, 1990, at 7.

²¹⁸ Bello & Holmer, *supra* note 2, at 271.

²¹⁹ Office of the USTR, *1990 Special 301 Report*, *supra* note 215; *1991 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://keionline.org/sites/default/files/ustr_special301_1991.pdf (last visited Jun. 28, 2013).

²²⁰ Office of the USTR, *1992 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://keionline.org/sites/default/files/ustr_special301_1992.pdf (last visited Jun. 28, 2013).

²²¹ The third reading legislative materials of the 1992 Copyright Act, 81 LIFAYUAN GONGBAO (立法院公報) [LEGIS.

trading partner's requests over the past year-round negotiation and to meet international standards of copyright protection.²²² The new law eliminated the registration requirement for the protection of foreign works and gave foreigners national treatment if Taiwanese nationals could enjoy copyright protection in such foreign countries.²²³ Copyright duration was extended from 30 to 50 years.²²⁴ As to criminal punishment, the new law raised penalties for copyright infringements and criminalized any knowing distribution of unauthorized copies.²²⁵

The USTR further initiated a Section 301 investigation on May 29.²²⁶ Following the USTR's identification and investigation, Taiwan's Executive Yuan immediately responded by proposing a "Protecting Intellectual Property Rights Action Plan."²²⁷ This extensive action plan provided substantial measures for the protection of American intellectual property rights. On June 5, 1992, Taiwan further signed an "Understanding between the American Institute in Taiwan and the Coordination Council for North American Affairs" (the 1992 Understanding)²²⁸ with the United States to affirm and undertake its commitments in the action plan.²²⁹ In the agreement into which the action plan is incorporated, Taiwan promised to: (1) sign a bilateral copyright agreement with the United States by January 31, 1993;²³⁰ (2) promulgate as soon as possible the

YUAN GAZ.], no.42, May 22, 1992, at 39-52. Zhonghua Minguo 81 Nian Zhuzuoquan Fa (中華民國 81 年著作權法) [Copyright Act of 1992], Jun. 10, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5579, 1992, at 1.

²²² 1 LUO MINGTONG (羅明通), ZHUZUOQUAN FA LUN (著作權法論) [Copyright Law] 63 (6th ed. 2005).

²²³ Art. 4 of the 1992 Copyright Act.

²²⁴ Art. 30 of the 1992 Copyright Act.

²²⁵ Art. 91-104 of the 1992 Copyright Act.

²²⁶ Bureau of National Affairs, *Intellectual Property: U.S., Taiwan Reach Key Agreement on Patent, Trademarks, and Copyrights*, 9 INT'L TRADE REP. (BNA) 1001 (June 10, 1992).

²²⁷ Jingjibu Guoji Maoyiju (經濟部國際貿易局) [Bureau of Foreign Trade of Department of Economic Affairs], *Baohu Zhihui Caichanquan Xingdong Jihua* (保護智慧財產權行動計畫) [Intellectual Property Rights Protection Action Plan], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.146, 1992, at 94-108.

²²⁸ *Understanding between the American Institute in Taiwan and the Coordination Council for North American Affairs*, AIT, <http://www.ait.org.tw/en/tecro-agreement/91.pdf> (last visited Jun. 28, 2013); Y. Kurt Chang, *supra* note 116, at 218; Paul C.B. Liu, *supra* note 215, at 113.

²²⁹ Art. 1, the 1992 Understanding.

²³⁰ Art. 2, para. 3, the 1992 Understanding.

newly revised copyright law which would raise penalties against piracy;²³¹ (3) review the newly revised copyright law in accordance with the U.S. concerns;²³² (4) enact its cable TV law by January 31, 1993 to criminalize unauthorized broadcasting;²³³ (5) immediately and systematically raid unlicensed cable TV systems;²³⁴ (6) ensure Taiwan's full compliance with TRIPS in patent, trademark, industrial design, semiconductor chip protection, and trade secret laws;²³⁵ (7) implement export licensing systems for Compact Discs (CDs) and computer software programs;²³⁶ and (8) provide quarterly statistics detailing penalties imposed in intellectual property infringement cases and effective measures sufficient to deter infringement of intellectual property rights including rigorously overseeing court's lenient sentences.²³⁷

In consideration of Taiwan's commitments and in the expectation that they would be fully implemented, the United States agreed to revoke the identification of Taiwan as a priority foreign country and terminate the Special 301 investigation.²³⁸

On April 30, 1993, in addition to citing Taiwan to the Priority Watch List, the USTR initiated "immediate action plans" that included deadlines and benchmarks for evaluating Taiwan's performance.²³⁹ In the action plans, the USTR set schedules for completion of legislation on IP-related laws.²⁴⁰ Taiwan soon enacted its Cable Television Act on August 11,

²³¹ Art. 2, para. 2, the 1992 Understanding. Taiwan passed the amendments to its Copyright Act on May 22, 1992 and promulgated it on Jun. 10, 1992.

²³² Art. 2, para. 4, the 1992 Understanding.

²³³ Art. 2, para. 5, the 1992 Understanding.

²³⁴ Art. 2, para. 6, the 1992 Understanding.

²³⁵ Art. 2, para. 8 & 10, the 1992 Understanding.

²³⁶ Art. 2, para. 12 & 13, the 1992 Understanding.

²³⁷ Art. 2, para. 14, the 1992 Understanding.

²³⁸ Art. 4, the 1992 Understanding. Bureau of National Affairs, *Intellectual Property: U.S., Taiwan Reach Key Agreement on Patent, Trademarks, and Copyrights*, *supra* note 226, at 1001.

²³⁹ Office of the USTR, *Fact Sheet on Special 301 Released April 30, 1993*, reprinted in 10 INT'L TRADE REP. (BNA) 761 (May 5, 1993), available at http://keionline.org/sites/default/files/ustr_special301_1993.pdf.

²⁴⁰ Bureau of National Affairs, *Taiwan Announces Program to Improve Its Intellectual Property Rights Regimes*, 10 INT'L TRADE REP. (BNA) 1082 (Jun. 30, 1993).

1993 to regulate its cable TV industry;²⁴¹ amended its trademark law for stiffer penalties against counterfeiting on December 22, 1993;²⁴² and revised its patent law increasing fines by six-hundred times on January 21, 1994.²⁴³ Additionally, Taiwan and the United States signed the Agreement for the Protection of Copyright on July 16, 1993 which provided reciprocal copyright protection for both sides.²⁴⁴

2.3.1.3. 1994 to 1998 Special 301 Reports

In recognition of the significant progress made by Taiwan, the USTR downgraded Taiwan to the Watch List in 1994 and 1995 and removed Taiwan from the Watch List in 1996. Taiwan was not identified by the USTR in 1997 and 1998.²⁴⁵ In the 1994 and 1995 reports, the United States continued to express its concerns over Taiwan's lack of protection for integrated circuit layout designs and adequate protection for trade secrets,²⁴⁶ and reminded Taiwan to establish reciprocal patent and trademark filing benefits in accordance with its former commitment.²⁴⁷

While Taiwan was not given any Special 301 status, the 1998 report addressed that the Taiwan-

²⁴¹ Youxian Dianshi Fa (有線電視法) [Cable Television Act], Aug. 11, 1993, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5757, 1993, at 1.

²⁴² Art. 62, 63 & 65 of the 1993 Trademark Act. Zhonghua Minguo 82 Nian Shangbiao Fa (中華民國 82 年商標法) [Trademark Act of 1993], Dec. 22, 1993, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5810, 1993, at 1.

²⁴³ Art. 123 of the 1994 Patent Act. Zhonghua Minguo 83 Nian Zhuanli Fa (中華民國 83 年專利法) [Patent Act of 1994], Jan. 21, 1994, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5824, 1994, at 1. Bureau of National Affairs, *Intellectual Property: Taiwan Legislature Passes Revisions to Patent Law; Penalties Raised*, 11 INT'L TRADE REP. (BNA) 8 (Jan. 5, 1994).

²⁴⁴ *Agreement for the Protection of Copyright between the American Institute in Taiwan and the Coordination Council for North American Affairs*, AIT, <http://www.ait.org.tw/en/tecro-agreement/91.pdf> (last visited Jun. 28, 2013).

²⁴⁵ Bureau of National Affairs, *USTR Announcement and Fact Sheets on Decisions Affecting Foreign Government Procurement, Intellectual Property Protection, and U.S.-Japan Supercomputer Pact*, 11 INT'L TRADE REP. (BNA) 722 (May 4, 1994); *Taiwan to Upgrade IPR Protection, Seeks Removal from Special 301 List*, 11 INT'L TRADE REP. (BNA) 749 (May 11, 1994).

²⁴⁶ Office of the USTR, *1994 Special 301 Report on April 30, 1994*, reprinted in 11 INT'L TRADE REP. (BNA) 722 (May 4, 1994), available at http://keionline.org/sites/default/files/ustr_special301_1994.pdf; *1995 Special 301 Report on April 29, 1995*, reprinted in 12 INT'L TRADE REP. (BNA) 791, available at http://keionline.org/sites/default/files/ustr_special301_1995.pdf.

²⁴⁷ Office of the USTR, *1995 Special 301 Report on April 29, 1995*, *supra* note 246.

original pirate and counterfeit products such as CDs and video games were being seized in the United States and Latin America. The 1998 report also called for the cancellation of complicated and time-consuming judicial procedures in dealing with foreign powers of attorney.²⁴⁸

Taiwan enacted the Integrated Circuit Layout Protection Act on August 11, 1995,²⁴⁹ and Trade Secret Act on January 11, 1996.²⁵⁰ Taiwan and the United States also reached a memorandum of understanding on April 10, 1996 spelling out each country's obligation to recognize the priority of patent and trademark applications filed earlier in the other country on a reciprocal basis.²⁵¹

2.3.1.4. 1999 to 2004 Special 301 Reports

After 1999, two issues came to the forefront of the trade negotiation between the United States and Taiwan. One was Taiwan's judicial reform; the other was new types of piracy spreading out from Taiwan. The United States was dissatisfied with Taiwan's lenient sentencing and was concerned with growing piracy brought by digital technology. The USTR placed Taiwan on the Watch List in 1999 and 2000. The USTR, in addition to calling for Taiwan's further control over optical media production, addressed the flaws in Taiwan's judicial procedures in the 1999 Special 301 report:

While a serious effort has been made to increase raids on suspected pirates especially in retail-level piracy, the Taiwan enforcement system is time-

²⁴⁸ Office of the USTR, *1997 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, <http://www.keionline.org/ustr/1997special301> (last visited Jun. 28, 2013); *1998 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://keionline.org/sites/default/files/ustr_special301_1998.pdf (last visited Jun. 28, 2013).

²⁴⁹ Jiti Dianlu Dianlu Buju Baohu Fa (積體電路電路布局保護法) [Circuit Layout Protection Act], Aug. 11, 1995, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6049, 1995, at 33.

²⁵⁰ Yingye Mimi Fa (營業秘密法) [Trade Secret Act], Jan. 17, 1996, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6074, 1996, at 4.

²⁵¹ *Memorandum of Understanding between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States*, AIT, <http://www.ait.org.tw/en/tecro-agreement/93.pdf> (last visited Jun. 28, 2013); Bureau of National Affairs, *Intellectual Property: Agreement with Taiwan Permits Claim to Priority Based on U.S. Filing Date*, 13 INT'L TRADE REP. (BNA) 758 (May 8, 1996).

consuming and cumbersome. Trials often drag on endlessly, or end with penalties that provide little deterrence... Finally, we urge Taiwan to ensure that foreign companies pursuing infringement cases in the Taiwan courts get fair and expeditious hearings, as well as fair treatment from Taiwan agencies.²⁵²

In 2000, while praising the newly established intellectual property office, the USTR voiced more concerns over Taiwan's judicial system and optical media production.

Taiwan has had mixed results on intellectual property during the last year. On the positive side, top level support within the Ministry of Economic Affairs has finally resulted in the establishment of an effective Intellectual Property Office. This office has been well staffed with energetic people. With their leadership, and the active cooperation of the Investigative Bureau of the Ministry of Justice, a number of illegal CD production facilities have been closed during the last year, and a number of retail raids have been conducted. On the negative side, responsibility for intellectual property matters is still badly fragmented among different agencies. Repeated U.S. Government requests for action to improve access to the judicial system in infringements case, to enforce existing source identification code regulations, and to adopt an effective chip marking system have been rebuffed. Taiwan is now among the world's largest producers of optical media. Toleration of extremely lax procedures in enforcing intellectual property rights in this area is out of step with Taiwan's increasing role as an originator of intellectual property.²⁵³

Due to the delay in Taiwan's improvement in controlling optical media piracy, the USTR placed Taiwan back on the Priority Watch List on April 30, 2001. The USTR labeled Taiwan "a haven for pirates" and criticized Taiwan's tolerance for pirated optical media products because Taiwan had "declined to enact the kind of strong optical media licensing legislation" that had been enacted elsewhere to deal with this kind of piracy.²⁵⁴ In addition, the USTR urged Taiwan to revise its patent law to apply the present 20-year patent term protection retroactively to patents filed prior to January 21, 1994 that could enjoy only 15-year patent term.

²⁵² Office of the USTR, *1999 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, <http://www.keionline.org/ustr/1999special301> (last visited Jun. 28, 2013).

²⁵³ Office of the USTR, *2000 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, <http://www.keionline.org/ustr/2000special301> (last visited Jun. 28, 2013).

²⁵⁴ Office of the USTR, *2001 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2001.pdf (last visited Jun. 28, 2013).

In response, Taiwan revised its Patent Act on October 24, 2001.²⁵⁵ According to Article 134 of the 2001 Patent Act that would take effect on January 1, 2002, Taiwan lengthened patent protection from 15 to 20 years for patents granted before January 21, 1994.²⁵⁶ Taiwan also enacted its Optical Disc Act on November 14, 2001.²⁵⁷ The legislative history shows that the enactment was to ease the pressure from the United States.²⁵⁸ In addition to administering the entire optical disc manufacturing industry, a third conviction for unlicensed manufacturing of optical discs became a criminal offense punishable by one-year minimum imprisonment.²⁵⁹

Even though Taiwan acceded to the World Trade Organization on January 1, 2002, it remained one of the largest producers and exporters of pirated CDs, DVDs, and other optical discs in the world.²⁶⁰ The USTR once again placed Taiwan on the Priority Watch List from 2002 to 2004. The 2002 Special 301 report urged Taiwan to strengthen its copyright law to deal with growing piracy.²⁶¹ The 2003 Special 301 report continued to emphasize that Taiwan's penalties were neither timely nor strong enough to deter infringement.²⁶² In addition to cautioning Taiwan

²⁵⁵ Zhonghua Minguo 90 Nian Zhuanli Fa (中華民國 90 年專利法) [Patent Act of 2001], Oct. 24, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6424, 2001, at 28.

²⁵⁶ Art. 134 of the 2001 Patent Act. Bureau of National Affairs, *Intellectual Property: USTR Welcomes Changes to Taiwan's Patent and Trademark Laws*, 18 INT'L TRADE REP. (BNA) 1740 (Nov. 1, 2001).

²⁵⁷ Guangdie Guanli Tiaoli (光碟管理條例) [Optical Disc Act], Nov. 14, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6428, 2001, at 16.

²⁵⁸ "Bennian zhongmei zhihui caichan zishang huiyi, dui woguo guangdie fangmao wenti shenwei guanqie, ceng duoci jianyi wofang lifa guifan." (本年年中美智慧財產權諮商會議，對我國光碟仿冒問題甚為關切，曾多次建議我方立法規範。) [The United States in the intellectual property negotiation concerned Taiwan's optical media piracy very much and demanded Taiwan's legislation.]. The draft bill of the Optical Disc Act proposed by the Executive Yuan, LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.53, Oct. 31, 2001, at 221.

²⁵⁹ Art. 15 of the 2001 Optical Disc Act.

²⁶⁰ See Bureau of National Affairs, *Intellectual Property: USTR Holds Intellectual Property Talks with Taiwan, Setting off Talk of Possible FTA*, 19 INT'L TRADE REP. (BNA) 1786 (Oct. 17, 2002); *Bilateral Agreements: U.S.-Taiwan Free Trade Agreement Several Years Away, U.S. Official Says*, 20 INT'L TRADE REP. (BNA) 276 (Feb. 6, 2003).

²⁶¹ Office of the USTR, *2002 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2002.pdf (last visited Jun. 28, 2013).

²⁶² Office of the USTR, *2003 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2003.pdf (last visited Jun. 28, 2013).

against pirated products over non-traditional channels including the Internet, the 2004 Special 301 report demanded Taiwan to prevent unfair commercial use of pharmaceutical and agricultural chemical test data and prohibit counterfeit pharmaceutical products.²⁶³

Following Taiwan's placement on the Priority Watch List, the Premier of Taiwan's Executive Yuan declared 2002 an "Action Year for IPR" and planned to improve legislation, strengthen enforcement, encourage speedy trials, and promote deterrent-level sentencing.²⁶⁴ The intellectual property specific task force, the Intellectual Property Rights Police Team (IPPT), was established on January 1, 2003.²⁶⁵ Taiwan passed copyright amendments on June 6, 2003 to raise penalties against piracy and deal with new types of piracy brought by digital technology.²⁶⁶ The new law redefined reproduction to include temporary copying and criminalized removal or alteration of electronic rights management information. More notably, the new law stiffened criminal punishment in the following ways. First, it raised penalties for each copyright crime.²⁶⁷ Second, it imposed more severe penalties on commercial-scale piracy whose thresholds were determined by certain quantity or the market price of pirated works.²⁶⁸ Third, it made unauthorized reproduction of optical discs a public crime in order to crack down on rampant

²⁶³ Office of the USTR, *2004 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2004.pdf (last visited Jun. 28, 2013); See Bureau of National Affairs, *Intellectual Property: International Drug Companies Say Taiwan Fails to Protect Pharmaceutical Patents*, 21 INT'L TRADE REP. (BNA) 539 (Mar. 25, 2004).

²⁶⁴ Office of the USTR, *2003 Special 301 Report*, *supra* note 262.

²⁶⁵ Intellectual Property Rights Police Team, the History of the Intellectual Property Rights Police Team, http://www.tipo.gov.tw/iprp/en/ArtHtml_Show.aspx?ID=36386b8a-1a49-4e73-b942-1914118d7e87&path=86 (last visited Jun. 28, 2013).

²⁶⁶ Zhonghua Minguo 92 Nian Zhuzuoquan Fa (中華民國 92 年著作權法) [Copyright Act of 2003], Jul. 9, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6532, 2003, at 43; the third reading legislative materials, 92 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.34, Jun. 6, 2003, at 168-171. "The amendments were pushed through the Legislative Yuan in record time." Bureau of National Affairs, *Bilateral Agreement: U.S. Suspends Meeting with Taiwan until Some Progress Shown on Trade Issues*, 20 INT'L TRADE REP. (BNA) 1305 (Jul. 31, 2003).

²⁶⁷ Art. 91-96 of the 2003 Copyright Act.

²⁶⁸ Art. 91-93 of the 2003 Copyright Act.

optical media piracy more aggressively.²⁶⁹ Since then the rule that piracy is actionable only upon complaint has been inapplicable to optical media piracy.

One year later, Taiwan revised its copyright law again on September 1, 2004.²⁷⁰ This revision established a cornerstone of the present criminal copyright law. It added a prohibition against circumvention of technological protection measures by imposing criminal and civil liability.²⁷¹ More importantly, given the fact that the thresholds for commercial-scale piracy were confusing and unclear, the new law deleted the differentiation between normal- and commercial-scale infringements and at the same time increased punishment against those infringers with the intent to sell or rent.²⁷² The three basic principles of the present criminal copyright law were therefore created: (1) criminalization of any knowingly unauthorized use of copyrighted works, (2) aggravated punishment against infringers with the intent to sell or profit, and (3) a public crime for optical media piracy.

In addition, Taiwan's legislature passed amendments to its Pharmaceutical Affairs Act on March 30, 2004 to raise penalties against counterfeiting pharmaceutical products.²⁷³ Subsequently, the Pharmaceutical Affairs Act was revised again on January 21, 2005 to provide a five-year term for the protection of pharmaceutical test data.²⁷⁴

²⁶⁹ Art. 100 of the 2003 Copyright Act. See Bureau of National Affairs, *Intellectual Property: Taiwan Adds Amendments to Copyright Law to Stiffen Penalties, Make Prosecution Easier*, 20 INT'L TRADE REP. 1270 (Jul. 24, 2003).

²⁷⁰ Zhonghua Minguo Zhuzuoquan Fa (著作權法) [Copyright Act of 2004], Sep. 1, 2004, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6592, 2004, at 18.

²⁷¹ Art. 96*bis* of the 2004 Copyright Act.

²⁷² Art. 91-93, the 2004 Copyright Act.

²⁷³ Art. 82-86 of the 2004 Pharmaceutical Affairs Act. Zhonghua Minguo 93 Nian Yiaoshi Fa (中華民國 93 年藥事法) [Pharmaceutical Affairs Act of 2004], Apr. 21, 2004, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6573, 2004, at 17.

²⁷⁴ Art. 40*ter* of the 2005 Pharmaceutical Affairs Act. (Yiaoshi Fa), Zhonghua Minguo 94 Nian Yiaoshi Fa (中華民國 94 年藥事法) [Pharmaceutical Affairs Act of 2005], Feb. 5, 2005, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6617, 2005, at 29.

2.3.1.5. 2005 to 2008 Special 301 Reports

In its 2004 Special 301 report, the USTR announced that it would conduct an out-of-cycle review in the fall of 2004 to evaluate Taiwan's progress in achieving the objectives that it had earlier set.²⁷⁵ The result of the out-of-cycle review on January 18, 2005 lowered Taiwan to the Watch List.²⁷⁶ Taiwan remained on the Watch List until January 6, 2009. While having demanded Taiwan's curb on Internet and school campus piracy, the USTR had monitored Taiwan's judicial reforms including the plan to establish a specialized intellectual property court and prosecutors' office.²⁷⁷

Taiwan enacted its new Intellectual Property Case Adjudication Act and Intellectual Property Court Organization Act on March 28, 2007.²⁷⁸ Pursuant to the new laws, the Intellectual Property Court would be established and the specialized judicial procedures would come into effect on July 1, 2008.²⁷⁹ To express Taiwan's stand against peer to peer (p2p) Internet piracy, Taiwan amended its copyright law on June 14, 2007.²⁸⁰ Soon after the 2007 revision, the

²⁷⁵ Office of the USTR, *2004 Special 301 Report*, *supra* note 263.

²⁷⁶ See Bureau of National Affairs, *Intellectual Property: Taiwan Recognized for IPR Enforcement, While Poland to Remain on "Watch List"*, 22 INT'L TRADE REP. (BNA) 84 (Jan. 20, 2005).

²⁷⁷ Office of the USTR, *2005 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2005.pdf (last visited Jun. 28, 2013); *2006 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2006.pdf (last visited Jun. 28, 2013). *2007 Special 301 Report*, OFFICE OF THE USTR, http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf (last visited Jun. 28, 2013); *2008 Special 301 Report*, OFFICE OF THE USTR, http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (last visited Jun. 28, 2013).

²⁷⁸ Zhihui Caichan Anjian Shenli Fa (智慧財產案件審理法) [Intellectual Property Case Adjudication Act], Mar. 28, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6737, 2007, at 2; Zhihui Caichan Fayuan Zuzhi Fa (智慧財產法院組織法) [Intellectual Property Court Organization Act], Mar. 28, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6737, 2007, at 14.

²⁷⁹ See Bureau of National Affairs, *Intellectual Property: Taiwan Urged to Work Harder in IPR Area to Aid Competitiveness*, 24 INT'L TRADE REP. (BNA) 802 (Jun. 7, 2007). Art. 39 of the Intellectual Property Case Adjudication Act and Art. 45 of the Intellectual Property Court Organization Act authorized the Judicial Yuan to decide when both laws came into effect. The Judicial Yuan later decided both came into effect on July 1, 2008.

²⁸⁰ Art. 92 of the 2007 Copyright Act. Zhonghua Minguo 96 Nian Zhuzuoquan Fa (中華民國 96 年著作權法) [Copyright Act of 2007], Jul. 11, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6752, 2007, at 74.

draft legislation to mandate Internet service providers to stop Internet piracy was submitted to the Legislative Yuan on October 1, 2008 (later passed on April 21, 2009).²⁸¹ Besides, a three-year Campus Intellectual Property Protection Action Plan was also initiated by Taiwan's Ministry of Education on January 1, 2007 for the protection of American textbooks and educational software.²⁸²

Thanks to Taiwan's progress, the USTR conducted an out-of-cycle review in the summer of 2008 and terminated Taiwan's long-term Special 301 status on January 6, 2009. The news release of the USTR Office on January 6, 2009 commended Taiwan's cooperation and efforts:

The Office of the U.S. Trade Representative today recognized Taiwan's progress on protection and enforcement of intellectual property rights by removing Taiwan from the Special 301 Watch List. "Taiwan has come a long way on this issue over the last eight years," said USTR spokesperson Sean Spicer. "In 2001, USTR called Taiwan a haven for pirates. Today, Taiwan has strengthened its enforcement, strengthened its laws, and demonstrated a commitment to becoming a haven for innovation and creativity. This is a credit to the hard work done by Taiwan as well as to our close bilateral cooperation. We hope that this progress can continue and be duplicated in other areas of our trade relationship."²⁸³

At last, Taiwan was being treated by the USTR as a successful example of protecting IP

²⁸¹ Art. 90*quinquie* of the 2009 Copyright Act. Zhonghua Minguo 98 Nian Zhuzuoquan Fa (中華民國 98 年著作權法) [Copyright Act of 2009], May 13, 2009, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6863, 2009, at 6. The first reading legislative materials, 97 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.53, Oct. 14, 2008, at 12.

²⁸² "The Taiwan Ministry of Education (MOE) continues to combat intellectual property rights (IPR) violations on Taiwan's campuses, and will indefinitely continue its Campus Intellectual Property (IP) Action Plan that began in 2007. The Plan's requirements and incentives are spurring schools to increase enforcement efforts, and the MOE is helping schools to implement best practices across Taiwan. Rights holders report online infringement is down from 2007, and confirm the MOE continues to cooperate in tracking and punishing unauthorized file-sharing on the pan-island university intranet, the Taiwan Academic Network (TANet). Rights holder groups, however, still report widespread use of pirated or unlicensed software. Although on-campus textbook copying and other physical infringement appear to have continued their decade-long decline, rights holders report widespread off-campus textbook piracy." *Campus Issues, Taiwan's IPR Environment*, AIT, <http://www.ait.org.tw/en/ipr-overview.html> (last visited Jun. 28, 2013).

²⁸³ *USTR Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan*, OFFICE OF THE USTR, <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re> (last visited Jun. 28, 2013).

rights as well as fighting IP piracy.

USTR is announcing that it invites any trading partner appearing on the Special 301 Priority Watch List or Watch List to work with the United States to develop a mutually agreed action plan designed to lead to that trading partner's removal from the relevant list. Agreement on such a plan will not by itself change a trading partner's status in the Special 301 Report. However, in the past, successful completion of action plans has led to the removal of trading partners such as Saudi Arabia, Taiwan, and many others from Special 301 lists.²⁸⁴

2.3.2. Taiwan's Compliance with Special 301

Over all, Taiwan has been very sensitive to U.S. imposition of Special 301 status. Whenever identified by the USTR, Taiwan would as soon as possible sign agreements with the United States or amend its IP laws to avoid further adverse effects. To see the relationship between U.S. Special 301 identifications and Taiwan's responses more clearly, the history is outlined in the following table. On average, whenever identified as Priority Watch List or Priority Foreign Country, Taiwan would sign a bilateral agreement with the United States within about 47 days.

Table 2-3 Special 301 Identification and Taiwan's Response

Special 301 Identification	Taiwan's Response
05/25/1989 Priority Watch List	06/27/1989 Signed the Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works (in 34 days) 01/24/1990 Amended the Copyright Act
04/27/1990 Watch List	
04/26/1991 Watch List	
04/29/1992 Priority Foreign Country	06/05/1992 Signed the Understanding (in 38 days) 07/01/1992 Launched the first Protecting Intellectual Property Rights Action Plan 06/10/1992 Amended the Copyright Act 01/08/1993 Amended the Act of Criteria on Raise of Fines
04/30/1993 Priority Watch List plus Immediate Action Plan	07/16/1993 Signed the Agreement for the Protection of Copyright (in 78 days) 07/16/1993 Enacted the Cable Television Act 11/19/1993 Amended the Trademark Act

²⁸⁴ 2011 Special 301 Report, OFFICE OF THE USTR, http://www.ustr.gov/webfm_send/2841 (last visited Jun. 28, 2013).

		12/28/1993	Amended the Patent Act
04/30/1994	Watch List		
04/29/1995	Watch List	07/13/1995	Enact the Integrated Circuit Layout Protection Act
		12/22/1995	Enacted the Trade Secret Act
		04/10/1996	Signed the Memorandum of Understanding
04/30/1996	No identification		
04/30/1997	No identification		
04/30/1998	No identification		
04/30/1999	Watch List		
04/28/2000	Watch List		
04/30/2001	Priority Watch List	10/04/2001	Amended the Patent Act
		11/14/2001	Enacted the Optical Disc Act
04/30/2002	Priority Watch List	01/01/2003	Established the Intellectual Property Rights Police Team
05/01/2003	Priority Watch List	06/06/2003	Amended the Copyright Act
		03/30/2004	Amended the Pharmaceutical Affairs Act
05/03/2004	Priority Watch List	08/24/2004	Amended the Copyright Act
04/29/2005	Watch List	01/21/2005	Amended the Pharmaceutical Affairs Act
04/28/2006	Watch List	03/28/2007	Enacted the Intellectual Property Court Organization Act and the Intellectual Property Cases Adjudication Act
		01/01/2007	Launched Campus Intellectual Property Protection Action Plan
04/30/2007	Watch List	06/14/2007	Amended the Copyright Act
04/25/2008	Watch List	07/01/2008	Established the Intellectual Property Court
		04/21/2009	Amended the Copyright Act (draft submitted on 10/01/2008)
01/06/2009		Removed from Watch List	

Source: Compiled by the author.

The next table shows Taiwan's compliance with individual U.S. demands in the Special 301 reports. Almost every demand by the United States could be satisfied within one year. The only exception was the judicial reform. Although the United States had complained about Taiwan's lenient sentences and cumbersome judicial procedures from the very beginning, Taiwan established its specialized court and procedures in intellectual property at the end. How Taiwan's judicial system reacted with the pressure will be discussed in the following chapters.

Table 2-4 U.S. Demands and Taiwan's Compliance

U.S. Demands		Taiwan's Compliance	
05/25/1989	Specific and effective actions by Taiwanese enforcement entities	06/27/1989	Signed the Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works
05/25/1989	Concrete evidence of decreased sales of pirated and counterfeit items		
05/25/1989	Implementation of measures to fulfill obligations under the recently agreed bilateral copyright agreement		
04/29/1992	Prompt enactment and effective enforcement of intellectual property laws	06/05/1992	Signed the Understanding incorporated with the Protecting the Intellectual Property Rights Action Plan
04/29/1992	Effective enforcement of intellectual property rights	07/01/1992	Launched the first Protecting Intellectual Property Rights Action Plan
04/29/1992	Prompt enactment of intellectual property laws	06/10/1992	Promulgated the copyright law revisions just passed in May to eliminate a registration requirement, give foreigners national treatment, extend copyright duration to 50 years, raise penalties, and criminalize any knowingly distribution of unauthorized works
04/29/1992	Apply penalties that deter further infringement	01/08/1993	Amended the Act of Criteria on Raise of Fines to increase the rate of conversion of jail terms to fines
04/30/1993	Completion of legislation on intellectual property-related laws	07/16/1993	Enacted the Cable Television Act to regulate its cable TV industry
04/30/1993	Completion of legislation on intellectual property-related laws	07/16/1993	Signed the Agreement for the Protection of Copyright to provide reciprocal copyright protection
		11/19/1993	Amended the Trademark Act for stiffer penalties against counterfeiting
		12/28/1993	Amended the Patent Act to raise 6 times fines
04/30/1994	Protection for integrated circuit layout	07/13/1995	Enacted the Integrated Circuit Layout Protection Act.
04/30/1994	Protection for trade secrets	12/22/1995	Enacted the Trade Secret Act
04/29/1995	Reciprocal patent and trademark filing benefits	04/10/1996	Signed a memorandum of understanding to recognize the priority of patent and trademark applications filed earlier in other countries
04/30/2001	Strong optical media licensing legislation	11/14/2001	Enacted the Optical Disc Act to criminalize unlicensed manufacture of optical discs
04/30/2001	Retroactive protection for	10/04/2001	Amended the Patent Act to lengthen

	patents filed prior to 1994		patent protection from 15 to 20 years for patents granted before 1994
04/30/2002	Strengthening copyright law to deal with growing piracy	04/03/2002	Declared 2002 an “Action Year for IPR”
		01/01/2003	Establish the Intellectual Property Rights Police Team
05/01/2003	Penalties neither timely nor strong to deter infringement	06/06/2003	Amended the Copyright Act to raise penalties and deal with new types of piracy.
		08/24/2004	Amended the Copyright Act to prohibit circumvention of technological protection measures and increase punishment against commercial-scale piracy
05/03/2004	Preventing unfair commercial use of pharmaceutical test data and prohibiting counterfeit pharmaceutical products.	03/30/2004	Amended the Pharmaceutical Affairs Act raised penalties against counterfeiting pharmaceutical products
		01/21/2005	Amended the Pharmaceutical Affairs Act to provide a five-year term of protection for pharmaceutical test data.
04/29/2005	Curbing Internet piracy	06/14/2007	Amended the Copyright Act to prohibit peer to peer Internet piracy
		04/21/2009	Amended the Copyright Act to mandate Internet service providers to stop Internet piracy
04/29/2005	Curbing school campus piracy	01/01/2007	Launched the Campus Intellectual Property Protection Action Plan to protect copyrights of American textbooks and educational software
04/29/2005	Judicial Reforms	03/28/2007	Enacted the Intellectual Property Court Organization Act and the Intellectual Property Cases Adjudication Act
		07/01/2008	The Intellectual Property Court started to operate and the specialized judicial procedures in intellectual property came into force

Source: Compiled by the author.

2.3.3. Taiwan’s Resentment against the Special 301

The way that the United States pressed Taiwan with Special 301 was extraordinarily successful.²⁸⁵ In the history of Special 301, several countries such as China, Brazil, and Thailand challenged U.S. Special 301 openly. To resist the United States, a reelection of Thai Parliament

²⁸⁵ “Special 301 legislation has been most successful thus far in U.S. dealings with Taiwan due to the latter’s heavy dependence on U.S. markets.” Paul C.B. Liu, *supra* note 215, at 114.

was incurred and several trade wars between the United States and China almost broke out. Interestingly, Taiwan kept silent and accepted U.S. demands.²⁸⁶ If the United States wants to protect their IP rights against China, they have to file a formal complaint against China at the WTO. Despite being a WTO member, no dispute settlement case has ever happened between Taiwan and the United States.²⁸⁷ Taiwan's compliance is distinct.

Of course, Taiwanese people dislike any demand from a foreign country especially when Taiwan has been isolated by the international society. Professor William P. Alford at Harvard Law School captured this sentiment:

When I lectured on intellectual property in January, 1991 at National Taiwan University—to an audience of officials, professors, lawyers, and others expert in or interested in intellectual property—and expressed concerns about American policy similar to those I am voicing today, the reaction was one of enormous anger. Terms like imperialism, traitor, and the like flew, not at me, but at the American government and at Chinese citizens involved in representing foreign intellectual property holders. And this reaction came from an audience of persons who were highly educated (in many instances in the US), sophisticated and, in general, friendly toward the US.²⁸⁸

When Taiwan enacted the Cable TV Act due to the Priority Foreign Country identification in 1992, legislators had only one thing in common; that is, the resentment against the United States.²⁸⁹ One of the legislators made the following statement in the Legislative Yuan decrying Special 301 and calling on Taiwan's self-dignity, "Please consult your conscience. Taiwan must never become a colony of the United States. Never yield to whatever Americans want us to

²⁸⁶ "On June 21, 1989, the Minister Counselor of the Brazilian Embassy in Washington maintained not only that Special 301 was undermining the progress of the Uruguay Round, but also stated that it was illegal under the General Agreement on Tariffs and Trade." Bello & Holmer, *supra* note 2, at 272.

²⁸⁷ See Steve Charnovitz, *Taiwan's WTO Membership and Its International Implications*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 404-405 (2006) (describing Taiwan's accession to the WTO in 2002 and analyzing its implications).

²⁸⁸ Alford, *supra* note 21, at 105-106.

²⁸⁹ The second reading legislative materials for the 1993 Cable Television Act, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.48, Jul. 15, 1993, at 91-92, 99-104.

do.”²⁹⁰

Some legislations history also reflects Taiwanese hostility towards Special 301 well. When reviewing the Agreement for the Protection of Copyright between Taiwan and the United States on January 18, 1993, the Legislative Yuan did not agree to everything but reserved eight clauses of the agreement without regard to the promises previously made by the Executive Yuan.²⁹¹ The legislature even passed a supplementary statement protesting what it called the United States continued use of the threat of Special 301 sanctions to interfere with the administrative and legislative actions of other countries.²⁹² Taiwan tried to work around a few U.S. demands as well. For example, Taiwan was demanded by the United States to ban parallel imports of copyrighted works by imposing civil and criminal liability in 1993. The Legislative Yuan lifted the criminal liability in 2003 because it believed that criminal liability had made Taiwan’s software price 150 percent higher than those in international markets and the bilateral copyright agreement did not articulate whether criminal liability was included.²⁹³

However, Taiwan’s dissatisfaction did not spark a fight at all. Taiwan has been particularly sensitive to the threat of retaliatory measures from the United States largely because of its diplomatic vulnerability. This has enabled the USTR to make significant headway in its dealings with Taiwan.²⁹⁴ This has resulted in the U.S. Special 301 trade policy being particular heavy-

²⁹⁰ “Qing gewei menxin ziwen, Taiwan juehui buneng chengwei Meiguo de zhimindi, jue buke Meiguoren yao women zuo sheme bian zhaozuo.” (請各位捫心自問，台灣絕對不能成為美國的殖民地，絕不可美國人要我們做什麼便照做。) The statement of Legislator Chen Wanzhen (陳婉真), the third reading legislative materials for the 1993 Cable Television Act, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.11, Jul. 16, 1993, at 59.

²⁹¹ The committee consideration legislative materials, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.11, Feb. 26, 1993, at 5.

²⁹² Bureau of National Affairs, *Intellectual Property: Taiwan, Facing Section 301 Action, Approves Copyright Reform Legislation*, 10 INT’L TRADE REP. (BNA) 701 (April 28, 1993).

²⁹³ Art. 93 of the 2003 Copyright Act. The 2rd reading legislative materials for the 2003 Copyright Act, 92 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.34, Jun. 6, 2003, at 168-171.

²⁹⁴ Paul C.B. Liu, *supra* note 215, at 114.

headed towards Taiwan. Unlike Thailand and China's undisguised defiance, Taiwan could only murmur behind the United States back or express its resentment in an indirect way.

2.3.3.1. Thailand's Defiance of U.S. Special 301

Thailand and the United States have close trade relations as well. Thailand has enjoyed trade deficit with the United States since 1985 and the U.S. goods and services trade deficit with Thailand was \$13.5 billion in 2010.²⁹⁵ The United States has been Thailand's major trading partner and was Thailand's the third largest export market in 2011 just behind China and Japan. Although listed on the Special 301 list many times, Thailand has not always complied with U.S. demands; instead, Thailand resisted the United States in a different way.

In 1987, the Thai government responded to the U.S. pressure to provide stronger copyright enforcement and penalties by putting amendments to the Copyright Act before the legislature. Though the copyright amendments bill was approved by the Thai legislature on April 28, 1988, significant opposition arose to the legislation with a political intensity that resulted in Prime Minister Prem Tinsulanonda's dissolution of his cabinet and the legislature to nullify the recently-enacted copyright legislation.²⁹⁶ After a general legislative election on July 24, 1988, a new coalition government led by Prime Minister Chatichai Choonhavan reexamined the entire copyright issues and renegotiated with the United States.²⁹⁷ Because no agreement could be reached, the United States announced a cut of \$165 million in Thailand's Generalized System of Preferences (GSP) benefits on January 19, 1989. Later, Choonhavan accepted the U.S. decision to exclude Thailand from its GSP offered to most developing countries rather than altered

²⁹⁵ *U.S.-Thailand Trade Facts*, OFFICE OF THE USTR, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand> (Apr. 9, 2013).

²⁹⁶ O'Neill, *supra* note 1, at 617.

²⁹⁷ McDorman, *supra* note 51, at 115; O'Neill, *supra* note 1, at 606.

Thailand's IP laws in the face of popular opposition.²⁹⁸ The lost GSP benefits were not restored until 1994 when Thailand amended its Copyright Act. In 1997, Thailand established its specialized court in intellectual property and international trade, the Intellectual Property and International Trade Court (the IPIT Court), in response to the U.S. pressure and in compliance with TRIPS.²⁹⁹ Despite an efficient mechanism for enforcing IP rights, one commentator pointed out that the court might be irrespective of the rate of intellectual property infringement.³⁰⁰

2.3.3.2. China's Defiance of U.S. Special 301

Compared to Thailand, China's reaction to Special 301 identification is even stronger. The USTR identified China as a Priority Foreign Country on April 26, 1991 and initiated Section 301 investigation on China's intellectual property practices on May 26, 1991. Because no agreement could be reached within six months, the American government announced on December 2, 1991 that retaliatory tariffs of \$1.5 billion would be imposed on Chinese textiles, shoes, electronic instruments, and pharmaceuticals on January 16, 1992.³⁰¹ This determination caused China to declare similar sanctions of \$1.2 billion on American commodities, such as aircraft, cotton, corn, steel, and chemicals.³⁰² At the last minute, the United States and China signed a memorandum of understanding on January 6, 1992 to avoid a trade war.³⁰³

After an unprecedented 60-day delay from the annual Special 301 report on April 30, 1994,

²⁹⁸ McDorman, *supra* note 51, at 115; O'Neill, *supra* note 1, at 606.

²⁹⁹ The USTR in its 1995 Special 301 report demanded the establishment of IPR courts to ensure deterrent penalties imposed on convicted pirates.

³⁰⁰ Andrea Morgan, Comment, *TRIPS to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court*, 23 *FORDHAM INT'L L.J.* 795-845 (2000) (noting that although the IPIT Court is functioning efficiently as intended, serious problems with intellectual property enforcement persist).

³⁰¹ See Yu, *supra* note 1, at 142; CHEN FULI (陈福利), *ZHONGMEI ZHISHI CHANQUAN WTO ZHENGDUAN YANJIU* (中美知识产权 WTO 争端研究) [STUDY ON WTO IPR DISPUTE BETWEEN CHINA AND THE UNITED STATES] 35-36 (2010).

³⁰² See Yu, *supra* note 1, at 142; CHEN FULI (陈福利), *supra* note 301, at 36.

³⁰³ See Harris, *supra* note 1, at 106-107.

China was identified again as a Priority Foreign Country by the USTR on June 30, 1994.³⁰⁴ Following a failure to reach any agreement within six months, the USTR on December 31, 1994 announced that retaliatory tariffs of \$2.8 billion would be imposed on Chinese imports such as electronics, bicycles, shoes, and toys by February 4, 1995.³⁰⁵ China did not hesitate and launched a counterattack the same day.³⁰⁶ Later on February 4, 1995, the United States lowered the retaliatory amount to \$1.08 billion and postponed the effective date to February 26, 1995.³⁰⁷ Hours before the deadline, both sides signed an agreement to avoid another trade war.³⁰⁸

After the 1995 agreement, China was still subject to USTR's Section 306 monitoring under which the USTR could review China's progress and decide to take an action at any time.³⁰⁹ Trade sanctions for noncompliance with the agreement could be imposed pursuant to a decision by the USTR at any time. Once again, the USTR identified China as a Priority Foreign Country on April 30, 1996.³¹⁰ Both sides soon declared punitive tariffs would be imposed on the other side. China's Ministry of Foreign Trade and Economic Cooperation made the following statement to express China's anger with Special 301:

In view of the fact, disregarding the tremendous efforts made by China in the field of intellectual property rights protection and the whole array of effective measures that China has adopted to protect intellectual property rights, the

³⁰⁴ The identification of Priority Foreign Country and Initiation of Section 302 Investigation, 59 Fed. Reg. 132 (Jul. 12, 1994).

³⁰⁵ CHEN FULI (陈福利), *supra* note 301, at 39.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *See* Harris, *supra* note 1, at 107-108.

³⁰⁹ 19 U.S.C. § 2416(a). Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1173-74, codified as 19 U.S.C. § 2416. The USTR is required by Section 306 of the Trade Act to "monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution." If a foreign country is not satisfactorily implementing a measure or agreement, the USTR must, pursuant to Section 306, determine whether it is actionable and if the answer is affirmative, what action should be taken.

³¹⁰ Office of the USTR, *USTR Fact Sheet on Special 301 Findings: Released April 30, 1996*, reprinted in 13 INT'L TRADE REP. (BNA) 736 (May 1, 1996), available at http://keionline.org/sites/default/files/ustr_special301_1996.pdf. Bureau of National Affairs, *Intellectual Property: USTR Identifies China as Priority Foreign Country*, 13 INT'L TRADE REP. (BNA) 704 (May 1, 1996).

United States Trade Representative Office has unilaterally announced the imposition of trade retaliations on China's export products to the United States such as textiles, garments and electronic products valued at \$3 billion, effective 30 days later. Article 7 of the Foreign Trade Law of the People's Republic of China stipulates that should any country or region apply discriminatory prohibitions, restrictions or other similar measures in the field of trade against the People's Republic of China, the People's Republic of China may, dependent upon the actual circumstances, adopt corresponding measures against that country or region. In compliance with this provision, with a view to safeguarding state sovereignty and national dignity, China shall have no other options but take corresponding counter-retaliation measures.³¹¹

Eventually, the United States and China reached another trade agreement for the protection of intellectual property on June 17, 1996.³¹²

In spite of China's accession to the WTO on December 11, 2001,³¹³ China has remained subject to the USTR's Section 306 monitoring. Dissatisfied with the implementation of China's TRIPS commitments, in its 2006 Special 301 report, dated April 28, 2006, the USTR threatened to invoke the WTO dispute settlement process to deal with China's inadequate protection of IP. On April 10, the United States filed a formal complaint against China in the WTO alleging that China's criminal laws did not provide a sufficient deterrent to trademark and copyright infringements, and failed to provide adequate remedies for willful trademark infringement and copyright piracy occurring on a commercial scale, thus violating obligations under the TRIPS. The United States contended that China's high thresholds for criminal liability were too high to be reached in most cases.³¹⁴ China denied any violation of the TRIPS agreement. In January 2009, the Dispute Settlement Body of the WTO released a panel report ruling for China on the issue of the thresholds for criminal liability because the United States had not established that the

³¹¹ See Office of the USTR, *Proposed Trade Sanctions on China Announced, May 15, 1996*, reprinted in 13 INT'L TRADE REP. (BNA) 853 (May 22, 1996).

³¹² See Yu, *supra* note 1, at 148-149; CHEN FULI (陈福利), *supra* note 301, at 41-42.

³¹³ See World Trade Organization, Accession protocol of the People's Republic of China to the WTO, WT/L/432 (Nov. 10, 2001).

³¹⁴ Harris, *supra* note 1, at 97.

criminal thresholds were inconsistent with China's obligations under the TRIPS agreement.³¹⁵

From the foregoing history, it can be seen that China did not respond to Special 301 like Taiwan did. The clashes that took place between China and the United States have never occurred in Taiwan's case. While Taiwan's progress is called a successful model, the application of Special 301 to China questions this as Professor Peter K. Yu comments:

By 1996, it had become obvious that the existing American foreign intellectual property policy was ineffective, misguided, and self-deluding. The United States not only lost its credibility, but its constant use of trade threats helped China improve its ability to resist American demands.³¹⁶

It is not just Special 301, but Taiwan's distinctness that has shaped Taiwan's criminal intellectual property system. Due to its vulnerability, Taiwan has always complied with Special 301 to create an environment that could nurture IP protection. However, the Taiwanese judiciary, despite U.S. ongoing complaints, has appeared to be resistant to U.S. demands for more severe sentences. The latter discussion will reveal how the judicial independence and judicial culture under Taiwan's newly gained democracy played a key role in this resistance.

2.4. Conclusion

Taiwan's compliance with the U.S. Special 301 demands is unique. Unlike China and Thailand's defiance, Taiwan was always compliant. Under the Special 301 framework backed by the U.S. unilateral trade retaliation, Taiwan established its legal framework for IP protection. However, Taiwanese compliance must be attributed to multiple factors: the U.S. Special 301 policy, Taiwan's high level of dependence on the United States, and the Taiwan elites' vision as a result of Taiwan's special political and economic status. However, among the U.S. demands and

³¹⁵ See Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R P 7.681 (Jan. 26, 2009).

³¹⁶ Yu, *supra* note 1, at 131 (also arguing that U.S. trade threats have become increasingly unsuccessful in eliciting responses and concessions from the Chinese government with respect to intellectual property protection).

Taiwan's responses, judges' ongoing lenient sentences appeared to be out of tune. Until the establishment of the IPC in 2008 resulted in the termination of U.S. oversight, the ROC judiciary seemed to persist in imposing lenient sentences on IP infringers in spite of the U.S. Special 301 framework. In fact, parallel with the Special 301 framework, Taiwan was stepping into a democratic country. The radical change also brought the judiciary into a new stage. The following two chapters will discuss the relationship between the judiciary's resistance to the Special 301 framework and the judiciary's transformation.

Chapter 3 Taiwan's Criminal Legal and Judicial System within Judicial Independence and Judicial Culture

This chapter presents the criminal legal and judicial system of Taiwan. The criminal intellectual property (IP) law of Taiwan is enforced by Taiwan's judicial system on the basis of Taiwan's criminal legal system. The first part of this chapter focuses on Taiwan's criminal legal system, especially Taiwan's criminal law and criminal procedure law. Taiwan's criminal law defines the basic principles for crime and punishment and lays the foundation of Taiwan's criminal IP law. To provide background information for criminal IP offenses and their corresponding statutory punishment, some basic legal terms with regard to crime and punishment in the criminal IP law are specified. In addition, prosecutions and convictions for criminal IP defendants are carried out through due process provided in Taiwan's criminal procedure law. Some basic pretrial, trial, and appellate procedures with respect to criminal IP litigation are specified, too.

Next, this chapter turns to the contexts of judicial independence and judicial culture. The contexts have been influential to judges' decision making. Under the authoritarian rule, the authoritarian government controlled public prosecutors and judges. Judicial independence was the subject matter of a series of judicial reforms following Taiwan's democratization from the mid-1980s. As part of the movement for judicial independence, the judiciary became an independent institution from the executive branch. In response to a fear of controlled judicial power, the system has become sensitive to any interference with the judiciary and judicial independence became a paramount principle. Meanwhile, the long-term judicial culture that survived the peaceful democratization continued to guide judges' decision making. Judges followed their own rules and values shaped by their long history of disciplinary training and

administration. Thus, it appears from the outside that judicial independence transformed the judiciary into a neutral institution; but from the inside judges have adhered to the long-term judicial culture.

3.1. Taiwan's Criminal Legal System—The Foundation of Criminal IP Law

3.1.1. Criminal Law—A Civil Law Tradition

The most important source of Taiwan's criminal law is the Criminal Code of the Republic of China (Criminal Code).¹ It was enacted by the Kuomintang (KMT) government² in 1935 in China and was then brought to Taiwan after World War II.³ The legislation of the Criminal Code can date back to the legislation movement by the late Chinese Qing Dynasty.⁴ During the last phase of the Empire, the Qing government commissioned the Japanese scholar Okada Asataro (岡田朝太郎) to draft the first modern criminal law of China.⁵ With reference to the Penal Code of Japan, Okada Asataro's draft reflects the views of a modern civil law country with regard to crime and punishment.⁶ Though the draft was not adopted by the Qing government, the later KMT government based its enactment of the Criminal Code on the draft. Thus, a civil law tradition is embodied in the Criminal Code.⁷

The beginning of the Criminal Code provides, "A criminal punishment shall be imposed

¹ Zhonghua Minguo Xingfa (中華民國刑法) [Criminal Code of Republic of China, hereinafter Criminal Code], 11 LIFA ZHUANKAN (立法專刊) [SPECIAL ISSUE OF LEGISLATION] 20 (Lifayuan Mishuchu (立法院秘書處) [Secretariat of the Legislative Yuan] ed., 1935).

² Kuomintang (KMT) is the Nationalist Party of China.

³ Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 550 (2002).

⁴ 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), ZHONGHUA MINGUO LIFASHI (中华民国立法史) [LEGISLATIVE HISTORY OF REPUBLIC OF CHINA] 881 (2000).

⁵ 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 883 (2000); LIN SHANTIAN (林山田), XINGFA TONGLUN (刑法通論) [GENERAL THEORY OF CRIMINAL LAW] 27 (1988).

⁶ 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 886.

⁷ See 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 887-888, 919, 943-944 (describing the legislative history of the Criminal Code); LIN SHANTIAN (林山田), *supra* note 5, at 29.

only if there is an explicit provision in law at the time when the offense is committed.”⁸ That is, all offenses must be defined by statute.⁹ The Criminal Code is divided into two parts. One is the General Provisions which provide basic rules and common requirements for the establishment of a crime; the other is the Special Offenses which provide specific requirements and corresponding penalties for individual crimes.¹⁰ The Special Offenses contain regular offenses. Whenever an offense is too new, too technical, or too specialized, the legislature prefers to place it in a specialized criminal law or a criminal administrative law other than in the Criminal Code. Therefore, the other sources include specialized criminal laws and criminal administrative laws.¹¹ The former are criminal laws in specific areas such as the Military Criminal Code¹² and the Anti-Corruption Act.¹³ The latter means offenses are contained in administrative laws. For example, criminal offenses for IP infringements are provided only in intellectual property laws that are generally categorized as a branch of administrative laws.

Unless otherwise specified, the General Provisions apply to any offenses in the Special Offenses, specialized criminal laws, and criminal administrative laws.¹⁴ To establish a crime, there are three tests that should be passed; the test for constituent elements of a crime, the test for illegality, and the test for culpability.¹⁵ The first test is to determine whether the human conduct

⁸ Art. 1 of the Criminal Code.

⁹ For a general introduction of the principle, see 1 HUANG RONGJIAN (黄荣坚), JICHU XINGFAXUE (基础刑法学) [BASIC CRIMINAL LAW] 73-75 (3rd ed. 2008); LIN SHANTIAN (林山田), *supra* note 5, at 19-26.

¹⁰ See 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 933-943 (describing the structure of the two parts).

¹¹ Tebie xingfa (特别刑法) [Specialized Criminal Laws]; xingzheng xingfa (行政刑法) [Criminal Administrative Laws]. See LIN SHANTIAN (林山田), *supra* note 5, at 11 (describing the categorization).

¹² Luhaikongjun Xingfa (陸海空軍刑法) [Criminal Code of the Armed Forces], Sep. 28, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6419, 2001, at 1.

¹³ Tanwu Zhizui Tiaoli (貪污治罪條例) [Anti-Corruption Act], Oct. 23, 1996, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6118, 1996, at 1.

¹⁴ Art. 11 of the Criminal Code; LIN SHANTIAN (林山田), *supra* note 5, at 29.

¹⁵ See 1 HUANG RONGJIAN (黄荣坚), *supra* note 9, at 120 (describing and reviewing the theory of the three tests).

at issue meets all objective and subjective elements of a crime.¹⁶ The objective elements deal with all acts needed to establish a crime and the subjective elements deal with the required intents.¹⁷ The second test is to see whether the human conduct is contrary to legal order in the aggregate.¹⁸ Human conduct that has already passed the first test is presumed to be contrary to the aggregate legal order, so the second test is to find out the justification of the conduct from the perspective of the overall legal order.¹⁹ A necessary self-defense is a typical justification which is not contrary to the legal order.²⁰ Unlike the second test, the third test is to discuss whether a defendant is culpable for his or her conduct.²¹ The test examines the inner world of an offender to see if he or she can understand the meaning of his conduct and then take the responsibility.²²

The most significant change came to the Criminal Code and the criminal justice system in 2006. After Taiwan's democratization, the society became more open and diverse. Meanwhile, increasing criticism has been leveled against the criminal justice system for its inability to cope with crime. The public became more strident in the mid-2000s, demanding harsher and longer penalties. About 71 years after its enactment in 1935, the almost intact Criminal Code was extensively amended in 2005 and has been implemented since July 1, 2006. The legislature revised more than half of the articles of the General Provisions to enhance its deterrent and retributive ability.²³

Next, several important criminal legal terms in relation to criminal IP offenses will be

¹⁶ LIN SHANTIAN (林山田), *supra* note 5, at 111.

¹⁷ *Id.* at 114-115.

¹⁸ *Id.* at 134.

¹⁹ *Id.* at 136.

²⁰ *Id.* at 140-141.

²¹ *Id.* at 167.

²² *Id.* at 168-169.

²³ The reason for the legislation, *see* the second reading legislative materials of the 2005 Criminal Code (later effective on July 1, 2006), 94 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.2, Jan. 4, 2005, at 321.

explained.

3.1.1.1. Criminal Intent and Negligence

The general rule is no crime without intent or negligence; negligence is punishable only where specifically prescribed by law.²⁴ An offender's criminal intent means his or her (1) knowledge and desire of the crime, or (2) foresight of the crime that does not violate his or her anticipation.²⁵ Some specific offenses require additional criminal intent to distinguish them from other offenses. For example, additional intent to gain a profit is required to distinguish drug trafficking from drug bartering.²⁶ In criminal copyright law, the mere possession of an unauthorized copy is not a crime, but the possession with the intent to distribute it is.²⁷ In criminal trademark law, the mere possession of a counterfeiting product is not a crime, but the possession with the intent to sell it is.²⁸ In addition, when the Penal Provisions chapter of Taiwan's Copyright Act was amended in 2004, the additional intent to gain a profit was removed from the offense against unauthorized reproduction of a copyrighted work because of the belief that this additional requirement might exclude most petty infringers.²⁹ Therefore, after 2004, any unauthorized reproduction of a copyrighted work except a fair use became a crime.

3.1.1.2. Multiple Counts

To prevent double jeopardy, the basic rule is one sentence for one offense.³⁰ There is one

²⁴ Art. 12 of the Criminal Code.

²⁵ Art. 13 of the Criminal Code.

²⁶ Art. 4 & 8 of the Drug Prevention Act. Dupin Weihai Fangzhi Tiaoli (毒品危害防制條例) [Drug Prevention Act], Jul. 9, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6532, 2003, at 20.

²⁷ Art. 91bis(b) of the Copyright Act. Zhuzuoquan Fa (著作權法) [Copyright Act, hereinafter], Sep. 1, 2004, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6592, Sep. 1, 2004, at 18.

²⁸ Art. 97 of the Trademark Act. Shangbiao Fa (商標法) [Trademark Act, hereinafter], Jun. 29, 2011, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6981, 2011, at 86.

²⁹ The official reason for the legislation, *see* the first reading legislative materials of the 2004 Copyright Act, 93 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.15, Mar. 12, 2004, at 164.

³⁰ *See* 2 HUANG RONGJIAN (黃榮堅), *supra* note 9, at 603 (explaining the exception and providing examples).

exception to this rule. When a person concurrently commits a number of crimes with a single act, only one sentence will be given.³¹ For example, if someone drives a car and intentionally hits two people at the same time, he will receive one sentence for two battering counts.³²

Prior to July 1, 2006, the Criminal Code had two other exceptions, the correlative offense (*qianlianfan* 牽連犯) and the consecutive offense (*lianxufan* 連續犯). In the former, a causal relationship could be found among multiple offenses;³³ for example, an offender forged a document and then defrauded a victim with it. In the latter, a person committed the same or similar offenses consecutively, and each offense was separated and identifiable.³⁴ For instance, someone stole five cars in one week at different places. According to the prior law, only one sentence for the most serious offense would be given in both cases even though the punishment prescribed could be increased by one half.³⁵

In the past, the court's interpretation for both of the correlative and consecutive relationships was so loose that one defendant's number of crimes usually resulted in one sentence though the relationships were remote.³⁶ The judicial system took both exceptions as a principle out of convenience in the long run. Suspects and defendants were always urged to plead guilty for as many correlative or consecutive crimes as they could in exchange for one sentence. They were often told that if they pleaded guilty, nothing different would happen to them, but if they did not, they would receive multiple sentences that could lead to severe punishment. By doing

³¹ Art. 55 of the Criminal Code.

³² See 2 HUANG RONGJIAN (黃榮堅), *supra* note 9, at 572-573 (analyzing the theory of double jeopardy).

³³ *Proviso* of Art. 55 of the Criminal Code of 1935 (abolished in 2006). For a general introduction, see LIN SHANTIAN (林山田), *supra* note 5, at 349-350.

³⁴ Art. 56 of the Criminal Code of 1935 (abolished in 2006). For a general introduction, see LIN SHANTIAN (林山田), *supra* note 5, at 356-357.

³⁵ *Proviso* of Art. 55 and Art. 56 of the Criminal Code of 1935 (abolished in 2006). For a brief introduction of the correlative offense and the consecutive offense, see CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 229 (2006).

³⁶ 2 HUANG RONGJIAN (黃榮堅), *supra* note 9, at 621, 633.

so, law enforcement officers could solve criminal cases easily, and prosecutors and judges could also terminate cases rapidly and smoothly.³⁷

Due to the criticism of inadequate deterrent effect for recidivists, the legislature abolished both exceptions in 2006.³⁸ According to the new law, the number of sentences should coincide with the number of offenses except for the concurrent offense in Article 55. Nonetheless, to prevent the excessive punishment caused by the sudden and radical change, some judges developed the concept of the “collective offense.”³⁹ The so-called collective crime (*jihefan* 集合犯) designates a single offense that in its nature contains multiple and repeated acts. Because of a single crime, only one sentence can be given to the offender.⁴⁰ The most common case for collective crime is trafficking contraband goods, especially pirate products.⁴¹ For example, if an offender opened a store selling numerous pirate CDs for a period of time, judges who do not recognize collective crime may accord the number of offenses with the number of transactions that the offender made. Suppose that the offender sold pirate CDs to ten customers in one day; he or she would thereby receive ten sentences. By contrast, some judges believe that the term “trafficking” contains many business transactions in its nature. With the term of “trafficking,” the

³⁷ The criticism of both offenses, *see* the first reading legislative materials of the 2005 Criminal Code, 91 LIFAYUAN GONGBAO (立法院公報) [Legis. Yuan Gaz.], no.69, Nov. 19, 2002, at 4, 214.

³⁸ The reason for the legislation, *see* the second reading legislative materials of the 2005 Criminal Code, 94 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.2, Jan 4, 2005, at 323.

³⁹ *See, e.g.*, Zuigao Fayuan (最高法院) [Sup. Ct.], Jun. 7, 2007, Minguo 96 (Taishang) No. 3064 Criminal Judgment (中華民國 96 年 6 月 7 日 96 年度台上字第 3064 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴⁰ The ninth decision of the 2007 Criminal Court Meeting of the Supreme Court (中華民國 96 年 8 月 21 日最高法院 96 年度第 9 次刑事庭會議), 49 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.11, 2007, at 231-234.

⁴¹ One example for trademark infringement cases, *see* Zhihui Caichan Fayuan (智慧財產法院) [Intellectual Property Court, hereinafter IPC], Jul. 27, 2011, Minguo 100 (Xingzhishangyi) No. 30 Criminal Judgment (中華民國 100 年 7 月 27 日 100 年度刑智上易字第 30 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; one example for copyright infringement cases, *see* Zhihui Caichan Fayuan (智慧財產法院) [IPC], Jul. 7, 2011, Minguo 100 (Xingzhishanggeng(1)) No. 34 Criminal Judgment (中華民國 100 年 7 月 7 日 99 年度刑智上更(一)字第 34 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

legislature's intention is to deal with multiple transactions with one single offense. Thus, only one sentence should be given to the offender. So far, some appellate court judges have upheld lower courts' collective crime interpretation, while some have taken the interpretation to be a resurgence of the abolished correlative and consecutive crimes.⁴² No decisive interpretation has been made in the area of intellectual property.⁴³

3.1.1.3. Penalties

The General Provisions part of the Criminal Code defines each penalty. Article 32 divides penalties into the two categories of primary penalties and supplementary penalties. Primary penalties may be imposed independently, while supplementary penalties may be assessed only incidentally to a primary penalty that has already been decided upon.⁴⁴ In the sequence of the severity of each penalty, primary penalties are classified as: (1) death penalty, (2) life imprisonment, (3) imprisonment, (4) criminal detention, and (5) a fine.⁴⁵ Supplementary penalties are: (1) deprivation of political rights, (2) forfeiture, and (3) compelling surrender, compelling payment, or compelling setoff.⁴⁶

Imprisonment involves confinement in a prison for a fixed term which must be neither less

⁴² One example for trademark infringement cases, *see* Zhihui Caichan Fayuan (智慧財產法院) [IPC], Oct. 6, 2011, Minguo 100 (Xingzhishangyi) No. 65 Criminal Judgment (中華民國 100 年 10 月 6 日 100 年度刑智上易字第 65 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; one example for copyright infringement cases, *see* Zhihui Caichan Fayuan (智慧財產法院) [IPC], Jan. 18, 2012, Minguo 101 (Xingzhishangyi) No. 99 Criminal Judgment (中華民國 101 年 1 月 18 日 100 年度刑智上易字第 99 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴³ *See* Cai Hui Fang (蔡蕙芳), *Xingfa Xiuzheng Hou Jihefan yu Zhuzuoquan Anjian Zhong zhi Shiyong Wenti—Zhuzuoquan Fa Shang Jihefan Panjue zhi Zonghe Xing Pingxi* (刑法修正後集合犯於著作權侵權案件中之適用問題—著作權法上集合犯判決之綜合性評析) [*Application of Collective Offenses to Copyright Infringement Cases After the Revisions of the Criminal Code—Comments and Analysis on Copyright Decisions Recognizing Collective Offenses*], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.175, 2009, at 219 (describing and analyzing the controversy).

⁴⁴ LIN SHANTIAN (林山田), *supra* note 5, at 377.

⁴⁵ Art. 33 of the Criminal Code.

⁴⁶ Art. 34 of the Criminal Code.

than two months nor more than 15 years.⁴⁷ The period for criminal detention is from one to 59 days.⁴⁸ According to the Code of Criminal Procedure, any penalty decided by courts shall be executed under the supervision of prosecutors.⁴⁹ In practice, the most common punishment is imprisonment.⁵⁰ Criminal detention and a fine are usually sentenced to petty offenders.⁵¹

If a defendant committed multiple offenses before one of the offenses was finalized by the court, the court has to combine all the multiple offenses together.⁵² To combine multiple sentences, the court sentences the defendant for each offense in the first place and then determines the final punishment according to Article 51 of the Criminal Code.⁵³ If the defendant was sentenced to multiple jail terms, the court has to set the final term within the range from the longest term to the aggregate of all terms.⁵⁴ For example, when combining a sentence to two-year imprisonment and a sentence to three-year imprisonment, the court must determine the final term between three years, the longest term, and five years, the aggregate of both terms. Prior to 2006, the cap for the final term was 20 years.⁵⁵ Due to the criminal policy in favor of harsh punishment against serious criminals and recidivists, it was extended to 30 years in 2006.⁵⁶

On the other hand, in order to prevent petty offenders from being plagued by other wicked inmates in prison,⁵⁷ the Criminal Code provides that whenever a defendant committed an offense, the maximum statutory punishment of which is not more than five years imprisonment,

⁴⁷ Art. 33(a)(3) of the Criminal Code.

⁴⁸ Art. 33(a)(4) of the Criminal Code.

⁴⁹ Art. 457 of the Code of Criminal Procedure. Xingshi Susong Fa (刑事訴訟法) [Code of Criminal Procedure, hereinafter], Jan. 28, 1967, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.1823, 1967, at 1.

⁵⁰ ZHANG GANMEI (張甘妹), XINGSHI ZHENGCE (刑事政策) [CRIMINAL POLICY] 256 (1986).

⁵¹ *Id.* at 256, 281, 346.

⁵² Art. 50 of the Criminal Code.

⁵³ Art. 51 of the Criminal Code.

⁵⁴ Art. 51(a)(5) of the Criminal Code.

⁵⁵ *Proviso* of Art. 51(a)(5) of the Criminal Code of 1935.

⁵⁶ *Proviso* of Art. 51(a)(5) of the Criminal Code of 2005.

⁵⁷ *See* ZHANG GANMEI (張甘妹), *supra* note 50, at 256 (discussing the shortcomings of imposing short-term imprisonment on petty offenders).

and he or she was sentenced to criminal detention or imprisonment not more than six months, the jail term can be converted into a fine unless the conversion is of little corrective effect or the legal order cannot be thereby maintained.⁵⁸ Thus, when a prosecutor supervises the execution of a convertible imprisonment or criminal detention, he or she has the authority to order the defendant to serve a real jail term if evidence shows that the conversion is inappropriate.⁵⁹

When the court delivers its judgment, it has to decide the conversion rate among 1,000, 2,000 or 3,000 NT dollars per day.⁶⁰ Since most offenses are convertible, offenders who are sentenced to six months imprisonment or less are usually eligible to pay a fine. Moreover, the Legislative Yuan added Article 42*bis* to the Criminal Code in 2009 to allow the defendant who is sentenced to six months imprisonment or less and cannot afford a converted fine to serve a community service as a replacement.⁶¹ The replacement rate is six hours of community service for one day imprisonment.⁶² Therefore, in Taiwan only a sentence to seven months imprisonment or more and without probation can guarantee a real jail term.

The present criminal IP law of Taiwan does not have any offense for which the maximum statutory punishment exceeds five years imprisonment,⁶³ so all criminal IP offenses are

⁵⁸ Art. 41(a) of the Criminal Code. See Lu Yingjie (盧映潔), *Taiwan Xingfa Zhixing yu Biangeng Zhong de Wenti yu Gaige—Yi Yikefajin Ji Yifushehuilaodong Wei Tantaog Zhongdian* (台灣刑罰執行與變更中的問題與改革—以易科罰金及易服社會勞動為探討重點) [*The Changing Problems and Reforms with Respect to Taiwan's Criminal Punishment Execution—Focusing on Conversion and Replacement*], FAXUE XINLUN (法學新論) [JOURNAL OF NEW PERSPECTIVES ON LAW], no.20, 2010, at 31, 33 (describing and analyzing the requirements for the conversion).

⁵⁹ Lu Yingjie (盧映潔), *supra* note 58, at 40.

⁶⁰ Art. 41(a) of the Criminal Code.

⁶¹ Art. 42*bis* of the Criminal Code. See Lu Yingjie (盧映潔), *supra* note 58, at 37 (describing and analyzing the requirements for the replacement).

⁶² Art. 42*bis*(a) of the Criminal Code.

⁶³ Prior to 2006, a career offender involve in copyright piracy could be sentenced up to seven years. A career offender in Taiwan designated an offender took a specific offense as his or her occupation. Given that the chronic offense for career offenders is one type of the consecutive crime, the legislature abolished the chronic offense in the copyright law when it removed the consecutive crime from the Criminal Code in 2006. Now the most serious copyright offense is unauthorized reproduction of a copyrighted work involving optical media piracy (Art. 91(c) of the Copyright Act). The maximum punishment for this offense is five years imprisonment. The most serious trademark offense is unauthorized use of a registered trademark (Art. 95 of the Trademark Act), but its maximum

convertible.⁶⁴ In fact, to let an IP offender serve a jail term in prison, several methods were devised over the past 20 years. First of all, conversion was one of the sources of judges' lenient sentences. If judges' convertible sentences had become fewer, more IP offenders would have had to go to jail.⁶⁵ Second, five-year maximum imprisonment was one of the prerequisites for conversion. Another method was to raise the maximum imprisonment for certain IP offenses to exceed five years.⁶⁶ Third, the conversion rate could decide how much money a defendant would have to pay. Thus, raising the conversion rate could cost defendants more.⁶⁷ Fourth, a sentence to six months imprisonment or less was another prerequisite for conversion, so raising the minimum imprisonment for certain criminal IP offenses would narrow judges' discretion in sentencing and make conversion more difficult.⁶⁸

punishment is three years imprisonment.

⁶⁴ Nonetheless, two Chinese scholars praised Taiwan's criminal IP law in 2008, "There is a very high level of criminal protection of copyright in the Taiwan Copyright Act. Firstly, the level of criminal protection of copyright in Taiwan is higher than in TRIPs... Secondly, the Taiwan Copyright Act protects the property right and personal right of copyright holders... Thirdly, the criminal law about offences of infringing copyright, is relative tough in the Taiwan Copyright Act." Zhe Zhou & Xiaomin Liu, *Introduction to Copyright Protection by Criminal Law in Taiwan*, in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD 480-481 (Shizhou Wang ed., 2008).

⁶⁵ The executive branch of the government did try to persuade judges to treat IP offenders differently. For example, Wang Quanlu was the chair of the Copyright Committee of the Ministry of Interior. When he was invited by the Judicial Yuan to give a lecture to judges, he pointed out the pressure of the Special 301 and urged judges to impose more severe punishment on IP offenders, see Wang Quanlu (王全祿), Chairman, Copyright Committee of the Ministry of Interior, Address for Sifayuan Di 1 Qi Keji Zixun Falü Yanjiu Hui (司法院第 1 期科技資訊法律研究會) [First Term of the Training Program on the Law of Technology and Information of the Judicial Yuan]: Zhongmei Tanpan zhong Zhihui Caichanquan Wenti Tansuo (中美談判中智慧財產權問題探索) [Probe into IP Rights Problems in the Taiwan-U.S. Negotiations], (Jun. 3, 1991), in 1 KEJI ZIXUN FALÜ YANJIU HUIBIAN (科技資訊法律研究彙編) [Collection for Law on Technology and Information Law Research] 134 (Judicial Yuan ed., 1992).

⁶⁶ It is technically viable but may be out of proportion when compared to the other offenses. In Taiwan, the maximum term for all offenses against tangible property in a peaceful manner such as theft, aggravated theft, fraud, or embezzlement is no more than five years. Only violent offenses like robbery or kidnapping deserve more severe punishment. An increase solely for criminal IP offenses regardless of the other offenses might violate Taiwan's conventional justice and arouse people's opposition.

⁶⁷ In response to U.S. pressure for more severe punishment, Taiwan raised the conversion rate in 1993. The conversion rate was raised ten times from 30, 60, or 90 NT dollars per day to 300, 600, or 900 NT dollars per day. If the court selected the highest rate, the fine for a one month jail term jumped from 2,700 to 27,000 NT dollars. At that time, the minimum wage was 12,000 NT dollars per month. *Jiben Gongzi zhi Zhiding yu Tiaozheng Jingguo* (基本工資之制訂與調整經過) [*The Progress for the Decision and Adjustment of the Minimum Wage*], XINGZHENG YUAN LAOGONG WEIYUAN HUI (行政院勞工委員會) [COUNCIL OF LABOR AFFAIRS OF THE EXECUTIVE YUAN], http://www.cla.gov.tw/cgi-bin/siteMaker/SM_theme?page=422d4691 (last visited Jun. 28, 2013).

⁶⁸ In consequence, the present copyright law has several offenses with six months minimum imprisonment. See Art.

3.1.1.4. Probation

In addition to the above-mentioned conversion and replacement, probation is another measure to prevent the shortcoming brought on by short-term imprisonment.⁶⁹ “Where any person is sentenced to imprisonment for not more than two years, to criminal detention, or to a fine, probation may at the same time be granted if suspension of punishment is appropriate, for a period of not less than two years and not more than five years from the day when judgment becomes final.”⁷⁰ Besides, either of the following two circumstances must exist: (1) the person has no prior sentence to imprisonment for an intentional offense,⁷¹ or (2) the person had a prior sentence to imprisonment for an intentional offense, but within five years after his or her imprisonment was completed or pardoned, he or she had no prior sentence to imprisonment for an intentional offense.⁷²

91(b), 91(c) and 91bis(c) of the Copyright Act.

⁶⁹ ZHANG GANMEI (張甘妹), *supra* note 50, at 163. Like the United States, Taiwan’s prisons have been overcrowded, especially by drug offenders. For example, Taiwan’s prisons and detention centers housed 63,875 persons at the end of 2009 but they were designed to house 54,593 persons only. *See* HUANG ZHENGAN (黃徵男), 21 SHIJI JIANYUXUE (21 世紀監獄學) [21TH CENTURY PENOLOGY] 82 (2010). In 2007, Taiwan even initiated an extensive commutation pardon plan to relieve the pressure from prison overcrowding. *Zhonghua Minguo 96 Nian Zuifan Jianxing Tiaoli* (中華民國 96 年罪犯減刑條例) [2007 Criminal Commutation Pardon Act], Jul. 4, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6751, 2007, at 11. To encourage and remind judges to place defendants on probation, the Judicial Yuan issued the Implementation Guidelines for Probation and Conversion in 1987. *Jiaqiang Huanxing ji Yikefajin Zhidu Shishi Yaodian* (加強緩刑及易科罰金制度實施要點) [Implementation Guidelines for the Enhancement of Probation and Conversion], Jun. 2, 1987, *Zhonghua Minguo 76 Nian 6 Yue 2 Ri Sifayuan* (76) Ting Er Zi Di 03743 Hao Han (中華民國 76 年 6 月 2 日司法院(76)廳二字第 03743 號函) [Judicial Yuan, Jun. 2, 1987, No. 03743 Order], 29 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.7, 1987, at 35-36. The Guidelines were renamed as the Implementation Guidelines for Probation Placement of Courts in 1992. *Fayuan Jiaqiang Huanxing Xuangao Shishi Yaodian* (法院加強緩刑宣告實施要點) [Implementation Guidelines for Probation Placement of Courts], Jun. 13, 1992, *Zhonghua Minguo 81 Nian 6 Yue 13 Ri Sifayuan* (81) Ting Er Zi Di 09173 Hao Han (中華民國 81 年 6 月 13 日司法院(81)廳二字第 09173 號函) [Judicial Yuan, Jun. 13, 1992, No. 09173 Order], 34 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.8, 1992, at 48-49. A couple of circumstances such as the defendant is a first time offender or the defendant is now a student are provided in the Guidelines for judges to consider a placement on probation. However, in the case that the offense affects social security or national interest, the Guidelines discourage judges from granting probation.

⁷⁰ Art. 74(a) of the Criminal Code. For a further introduction, *see* LIN SHANTIAN (林山田), *supra* note 5, at 447-451. For a general introduction to American probation, *see* I NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 1:1 (1999).

⁷¹ Art. 74(a)(1) of the Criminal Code.

⁷² Art. 74(a)(2) of the Criminal Code.

In Taiwan, when the court imposes a sentence of primary punishment on an offender, it can also place the offender on probation for a fixed term with certain conditions such as apology,⁷³ reparations,⁷⁴ fines,⁷⁵ community service,⁷⁶ or counseling⁷⁷ to spare execution of the sentence.⁷⁸ If the offender was sentenced to seven months imprisonment or more for another intentional offense during his probation, the court must revoke the probation and order him or her to serve the original sentence.⁷⁹ If the offender during his probation was: (1) sentenced to six months imprisonment or less, criminal detention, or a fine, or (2) breached any condition adhered to the probation, the court has the discretion to revoke the probation and order the offender to serve the original sentence.⁸⁰ If probation expires and it has not been revoked, the sentence shall forfeit its validity after its expiration.⁸¹ In practice, probation is usually hinged on civil compensation. That is, criminal IP offenders may pay civil compensation to victims in exchange for sentences of probation.

3.1.2. Taiwan's Criminal Procedure Law—Toward Adversarial Justice

The most important source of Taiwan's criminal procedure law is the Code of Criminal Procedure.⁸² Like the Criminal Code, the Code of Criminal Procedure can date back to the legislative movement during the late Qing Dynasty⁸³ and find its roots in the criminal procedure

⁷³ Art. 74(b)(1) of the Criminal Code.

⁷⁴ Art. 74(b)(3) of the Criminal Code.

⁷⁵ Art. 74(b)(4) of the Criminal Code.

⁷⁶ Art. 74(b)(5) of the Criminal Code.

⁷⁷ Art. 74(b)(6) of the Criminal Code.

⁷⁸ Art. 74(b) of the Criminal Code.

⁷⁹ Art. 75 of the Criminal Code.

⁸⁰ Art. 75*bis* of the Criminal Code.

⁸¹ Art. 76 of the Criminal Code.

⁸² Xingshi Susong Fa (刑事訴訟法) [Code of Criminal Procedure], Jan. 28, 1967, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.1823, 1967, at 1. See 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 1013-1030 (describe the whole legislative history for criminal procedure law from the late Qing Dynasty to the National government on mainland China).

⁸³ See 2 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), *supra* note 4, at 1013-1030 (describe the whole legislative history for criminal procedure law from the late Qing Dynasty to the Nationalist government on Mainland

law of Japan.⁸⁴ After the 1911 revolution, the provisional Beiyang government, based on the late Qing draft, announced a few interim ordinances for criminal procedures; however, these ordinances did not have a chance to survive because the provisional government was soon overthrown by local warlords.⁸⁵ Not until the KMT's Northern Expedition military campaign defeated the warlords and unified China, was a formal criminal procedure law enacted.⁸⁶ In 1928, the KMT government promulgated the Code of Criminal Procedure⁸⁷ and brought it to Taiwan after the end of the Second World War.⁸⁸

The Code of Criminal Procedure can be divided into five major sections: General Provisions, Trial, Appeal, Post-Conviction, and Affiliated Civil Action. The General Provisions section deals with common issues including definition of terms,⁸⁹ jurisdiction,⁹⁰ recusal,⁹¹ representation,⁹² formats of legal documents,⁹³ service,⁹⁴ summon and arrest of defendants,⁹⁵ interrogation of defendants,⁹⁶ detention of defendants,⁹⁷ search and seizure,⁹⁸ evidence,⁹⁹ and formats of court decisions.¹⁰⁰ The Trial section consists of public prosecution and private prosecution.¹⁰¹ The former details the procedures for public prosecutors' crime investigation,

China).

⁸⁴ HUANG DONGXIONG (黃東熊), XINGSHI SUSONG FA LUN (刑事訴訟法論) [CRIMINAL PROCEDURAL LAW] 27 (1985).

⁸⁵ See 2 XIE ZHENMIN & ZHANG ZHIBEN (謝振民&張知本), *supra* note 4, at 1014.

⁸⁶ See *id.* at 1015-1016.

⁸⁷ See *id.* at 1019.

⁸⁸ Tay-Sheng Wang, *supra* note 3, at 552.

⁸⁹ Art. 1-3 of the Code of Criminal Procedure.

⁹⁰ Art. 4-16 of the Code of Criminal Procedure.

⁹¹ Art. 17-26 of the Code of Criminal Procedure.

⁹² Art. 27-38 of the Code of Criminal Procedure.

⁹³ Art. 39-54 of the Code of Criminal Procedure.

⁹⁴ Art. 55-62 of the Code of Criminal Procedure.

⁹⁵ Art. 71-93 of the Code of Criminal Procedure.

⁹⁶ Art. 94-100 of the Code of Criminal Procedure.

⁹⁷ Art. 101-121 of the Code of Criminal Procedure.

⁹⁸ Art. 122-153 of the Code of Criminal Procedure.

⁹⁹ Art. 154-219 *nonies* of the Code of Criminal Procedure.

¹⁰⁰ Art. 220-227 of the Code of Criminal Procedure.

¹⁰¹ Art. 228-343 of the Code of Criminal Procedure.

public prosecutors' decision to prosecute or not to prosecute, and trial.¹⁰² The latter sets rules for direct victims to initiate prosecutions.¹⁰³ The Appeal section regulates appeals at the second and third level appellate courts.¹⁰⁴ In addition to two post-conviction reliefs, retrial¹⁰⁵ and extraordinary appeal,¹⁰⁶ the Post-Conviction section prescribes the procedures for public prosecutors to carry out courts' final decisions.¹⁰⁷ In the last section, Affiliated Civil Action, the criminal procedure law allows a direct victim to file a civil action affiliated to the criminal case¹⁰⁸ without prepaying adjudication fees like a regular civil plaintiff must do.¹⁰⁹

The Code of Criminal Procedure, as part of Taiwan's transformation from an authoritarian country to a democratic country, has undergone several major revisions in response to the sharp criticisms of inadequate protection of human rights and cumbersome legal proceedings.

Prior to the judicial reform starting in the early 1990s, Taiwan had a typical "inquisitorial" criminal judicial system¹¹⁰ that is still popular in many civil law countries.¹¹¹ Different from adversarial justice where both parties are main actors, the public sector plays an active and powerful role in inquisitorial justice.¹¹² More emphasis is placed on the government's responsibility to carry out justice. Remarkably, the institution of public prosecutors is the feature

¹⁰² Art. 228-318 of the Code of Criminal Procedure.

¹⁰³ Art. 319-343 of the Code of Criminal Procedure.

¹⁰⁴ Art. 344-402 of the Code of Criminal Procedure.

¹⁰⁵ Art. 420-440 of the Code of Criminal Procedure. The retrial is the measure to remedy a final judgment with material errors in the finding of facts, *see* HUANG DONGXIONG (黃東熊), *supra* note 84, at 661.

¹⁰⁶ Art. 441-448 of the Code of Criminal Procedure. The extraordinary appeal is the measure to remedy a final judgment with material errors in the application of laws, *see* HUANG DONGXIONG (黃東熊), *supra* note 84, at 676.

¹⁰⁷ Art. 456-486 of the Code of Criminal Procedure.

¹⁰⁸ Art. 487-512 of the Code of Criminal Procedure.

¹⁰⁹ Art. 504(b) of the Code of Criminal Procedure.

¹¹⁰ Jaw-Perng Wang, *The Evolution and Revolution of Taiwan's Criminal Justice*, 3 TAIWAN IN COMPARATIVE PERSPECTIVE 8, 9 (2011).

¹¹¹ For a general introduction to the inquisitorial system in civil law countries, *see* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 127-129 (3rd ed. 2007).

¹¹² For a general introduction to the inquisitorial model, *see* Leonard L. Cavise, *Essay: The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 792-796 (2007).

of the inquisitorial system of civil law countries.¹¹³ A public prosecutor in a civil law country is a special bureaucrat who is employed by the state and is subject to the supervision of the state to prosecute crimes and perform certain functions in the civil process.¹¹⁴ Public prosecutors are qualified in the same manner as judges, and in some countries, such as Italy, it is possible to move between judicial and prosecutory appointments.¹¹⁵ A public prosecutor is obligated to investigate all crimes that come to his attention and has at his or her disposal the services of the police forces of the country or locality in carrying out crime investigation.¹¹⁶ A public prosecutor is known by a variety of titles in the countries of the civil law. In France, he or she is the *procurateur de la République*; in Italy, the *pubblico ministero*; in Spain, the *ministerio fiscal*; in Germany, the *Staatsanwalt*.¹¹⁷ In Scotland, he or she is known as the Procurator Fiscal.¹¹⁸ In China, the official English translation is Procurator.¹¹⁹

¹¹³ THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 402 (1999).

¹¹⁴ See Watkin, *supra* note 113, at 402. Cf. “American prosecutors are not a hierarchically organized state bureaucracy, as they are in virtually all Continental countries. They work mostly alone, or with a few assistants, free from effective hierarchical supervision. Being locally elected, they depend for their staying power in office on the electorate rather than on institutional superiors. Rather than expecting promotion to a more elevated prosecutorial position as a reward for good service, they view political rewards as a stimulation: good performance can result in election to City Hall, Congress, or some other political office.” MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 223 (1986).

¹¹⁵ WATKIN, *supra* note 113, at 402. In Taiwan, prior to 2012, the qualification for a prosecutor and a judge was the same. See Art. 9(a) of the Sifa Renyuan Renshi Tiaoli (司法人員人事條例) [Judicial Personnel Act]. Sifa Renyuan Renshi Tiaoli (司法人員人事條例) [Judicial Personnel Act], Dec. 22, 1989, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5184, 1989, at 17. Also, prior to 2012, a prosecutor could transfer to be a judge with little difficulty. See Faguan Jianchaguan Hudiao Banfa (法官檢察官互調辦法) [Regulations for the Transfer between Judges and Prosecutors], Sep. 21, 2000, Zhonghua Minguo 89 Nian 9 Yue 21 Ri Sifayuan (89) Yuan Tai Ren Er Zi Di 22274 Hao Ling & Xingzhengyuan (89) Tai Fa Zi Di 27209 Hao Ling (中華民國 89 年 9 月 21 日司法院(89)院台人二字第 22274 號令&行政院(89)台法字第 27209 號令) [Judicial Yuan, Sep. 21, 2000, No. 22274 Order & Executive Yuan, Sep. 21, 2000, No. 27209 Order] (abolished in 2012).

¹¹⁶ WATKIN, *supra* note 113, at 402.

¹¹⁷ *Id.* at 403.

¹¹⁸ The powers and duties of the procurator fiscal, see A. V. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE 112 (1975).

¹¹⁹ The official English translation for China’s Zuigao Renmin Jianchayuan (最高人民检察院) is “the Supreme People’s Procuratorate of People’s Republic of China.” *Front Page*, SUPREME PEOPLE’S PROCURATORATE OF PRC, <http://www.spp.gov.cn/> (last visited Jun. 28, 2013).

In Taiwan, the official English translation for a public prosecutor is Prosecutor¹²⁰ though a public prosecutor in Taiwan and a prosecutor in the United States do not share exactly the same meaning,¹²¹ especially before the introduction of the “reformed adversarial justice”¹²² to Taiwan’s criminal justice in the 2000s. Under Taiwan’s inquisitorial justice in the past, the ideology that both public prosecutors and judges were government officials responsible for justice was prevalent. When conducting pretrial crime investigation, public prosecutors enjoyed great power. For example, they were authorized to search, seize, and even detain suspects without any judicial approval.¹²³ Upon prosecution, judges not only took over prosecutors’ role to investigate crime but also shouldered the responsibility to review the prosecution as well as the defense.¹²⁴ While no substantial burden of proof was placed on public prosecutors, the court had to collect any evidence that would help find the truth and make final judgment.¹²⁵ Due to public prosecutors’ great power and a judges’ dual role, the general public confused public prosecutors with judges in criminal proceedings.¹²⁶

¹²⁰ The official English translation for Taiwan’s Zuigao Fayuan Jianchashu (最高法院檢察署) is “the Supreme Prosecutors’ Office.” *Front Page*, SUPREME PROSECUTORS’ OFFICE OF THE ROC, <http://www.tps.moj.gov.tw/mp096.html> (last visited Jun. 28, 2013).

¹²¹ The public prosecutor in Taiwan is not exactly the counterpart of the prosecutor in the United States. Nevertheless, many, including the Taiwanese government, use the word “prosecutor” to designate the public prosecutor. The same translation, see Jaw-Perng Wang, *supra* note 110, at 8; Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651, 652 (2009).

¹²² Gailiang Dangshiren Jinxing Zhuyi (改良當事人進行主義) [Reformed Adversarial Justice]. See Lewis, *supra* note 121, at 651 (describing Taiwan’s reformed adversarial justice).

¹²³ Art. 67(b) & 142(b) of the Code of Criminal Procedure of 1928; Art. 102(c) & 128(c) of the Code of Criminal Procedure of 1967.

¹²⁴ “Faguan ji banyan fanzui zhi dajizhe, fuban zhongli zhi shenpanzhe deng erzhong wanquan chongtu zhi jiaose, shi sifa zhi gongzhengxing shenshou huaiyi.” (法官既扮演犯罪之打擊者，復扮中立之審判者等二種完全衝突之角色，使司法之公正性深受懷疑。) [Judges play the role of crime busters, and also play the role of neutral referees. The conflicting roles are detrimental to criminal justice.] 2 SIFA GAIGE WEIYUANHUI HUIYI SHILU (司法改革委員會會議實錄) [MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, hereinafter] 692 (Judicial Yuan ed., 1996).

¹²⁵ The court’s obligation to find truth was prescribed in Art. 163(a) of the Code of Criminal Procedure of 1967. The legislative history, see the third reading legislative materials, 55 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.38, Jan. 13, 1967, at 444-454.

¹²⁶ “Weizhi yu fayuan zixing tiaocha zhengju, zhi jiuwen zhuyi secaili nonghou, yibei wuhui wei faguan yu jianchaguan shi yiti, ziying qianghua jianchaguan zhi juzheng zeren.” (委之於法院自行調查證據，致糾問主義色

Prior to the introduction of the “reformed adversarial justice,” judges played a very active role at trial. For example, in addition to presenting all evidence to both parties, judges’ interrogation of defendants and witnesses was the major part of trials. Until judges finished their interrogation, neither party was allowed to examine witnesses.¹²⁷ In practice, everything was under the court’s control and a court debate, if any, was supplemental or even hollow.¹²⁸ One Taiwanese law professor who specializes in the criminal procedural law of Taiwan described the court proceedings under the inquisitorial justice:

Consequently, it appeared that the prosecutor and defence lawyer did not truly commit to their case at trial. In the prosecutor’s opening statement, s/he normally read the written prosecution word by word, or said only a few words, such as: “the facts are indicated and detailed in the written prosecution.” In the closing argument, the prosecutor normally did not make any arguments at all. Instead, s/he only stated: “I request the court to decide the defendant’s guilt or innocence and his sentence in accordance with the law.” In fact, the prosecutor appearing at the trial was not normally the one who prosecuted the accused. All prosecutors were scheduled to take turns at appearing at different trials. Moreover, it was extremely common that the prosecutor obtained no information about the case before the trial.¹²⁹

Since the court dominated the whole process, a prosecutor usually arrived at a courtroom at the last minute only to enter their appearance.¹³⁰ On the other hand, given the thinking that

彩濃厚，易被誤會為法官與檢察官是一體，自應強化檢察官之舉證責任。) [The present practice that the court has to investigate evidence by itself leads to an inquisitorial model. The public often mistakenly takes judges and prosecutors as a body. The duty of proof on prosecutors should be strengthened.], 2 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 582.

¹²⁷ Art. 166(a) of the Code of Criminal Procedure of 1967.

¹²⁸ Under Taiwan’s inquisitorial justice, judges in fact continued prosecutors’ duty to investigate crime evidence. Because judges played a very active role, both parties’ participation in criminal proceedings was relatively limited. Thus, a court debate was usually nominal.

¹²⁹ Jaw-Perng Wang, *supra* note 110, at 9.

¹³⁰ “Before the current reform effort, prosecutors controlled the investigation and charging process but made only a ceremonial appearance in court, and defense lawyers were seldom seen and less frequently heard.” Lewis, *supra* note 121, at 689. “Diyishen jianchaguan tiqi gongsu hou, shiwushang chu shaoshu jiao zhongda zhi anjian you yuan qisu zhi jianchaguan daoting zhixing zhiwu wai, qiyu jieyou lunzhi fei qisu zhi qita jianchaguan daoting shixing gongsu, qie jinxian yu shenpan qiri daoting, yu diaocha chengxu xianyou daoting zhe.” (第一審檢察官提起公訴後，實務上除少數較重大之案件由原起訴之檢察官到庭執行職務外，其餘皆由輪值非起訴之其他檢察官到庭實行公訴，且僅限於審判期日到庭，於調查程序鮮有到庭者。) [After indictment, except some serious cases for which the indicting prosecutor will participate in the trial, one on-duty prosecutor will attend the trial, but only

judges were supposed to be omnipotent, it was a fairly common practice for prosecutors to present premature cases for courts to investigate.¹³¹ Faced with numerous premature cases, judges could not help but either sacrifice investigation for timely adjudication or delay adjudication for investigation. Timely adjudication downgraded justice, whereas an emphasis on investigation delayed justice.

Another explanation for the slow pace of the criminal justice system is the appellate system. Taiwan's judicial system has two tiers of appeals courts.¹³² Until now, the first level appellate court, Gaodeng Fayuan (高等法院) [High Court], has to review lower courts' application of law as well as findings of facts.¹³³ Moreover, in the second instance, both parties are allowed to present new evidence and the intermediate court have to resume almost all procedures that have been done in lower courts.¹³⁴ Because the High Court has to retry cases, a losing party at the district court is apt to take the chance to appeal.¹³⁵ In addition, the High Court not only has to take cases from lower courts, but also needs to deal with those remanded cases from the second level appellate court, Zuigao Fayuan (最高法院) [Supreme Court]. Unlike the highest court in

for a closing statement, not the whole procedures.] 2 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 581.

¹³¹ “Jianchaguan baguan gongneng buzhang, sifa jingcha lanxing yisong, jianchaguan qingyi tiqi gongsu de xianxiang, zhide zhuyi.” (檢察官把關功能不彰，司法警察濫行移送，檢察官輕易提起公訴的現象，值得注意。) [Public prosecutors do not filter cases referred by the police very well. We have to pay attention to the premature cases prosecuted by public prosecutors.] *Id.* at 631.

¹³² Art. 32 & 48 of the Court Organization Act. Fayuan Zuzhi Fa (法院組織法) [Court Organization Act], Dec. 22, 1989, Zongtongfu Gongbao (總統府公報) [Presidential Off. Gaz.], no.5184, 1989, at 1.

¹³³ Art. 369(a) of the Code of Criminal Procedure provides that the appellate court, despite the appeal without merit, should vacate the decision of the lower court if the decision is inappropriate or violates law.

¹³⁴ Art. 364 of the Code of Criminal Procedure. For a brief introduction, *see* Wu Xunlong (吳巡龍), *Cong Meiguo Shangsus Zhidu Jiantao Wuoguo Xingshisusong Shangsushen Xiuzheng Caoan* (從美國上訴制度檢討我國刑事訴訟上訴審修正草案) [Examine Taiwan's Draft Bill on Criminal Appellate Procedures from the Perspective of U.S. Appellate Procedures], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [Taiwan L. Rev.], no.143, 2007, at 121, 129-130.

¹³⁵ “Ci zhidu siyou qinghu diyishen panjue zhi xian, zhuzhang beigao lanxing shangsus zhi feng, bing zaocheng susong chengxu zhi tuoyan.” (此制度似有輕忽第一審判決之嫌，助長被告濫行上訴之風，並造成訴訟程序之拖延。) [It appears that the system overlooks the first instance, fosters frivolous appeals by defendants, and delays the proceedings.], 2 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 580-581.

the United States where review of most types of cases is at the court's discretion,¹³⁶ Taiwan's Supreme Court is required to review all cases for which an appeal is lodged across the appellate thresholds. Taiwan's criminal procedure law does not set the thresholds to the highest court very high. Article 376 of the Code of Criminal Procedure prohibits the appeals for two categories of cases to the highest court. The first category is the cases dealing with the offenses whose maximum punishment is three-year imprisonment or less.¹³⁷ The second category is the cases dealing with the enumerated offenses such as theft,¹³⁸ embezzlement,¹³⁹ fraud,¹⁴⁰ breach of trust,¹⁴¹ extortion,¹⁴² and receiving stolen property.¹⁴³ Because the Supreme Court cannot decide its caseload and the appellate thresholds are low, the caseload of the highest court is heavier than its counterpart in other countries.¹⁴⁴

To solve the problem of the heavy caseload, the Supreme Court of Taiwan has been equipped with relatively high number of personnel. Taiwan's Supreme Court had 86 judges in 2011¹⁴⁵ while the counterpart in Japan had only 15.¹⁴⁶ In the past, a special practice that could

¹³⁶ MARK E. CAMMACK & NORMAN M. GARLAND, *ADVANCED CRIMINAL PROCEDURE IN A NUTSHELL* 458 (2001).

¹³⁷ Art. 376(a)(1) of the Code of Criminal Procedure.

¹³⁸ The theft offenses in Art. 320 and 321 of the Criminal Code. Art. 376(a)(2) of the Code of Criminal Procedure.

¹³⁹ The embezzlement offenses in Art. 335 and 336(b) of the Criminal Code. Art. 376(a)(3) of the Code of Criminal Procedure.

¹⁴⁰ The fraud offenses in Art. 339 and 341 of the Criminal Code. Art. 376(a)(4) of the Code of Criminal Procedure.

¹⁴¹ The breach of trust offenses in Art. 342 of the Criminal Code. Art. 376(a)(5) of the Code of Criminal Procedure.

¹⁴² The extortion offenses in Art. 346 of the Criminal Code. Art. 376(a)(6) of the Code of Criminal Procedure.

¹⁴³ The swag offenses in Art. 349(b) of the Criminal Code. Art. 376(a)(7) of the Code of Criminal Procedure.

¹⁴⁴ See Chen Yuncai (陳運財), *Xingshi Shangsu Zhidu zhi Gaige—You Ribanfa Lun Wuoguo Diershan Shangshen zhi Jiegou* (刑事上訴審制度之改革—由日本法論我國第二審上訴審之結構) [*Reform for Criminal Appellate System—Examine Taiwan's Intermediate Appellate Procedures from the Perspective of Japanese Law*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 280 n.8 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010) (comparing the caseload of Taiwan's highest court with Japan's).

¹⁴⁵ See Lin Menghuang (林孟皇), *Zuigao Fayuan Ying Jiejue Fayuan Zuzhi Buhefa de Wenti* (最高法院應解決法院組織不合法的問題) [*Supreme Court Should Solve the Problem on Illegal Court Organization*], SIFAGAIGE ZAZHI (司法改革雜誌) [JUDICIAL REFORM], no.90, Jun. 30, 2012, at 48-49.

¹⁴⁶ *Justices of the Supreme Court of Japan*, SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/justices/index.html> (last visited Jun. 28, 2013).

terminate cases rapidly was developed to curb the caseload. The criminal procedure law requires that the Supreme Court focus on meritorious legal issues that would affect the results, not harmless legal errors or findings of fact.¹⁴⁷ However, the highest court always remanded cases mainly on the grounds of lower courts' slight legal errors and findings of fact.¹⁴⁸ This practice expedited the proceedings at the highest level because the Supreme Court could easily find few errors to throw the cases back to the intermediate appellate court for new trials.¹⁴⁹ However, it also caused two serious problems in the appellate system. One was the aggravation of the caseload of the High Court because the High Court had to take cases from both of the lower and upper sides; the other was the aggravation of the caseload of the Supreme Court itself because some cases, especially complicated and serious ones, would come back someday.¹⁵⁰ The accumulation of cases at the appellate courts made the overall structure of the caseload of the three tiers court system a "barrel" shape instead of a "pyramid" one.¹⁵¹ In the long-term the practice did not ease the caseload but damaged the reputation of Taiwan's criminal justice.

This practice can be found in the controversial Xu Jianhe (蘇建和) case that was just finalized in 2012 after pending in court over 21 years.¹⁵² In this case, three defendants, Xu Jianhe, Zhuang Linxun (莊林勳), and Liu Binglang (劉秉郎) were charged with the brutal

¹⁴⁷ Art. 377 & 380 of the Code of Criminal Procedure.

¹⁴⁸ Chen Yuncai & Qui Renying (陳運財&邱仁楹), *Zuigaofayuan Chexiao Fahui Gengshen Yuanyin zhi Jiantao* (最高法院撤銷發回更審原因之檢討) [A Study on the Grounds for Reversed and Remanded Decisions by the Supreme Court], TONGHAI DAXUE FAXUE YANJIU (東海大學法學研究) [TUNGHAI U. L. REV.], no.22, 2005, at 151, 175.

¹⁴⁹ *Id.* at 164.

¹⁵⁰ *Id.* at 154.

¹⁵¹ The judicial reform for a pyramid caseload structure, *see* YUEH-SHENG WENG, IN PURSUIT OF JUSTICE: RECENT JUDICIAL REFORMS IN TAIWAN 16 (2002).

¹⁵² Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Ct.], Aug. 31, 2012, Minguo 101 (Zhuzaigeng(3)) No. 1 Criminal Judgment (中華民國 101 年 8 月 31 日 100 年度矚再更(三)字第 1 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>. For a brief history of this case, *see* Lin Junhong (林俊宏), *Su Jianhe An Dashiji* (蘇建和案大事紀) [Notable Events of the Su Jianhe Case], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Sep. 1, 2012, at Jiaodian Xinwen (焦點新聞) [Focus News], available at <http://www.libertytimes.com.tw/2012/new/sep/1/fo4-5.htm>.

murder of a couple in Xizhi (汐止), Xinbeishi (新北市) [New Taipei City] in 1991. In the very beginning of the case, the police found one bloody finger print left on the crime scene when conducting the initial investigation and soon arrested the suspect whose finger print accorded with the one left. Because the suspect was a soldier, the military police and prosecutors took over the case. The suspect later confessed and asserted that the three defendants were conspirators. Following the clues, the police arrested the three defendants and then obtained their confessions. As soon as the three defendants were referred to a prosecutors' office for further interrogation, they all denied any involvement and insisted their confessions were a result of torture by the police.

Following the main suspect's conviction, death sentence, and execution by the military, the district court convicted all of the three alleged co-conspirators and sentenced them to death based on their confessions and the suspect's confession during the police interrogation as well as the reasoning that the brutal murder could never be done by the suspect alone.¹⁵³ Between 1992 and 2012, the case repeatedly bounced back and forth between the High Court and the Supreme Court. The case was once final when the Supreme Court affirmed the conviction and death sentences in 1995. In response to the criticism of lack of scientific evidence and high dependence on the co-defendants' inconsistent confessions, 40 judges of the Supreme Court who had participated in the review of this case hosted an unprecedented press conference in 1996 to defend the affirmation.¹⁵⁴ While five ministers of justice deferred the three defendants'

¹⁵³ Taiwan Taipei Difang Fayuan Shilin Fenyuan (臺灣臺北地方法院士林分院) [Taiwan Taipei Dist. Ct. Shilin Branch Ct., now Taiwan Shilin Dist. Ct.], Feb. 18, 1992, Minguo 80 (Zhongsu) No. 23 Criminal Judgment (中華民國 81 年 2 月 18 日 80 年度重訴字第 23 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

¹⁵⁴ Fong Yurong (馮郁容), *Sifashi Zui Ju Zhengyi Anjian, Wuren Fawubuzhang, Jupi Qiangjueling* (司法史最具爭議案件 五任法務部長 拒批槍決令) [*The Most Controversial Case in the Judicial History that Five Ministers of Justice Refused to Sign the Execution Order*], ZHONGGUO SHIBAO (中國時報) [CHINA TIMES], Sep. 1, 2012, at Jiaodian Xinwen (焦點新聞) [Focus News].

execution,¹⁵⁵ the High Court ordered a retrial in 2000 given the new evidence discovered for the torture.¹⁵⁶ At the retrial, the expert witness, the famous American forensic scientist Henry Lee, testified with evidence that the murder was carried out by the drug-addicted and later executed suspect acting alone should not be excluded.¹⁵⁷ In 2012, the three defendants were acquitted.¹⁵⁸

Another controversial case that took 24 years is the Qiu Heshun (邱和順) case. This case involved a nine-year-old boy who was kidnapped and killed in 1987 but his body was never found.¹⁵⁹ Like the Xu Jianhe case, the confessions of the codefendants on which the prosecution heavily relied were later proven to have been given after torture. The district court convicted the defendant and sentenced him to death in 1989.¹⁶⁰ After eleven subsequent proceedings in the High Court, the Supreme Court finally rejected the defendant's final appeal and affirmed a sentence of life imprisonment in 2011.¹⁶¹

As Taiwan transformed into a democratic country, the dissatisfaction with the judicial system gave rise to unprecedented and comprehensive judicial reform.¹⁶² The election for the

¹⁵⁵ Rich Chang, "Hsichih Trio" Are Finally Freed, *TAIPEI TIMES*, Sep. 1, 2012, at Front Page, available at <http://www.taipeitimes.com/News/front/archives/2012/09/01/2003541675>.

¹⁵⁶ Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Ct.] May 19, 2000, *Minguo* 88 (Shengzhigeng(1)) no.13 Criminal Order (中華民國 89 年 5 月 19 日臺灣高等法院 88 年度聲再更(一)字第 13 號刑事裁定), <http://jirs.judicial.gov.tw/FJUD/>.

¹⁵⁷ Rich Chang, *supra* note 155.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Celia Llopis-Jepsen, *Justice Delayed, Justice Denied*, *TAIPEI TIMES*, Jan. 3, 2010, at page 13, available at <http://www.taipeitimes.com/News/feat/print/2010/01/03/2003462549>.

¹⁶⁰ Taiwan Hsinchu Difang Fayuan (臺灣新竹地方法院) [Taiwan Hsinchu Dist. Ct.], Nov. 29, 1989, *Minguo* 78 (Tezhongshaosu) No. 11 Criminal Judgment (中華民國 78 年 11 月 29 日 78 年度特重少訴字第 11 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

¹⁶¹ Zuigao Fayuan (最高法院) [Sup. Ct.], Jul. 28, 2011, *Minguo* 100 (Taishang) No. 4177 Criminal Judgment (中華民國 100 年 7 月 28 日 100 年度台上字第 4177 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

¹⁶² "During the authoritarian rule of the Kuomintang (KMT), internal reforms were impossible because the judiciary was under the strict control of the regime. As a result, external reforms were logically the choice for reformers prior to Taiwan's democratization. In the beginning, most reformers were lawyers who joined social movement organizations." Chin-shou Wang, *The Movement Strategy in Taiwan's Judicial Independence Reform*, 39 *JOURNAL OF CURRENT CHINESE AFFAIRS*, no.3, 2010, at 125, 129-130.

board of directors of the Taipei Bar Association in 1990 sparked the reform. The reformers won the election and started to challenge the KMT-dominated judicial system.¹⁶³ In 1993, nine young judges at Taichung District Court launched the judicial independence movement attacking the long-term interference.¹⁶⁴ In response to the pressure, the Judicial Yuan set up its Judicial Reform Committee (Sifagaige Weiyuanhui 司法改革委員會) in 1994.¹⁶⁵ The committee, chaired by the President of the Judicial Yuan Shi Qiyang (施啟揚), consisted of 27 members coming from different groups of interests, including some 1993 reformers.¹⁶⁶ Many flaws of the criminal procedure law were identified and discussed. Later in 1999, urged by many civil groups and organizations, President Lee Teng-hui (李登輝) and the President of the Judicial Yuan Weng Yueh-sheng (翁岳生) hosted the National Judicial Reform Conference (Quanguo Sifagaige Huiyi 全國司法改革會議).¹⁶⁷ The two-month Conference, with its 125 participants from different backgrounds including Taiwan's Nobel Prize winner Lee Yuan-tseh (李遠哲), reached many conclusions that would be transformed into the action and legislation in the following decade.¹⁶⁸

With regard to criminal procedures, the judicial reform went forward in two major directions. To solve the problem that judges always took an over-dominant role and often

¹⁶³ See Jane Kaufman Winn & Tang-chi Yeh, *The Role of Lawyers in Taiwan's Political Transformation*, 20 LAW & SOC. INQUIRY 561, 581 (1995).

¹⁶⁴ The history for Taiwan's judicial reform in the late 1980s and the early 1990s, see Wang Jinshou (王金壽), *Taiwan Sifa Gaige Ershi Nian: Maixiang Duli zhi Lu* (台灣司法改革二十年：邁向獨立之路) [*The 20 Years Judicial Reform of Taiwan: Toward the Road of Independence*], 46 SI YU YAN (思與言) [THOUGHT & WORDS], no.2, 2008, at 133, 138-143.

¹⁶⁵ Wong Yuesheng (翁岳生), *Sifa Gaige Shi Zhounian de Huigu yu Zhanwang* (司法改革十週年的回顧與展望) [*Retrospect and Prospect on the Tenth Anniversary of the Judicial Reform*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 23 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010).

¹⁶⁶ 1 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 2-4.

¹⁶⁷ Wong Yuesheng (翁岳生), *supra* note 165, at 23-24.

¹⁶⁸ For a general introduction of the conference, see *id.*

collected evidence against defendants at trial, one direction was toward a “reformed adversarial system” in which a tripartite structure of judges, prosecutors, and defense lawyers was established.¹⁶⁹ The new system now emphasizes contested trials.¹⁷⁰ As one of the parties, prosecutors’ pretrial power is subject to judicial review, and at trial prosecutors are equal to defendants and defense lawyers.¹⁷¹ Any detention must be approved by the court without exception and any search and seizure conducted by the police and prosecutors is subject to judicial review.¹⁷² In addition to the introduction of the hearsay and cross-examination rules that benefit the defense,¹⁷³ the burden of proof is now placed on prosecutors and a judges’ responsibility to find the truth is the only exception.¹⁷⁴ Although some inquisitorial measures still remain, judges are expected to play a neutral role under the spirit of the “reformed adversarial system.”¹⁷⁵

The other direction is toward a more efficient system. Several measures that can expedite the proceedings are introduced to the system. To relieve judges’ burden to make lengthy opinions, they are now allowed to deliver summary opinions that quote indictments or lower court opinions, and contain simplified reasoning.¹⁷⁶ To keep those cases that do not need cross-examination away from the time-consuming adversarial procedures, deferred prosecution,¹⁷⁷

¹⁶⁹ For a brief history of Taiwan’s introduction of the reformed adversarial system, see Lewis, *supra* note 121, at 662-679.

¹⁷⁰ *Id.* at 652.

¹⁷¹ Jaw-Perng Wang, *supra* note 110, at 24.

¹⁷² Art. 102(d) & 128(d) of the Code of Criminal Procedure.

¹⁷³ Art. 159(a) & 166(a) of the Code of Criminal Procedure.

¹⁷⁴ Art. 163(b) of the Code of Criminal Procedure.

¹⁷⁵ Jaw-Perng Wang, *supra* note 110, at 10.

¹⁷⁶ Art. 310*bis*, 310*re*, 373, 454 of the Code of Criminal Procedure.

¹⁷⁷ Art. 253*bis*(a) of the Code of Criminal Procedure.

plea bargaining,¹⁷⁸ file-based adjudication,¹⁷⁹ and simplified trials¹⁸⁰ were authorized.¹⁸¹ Only a relatively small part of criminal cases are now required to be the subject of adversarial proceedings before the bench.¹⁸²

Overall, the judicial reform over the past 20 years has shaped a neutral criminal judicial system. Although not perfect, the system has drawn a clear line between judges and public prosecutors. Judges are expected to be a neutral referee in a contested trial, instead of an almighty player. Blended with the newly established judicial independence, the criminal justice system of Taiwan has found its new mission to find justice other than serve political power.

3.1.2.1. Pretrial Procedures

Like some countries in Europe and Latin America,¹⁸³ Taiwan considers public prosecutors to be quasi-judges or pretrial judges.¹⁸⁴ For example, a public prosecutor is able to pardon a defendant¹⁸⁵ or defer prosecution with certain conditions such as non-recidivism, counseling, fines, reparations, apology, or community service.¹⁸⁶ A public prosecutor is vested with power to: (1) subpoena a defendant or a witness;¹⁸⁷ (2) interrogate and examine a suspect, a witness, or an expert;¹⁸⁸ (3) order a witness or an expert to testify under oath;¹⁸⁹ (4) issue a warrant to arrest

¹⁷⁸ Art. 455ter(a) of the Code of Criminal Procedure.

¹⁷⁹ Art. 449(a) of the Code of Criminal Procedure.

¹⁸⁰ Art. 273bis(a) of the Code of Criminal Procedure.

¹⁸¹ See Lewis, *supra* note 121, at 669-676 (describing, analyzing and discussing the “efficiency-driven” procedures).

¹⁸² *Id.* at 706-707.

¹⁸³ See Cavise, *supra* note 112, at 792-793 (describing the similar judicial reform in some Latin American countries).

¹⁸⁴ Jaw-Perng Wang, *supra* note 110, at 24; HUANG DONGXIONG (黃東熊), *supra* note 84, at 26.

¹⁸⁵ Art. 253 of the Code of Criminal Procedure.

¹⁸⁶ Art. 253ter of the Code of Criminal Procedure.

¹⁸⁷ Art. 71(d) of the Code of Criminal Procedure provides that a public prosecutor can issue an order to compel a defendant to be present. Art. 175(b) of the Code of Criminal Procedure provides that a public prosecutor can issue an order to compel a witness to be present.

¹⁸⁸ Art. 41 of the Code of Criminal Procedure.

¹⁸⁹ Art. 186(a) of the Code of Criminal Procedure provides that a witness or an expert shall be ordered to make an oath before testifying. Art. 168 of the Criminal Code provide that a person is guilty of perjury if he or she, under oath, makes a false statement before a public prosecutor or a judge.

a defendant or a witness who was subpoenaed but failed to appear without any due reason;¹⁹⁰ and (5) issue a circular order to arrest a running away defendant.¹⁹¹ If a public prosecutor does not request the court for pretrial detention of a suspect, he or she may set bail or other terms of release without judicial approval.¹⁹² Today public prosecutors still enjoy the great inquisitorial power at the pretrial stage; nonetheless, the power is declining and subject to judicial approval or review.¹⁹³

Prior to the late 1980s, public prosecutors were allowed to issue search and seizure warrants as well as detain suspects on their own because of their quasi-judicial status.¹⁹⁴ The justification for public prosecutors' quasi-judicial status was challenged by the opposition and the academics when Taiwan transformed into a democratic country. Given that the authoritarian government always made use of public prosecutors and judges to suppress opposition activists, reformers argued for an independent court system and the separation of powers between the prosecution and adjudication.¹⁹⁵ The first target was the public prosecutors' power in pretrial detention.

Article 8 of the Constitution of the Republic of China provides,

Personal freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment not carried out in accordance with the

¹⁹⁰ Art. 71(d) of the Code of Criminal Procedure provides that a public prosecutor can issue a warrant to arrest a defendant who was subpoenaed but did not appear without any due reason. Art. 178(d) of the Code of Criminal Procedure provides that a public prosecutor can issue a warrant of arrest against a witness in accordance with the same procedure applied to a defendant.

¹⁹¹ Art. 84 of the Code of Criminal Procedure.

¹⁹² Lewis, *supra* note 121, at 696.

¹⁹³ Jaw-Perng Wang, *supra* note 110, at 24.

¹⁹⁴ Art. 102(c) & 128(c) of the Code of Criminal Procedure of 1967.

¹⁹⁵ See Tang Jingping & Huang Hongsen (湯京平&黃宏森), *Minzhuhua Yu Sifaduli: Taiwan Jiancha de Zhengzhi Fenxi* (民主化與司法獨立：台灣檢察改革的政治分析) [*Democratization and Judicial Independence: A Political Analysis of the Public Prosecutor Reforms in Taiwan*], 12 TAIWAN ZHENGZHI XUEKAN (台灣政治學刊) [TAIWAN POL. SCI. REV.], no. 2, 2008, at 67, 84, 88.

procedure prescribed by law may be resisted.¹⁹⁶

Because public prosecutors had quasi-judicial status, it was commonly accepted that the interpretation for the “judicial organ” in the Article 8 of the Constitution should include public prosecutors. As one of the judicial organs, public prosecutors were authorized to impose pretrial detention without the court’s approval. In 1995, Taiwan’s constitutional court, the Council of Grand Justices of the Judicial Yuan, took a case filed by the defendant Hsu Hsin-liang (許信良) and his defense attorney Chen Shui-bian (陳水扁) for Hsu’s 1989 detention by a public prosecutor on the grounds that Hsu was suspected of treason. Taking Hsu as a dangerous opposition activist, the KMT government charged the exiled Hsu of treason and refused his re-entrance. In 1986, when Hsu, in a pseudo name, arrived at Taiwan by taking an airplane from the Philippines to the Chiang Kai-shek International Airport (later renamed Taoyuan International Airport), he was immediately identified and deported right away. The deportation led to a violent clash between opposition activists and riot police. After three years, Hsu stowed away on a fishing boat from China headed for Taiwan. This time he successfully entered into Taiwan but was soon arrested and detained by a public prosecutor who later indicted him for treason.¹⁹⁷

The Grand Justices finally issued the Judicial Yuan No. 392 Interpretation on December 22, 1995 holding that the provisions of the criminal procedure law that authorized public prosecutors to detain defendants were unconstitutional but the Grand Justices gave the legislature a two-year grace period to fix the unconstitutional problem.¹⁹⁸ The Legislative Yuan then passed the

¹⁹⁶ MINGUO XIANFA art. 8 (1947). The English translation, Guomin Dahui Mishuchu (國民大會秘書處) [Secretariat of the National Assembly], ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF THE REPUBLIC OF CHINA] 2 (2000).

¹⁹⁷ *Hsu Hsin-liang Shexian Panluan An, Ding 23 Ri Xuanpan* (許信良涉嫌叛亂案，定 23 日宣判) [*Hsu Hsin-liang Treason Case Will Be Publicized on 23th*], ZHONGGUO SHIBAO (中國時報) [CHINA TIMES], Dec. 17, 1989, at page 3.

¹⁹⁸ Sifayuan (司法院) [Judicial Yuan], Dec. 22, 1995, (Shi) No. 392 Interpretation, *in* 7 SIFAYUAN DAFAGUAN JIESHI

amendments to the Code of Criminal Procedure in 1997 to repeal public prosecutors' power to detain defendants.¹⁹⁹ Now only the court has the authority to detain a defendant.²⁰⁰

Following the Judicial Yuan No. 392 Interpretation that drew a line between public prosecutors and judges, the concerns over the possibility of abuse of their search and seizure power further weakened public prosecutors' quasi-judicial status. The most striking events that facilitated new legislation arrived in the second half of 2000 when the long-term opposition Democratic Progress Party (DPP) had just come to power. To investigate a criminal case involving a legislator, four public prosecutors of Tainan District Prosecutors' Office, with a SWAT team, searched the Legislative Yuan in August.²⁰¹ Two months later, public prosecutors of Taipei District Prosecutors' Office abruptly raided the headquarters of the China Times, the pro-KMT and one time biggest newspaper in Taiwan, for the suspicion that it divulged confidential information regarding national security.²⁰² The legislature under the control of the KMT soon passed the amendments to the criminal procedure law on January 3, 2001.²⁰³ Currently, except in exigent circumstances or as otherwise provided by the law,²⁰⁴ a public prosecutor, without a court-issued warrant, cannot conduct searches or seizures nor authorize the police to do so.²⁰⁵

(司法院大法官解釋) [INTERPRETATION OF THE GRAND JUSTICES OF THE JUDICIAL YUAN] 377 (Judicial Yuan ed., 2009), available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=392.

¹⁹⁹ Zhonghua Minguo 86 Nian Xingshi Susong Fa (中華民國 86 年刑事訴訟法) [Code of Criminal Procedure of 1997], Dec. 19, 1997, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6193, 1997, at 1.

²⁰⁰ Art. 102 of the Code of Criminal Procedure.

²⁰¹ See Ying-cheng Jou & Monique Chu, *Prosecutors Allege That Lawmaker Sold Fake Stocks*, TAIPEI TIMES, Aug. 17, 2000, at page 3, available at <http://www.taipeitimes.com/News/local/archives/2000/08/17/0000048123>; Ying-cheng Jou, *Justice Minister Refutes Lawmakers' Claims over Search*, TAIPEI TIMES, Aug. 18, 2000, at page 3, available at <http://www.taipeitimes.com/News/local/archives/2000/08/18/0000048263>.

²⁰² See Ying-cheng Jou, *China Times Express Office Raided*, TAIPEI TIMES, Oct. 4, 2000, at page 1, available at <http://www.taipeitimes.com/News/front/archives/2000/10/04/0000055925>; *Newsroom Search Sparks Outrage*, TAIPEI TIMES, Oct. 4, 2000, at page 2, available at <http://www.taipeitimes.com/News/local/archives/2000/10/04/0000055935>.

²⁰³ Zhonghua Minguo 90 Nian Xingshi Susong Fa (中華民國 90 年刑事訴訟法) [Code of Criminal Procedure of 2001], Jan. 12, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6376, 2001, at 1.

²⁰⁴ Art. 130, 131(a), 131(b), 131bis and 143 of the Code of Criminal Procedure

²⁰⁵ Art. 128 (c) of the Code of Criminal Procedure. Jaw-Perng Wang, *supra* note 110, at 25.

Moreover, the evidence stemming from an illegal search and seizure might be excluded at trial.²⁰⁶

By shifting the power of pretrial detention, and searches and seizures from public prosecutors to judges, the legislature made the message clear that judges should be independent from the executive branch of government and oversee the power of the executive branch of government.

3.1.2.2. Trial Procedures

As discussed above, Taiwan's criminal justice was based on inquisitorial justice before the judicial reforms of the 1990s. Trial judges, for the purpose of finding the truth, had the responsibility to investigate even though the finding might be against defendants.²⁰⁷ Not only could judges interrogate defendants and witnesses, but judges' interrogation over defendants and witnesses was superior to the examination of both parties. If a defense lawyer wanted to examine a witness, he or she had to wait until the court finished the interrogation.²⁰⁸ Under inquisitorial justice, trial judges were expected to be an all-powerful player who could do anything for the sake of carrying out justice. Judges' unrivaled power in the inquisitorial justice system was reinforced by the authoritarianism on the basis of an all-powerful government.²⁰⁹ However, as democratization proceeded, the injustices caused by the criminal justice under authoritarian rule were gradually revealed and reviewed. The inquisitorial justice was considered unfair against the defense because the defense often found its opponent was not only the prosecution but also the

²⁰⁶ Art. 158*quinquies* of the Code of Criminal Procedure.

²⁰⁷ Art. 163(a) of the Code of Criminal Procedure of 1967.

²⁰⁸ Art. 166(a) of the Code of Criminal Procedure of 1967.

²⁰⁹ "[B]road presidential latitude in declaring a state of emergency, and an inquisitorial criminal code and procedure—made the law a particularly effective instrument for political persecution in Latin America." Anthony W. Pereira, *Political Justice under Authoritarian Regimes in Argentina, Brazil, and Chile*, 4 HUMAN RIGHTS REV., no.2, 2003, at 27, 31.

court.²¹⁰ As a result, the notion of adversarial justice as a strategy for counterbalancing the power of the state has gradually been introduced into the criminal procedure law of Taiwan in recent decades.

In 1994, the Judicial Reform Committee²¹¹ recommended revisions to the criminal procedure law including: (1) the prosecution should be carried out by public prosecutors at trial,²¹² (2) more weight should be placed on the defense,²¹³ (3) the burden of proof should be placed more on the prosecution,²¹⁴ and (4) cross-examination should be strengthened.²¹⁵ The 1999 National Judicial Reform Conference²¹⁶ reiterated the same reform plans.²¹⁷ The recommendations of this Conference resulted in the 2003 revisions to the Code of Criminal Procedure.²¹⁸ The most significant change made to the criminal procedure law was the emphasis on a judge neutrality. Relying on the establishment of an equal contest between both parties, the new law anticipated the arrival of impartial justice. As a consequence, the burden of proof was shifted to the prosecution to increase public prosecutors' responsibility to present their cases as well as reduce the court's intervention.²¹⁹ To balance the uneven status against the defense, the new law empowered the defense with the right to investigation.²²⁰ To redress judges' prejudice caused by the high dependence on pretrial interrogation scripts, brand new hearsay rules by

²¹⁰ "Worse of all, a defendant would normally take the judge to be his enemy instead of a neutral referee at trial." Jaw-Perng Wang, *supra* note 110, at 10.

²¹¹ The establishment of the Committee, *see* 3.1.2 and note 165.

²¹² 1 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 45.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ The establishment of the Conference, *see* 3.1.2 and note 167.

²¹⁷ *See* Wong Yuesheng (翁岳生), *supra* note 165, at 36.

²¹⁸ Zhonghua Minguo 92 Nian Xingshi Susong Fa (中華民國 92 年刑事訴訟法) [Code of Criminal Procedure of 2003], Feb. 6, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6505, 2003, at 82.

²¹⁹ Art. 161(a) of the Code of Criminal Procedure provides that prosecutors shall bear the burden of proof as to the facts of the crime charged against an accused, and shall indicate the methods of proof.

²²⁰ Art. 161*bis* of the Code of Criminal Procedure provides that the accused may indicate methods of proof favorable to him or her.

which the defense could exclude out-of-court statements and confront witnesses were introduced to the system.²²¹ To increase adversary, cross-examination between both parties became the highlight of the trial while the interrogation of the court was downgraded as a supplement.²²²

Although the 2003 legislation did bring some fundamental changes, these changes did not entirely eliminate the role of inquisitorial justice. For instance, the new legislation lifted the court's responsibility to investigate, but it still allowed the court to investigate at its discretion.²²³ When the court exercised its remaining privilege to investigate, its interrogation was still prior to both parties' cross-examination.²²⁴ Further, only the court was authorized to appoint an expert witness.²²⁵ As a result of the limitations of the 2003 reforms, an individual judge may still play an active or aggressive role at trial if he or she has a personal preference for a more inquisitorial style of justice.

Despite leaving some elements of inquisitorial justice in the system, the ambition of the reformed adversarial system to ensure the neutrality of the court by clarifying the difference between judges and prosecutors is obvious.²²⁶

3.1.2.3. Appellate Procedures

To date, judicial reform for the appellate system has not been accomplished.²²⁷ The final

²²¹ Art. 159(a) of the Code of Criminal Procedure provides that unless otherwise provided by law, oral or written statements made out of trial by a person other than the accused, shall not be admitted as evidence.

²²² Art. 166(c) of the Code of Criminal Procedure provides that after the examination between both parties, the court may interrogate witness or expert witness.

²²³ Art. 163(b) of the Code of Criminal Procedure provides that the court may, for the purpose of discovering the truth, ex officio investigate evidence, and in case for the purpose of maintaining justice or discovering facts that are critical to the interest of the accused, the court shall ex officio investigate evidence.

²²⁴ Art. 166septies(a) of the Code of Criminal Procedure provides that after the court finishes its interrogation over the witness or expert witness subpoenaed by the court on its own motion, both parties may examine the witness.

²²⁵ Art. 198(a) of the Code of Criminal Procedure provides that an expert witness is appointed by the presiding judge at trial or the prosecutor at pretrial.

²²⁶ The Judicial Yuan listed the clarification of judges and public prosecutors' responsibilities as a chief benefit of the reformed adversarial system. See *Gailian Shi Dangshiren Jinxing Zhuyi* (改良式當事人進行主義) [*Reformed Adversarial System*], JUDICIAL YUAN, <http://www.judicial.gov.tw/work/work02/work02-01.asp>.

²²⁷ Chen Yuncai (陳運財), *supra* note 144, at 276.

report of the 1993 Judicial Reform Committee²²⁸ proposed to narrow the scope of appellate review.²²⁹ In the 1999 National Judicial Reform Conference,²³⁰ reformers all agreed with the establishment of a pyramid shape caseload among three tiers courts by narrowing the scope of appellate review.²³¹ To ease the heavy caseload of the appellate courts, the reform plans that the High Court should review new evidence and legal issues and the Supreme Court should review significant legal errors were devised.²³²

The Judicial Yuan in 2004 proposed²³³ a reform bill based on the foregoing agreement but it was never enacted into law due to fierce opposition from lawyers.²³⁴ Lawyers argued that the narrowing might jeopardize defendants because they would lose the opportunity to remedy courts' errors. Given the poor performance of the district court as a result of judges' habitual prejudice against the defense and the unfamiliarity with the newly introduced cross-examination

²²⁸ The establishment of the Committee, *see* 3.1.2 and note 165.

²²⁹ “Xingshi diershen, cai shihoushen wei yuanze. Jincheng de gaige zhongdian wei xiuzheng xingshi susong fa xiangguan tiaowen, kuoda xianzhi shangsu disanshen anjian de fanwei; yuancheng de mubiao wei fuyu disanshen fayuan shangsu cailiangquan, yi xianzhi fulan shangsu.” (刑事第二審，採事後審為原則。近程的改革重點為修正刑事訴訟法相關條文，擴大限制上訴第三審案件的範圍；遠程的目標為賦予第三審法院上訴裁量權，以限制浮濫上訴。) [The second instance should take reviewing as a principle. In the short term, the criminal procedure law should be amended to narrow the scope of the appeals to the last instance. In the long run, the discretion should be given to the last instance to limit appeals.] 1 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 45, 47.

²³⁰ The establishment of the Conference, *see* 3.1.2 and note 167.

²³¹ Wong Yuesheng (翁岳生), *supra* note 165, at 39.

²³² Chen Yuncai (陳運財), *supra* note 144, at 277.

²³³ In Taiwan, the Judicial Yuan is authorized by the Constitution to propose a statutory bill to the Legislative Yuan. The Council of Grand Justices confirmed this in 1982 in the Judicial Yuan No. 175 Interpretation. According to the Interpretation, the Constitution authorizes the Examination Yuan that is responsible for the examinations and management of all civil service personnel to propose a bill to the Legislative Yuan in Article 87 but does not articulate whether the Judicial Yuan has the same power. Since the Constitution treats the Judicial Yuan equal to the Examination Yuan and there is no reason to discriminate the Judicial Yuan's expertise, the Judicial Yuan enjoys the same power as the Examination Yuan. Sifayuan (司法院) [Judicial Yuan], May 25, 1982, (Shi) No. 175 Interpretation, *in* 2 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATION OF THE COUNCIL OF GRAND JUSTICES OF THE JUDICIAL YUAN] 291 (Judicial Yuan ed., 2009), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=175.

²³⁴ In fact, several groups from academics and practicing lawyers, including the Bar Association of Republic of China, petitioned the legislature not to pass any bill regarding the appellate procedure, *see* Judicial Committee Records, 93 LIFAYUAN GONGBAO (立法院公報) (Issue No. 21) 255 (Apr. 7, 2004).

and hearsay rules, letting the district court monopolize findings of fact was considered too risky.²³⁵ Lawyers further insisted that the Judicial Yuan should wait until the reform at the district court level became satisfactory.²³⁶ As a result, appellate courts continue to struggle with a heavy caseload.

In spite of these obstacles, progress has been made in one area. Taiwan enacted its Speedy Trial Act in 2010.²³⁷ Unlike the United States' speedy trial law which deals with the delay between the arrest or filing of charges and the commencement of the trial,²³⁸ Taiwan's speedy trial legislation responds to the seriously delay in adjudication of appellate cases. The Speedy Trial Act adopts two different measures to remedy the delay of justice. First of all, the new law sets an eight-year time frame starting from the filing of charges. If a criminal case cannot be final within the eight-year time frame and the delay is not attributable to the defendant, the defendant can enjoy his or her right to a speedy trial.²³⁹ The remedy for the violation of the right is a reduction of the defendant's sentence.²⁴⁰ Secondly, to solve the serious delay caused by the heavy caseload, the new law sets limits on appeals by the prosecution. Prior to the legislation, the prosecution appeals were subject to the same limitations as defense appeals. Article 9 of the

²³⁵ Some commentators implied that a loss of profits caused by the reduction in the appellate cases was the real reason behind the opposition, *see* Wu Xunlong (吳巡龍), *supra* note 134, at 121; 2 LIN YONGMOU (林永謀), XINGSHI SUSONG FA SHILUN (刑事訴訟法釋論) [INTERPRETATION FOR CRIMINAL PROCEDURE LAW] 3 (2008).

²³⁶ Lawyers suggested that the timing for the reform should be when the majority of cross-examination cases would be upheld by the appellate courts, *see* Lo Bingcheng (羅秉成), *Xingshi Shangsu Zhidu Zhi Gaige* (刑事上訴審制度之改革) [*Reform for Criminal Appellate System*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 272-273 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010).

²³⁷ Xingshi Tuosu Shenpan Fa (刑事妥速審判法) [Speedy Trial Act], May 19, 2010, Zongtongfu Gongbao (總統府公報) [Presidential Off. Gaz.], no.6922, 2010, at 2.

²³⁸ Speedy Trial Act of 1974, Pub. L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076, codified as 18 U.S.C. §§ 3161-3174; amended Pub. L. 96-43, §§ 2-5, Aug. 2, 1979, 93 Stat. 327, 328; Pub. L. 98-473, Title II, § 1219, Oct. 12, 1984, 98 Stat. 2167; Pub. L. 100-690, Title VI, § 6476, Nov. 18, 1988, 102 Stat. 4380; Pub. L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 110-406, § 13, Oct. 13, 2008, 122 Stat. 4294.

²³⁹ Art. 7 of the Speedy Trial Act.

²⁴⁰ Art. 7 of the Speedy Trial Act.

Speedy Trial Act provides that if the court of the second instance upholds the not guilty judgment rendered by the first instance, the prosecution appeals to the Supreme Court are allowed only when the constitutional law, an interpretation of the Council of Grand Justices, or a Supreme Court Selected Case Excerpt is violated.²⁴¹ The legislation made the prosecution appeals to the Supreme Court very difficult due to the scarcity of the legal issues concerned with these highest authorities.²⁴²

Because the new legislation would create the asymmetry between the prosecution and the defense, public prosecutors opposed the legislation by arguing that the new law would set criminals free while sacrificing victims and justice.²⁴³ This time, by appealing to the public concern over the problem of delayed cases and by cooperating with lawyers, the Judicial Yuan successfully facilitated the passage of the new legislation.²⁴⁴

3.2. How Did Taiwan's Judicial Independence and Judicial Culture Shape Taiwan's Judiciary?

Following Taiwan's democratization in the mid-1980s, the judicial reform in the early 1990s established Taiwan's judicial independence. Given the injustice caused by the interference with the judiciary under the authoritarian rule, the judicial independence of Taiwan emphasized the resistance to the will of the political power. Any interference with the judiciary was no longer acceptable. Under the judicial independence, judges enjoyed great autonomy in decision making.

²⁴¹ Art. 9 of the Speedy Trial Act. In Taiwan, the Supreme Court sometimes publishes a Selected Case Excerpt from its previous court decisions to unify lower courts' interpretation of law on the same legal issue.

²⁴² See He Laijie (何賴傑), *Cong Xingshi Tuosushenpanfa zhi Zhiding Kan Shangshushen zhi Wenti* (從刑事妥速審判法之制定看上訴審之問題) [*Examine the Problem on the Appellate Court from the Enactment of the Speedy Trial Act*], JIANCHA XINLUN (檢察新論) [TAIWAN PROSECUTOR REV.], no.9, 2011, at 2, 4-5 (discussing the limits on the prosecution appeals).

²⁴³ The committee consideration legislative materials of the Speedy Trial Act, 99 LIFAYUAN GONGBAO (立法院公報) [Legis. Yuan Gaz.], no.4, Dec. 28, 2009, at 426, 310-311 (containing the argument by the Ministry of Justice).

²⁴⁴ The committee consideration legislative materials for the Speedy Trial Act, 99 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.28, Apr. 12, 2010, at 302-303 (describing prosecutors' resistance to the legislation).

While democratization ushered Taiwan into a new era; the long lasting political and economic structure shaped by the previous authoritarian rule still entangled Taiwan. Democratization expelled the authoritarian rule, but the KMT and its supporters continuously controlled the legislature and the government was still operated by those officers baptized under their authoritarian rule.²⁴⁵ The structure of the judiciary was no exception. From the outside of the judiciary, the judicial independence shielded judges from interference; from the inside of the judiciary, the long-term judicial culture shaped by the previous authoritarian rule was still influential on judges' decision making. The long-term judicial culture that emphasized discipline gave rise to a conservative judicial system.

3.2.1. The Judicial Independence Following the Democratization

Judicial independence involves the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other parties or entities.²⁴⁶ In response to the interference and corruption under the authoritarian governance as well as for fear of the controlled judiciary used to silence to the opposition, Taiwan's judicial independence focused on the institutional shields against the threats or temptations stemming from political power. The progress of the judicial independence since the late authoritarian period shows that the main emphasis of Taiwan's judicial independence has been institutional.²⁴⁷

²⁴⁵ See DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 231 (2003) (describing the political power remained strong to control the legislature and the bureaucracy remained largely loyal to the KMT).

²⁴⁶ Tom Ginsburg, *Judicial Independence in East Asia: Lessons for China*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 249 (Randall Peerenboom ed., 2010). "The most basic form of judicial independence, decisional independence, refers to the ability of judges to decide cases independently in accordance with law and without (undue, inappropriate, or illegal) interference from other parties or entities." Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 71 (Randall Peerenboom ed., 2010).

²⁴⁷ Judicial independence is a feature of the institutional setting with which judging takes place... but providing personal protection for judges is no guarantee that they will respond to law and the constitution in desirable ways." John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 354 (1998).

3.2.1.1. Interference with the Judiciary

Prior to the judicial reform in the early 1990s, Taiwan's judicial system was notorious for its partiality and corruption.²⁴⁸ Under the authoritarian regime, the judicial system was controlled by the sole political party, the KMT,²⁴⁹ and plagued by political interference, corruption and *guanxi* (關係/关系).²⁵⁰ The fact that the KMT made use of the judicial system to maintain its regime and repress the opposition can also be found in the very famous public statement made by one of the KMT leaders, "The court is opened by the KMT."²⁵¹ In addition, the very popular saying at that time, "With money, a judgment for your life; without money, a judgment for your death,"²⁵² reflected the little confidence with the integrity of the judicial system.²⁵³ As a

²⁴⁸ See WANG TAISHENG (王泰升), *TAIWAN FA DE DUANLIE YU LIANXU* (台灣法的斷裂與連續) [SEVERANCE AND CONTINUANCE OF LAW OF TAIWAN] 99-108 (2002) (describing the judicial culture of Taiwan under the ruling of the Nationalist government).

²⁴⁹ Wang Jinshou (王金壽), *Taiwan de Sifa Duli Gaige yu Kuomintang Shicong Zhuyi de Bengkui* (台灣的司法獨立改革與國民黨侍從主義的崩潰) [*Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism in Taiwan*], 10 TAIWAN ZHENGZHI XUEKAN (台灣政治學刊) [TAIWAN POL. SCI. REV.], no.1, 2006, at 103, 111-112.

²⁵⁰ "The common allegations of corruption among legal personnel and lax enforcement of existing regulations are evidence that legal institutions are at least perceived as subordinated to interpersonal networks in Taiwanese society." Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC'Y REV. 193, 204 (1994). In addition, "'Guanxi' literally means 'relation' or 'relationship,' as a noun, and 'relate to' as a verb, though as commonly used in contemporary Chinese society, it refers more narrowly to 'particularistic ties.' These ties are based on ascribed or primordial traits such as kinship, native place, and ethnicity, and also on achieved characteristics such as attending the same school (even if not at the same time), serving together in the same military unit, having shared experiences, such as the Long March, and doing business together... This term usually has a negative connotation, implying 'going through the back door' to get something done, though it undeniably performs a positive function as well, especially if there is no formal 'front door' available." Thomas Gold, Doug Guthrie & David Wank, *An Introduction to the Study of Guanxi*, in SOCIAL CONNECTION IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 6 (Thomas Gold, Doug Guthrie & David Wank eds., 2002).

²⁵¹ "Fayuan shi Kuomintang kai de" (法院是國民黨開的). Yang Helun (楊和倫), *Xu Shuide Yuchujingren: Fayuan Yeshi Zhizhengdang de* (許水德語出驚人：法院也是執政黨的) [*A Surprising Remark from Xu Shuide: Court Belongs to the KMT*], XIN XIN WEN (新新聞) [JOURNALIST], no.437, Jul. 23, 1995, at 25.

²⁵² Yuoqian pansheng, meiqian panshi (有錢判生，沒錢判死).

²⁵³ According an on-line poll in 1999, 74% respondents agreed with the saying. Chen Tsungfu (陳聰富), *Fazhi Zhuyi Falü Wenhua yu Taiwan Shehui Bianqian—Yi Minyi Diaocha yu Tongji Ziliao Wei Zhongxin* (法治主義、法律文化與台灣社會變遷—以民意調查與統計資料為中心) [*Rule of Law, Legal Culture, and the Social Change of Taiwan—Centered on Polls and Statistics*], Xinzhengyuan Guojia Kexue Weiyuanhui Buzhu Zhuanti Yanjiu Jihua Baogao (行政院國家科學委員會補助專題研究計畫報告) [Report for Research Project Funded by the National Science Council of the Executive Yuan], Mar. 30, 2002, at 7.

commentator observed in 1990, the Taiwanese people tended to avoid the judicial system administered by the KMT and rely on alternative dispute resolution.

For decades, the integrity of the ROC legal system was undermined by the imposition of martial law and the paternalistic, authoritarian political strategies of the Nationalist Party (Kuomintang or KMT) regime. Many individual Taiwanese citizens have tended to rely on informal dispute resolution techniques, although it is unclear if this is due to the persistence of a traditional mistrust of litigation or merely a pragmatic assessment of the relative merits of litigating in ROC courts.²⁵⁴

Under the authoritarian rule, interference with the judiciary was common and those judges who did not succumb to the interference would not be selected for promotion or would suffer disadvantages. For example, the former Grand Justice and the former Supreme Court Judge Yao Ruiguang (姚瑞光) in a 2002 interview recalled his experience with interference with the judiciary:

After I went to the Tainan Branch Court of the Taiwan High Court, the President Fang Xilu assigned me to the criminal division²⁵⁵ because I tried my cases according to the Constitution and laws and did not accept any direction from the President. He gave me a hard time and wanted me to quit.²⁵⁶

The second thing I want to mention is the judicial scandal that the President Fang Xilu interfered with a trial case. The court judgment was decided on July 10, 1950 by the panel of the trial judges, but President Fang did not approve the publication of the judgment. Pursuant to the administrative rule of the Taiwan High Court and the branch courts at that time, the finished judgment was supposed to be sent to the President for review (but not for approval). Nowadays any judgment should not be sent to the president because of the judicial independence in the Constitution. When the judgment was sent to the President

²⁵⁴ Winn & Yeh, *supra* note 163, at 563.

²⁵⁵ In Taiwan, judges usually preferred to be a civil court judge, instead of a criminal court judge because a criminal court judge has to deal with emergent and unexpected petitions for pretrial detention and needs to shoulder the pressure stemming from the deprivation of defendants' life and freedom while a civil court judge does not.

²⁵⁶ "Diaodao Tainan Gaofenyuan hou, wo yin he Fang Xilu yuanchang buhe (Wo yi Xianfa ji falü duli shenpan, bu jieshou Fang Xilu yuanchang zhishi), Fang yuanchang cunxin zhengwo, bawuo diao xingting gongzuo, yaowo zhinan er qufu." (調到台南高分院後，我因和方希魯院長不和(我依憲法和法律獨立審判，不接受方希魯院長指示)，方院長存心整我，把我調刑庭工作，要我知難而屈服。) Interview with Yao Ruiguang, Wang Taisheng & Liu Hengwen (王泰升&劉恆姣), in Taipei, Taiwan (Nov. 13, 2002), *Yao Ruiguang Xiansheng Fangtan Jilu* (姚瑞光先生訪談紀錄) [Interview with Mr. Yao Ruiguang], in 1 Taiwan Fajie Qisu Koushu Lishi (台灣法界耆宿口述歷史) [Narrative History of Taiwanese Senior Jurists] 11 (Sifa Xingzheng Ting (司法行政廳) ed., 2004).

for review, the President did not approve the publication of the judgment. Instead, he intentionally ignored the case until July 28. After 18 days, the judgment was finally referred to a clerk.²⁵⁷ The president's interference with the judgment should be reported by the presiding judge; however, because both Zhang Jinlan²⁵⁸ and Fang Xilu were the alumni of the Chaoyang University and had good private friendship, the serious scandal was not dealt with. Besides, Fang Xilu intentionally set me up. He reported me to the Ministry of Judicial Administration secretly saying I was corrupted. The Ministry assigned the President of the Taichung District Court Chi Biao to investigate and made interrogation scripts.²⁵⁹

Justice Yao's testimony revealed the judicial culture that tolerated interference. Another former Grand Justice and former Supreme Court Judge Yang Yuling (楊與齡), though he explicitly denied any corruption and interference with the judicial system and insisted that the government made efforts to eradicate corruption,²⁶⁰ unintentionally disclosed an event in which the KMT and the President Chiang Kai-shek did review the court decisions and made a specific

²⁵⁷ According to Art. 228(a) of the Code of Civil Procedure of 1934, the original copy of a judgment shall be delivered to the court clerk on the same day of its announcement. *Zhonghua Minguo 24 Nian Minshi Susong Fa* (中華民國 24 年民事訴訟法) [Code of Civil Procedure of 1935], 11 LIFA ZHUANKAN (立法專刊) [SPECIAL ISSUE OF LEGISLATION] 108 (Lifayuan Mishuchu (立法院秘書處) [Secretariat of the Legislative Yuan] ed., 1935).

²⁵⁸ The chief judge of Judge Yao's division.

²⁵⁹ “Woyao shuode dier jianshi shi Tainan Gaofenyuan yuanzhang Fang Xilu ganshe shenpan zhi sifa chouwen. Nashi Minguo sanshijiu nian qiye shiri yijing pingyi tongguo, Fang yuanzhang pishi buyu xuanpan de anjian. Anzhao dangshi Gaoyuan ji Gaofenyuan Chuli Shiwu Guicheng guiding, faguan jiang panjueshu xiehao hou, yaosong yuanzhang shenyue (bingfei heyue). Jiyu faguan duli shenpan, bushou renhe ganshe de Xianfa guiding, xingzai de panjueshu buxu song yuanzhang shenyue. Nayici de panjueshu song yuanzhang shenyue, yuanzhang jing pishi ‘yuan nipan ci zhan bu pan xing,’ jiang anjian yazhi qiye ershibari, jingli shibatian hou cai jiaogei shujiguan. Zhezhong yuanzhang weifa ganshe shenpan zhi shi, tingzhang liying baogao dangshi de Sifa Xingzhangbu buzhang chuli, danyin Zhang Jinlan Fang Xilu tongwei Chaoyang xiaoyou, qie sijiao shendu, bulialiaozhi. Lingwei, Fang Xilu cunxin zhengwuo, ta ceng migao zhi Sifa Xingzheng Bu, shuowo tanwu, buli zhipai dangshi ren Taichung Diyuan yuanzhang Chi Biao qianlai diaocha, zhizuo bilu.” (我要說的二件事是台南高分院院長方希魯干涉審判之司法醜聞。那是民國三十九年七月十日已經評議通過，方院長批示不予宣判的案件。按照當時高院及高分院處理事務規程規定，法官將判決書寫好後，要送院長審閱（並非核閱）。基於法官獨立審判，不受任何干涉的憲法規定，現在的判決書不須送院長審閱。那一次的判決書送院長審閱，院長竟批示「原擬判詞暫不判行」，將案件壓至七月二十八日，經歷十八天後才交給書記官。這種院長違法干涉審判之事，庭長理應報告當時的司法行政部部長處理，但因張金蘭、方希魯同為朝陽校友，且私交甚篤，不了了之。另外，方希魯存心整我，他曾密告至司法行政部，說我貪污，部裡指派當時任台中地院院長池彪前來調查，製作筆錄。) Interview with Yao Ruiguang, *supra* note 256, at 14.

²⁶⁰ Interview with Yang Yuling, Wang Taisheng & Pan Guangzhe (王泰升&潘光哲), in Taipei, Taiwan (Nov. 26, 2002), *Yang Yuling Xiansheng Fangtan Jilu* (楊與齡先生訪談紀錄) [Interview with Mr. Yang Yuling], in 1 TAIWAN FAJIE QISU KOUSHU LISHI (台灣法界耆宿口述歷史) [NARRATIVE HISTORY OF TAIWANESE SENIOR JURISTS] 66, 75 (Sifa Xingzheng Ting (司法行政廳) ed., 2004).

direction when he described 19 local election cases in 1953 for which he and his colleague judges did not follow the direction from the president of his district court. He said in his 2002 interview:

When dealing with this incident, the security agency suspected that we were communists. The Minister of the Judicial Administration Lin even took the administrative responsibility... It finally went to President Chiang. After many years, the successor of the Minister Lin, Gu Fengxiang told me that President Chiang's direction was that judges would not be blamed for their interpretation of law but as party members they should be disciplined as a result of the violation of the party policy.²⁶¹

At that time, most of the judges joined the KMT²⁶² and the participation in the political activities of the party was taken for granted.²⁶³ Soon after his defeat in Mainland China, Chiang Kai-shek in 1949 established the Revolution Implementation Research Institute²⁶⁴ in Taiwan to reform the KMT.²⁶⁵ According to Chiang himself, this institute aimed to train elites such as high ranking government officials and intellectuals into party loyalists.²⁶⁶ Almost all judges who ever

²⁶¹ “Zai chuli zhe jianshi shi, zhian jiguan bian huaiyi women shi gongchandang, shenzhi hai rang Lin buzhang fule xingzheng zeren... Zhejiang shiqing zuihou daole Laozongtong nali. Duonian yihou, ji Lin buzhang ren Sifa Xingzheng Bu buzhang de Gu Fengxiang xiansheng gaozhi, dangshi Jiangzongtong de pishi shi: faguan buneng yinwei falü de jianjie butong er shou chufen, dangyuan weibeidang de zhengce yi dangji yichu.” (在處理這件事時，治安機關便懷疑我們是共產黨，甚至還讓林部長負了行政責任... 這件事情最後到了老總統那裡。多年以後，繼林部長任司法行政部部長的谷鳳翔先生告知，當時蔣總統的批示是：法官不能因為法律的見解不同而受處分，黨員違背黨的政策依黨紀議處。) *Id.* at 69.

²⁶² Prior to the judicial reform in the early 1990s, the KMT government recruited party members in the training institute, and the training often promoted the idea that the judiciary was supposed to service the party. See Liu Hengwen (劉恆文), *Zhanhou Taiwan Sifaren zhi Yanjiu—Yi Sifaguan Xunlian Wenhua Weizhu zhi GuanCha* (戰後台灣司法人之研究—以司法官訓練文化為主之觀察) [*A Study of the Judges and Prosecutors in Postwar Taiwan—An Observation Focused on Their Training Culture*], 40 SI YU YAN (思與言) [THOUGHT & WORDS], no.1, 2001, at 125, 144, 146 n.47.

²⁶³ In 1995, some Taichung District Court judges joined the political training held by the KMT and were criticized. 2 MEETING RECORDS FOR THE JUDICIAL REFORM COMMITTEE, *supra* note 124, at 616.

²⁶⁴ Geming Shijian Yanjiu Yuan (革命實踐研究院) [Revolution Implementation Research Institute]. Now renamed as Guojia Fazhan Yanjiu Yuan (國家發展研究院) [National Development Research Institute].

²⁶⁵ Xue Huayuan (薛化元), *Geming Shijian Yanjiu Yuan* (革命實踐研究院), in TAIWAN LISHI CIDIAN (臺灣歷史辭典) [TAIWAN HISTORY DICTIONARY] 618 (Hsu Xueji (許雪姬) ed., 2004).

²⁶⁶ Chiang Kai-shek (蔣介石), *Shuoming Geming Shijian Yanjiu Yuan Jiaoyu de Jingshen he Fangfa yiji Zaocheng Geming Xin Jingshen Xin Fengqi de Qidian* (說明革命實踐研究院教育的精神和方法以及造成革命新精神新風氣的起點), in 23 XIAN ZONGTONG JIANGGONG SISIANG YANLUN ZONGJI (先總統蔣公思想言論總集) [COLLECTION FOR THOUGHTS AND SPEECHES OF FORMER PRESIDENT CHIANG KAI-SHEK] 448-450 (1984), available at

took the highest positions in the judicial system joined the training programs of the institute. For example, Justice Yang Yuling, when he served as the presiding judge at the Taichung Branch of the Taiwan High Court, graduated from the training institute in 1966.²⁶⁷ The former Grand Justice and former Supreme Court Judge Zhang Chengtao (張承韜) was also one of the 1965 graduates.²⁶⁸ The former Grand Justice and the former Supreme Court Judge Wang Jiayi (王甲乙) joined the program twice in 1965 and 1968 while he was a presiding judge of the Taiwan High Court.²⁶⁹ He was twice elected as the central council member of the KMT in 1981 and 1988 when he was the President of the Supreme Administrative Court and the General Secretary of the Judicial Yuan.²⁷⁰ After he became the President of the Supreme Court in 1993, he was soon invited by the KMT to be the member of the central arbitration council.²⁷¹

Justice Zhang Chengtao in his 2002 interview said that he joined the KMT party because the president of his district court told him that after joining the party all would be buddies.²⁷² He remembered that when he was appointed as a Grand Justice, only one Justice, Herbert Ma (馬漢寶), was not a party member among all 15 justices.²⁷³ He also admitted that a party member, even though a judge, would automatically follow the direction or policy made by the party.²⁷⁴

<http://www.chungcheng.org.tw/thought/Image03/0023/00230448.gif>.

²⁶⁷ Interview with Yang Yuling, *supra* note 260, at 90.

²⁶⁸ Interview with Zhang Chengtao, Wang Taisheng & Pan Guangzhe (王泰升&潘光哲), in Taipei, Taiwan (Nov. 9, 2002), *Zhang Chengtao Xiansheng Fangtan Jilu* (張承韜先生訪談紀錄) [*Interview with Mr. Zhang Chengtao*], in 1 TAIWAN FAJIE QISU KOUSHU LISHI (台灣法界耆宿口述歷史) [NARRATIVE HISTORY OF TAIWANESE SENIOR JURISTS] 148 (Sifa Xingzheng Ting (司法行政廳) ed., 2004).

²⁶⁹ Interview with Wang Jiayi, Wang Taisheng & Pan Guangzhe (王泰升&潘光哲), in Taipei, Taiwan (Nov. 6 & 18, 2002), *Wang Jiayi Xiansheng Fangtan Jilu* (王甲乙先生訪談紀錄) [*Interview with Mr. Wang Jiayi*], in 1 TAIWAN FAJIE QISU KOUSHU LISHI (台灣法界耆宿口述歷史) [NARRATIVE HISTORY OF TAIWANESE SENIOR JURISTS] 245 (Sifa Xingzheng Ting (司法行政廳) ed., 2004).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 246.

²⁷² Interview with Zhang Chengtao, *supra* note 268, at 130.

²⁷³ *Id.* at 132.

²⁷⁴ *Id.*

He also said that the influence of *guanxi* (關係) was inevitable in Taiwan including in the judicial system.²⁷⁵

Given the coercive power of the judicial system, the KMT used it effectively to oppress the opposition.²⁷⁶ Because the KMT government usually sent the convicted opposition activists to the isolated and remote small island in the Pacific Ocean called Green Island (Lü Dao 綠島), Taiwan's opposition activists always sarcastically referred to themselves as the graduates from the Green Island University or the survivors from the Taiwanese Gulag.²⁷⁷ Knowing that the court always favored the KMT, the opposition activists would fight on streets and focus on political campaigns rather than litigate in the unfair courtrooms.²⁷⁸ Therefore, when Taiwan's democratization started in the mid-1980s, the opposition always complained about the injustice of the KMT and the manipulated judicial system in order to win voters' sympathy.²⁷⁹ As the opposition grew rapidly and became a possible threat to the KMT regime, the Taiwanese people thirsted for more democracy and justice. Some insiders were aware of the crisis of the conservative system. Hence, the sharp criticism led to the new wave of judicial reform in the

²⁷⁵ *Id.*

²⁷⁶ See Hou Kunhong (侯坤宏), *Zhanhou Taiwan Baise Kongbu Lunxi* (戰後臺灣白色恐怖論析) [*White Terror in Postwar Taiwan*], GUOSHIGUAN XUESHU JIKAN (國史館學術集刊) [ACADEMIA HISTORICA REV.], no.12, 2007, at 139, 145-146 (describing KMT's use of martial law to punish oppositionists); Wang Jinshou (王金壽), *supra* note 249, at 111-112 (analyzing the relationship between the KMT and the judicial system).

²⁷⁷ HUANG JINAN & HUANG LINGZHU (黃紀男&黃玲珠), LAOPAI TAI DU HUANG JINAN QIXIE MENGHUI LU (老牌臺獨黃紀男泣血夢迴錄) [OLD BRAND TAIWAN INDEPENDENCE HUANG JINAN'S WEEPING MEMOIR] 433 (1991) (as cited in Hou Kunhong (侯坤宏), *supra* note 276, at 141 n.2).

²⁷⁸ "While litigation might not have been a promising route to challenge injustice in Taiwan, lawyers have played a significant role in opposition politics. The relatively large number of lawyers involved in leadership positions in the Democratic Progressive Party (DPP), the primary opposition to the ruling KMT, suggests that there may be some correlation between legal training and a commitment to the realization of liberal ideals." Winn & Yeh, *supra* note 163, at 563.

²⁷⁹ In 1979, a political parade for human rights became a serious riot between the oppositionists and the police. The KMT government then arrested, convicted and jailed the opposition leaders in the name of their treason. In the following decade, the spouses or the defense lawyers of the political prisoners of the Kaohsiung Incident successfully won several elections. See ROY, *supra* note 245, at 169-170.

early 1990s.²⁸⁰ Given the past experiences in the manipulated judiciary under the authoritarian rule, the judicial reform emphasized more on judicial independence.²⁸¹

On the other hand, since the judicial system was deeply affected by the KMT party and was expected to maintain or support the KMT regime, it was inevitable that the judicial culture was extremely conservative. Any thoughts in violation of the party policies might be deemed a threat. For example, in the foregoing interviews, Justice Yao and Yang both mentioned that they were suspected of taking bribes and being a communist because they rejected the KMT interference with their decisions. As a result, the most viable way for judges to stay safe was to comply with wishes of the party, government, or higher authority. In the judicial system, a good judge was therefore the one who was not only familiar with all legal rules but also adhered to them in a politically correct manner.

3.2.1.2. Widespread Impression of Corruption

Compared with the “mainlanders” Justice Yao, Yang, and Chang, who denied the corruption during the reign of the KMT,²⁸² the native Taiwanese former Grand Justice and former Supreme Court Judge Chen Ruitang (陳瑞堂) admitted the widespread impression on the corruption but blamed it to the poor quality personnel and individual judges’ personal wrongdoings exaggerated

²⁸⁰ See Su Yongqin (蘇永欽), *Piaoyi zai Liangzhong Sifa Linian Jian de Sifagaige—Taiwan Sifa Gaige de Shejing Beijing yu Fazhi Jichu* (飄移在兩種司法理念間的司法改革—台灣司法改革的社經背景與法制基礎) [*Judicial Reform Shifting between Two Judicial Rationales—Social Political Backgrounds and Legal Infrastructure for Taiwan’s Judicial Reform*], TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.], no.28, 2001, at 1, 5 (analyzing the correlation between Taiwan’s democratization and Taiwan’s judicial reform).

²⁸¹ See Wang Jinshou (王金壽), *supra* note 164, at 159 (arguing the judicial independence was the most successful reform in the judicial system).

²⁸² Those who migrated from the Chinese mainland since 1945 are collectively called the Waishengren (外省人). The literal meaning of the Mainlanders is “people from other provinces.” Those who inhabited Taiwan island before 1945 are collectively called the Benshenren (本省人). The literal meaning of the native Taiwanese is “people of this province.” Tay-sheng Wang, *supra* note 3, at 535. “Like other aspects of the government structure, the judiciary was then dominated by ‘mainlanders’ who had retreated with Chiang during the loss of the mainland. Some of these judges were of high quality, but they were unable to exercise independence in cases of importance to the regime.” Tom Ginsburg, *supra* note 246, at 249.

by the mass media. He said in a 2002 interview:

After the return to China, some lawyers were assigned as judges because of too many vacancies in Taiwan's courts. As a regained territory, those judges from the Mainland China, except for some who had passed a formal examination, depended on their past administrative experiences or even publications of academic commentary on the law to gain their appointments as judges. Due to the low standard for the appointments, the quality of the judiciary was poor. The Taiwanese society looked at the judiciary with distrust for a long time. The main reason was because a few greedy judges could not preserve their personal integrity. They violated the law and discredited their work, or they loved luxury and did not take their reputation seriously at all. Despite some judges' personal behavior, after newspapers disclosed and exaggerated the scandals, common people mistakenly believed that the criticisms applied to the whole judiciary and erroneously concluded that no judge could be trusted. Common people therefore believed that all judges took bribes. Before hiring a lawyer, a client usually asked if the lawyer had any connection with the judge. When a judge could not resist temptation, it would cause injustice. Sometimes some conmen would defraud people in the name of judges. All this caused great harm to Taiwan's justice.²⁸³

In fact, the Taiwanese people's dissatisfaction with the corruption of the judicial system can

²⁸³ “Guangfu yihou youyu Taiwan faguan renshu bugou, bushao lüshi bei pairen wei faguan. Yin shu shoufuqu, dalu laitai faguan zhong, chu zhengshi jing kaoshi jike zhe wei, you xiangdang duo de faguan xi yi cengren sifa xingzhengguan, shujiguan, chengshenyuan, shenzhi jinping falü zhuzuo qude renyong cige zhe, linren fulan, liangyou buqi. Taiwan shehui changqi yilai doudui sifajie cunyou buxinren gan, zhuyao yinwei shaoshu yizhi bujian buneng jieshen ziai zhi faguan tantu bufu liyi, wangfa duzhi, huo shenghuo shechi fangdang, dianru guanzhen, suiwei buxiao faguan geren zhi xingwei, dan jing baoduan jielu xuanran hou, yishi minzhong chansheng yipian gaichuan zhi cuojue, jiangqi guize yu sifajie, renwei sifa genben buke xinlai. Gu yibanren pupian yinxiang li, faguan dou yaoqian, dangshiren zai qing lüshi si wangwang yehui xianwen nengfou yu faguan goutong? Er yixie faguan yinwei bachi buiding, zaocheng shenpan bugong, you yixie zeshi sifa huangniu jiajie faguan mingyi congzhong zhapian, zhe doudui sifa laishuo shi jida de shanghai.” (光復以後由於台灣法官人數不夠，不少律師被派任為法官。因屬收復區，大陸來台法官中，除正式經考試及格者外，有相當多的法官係以曾任司法行政官、書記官、承審員，甚至僅憑法律著作取得任用資格者，遴任浮濫，良莠不齊。台灣社會長期以來都對司法界存有不信任感，主要因為少數意志不堅不能潔身自愛之法官貪圖不法利益，枉法瀆職，或生活奢侈放蕩，玷辱官箴，雖為不肖法官個人之行為，但經報端揭露渲染後，易使民眾產生以偏概全之錯覺，將其歸責於司法界，認為司法根本不可信賴。故一般人普遍印象裡，法官都要錢，當事人在請律師時往往也會先問能否與法官溝通？而有些法官因為把持不定，造成審判不公；又有些則是司法黃牛假借法官名義從中詐騙，這都對司法來說是極大的傷害。) Interview with Chen Ruitang, Pan Guangzhe, Wang Taisheng & Chen Yishen (潘光哲、王泰升&陳儀深), in Taipei, Taiwan (Nov. 23 & 26, 2002), *Chen Ruitang Xiansheng Fangtan Jilu* (陳瑞堂先生訪談紀錄) [Interview with Mr. Chen Ruitang], in 1 TAIWAN FAJIE QISU KOU SHU LISHI (台灣法界耆宿口述歷史) [NARRATIVE HISTORY OF TAIWANESE SENIOR JURISTS] 159 (Sifa Xingzheng Ting (司法行政廳) ed., 2004). Justice Chen said he was invited by Justice Yang Yuling to join the KMT in 1973 but he did not remember any interference from the political party. Even the routine cell meetings of the party never mentioned any specific case. *Id.* at 183.

date back to the KMT government's taking over.²⁸⁴ The 1992 Research Report for the 228 Event²⁸⁵ written by the investigation team of the Executive Yuan under the KMT rule also admitted the extensive corruption after the KMT took over Taiwan, "Corruption not only occurred among regular governmental officers, but prosecutors, presidents of courts, and even school teachers were also corrupted."²⁸⁶

3.2.1.3. Advent of Judicial Independence

Following Taiwan's political reconstruction from the mid-1980s, the sharp criticism of the partiality and corruption led to judicial reform in the early 1990s. The most significant reform was judicial independence. Prior to the judicial reform, the operation of the judicial system was controlled by the judicial administration closely with the KMT.²⁸⁷ At that time, not only did the judicial administration enjoy the power to reward and discipline judges, but it could also affect judges' decision making. The representative of the judicial administration in individual courts, the president, had the power to decide which judge would be promoted as a presiding judge or a higher court judge, and to assign a judge to a specific court division. A judge's court decision prior to its public announcement had to be sent to his or her president for approval.²⁸⁸ Because

²⁸⁴ WANG TAISHENG (王泰升), *supra* note 248, at 106.

²⁸⁵ The 228 Event happened in 1947. Following the riots all over Taiwan due to the dissatisfaction with the KMT ruling, the later arrived KMT troops slaughtered many Taiwanese elites. See ROY, *supra* note 245, at 67-75.

²⁸⁶ "Tanwu anjian bujin chuxian zai yiban gongwuyuan, lian jianchaguan, fayuan yuanzhang, shenzhi jiaoshi dou Tanwu." (貪污案件不僅出現在一般公務員，連檢察官、法院院長，甚至教師都貪污。) LAI ZEHAN & XINGZHENGYUAN YANJIU ER ER BA SHIJIAN XIAOZU (賴澤涵&行政院研究二二八事件小組), ER ER BA SHIJIAN YANJIU BAOGAO (二二八事件研究報告) [RESEARCH REPORT ON THE 228 EVENT] 21 (1994).

²⁸⁷ Wang Jinshou (王金壽), *Sifaduli yu Minzhu Kewenzexing: Lun Taiwan de Sifa Renshi Quan* (司法獨立與民主可問責任：論台灣的司法人事權) [*Judicial Independence and Democratic Accountability: The Power of Judicial Personnel of Taiwan*], 12 TAIWAN ZHENGZHI XUEKAN (台灣政治學刊) [TAIWAN POL. SCI. REV.], no.2, 2008, at 115, 116.

²⁸⁸ Fayuan Banan Shulei ji Wenjuan Shencha Shishi Yaodian (法院辦案書類及文卷審查實施要點) [Implementation Guidelines for the Examination of Court Decisions and Files], Jul. 10, 1987, Zhonghua Minguo 76 Nian 7 Yue 10 Ri Sifayuan (76) Yuan Tai Ting Yi Zi Di 04385 Hao Han (中華民國 76 年 7 月 10 日司法院(76)院台廳一字第 04385 號函) [Judicial Yuan, Jul. 10, 1987, No. 04385 Order], 29 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.8, 1987, at 53-54. According to the Order, the original court decision with all case files should be reviewed by the division chief judge and the president prior to its public announcement. See Lü Tailang

the position for a presiding judge or a higher court judge represented the authority of the system, and the workload for a presiding judge or a chief judge of a court division was much less,²⁸⁹ whoever wanted to gain the position or take an easy job had to keep good *guanxi* with the judicial administration. Given the huge influence of the judicial administration, the judicial administration could interfere with the judiciary. Those who did not succumb to the interference might suffer disadvantages.

Since the late 1980s, the opposition attacked the partiality and corruption of the system primarily from the outside with some reformers beginning to fight from the inside. Because the KMT still firmly controlled the government, including the judicial system, the early stage efforts did not succeed but resulted in the sacrifice of some reformers.²⁹⁰ In 1989, the reformist Prosecutor Gao Xinwu (高新武) at the Hsinchu Prosecutors' Office arrested the Director of the Department of the Judicial Administration of the Judicial Yuan Wu Tianhui (吳天惠) and his wife, the lawyer Su Gang (蘇岡), because of their suspect of bribing another prosecutor at the same prosecutors' office. Gao later indicted both Wu and Su but they were acquitted by the Hsinchu District Court. Gao, another prosecutor, and four district court judges then resigned to protest the interference with this case.²⁹¹ This was the first time that the dark side of the system

(呂太郎), *Taiwan zhi Shenpan Duli yu Sifa Xingzheng* (台灣之審判獨立與司法行政) [*The Judicial Independence and Judicial Administration of Taiwan*], 2 FAGUAN XIEHUI ZAZHI (法官協會雜誌) [J. JUDGES ASS'N], no.2, 2000, at 95, 97-98 (2000) (arguing the approval of the judicial administration in fact damaged judicial independence).

²⁸⁹ For example, the Implementation Guidelines for Case Assignment of the Taiwan High Court provides that a division chief judge should be assigned 1/6 to 1/12 cases. Taiwan Gaodeng Fayuan Fenan Shishi Yaodian (臺灣高等法院分案實施要點) [Implementation Guidelines for Case Assignment of the Taiwan High Court of 2011], Jan. 16, 2013, *Zhonghua Minguo* 102 Nian 1 Yue 16 Ri Taiwan Gaodeng Fayuan Tian Wen Zhuang Zhi Di 1020000427 Hao Ling (中華民國 102 年 1 月 16 日臺灣高等法院院填文莊字第 1020000427 號函) [Taiwan High Ct., Jan. 16, 2013, No. 1020000427 Order].

²⁹⁰ “[S]ince the judiciary was controlled by the KMT, the early reformers were persecuted both politically and judicially. Therefore, opposition groups soon turned their focus away from judicial reform to political reform.” Chin-shou Wang, *supra* note 162, at 130.

²⁹¹ Wang Jinshou (王金壽), *supra* note 164, at 139.

was attacked by insiders. Also in 1989, the Prosecutor Peng Shaojin (彭紹瑾) at Taoyuan Prosecutors' Office investigated the Minister of Justice Xiao Tianzan (蕭天讚) for Xiao's illegally lobbying a case. Later the Taiwan High Court Prosecutors' Office transferred the case from Peng to someone else and Xiao was not indicted in the end. Peng was isolated and could not help but resign.²⁹²

Compared to the previous two events that occurred in the prosecution system, the next case was from the inside of the judiciary. In 1991, when the President of Tainan District Court Wang Xingren (王興仁) lobbied Judge Xie Yuerong (謝說容) of the same court for Xie's trial case, Xie secretly taped the lobbying conversation and refused the lobbying. Xie later disclosed the recording to the mass media. Finally, the President was disciplined by the Judicial Yuan for his inappropriate lobbying; however, Xie was also disciplined by the Judicial Yuan because she did not take a statutory channel to report the lobbying but turned in the tape to the media.²⁹³

The reformers in all of these cases resigned or were disciplined; nevertheless, the sparks ignited by the reformers inspired followers. The most significant success in judicial independence came in 1993. The Court Organization Act at that time provided that every court should hold a meeting of all judges by the end of the year to decide the allocation of judicial assignments and the order of rotation for the following year, and resolutions of the meeting should be passed with majority votes.²⁹⁴ In reality, the allocation and rotation was totally

²⁹² *Id.* at 140.

²⁹³ *Id.* at 140-141; Qu Haiyuan (瞿海源), Op-Ed, *Ping Sifayuan Feichu Caipanshulei Songyue Zhidu Jianbo Dui Tainan Fayuan Xiangguan Renyuan Chengchu zhi Liyou* (評司法院廢除裁判書類送閱制度兼駁對臺南法院相關人員懲處之理由) [*Comments on Judicial Yuan's Abolition of Court Decisions Review System and Judicial Yuan's Reasons to Discipline Tainan District Court Judges*], ZILI ZAobao (自立早報) [INDEPENDENCE MORNING POST], Mar. 6, 1991, at page 3.

²⁹⁴ Art. 79 & 80 of the 1989 Court Organization Act. *Zhonghua Minguo 78 Nian Fayuan Zuzhi Fa* (中華民國 78 年法院組織法) [Court Organization Act of 1989], Dec. 22, 1989, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5184, 1989, at 1.

decided by the representative of the judicial administration, the president, not the meeting of judges, due to the president's huge influence in the system.²⁹⁵ In order to break the long-term control by the judicial administration, nine young judges at the Taichung District Court unprecedentedly held a press conference and announced their judicial autonomy movement.²⁹⁶ They proclaimed the rules for the meeting of judges should be restored; that is, the allocation and rotation should be decided by judges' autonomy, not the president or the judicial administration.²⁹⁷ Their announcement was praised by the media and received support from other judges.²⁹⁸ Later in the meeting of judges at the Taichung District Court, the reformers won the battle on the judicial autonomy by a 41-34 vote.²⁹⁹ Since then, many district courts followed the same model to regain the control from the judicial administration.³⁰⁰

Another battlefield for judicial independence in the 1990s was the Judicial Personnel Review Committee. Prior to 1980, both judges and public prosecutors were subject to the supervision of the Ministry of the Judicial Administration (Sifa Xingzheng Bu 司法行政部). The Legislative Yuan amended the Court Organization Act in 1980 to transfer the power of judicial administration to the Judicial Yuan.³⁰¹ The new law renamed the Ministry of Judicial Administration as the Ministry of Justice and subjected the remaining prosecution administration to the Ministry of Justice. To regulate the newly gained power for the Judicial Yuan, the Legislative Yuan also amended the Judicial Yuan Organization Act at the same time.³⁰²

²⁹⁵ Lü Tailang (呂太郎), *supra* note 288, at 101 (describing the great influence of the hierarchy on judicial influence); Wang Jinshou (王金壽), *supra* note 164, at 143.

²⁹⁶ Wang Jinshou (王金壽), *supra* note 164, at 143.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 144.

³⁰⁰ *Id.*

³⁰¹ Zhonghua Minguo 69 Nian Fayuan Zuzhi Fa (中華民國 69 年法院組織法) [Court Organization Act of 1980], Jun. 29, 1980, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.3688, 1980, at 11.

³⁰² Zhonghua Minguo 69 Nian Sifayuan Zuzhifa (中華民國 69 年司法院組織法) [Judicial Yuan Organization Act

According to Article 20 of the Judicial Yuan Organization Act of 1980, the Judicial Yuan should install the Judicial Personnel Review Committee to review judges' appointment, removal, transfer, reward, and discipline, and all committee members should be appointed by the President of the Judicial Yuan. The power of judicial personnel was therefore divided into two; that is, the Judicial Yuan had the right to proposal while the Committee had the right to review.³⁰³

In order to introduce judicial autonomy into the Committee,³⁰⁴ the Legislative Yuan revised Article 20 of the Judicial Yuan Organization Act in 1992.³⁰⁵ The new law provided that the Committee should consist of the President of the Judicial Yuan, the Vice President of the Judicial Yuan, the General Secretary of the Judicial Yuan, the President of the Supreme Court, the President of the Supreme Administrative Court, the Chair of the Commission on the Disciplinary Sanctions of Functionaries, all directors of the departments of the Judicial Yuan, the President of the Taiwan High Court, one representative of Supreme Court judges, two representatives of Taiwan High Court judges, and seven representatives of district court judges.³⁰⁶ All representatives should be elected directly by judges.³⁰⁷ Therefore, of the 22 Committee members, 12 were designated by the Judicial Yuan and 10 were elected by judges.³⁰⁸

The Committee was very important because it was the only way that the majority of judges, through their representatives, could express their opinions on a proposal of the Judicial Yuan for

of 1980], Jun. 29, 1980, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.3688, 1980, at 2.

³⁰³ *Renshi Shenyi Zhidu Shuoming* (人事審議制度說明) [*Explanation for the Judicial Personnel Review*], SIFAYUAN RENSHICHU (司法院人事處) [DEPARTMENT OF PERSONNEL OF THE JUDICIAL YUAN], <http://www.judicial.gov.tw/revolution/人事審議制度說明.pdf> (last visited Jun. 28, 2013).

³⁰⁴ The second reading legislative materials for the Judicial Yuan Organization Act of 1992, 81 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.67, Oct. 22, 1992, at 48.

³⁰⁵ *Zhonghua Minguo 81 Nian Sifayuan Zuzhifa* (中華民國 81 年司法院組織法) [Judicial Yuan Organization Act of 1992], Nov. 20, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5646, 1992, at 1.

³⁰⁶ Art. 20(b) of the 1992 Judicial Yuan Organization Act.

³⁰⁷ *Proviso* of Art. 20(b) of the 1992 Judicial Yuan Organization Act.

³⁰⁸ *Renshi Shenyi Zhidu Shuoming* (人事審議制度說明) [*Explanation for the Judicial Personnel Review*], *supra* note 303.

judicial personnel or even object to it. When the power was totally controlled by the judicial administration, the crucial considerations for the judicial administration to select a judge were usually his or her seniority in the system and *guanxi* with the judicial administration, not professional performance and decency.³⁰⁹ The reformers believed that reliance on *guanxi* was detrimental to judicial independence and took the position of the representatives as a weapon to hold the judicial administration accountable for its personnel proposal.³¹⁰ In 1994, three reformers were successfully elected as representatives. Though they were the minority in the Committee, they played a key role for the transparency of the judicial personnel. They demanded the judicial administration to explain the reason especially for some controversial candidates and effectively boycotted some inappropriate candidates.³¹¹ The Committee was no longer a rubber stamp of the judicial administration.

In addition, the reformers have launched two other movements with respect to judicial personnel since 1994.³¹² One was the evaluation for all court presidents. They sent out periodical surveys to judges to investigate the performance of their presidents, especially whether or not their presidents ever interfered in judges' decision making.³¹³ The other was the election for chief judges of court divisions. They invited judges to vote for their ideal candidates for the position and brought the results of the evaluation and election to the Judicial Yuan and the Committee as ammunition.³¹⁴

From outside of the judicial system, the opposition kept attacking the partiality and

³⁰⁹ Wang Jinshou (王金壽), *supra* note 164, at 146.

³¹⁰ *Id.*

³¹¹ *Id.* at 147.

³¹² Lü Tailang (呂太郎), *supra* note 288, at 102.

³¹³ *Id.*; Wang Jinshou (王金壽), *supra* note 164, at 147.

³¹⁴ Wang Jinshou (王金壽), *supra* note 164, at 147.

corruption. As the opposition acquired more ballots and gained more strength in the legislature, the pressure they imposed on the judicial system became heavier. In response to the criticism, the Judicial Yuan issued the Code of Conduct for Judges in 1995 to ban any involvement of judges in political activities.³¹⁵ A violation of the ban would be reviewed by the self-disciplinary committee of judges and lead to a negative grade.³¹⁶ After the DPP defeated the KMT in the 2000 presidential election, the criticism of judicial independence did not cease but came from both the ruling party and the opposition party. Whenever they received an unfavorable court decision, the KMT accused the DPP of manipulating the judicial system. On the other hand the DPP continued to criticize the judicial system for its pro-KMT stand. For example, upon knowing the lawsuit to annul the result of the 2004 presidential election was rejected, the KMT accused the court of succumbing to political pressure from the government.³¹⁷ The President Chen Shui-bian in 2007 asserted in a televised interview that between 70 and 80 percent of the judiciary was biased and favored the KMT.³¹⁸ In such a political atmosphere, any interference with the judiciary would be challenged and taken as a serious issue.³¹⁹

³¹⁵ Faguan Shouze (法官守則) [Guidelines for Judges Ethics], Aug. 22, 1995, *Zhonghua Minguo* 84 Nian 8 Yue 22 Ri Sifayuan (84) Yuan Tai Ting Si Yi Zi Di 16405 Hao Han (中華民國 84 年 8 月 22 日司法院(84)院台廳司一字第 16405 號函) [Judicial Yuan, Aug. 22, 1995, No. 16405 Order]. *See also*, YUEH-SHENG WENG, *supra* note 151, at 29.

³¹⁶ Sifayuan Suoshu Geji Fayuan Faguan Kaoji (Cheng) Pingding Cankao Yaodian (司法院所屬各級法院法官考績(成)評定參考要點) [Reference Guidelines for the Evaluation of Judges' Performance], Aug. 23, 1999, *Zhonghua Minguo* 88 Nian 8 Yue 23 Ri Sifayuan (88) Yuan Tai Ren San Zi Di 22416 Hao Han (中華民國 88 年 8 月 23 日司法院(88)院台人三字第 22416 號函) [Judicial Yuan, Aug. 23, 1999, No. 22416 Order]. "Thus, for, three judges have been disciplined due to their political involvement." YUEH-SHENG WENG, *supra* note 151, at 30.

³¹⁷ Caroline Hong, *Blue Camp to Appeal "Illegal" Verdict*, *TAIPEI TIMES*, Dec. 31, 2004, at 3, available at <http://www.taipeitimes.com/News/taiwan/archives/2004/12/31/2003217413>.

³¹⁸ Rich Chang & Jimmy Chuang, *Judiciary Denies Political Bias*, *TAIPEI TIMES*, Sep. 5, 2007, at 1, available at <http://www.taipeitimes.com/News/front/archives/2007/09/05/2003377251>.

³¹⁹ *See* Wang Jinshou (王金壽), *supra* note 164, at 167.

3.2.2. The Long-Term Judicial Culture Surviving the Transformation

Judicial culture refers to judges' collective notions of law and of the judicial role.³²⁰ In judicial culture, specific empirical assumptions, historical interpretations, and normative ideals are developed among judges and influence the enforcement of law.³²¹ Providing institutional protection for judicial independence is no guarantee that judges will respond to law and the constitution in desirable ways.³²² Judges are human. Judicial culture will affect court functions and changes in judicial culture push courts in a different direction.³²³ Some scholars have articulated the influence of judicial culture as follows:

Judges are members of a common profession. They are trained in the law, and there are important continuities in legal education and doctrine across states. But the judiciary in each state also may develop particular traditions, depending partly on whether judges are elected or appointed, whether they come predominantly from backgrounds in politics or law enforcement, whether they are liberal or conservative. Resulting differences in judicial culture may explain variations in [state supreme court] caseloads and opinion writing among states that are socioeconomically similar.³²⁴

In Taiwan, the judiciary's decision making has been heavily influenced by the judicial culture shaped by the long-term authoritarian rule. Although outside the judiciary the newly gained judicial independence protected judges from interference, inside the judiciary the judicial culture that emphasized discipline survived the reform and continued to influence judges' decision making.

3.2.2.1. Disciplinary Judicial Culture

While the judicial independence was established, the long-term judicial culture survived.

³²⁰ Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981).

³²¹ See Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 696 (2001).

³²² Ferejohn, *supra* note 247, at 354.

³²³ Friedman, Kagan, Cartwright & Wheeler, *supra* note 320, at 773.

³²⁴ Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 123 (1977).

Although the power of the KMT was declining, all societal and governmental structure established and reinforced by the authoritarian regime did not entirely disappear. Despite the defeat in the 2000 and 2004 presidential elections, the KMT and its political allies continued to control the legislature and the bureaucracy have remained largely loyal to the KMT.³²⁵ In the judiciary, those judges who were recruited, trained, appointed, and promoted under the authoritarian regime still dominate the judicial system. Following the democratization, the 1990s judicial reform launched by insiders successfully introduced judicial independence. Nevertheless, in order to earn the recognition from the majority of judges, it was inevitable that the reform focused on the external judicial independence, instead of the internal judicial culture.³²⁶ Under such circumstances, the judicial culture survived the transformation and continued to influence judges' values and decision making.

Until the recent judicial reform targeting judicial culture in 2012, Taiwan's judicial culture had emphasized discipline. Judges were expected to adhere to the internal rules shaped by the disciplinary judicial culture. A so-called good judge in the system always knew and provided what senior judges would like to see. The most important component in reasoning was to show the compliance with the system. One judge described the style:

The lower court judges write their court decisions only for the appellate court judges. Whenever faced with legal questions, the most important thing is to find out what the Supreme Court and appellate courts said before. Most judges do not consider whether or not the facts in their cases are the same as or similar to the facts in the cited case but mechanically copy some sentences or phrases in the cited opinion. No wonder many criticized that Taiwan's court decisions often departed from people's legal common sense.³²⁷

³²⁵ See ROY, *supra* note 245, at 231 (describing the political power remained strong to control the legislature and the bureaucracy remained largely loyal to the KMT).

³²⁶ Wang Jinshou (王金壽), *supra* note 287, at 130.

³²⁷ Lin Menghuang (林孟皇), *Taiwan Faguan Renshi Zhidu Wenti ji Qi Gaige Fangxiang—Yi Sifayuan Renshi Shenyi Weiyuanhui de Biange Wei Zhongxin* (台灣法官人事制度問題及其改革方向—以司法院人事審議委員會

How Taiwan's judges were recruited, trained, and appointed can shed some light on the disciplinary judicial culture. The judiciary of Taiwan has been made up of career judges appointed by the government.³²⁸ There are two sources from which the government picks up the candidates. One is from those who have already passed the national exam and finished the governmental training; the other is from legal professions such as (practicing) lawyers, public prosecutors, or law professors.³²⁹ The former has been the major source though the Legislative Yuan in 2012 demanded more judges from the latter channel.³³⁰ Because the former has been the major channel and remained unchanged for over 40 years, the following discussion will concentrate on the former channel unless otherwise specified.

In Taiwan, judges' appointment is preconditioned by passing the national exam and the governmental training. Both the bar exam³³¹ and the national exam for judges and public prosecutors are given almost once a year. Those who pass the written and oral tests of the national exam and want to be judges or public prosecutors must join the training program at the

制度的變革為中心) [*The Problem on the Judge Personnel System of Taiwan and the Direction of the Reform—Centered on the Evolution of the Judicial Personnel Review Committee of the Judicial Yuan*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.164, 2010, at 1, 4-5.

³²⁸ Taiwan's post-war legal education brought by the Nationalist government from China in fact could find its roots in Japan. Liu Hengwen (劉恆旻), *Qingme Fali dao Minguo Faguan: Yi "Wu Chao Bu Cheng Yuan" de Beijing Chaoyang Daxue Weili* (清末法吏到民國法官—以「無朝不成院」的北京朝陽大學為例) [*From an Imperial Official to a Judge of Nationalist Government: A Case Study of Chaoyang University in Beijing*], ZHONGYANYUAN FAXUE QIKAN (中研院法學期刊) [ACADEMIA SINICA L.J.], no.8, at 185, 205-206, 208, 209 (2011).

³²⁹ CHANG-FA LO, *supra* note 35, at 19-20.

³³⁰ When the Legislative Yuan enacted the Judges Act in 2011, it also passed the affiliated resolution demanding the government to decrease new judges from the national exam channel down to 20% in 10 years. See the third reading legislative materials of the Judges Act, 100 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.49, Jun. 14, 2011, at 2229.

³³¹ "[P]rior to 1989, of 2,000-3,000 candidates sitting for the official bar exam each year, as few as six might pass the exam (as was true as recently as 1982)." Winn & Yeh, *supra* note 163, at 573.

Judges and Prosecutors Training Institute of the Ministry of Justice (JPTI)³³² as interns.³³³ After an intern finishes the training courses at the JPTI, he or she has to go to a district court and prosecutors' offices for the practical training under the supervision of the JPTI.³³⁴ Afterwards, the intern will be appointed as a probationary judge or public prosecutor in a district court or prosecutors' office in light of his or her training grade and willingness.³³⁵ A probationary judge (*houbu faguan* 候補法官) or a probationary public prosecutor must successfully complete at least five-year probation to become be an assistant judge (*shisu faguan* 試署法官) or an assistant public prosecutor.³³⁶ An assistant judge or an assistant public prosecutor must take additional one-year probation.³³⁷ During the two separate probations, a judge or public prosecutor's performance, especially his or her court decisions or indictments, is subject to the review of the Judicial Yuan or the Ministry of Justice.³³⁸ If a judge is qualified for both probations, he or she will be granted life-time tenure and his status is guaranteed pursuant to

³³² Fawubu Sifaguan Xunliansuo (法務部司法官訓練所) [Judges and Prosecutors Training Institute of the Ministry of Justice, hereinafter JPTI]. The Ministry of Justice is under the Executive Yuan. The predecessor of the Ministry of Justice is the Ministry of Judicial Administration (司法行政部). Prior to 1980, the Ministry of Judicial Administration was in charge of the administration for both the prosecution and the judiciary. In 1980, the administration for the judiciary was transferred under the Judicial Yuan. The Ministry of Judicial Administration was renamed the Ministry of Justice and responsible for the remaining administration for the prosecution. See SHI QINGPU (史慶璞), FAYUAN ZUZHI FA (法院組織法) [LAW OF COURT ORGANIZATION IN TAIWAN] 56 (2007).

³³³ Art. 27 of the Judicial Personnel Act provides that those who passed the national exam should receive the learning and training administered by the JPTI.

³³⁴ Art. 10 of the JPTI Training Rules for Judges and Prosecutors. Fawubu Sifaguan Xunliansuo Sifaguan Xunlian Guize (法務部司法官訓練所司法官訓練規則) [JPTI Training Rules for Judges and Prosecutors, hereinafter Training Rules], Zhonghua Minguo 92 Nian 3 Yue 3 Ri Fawubu Fa Ling Zi Di 0921300620 Hao Ling (中華民國 92 年 3 月 3 日法務部法令字第 0921300620 號令) [Ministry of Justice, Mar. 3, 2003, No. 0921300620 Order].

³³⁵ Art. 9(a) of the Judges Act (replaced Art. 10(a) of the Judicial Personnel Act in 2012). Similarly, in Korea, "[o]nly those whose performance score on the Bar examination and at the JRTI are among the highest are assigned to the most preferred posts, that is to posts in courts such as one of the five District Courts in Seoul." Dai-Kwon Choi, *Legal System: Korea*, in JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN 20 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

³³⁶ Art. 9(a) of the Judges Act (replaced Art. 10(a) of the Judicial Personnel Act in 2012).

³³⁷ Art. 9(b) of the Judges Act (replaced Art. 10(b) of the Judicial Personnel Act in 2012).

³³⁸ Art. 9(f) of the Judges Act (replaced Art. 10(d) of the Judicial Personnel Act in 2012).

Article 80³³⁹ and 81³⁴⁰ of the Constitution.³⁴¹

The KMT government established the JPTI in 1954.³⁴² In general, after the government announces the results of the national exam for judges and public prosecutors, the JPTI will soon conduct a new term (*qi* 期) of training for the incoming interns.³⁴³ A different term means the different time when an intern enters into the system. Usually, the earlier an intern entered into the JPTI, the more senior he or she is in the system. In the judicial system of Taiwan, the seniority has been the most important consideration to administer judges; that is, the priority to be promoted, transferred, or rotated is based on the seniority.³⁴⁴ The former Grand Justice and the former Supreme Court Judge Wang Jiayi mentioned the importance of a judge's term, "Generally speaking, the sequence of the training terms, seniority, integrity, and so on have great influence on a judge's promotion."³⁴⁵ With its great influence, the seniority leads to the "term"

³³⁹ Art. 80 of the Constitution of the ROC provides, "Judges shall be impartial. They shall try and review cases independently, in accordance with law, and be free from any interference. MINGUO XIANFA art. 80 (1947). The English translation, GUOMIN DAHUI MISHUCHU (國民大會秘書處) [SECRETARIAT OF THE NATIONAL ASSEMBLY], *supra* note 196, at 12.

³⁴⁰ Art. 81 of the Constitution of the ROC provides, "Judges shall hold office for life. No judge shall be removed from office unless he has been guilty of a criminal offense or subjected to disciplinary action, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended from office, transferred, or liable to salary cuts." MINGUO XIANFA art. 81 (1947). The English translation, GUOMIN DAHUI MISHUCHU (國民大會秘書處) [SECRETARIAT OF THE NATIONAL ASSEMBLY], *supra* note 196, at 12-13.

³⁴¹ The Judicial Yuan No. 13 Interpretation holds that the word "judges" in the Article 80 and 81 of the Constitution does not include public prosecutors but public prosecutors are treated as judges by Article 82 of the Constitution and the other laws. Sifayuan (司法院) [Judicial Yuan], Jan. 31, 1953, (Shi) No. 13 Interpretation, *in* 1 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATION OF THE GRAND JUSTICES OF THE JUDICIAL YUAN] 20 (Judicial Yuan ed., 2009), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=13.

³⁴² Liu Hengwen (劉恆旻), *supra* note 262, at 132. For a general introduction on the JPTI, see *History of the JPTI*, JPTI, <http://www.tpi.moj.gov.tw/ct.asp?xItem=56464&CtNode=15109&mp=186> (last visited Jun. 28, 2013).

³⁴³ Liu Hengwen (劉恆旻), *supra* note 262, at 132.

³⁴⁴ *Id.* at 130.

³⁴⁵ Interview with Wang Jiayi, *supra* note 269, at 240.

culture³⁴⁶³⁴⁷ and judicial hierarchy.³⁴⁸

The training period was one year in 1955 and 1956.³⁴⁹ Since 1957, it was then changed to one and half years.³⁵⁰ The one and half years training was divided into three phases.³⁵¹ During the first phase of six months, the interns stayed in the JPTI to learn how to read case files and write court opinions and indictments.³⁵² The interns were then distributed to district courts and prosecutors' offices for the second phase, the nine-month practical training.³⁵³ Three major subjects, civil litigation, criminal litigation, and criminal prosecution, were provided. For each subject, an intern was usually assigned an instructor judge or public prosecutor. Through

³⁴⁶ The term culture (*qibie wenhua*, 期別文化) means a judge's identity and status in the system is decided by the training term. For example, whenever a judge introduces himself or herself, the first thing he or she shows is his or her term number. See Liu Hengwen (劉恆文), *supra* note 262, at 130, 156. Outside the judicial system, people also use the term number to identify a judge's status in the system. For example, when a newspaper reported that a judge was disciplined in 2012 due to his misconduct, the judge's term number was also listed in the news report. See Yang Guowen, Lin Jiadong & Lin Xinhan (楊國文、林嘉東&林欣漢), *Yu Shetanjing Yanyin, Naoshi, Faguan Tingzhi* (與涉貪警宴飲、鬧事，法官停職) [*Feast with the Police officer Involved in Corruption, Judge Suspended*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Feb. 24, 2012, at Touban Xinwen (頭版新聞) [Headline News], available at <http://www.libertytimes.com.tw/2012/new/feb/24/today-t1.htm>.

³⁴⁷ A similar term culture can be also found in Korea. A judge who graduated from an earlier term at the Judicial Research and Training Institute (JRTI) is usually the one with higher rank. "It is regarded that the de facto order (*soyol*) among judges is determined mainly by two factors. First, the most important factor involves when he/she graduated from the JRTI. Those who have graduated from the JRTI even just one year earlier are regarded as being of higher rank than the graduates of later years. Each class year from the JRTI is normally expressed as *ki* in Korea (for example, 'JRTI 20th *ki*' for those who graduated in 1991)." Dohyun Kim & Seung Heum Hwang, *Career Patterns of the Korean Legal Profession*, in JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN 157 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

³⁴⁸ "Courts tend to be more hierarchical in civil law countries than in common w countries. Accordingly, the views of senior judges may carry more weight in practice if not according to law. Senior judges in civil systems may also exercise greater control over important administrative matters such as assignment of cases and personnel issues." Randall Peerenboom, *supra* note 246, at 74. The hierarchy of the judicial system in Taiwan means higher courts have great control over lower courts. Whenever delivering a court opinion, a lower court judge has to concern whether or not the opinion can be upheld by higher courts. Although higher court judges cannot interfere in individual cases, their interpretation of law has huge binding power on a basis of the seniority. Of course, any court system is hierarchical; however, Taiwan's hierarchy is distinct because of judges' extremely high dependence on the seniority. See Lin Menghuang (林孟皇), *supra* note 327, at 4-5.

³⁴⁹ Liu Hengwen (劉恆文), *supra* note 262, at 133.

³⁵⁰ *Id.* at 134.

³⁵¹ *Id.* at 136-137.

³⁵² *Content of Education, JPTI*, <http://www.tpi.moj.gov.tw/ct.asp?xItem=59753&CtNode=15491&mp=186> (last visited Jun. 28, 2013).

³⁵³ *Id.*

observing the proceedings of a real case and drafting the court opinion or indictment of a real case, an intern would learn how a judge or public prosecutor dealt with a case. In the last phase of three months, the interns went back to the JPTI for the final test.³⁵⁴ The purpose of the final test was to confirm whether an intern was qualified for the position. All the interns were given the same case file and required to deliver court opinions or indictments in several hours. In 2001, the training period of time was extended to two years and another new phase of practical training in administrative agencies was added.³⁵⁵ In response to the new jurisdiction of the district court over the administrative cases that were adjudicated at the high court level before, the JPTI in 2010 added another new phase.³⁵⁶

The JPTI set strict rules and emphasizes group discipline for interns. Prior to the 1990s judicial reform, the life in the JPTI was similar to that in the military and the administration was to cultivate the loyalty to the country, even the political party.³⁵⁷ Justice Yang Yuling and Chen Ruitang recalled life in the JPTI in their interviews:

During the training period, the life administration was very strict. There was a flag-raising ceremony every morning and a roll call every night.³⁵⁸

The administration was very strict. There was a roll call every night. Living in the Institute was mandatory. The life was similar to that in the military.³⁵⁹

³⁵⁴ *Id.*

³⁵⁵ Liu Hengwen (劉恆文), *supra* note 262, at 134; *Content of Education, JPTI*, *supra* note 352.

³⁵⁶ *Content of Education, JPTI*, *supra* note 352.

³⁵⁷ Liu Hengwen (劉恆文), *supra* note 262, at 144-145, 148.

³⁵⁸ “Shouxun qijian shenghuo guanli henyuan, zaoshang yao shengqi, wanshang ze you dianming.” (受訓期間生活管理很嚴，早上要升旗，晚上則有點名。) Interview with Yang Yuling, *supra* note 260, at 64.

³⁵⁹ “Dui xueyuan de guanshu feichang yange, meitian wandianming, guiding bixu zaisuo zhusu, henxiang shi junshihua shenghuo guanli.” (對學員的管束非常嚴格，每天晚點名，規定必須在所住宿，很像是軍事化生活管理。) Interview with Chen Ruitang, *supra* note 283, at 182. Justice Chen disagreed with the military administration and commented, “Ruguo xiang junshi guanli nayang guande taiduo, qishi shi hennan peiyang qi zili ziai de jingshen.” (如果像軍事管理那樣管得太多，其實是很難培養其自立自愛的精神的。) [If the administration is too much like that in the military, it is in fact difficult to cultivate the spirit of independence.]. *Id.* at 183.

Further, one commentator remarked after she reviewed the training materials prior to the judicial reform, “The most important purpose of the training at that time was to baptize the future judges and public prosecutors with the creeds of the party.”³⁶⁰

After the judicial reform instituted in the early 1990s, explicit political activities did not exist in the training program, but the discipline that aimed to shape a unified and obedient judiciary did not disappear altogether.³⁶¹ The belief that the disciplinary rules and administration are helpful to shape an excellent judge can still be easily traced now on the official website of the JPTI:

The activities are designed to strengthen trainees’ nationalism, to build their strong bodies and cultivate excellent talent and to broaden their views and mind, helping trainees to live with discipline. Thus, after graduation, they will uphold the principles of “loyalty to the country, self-discipline, identification of the truth, [and] fairness” by ways of fair administration of law, respect the job and get along well with others so as to become excellent judges and prosecutors.³⁶²

Before 2012, all interns were required to live in the JPTI for the first and last training phases.³⁶³ Until recently, all interns had to obey curfew and dine together, and were demanded to applaud whenever an instructor or teacher entered into the classroom.³⁶⁴ To effectively enforce the rules, the obedience was linked to the training grade of the interns; that is, a violator would suffer disadvantages in his or her career, or even be failed.³⁶⁵ Three members of the Control

³⁶⁰ “Dangshi zhi sifaguan xunlian, zuida de mudi zaiyu shi zhexie weilai de sifaguan shou dang he zhuyi de xili.” (當時之司法官訓練，最大的目的在於使這些未來的司法官受黨和主義的洗禮。) Liu Hengwen (劉恆奴), *supra* note 262, at 146.

³⁶¹ *See id.* at 149, 152.

³⁶² *Content of Education, JPTI, supra* note 352.

³⁶³ Liu Hengwen (劉恆奴), *supra* note 262, at 135. Due to the sharp criticism in a public hearing held by the Legislative Yuan, the JPTI abolished the mandatory residence since 2013. *See* Yang Guowen (楊國文), *Sifaguan Xueyuan Qiangzhi Zhusu Quxiao* (司法官學員強制住宿取消) [*Mandatory Residence for Judge and Prosecutor Interns Abolished*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Jul. 24, 2012, at Shehui Xinwen (社會新聞) [Social News], available at <http://www.libertytimes.com.tw/2012/new/jul/24/today-so7.htm>.

³⁶⁴ Liu Hengwen (劉恆奴), *supra* note 262, at 152.

³⁶⁵ Art. 18 of the Training Rules.

Yuan, another branch of the central government responsible for government integrity,³⁶⁶ after investigating the training program, questioned the disciplinary culture of the training program in their 2011 official report:

Can the virtues and morals that a judge or public prosecutor is supposed to have be cultivated in such a disciplinary culture? We have some doubts. Especially for those who must carry out their duties independently and thus need personal qualities such as independent thinking, responsibility, and courage to resist any inappropriate interference, the training is questionable. In fact, the over-emphasis on disciplinary administration at the JPTI for every term is harmful to a judge or public prosecutor's virtue and diligence.³⁶⁷

In addition to the training of the JPTI prior to the appointment, the disciplinary judicial culture can also be seen by observing how a judge is evaluated after he or she assumes office. To become a tenured judge, either a probationary judge or an assistant judge is subject to the review by the Judicial Yuan. Prior to the implementation of the Judges Act in 2012,³⁶⁸ the review was pursuant to the Review Rules for Probationary and Assistant Judges³⁶⁹ authorized by Article 10 of the Judicial Personnel Act.³⁷⁰ From 2012, the review was pursuant to the Examination Rules

³⁶⁶ The Control Yuan is one of five major government organs in the Constitution. Its duty is to oversee the integrity of the government and its officials. *See* MINGUO XIANFA art. 90 (1947).

³⁶⁷ “Sifaguan suoying jubei zhi gaoshang pingge yu sifa lunli guannian shifou nengzei ruci zhi xundao wenhua zhong peiyang erde? Buwu yiwen. Youqi duiyu weilai xu juyou duli shenpan zhi sifaguan, ying ruhe peiyang qi duli sikao, jinzhi fuze, neng kangju budang ganyu yongqi de renge tezhi, geng zhi shangque. Qishi, zei geqi de xundao gongzuo zhong, guoyu qiangdiao beidongshi de guanli faner buli peiyang chu pinde gaoshang, fuze jinzhi zhi sifaguan.” (司法官所應具備之高尚品格與司法倫理觀念是否能在如此之訓導文化中培養而得？不無疑問。尤其對於未來需具有獨立審判職務之司法官，應如何培養其獨立思考、盡職負責、能抗拒不當干預勇氣的人格特質，更值商榷。其實，在各期的訓導工作中，過於強調被動式的管理反而不利培養出品德高尚、負責盡職之司法官。) Ye Yaopeng, Yu Tengfang & Li Fudian (葉耀鵬、余騰芳&李復甸), FAGUAN YU JIANCHAGUAN ZHIQIAN XUNLIAN ZHI JIANTAO ZHUANAN DIAOCHA YANJIU BAOGAO (法官與檢察官職前訓練之檢討專案調查研究報告) [SPECIALIZED INVESTIGATION AND RESEARCH REPORT ON JUDGES AND PROSECUTORS PRE-APPOINTMENT TRAINING] 112 (2011).

³⁶⁸ Faguan Fa (法官法) [Judges Act, hereinafter], Jul. 6, 2011, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6982, 2011, at 20.

³⁶⁹ Houbu Shishu Faguan Banli Shiwu ji Fuwu Chengji Kaocha Banfa (候補試署法官辦理事務及服務成績考查辦法) [Review Rules for Probationary and Assistant Judges, hereinafter Review Rules], Jul. 1, 2008, Zhonghua Minguo 97 Nian 7 Yue 1 Ri Sifayuan (97) Yuan Tai Ren San Zi Di 0970014097 Hao Ling (中華民國 97 年 7 月 1 日司法院(97)院台人三字第 0970014097 號令) [Judicial Yuan, Jul. 1, 2008, No. 0970014097 Order].

³⁷⁰ Sifa Renyuan Renshi Tiaoli (司法人員人事條例) [Judicial Personnel Act], Dec. 22, 1989, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5184, 1989, at 17.

for Probationary and Assistant Judges³⁷¹ authorized by Article 9 of the Judges Act.

Prior to 2012, the Review Rules provided that the candidate's judicial decisions should be reviewed by the review board set by the Judicial Yuan.³⁷² The Judicial Yuan usually appointed judges among those who had served as Supreme Court presiding judges, Supreme Court judges, or High Court presiding judges to be board members.³⁷³ These members were very senior judges in the system and the review always focused on whether the reviewed decisions abided by the decisions of the Supreme Court.³⁷⁴ One district court judge was failed by the board because he criticized one Supreme Court decision in his court opinion.³⁷⁵ In order to gain the tenure smoothly, young judges always followed the formerly decided court opinions of higher courts. Then, when they became senior judges, they were so accustomed to submitting to the authority of higher courts that they took the submission to the authority for granted. The result was that a higher courts' interpretation of law was almost unchallengeable in the system.³⁷⁶

The judicial merit system of Taiwan prior to 2012 also reflected the ideology of the disciplinary judicial culture that the judiciary as a whole should be bureaucratic. Before the enactment of the Judges Act in 2011, all government officials, including judges, were subject to the same merit system.³⁷⁷ Each year the judicial administration graded all judges to distribute

³⁷¹ Houbu Shishu Faguan Banli Shiwu ji Fuwu Chengji Kaohe Banfa (候補試署法官辦理事務及服務成績考核辦法) [Examination Rules for Probationary and Assistant Judges], Jul. 5, 2012, *Zhonghua Minguo* 101 Nian 7 Yue 5 Ri Sifayuan Yuan Tai Ren San Zi Di 1010019266 Hou Ling (中華民國 101 年 7 月 5 日司法院院台人三字第 1010019266 號令) [Judicial Yuan, Jul. 5, 2012, No. 1010019266 Order].

³⁷² Art. 17 of the Review Rules.

³⁷³ Art. 17 of the Review Rules.

³⁷⁴ Lin Menghuang (林孟皇), *supra* note 327, at 8.

³⁷⁵ *Id.* at 9.

³⁷⁶ Lin Menghuang (林孟皇), *Taiwan Panli Zhidu de Qiyuan, Yangde, Wenti yu Gaige Fangxiang (Shang)—Zhong Zuigaofayuan 25 Nian Fei Zi Di 123 Hao Panli Tanqi* (臺灣判例制度的起源、沿革、問題與改革方向(上)—從最高法院 25 年非字第 123 號判例談起) [*The Origin, Evolution, Problem, and Reform Direction of Taiwan's Selected Summaries of Court Opinions (1)—Talking from the Minguo 25 (Fei) No. 123 Selected Case Summary of the Supreme Court*], *YUEDAN FAXUE ZAZHI* (月旦法學雜誌) [TAIWAN L. REV.], no.195, 2011, at 127.

³⁷⁷ *Gongwu Renyuan Kaoji Fa* (公務人員考績法) [Government Official Merit Act], Jul. 11, 1986, ZONGTONGFU

rewards, bonuses, and promotions among judges.³⁷⁸ The most important indicators for the judicial administration to evaluate judges' performance were the rate of delayed cases, the rate of closed cases, the rate of final cases, and the rate of upheld cases.³⁷⁹³⁸⁰ The rate of delayed cases was to prevent judges from delaying cases while the rate of closed cases was to encourage judges to close cases as soon as possible.³⁸¹ The rate of final cases was to see whether a judge's work is recognized by both parties while the rate of upheld cases was to see whether a judge's work was recognized by higher courts.³⁸² Every month the statistics department gave every judge the detailed information about the rates.³⁸³ In order to either fall within the category of excellent

GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.4635, 1986, at 1. See Lü Tailang (呂太郎), *supra* note 288, at 97 (describing the confusion between judges and governmental officers).

³⁷⁸ Sifayuan Suoshu Geji Fayuan Faguan Kaoji (Cheng) Pingding Cankao Yaodian (司法院所屬各級法院法官考績(成)評定參考要點) [Reference Guidelines for the Evaluation of Judges' Performance], Aug. 23, 1999, Zhonghua Minguo 88 Nian 8 Yue 23 Ri Sifayuan (88) Yuan Tai Ren San Zi Di 22416 Hao Han (中華民國 88 年 8 月 23 日司法院(88)院台人三字第 22416 號函) [Judicial Yuan, Aug. 23, 1999, No. 22416 Order].

³⁷⁹ Fayuan Faguan Banan Chengji Kaocha Shishi Yaodian (法院法官辦案成績考查實施要點) [Implementation Guidelines for the Evaluation of Judges' Performance], Mar. 6, 1981, Zhonghua Minguo 70 Nian 3 Yue 6 Ri Sifayuan Yuan Tai Ting Yi Zi Di 01859 Hao Han (中華民國 70 年 3 月 6 日司法院院臺廳一字第 01859 號函) [Judicial Yuan, Mar. 6, 1981, No. 01859 Order] and revised by Zhonghua Minguo 82 Nian 12 Yue 23 Ri Sifayuan Yuan Tai Ging Min Yi Zi Di 22573 Hao Han (中華民國 82 年 12 月 23 日司法院院臺廳民一字第 22573 號函) [Judicial Yuan, Dec. 23, 1993, No. 22573 Order]. Though the Guidelines were abolished on Dec. 16, 1997 due to the criticism of its influence on judicial independence, yet the judicial administration still made use of the methods in the Guidelines to evaluate judges' performance. See Cai Jiongdun (蔡炯燉), *Sifazizhu yu Sifahuanjin* (司法自主與司法環境) [*Judicial Autonomy and Judicial Environment*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 138 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010).

³⁸⁰ Many civil law countries adopt the similar system to evaluate judges' performance. In Europe, a number of states defined quality standards and have specialized staff entrusted with quality policy and/or quality systems. There are four main indicators to evaluate judges' performance: (1) indicator of pending cases and backlogs, (2) indicator of the length of proceedings, (3) indicator of the number of closed cases, and (4) indicator of the number of incoming cases. EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS—EDITION 2010: EFFICIENCY AND QUALITY OF JUSTICE 98, 99 (2010). In Korea, the competence demonstrated in each judge's judicial decisions is one of the factors to decide the de facto order among judges. The performance rating (*kunmupyongjong*) of judges will be the most important factor. See Kim & Hwang, *supra* note 347, at 157-158.

³⁸¹ Art. 8(a)(1) & 10 of the Implementation Guidelines for the Evaluation of Judges' Performance of 1993.

³⁸² Art. 8(a)(3) & 8(a)(4) of the Implementation Guidelines for the Evaluation of Judges' Performance of 1993.

³⁸³ Sifayuan Suoshu Ge Jiguan Banli Tongji Shiwu Zhuyi Shixiang (司法院所屬各機關辦理統計事務注意事項) [Guidelines for Dealing with Statistical Affairs for Institutions of the Judicial Yuan], Jan. 16, 1981, Zhonghua Minguo 70 Nian 1 Yue 16 Ri Sifayuan Yuan Tai Tong Zi Di 01199 Hao Ling (中華民國 70 年 1 月 16 日司法院院臺統字第 01199 號令) [Judicial Yuan, Jan. 16, 1981, No. 01199 Order], art. 3(a).

judges or not to fall within the category of inferior judges, it was inevitable that a judge, whenever dealing with a case, would place heavy weight on the rates.³⁸⁴ For example, in order to gain a higher rate of final cases, some judges always urged or even threatened both parties to settle the case.³⁸⁵ In order to gain a higher rate of upheld cases, some judges always distributed their energy on petty cases because a judge usually dealt with many petty cases but few difficult cases at the same time.³⁸⁶ In 2000, Lü Tailang, the Director of the Department of Judicial Personnel of the Judicial Yuan at that time, commented on the influence of the merit system, “Under the design of the grading system, a judge’s the most important consideration is numbers, instead of justice.”³⁸⁷

Under the hierarchical and bureaucratic system, the ROC judiciary was a closed judicial system in which judges adhered to the internal rules. Distinctness was not welcome in the system. In 2012, Qian Jianrong, a district court judge, described the style of the Supreme Court judges under the disciplinary judicial culture in a symposium, “All Supreme Court judges look the same. No personal style. No distinctness. No liberal. No conservative. All are the same.”³⁸⁸ Judges lived in their world and were usually conservative to the changing society.

To lessen the conservativeness brought by the seniority and the merit system, the newly enacted Judges Act replaced the merit system with a new evaluation system. Different from the previous merit system on a yearly basis, judges’ performance are now reviewed upon request. Judges, prosecutors’ offices, bar associations, or specific civil organizations are authorized to

³⁸⁴ Lü Tailang (呂太郎), *supra* note 288, at 98.

³⁸⁵ *Id.* at 98 n.1.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 98.

³⁸⁸ Qian Jianrong (錢建榮), Remarks at the Round Table Symposium on the Reform of the Supreme Court (Mar. 11, 2012), in TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.197, 2012, at 65.

request the Evaluation Committee of the Judicial Yuan to initiate evaluation on the specified performance of a judge.³⁸⁹ A party or a victim of an individual case is also allowed to file a petition to the foregoing agencies or organizations for their request for an evaluation.³⁹⁰ To emphasize its diversity and impartiality, the Evaluation Committee consists of 11 members including three judges, one prosecutor, three lawyers, and four non-legal professionals including scholars and members of the public (*gongzheng renshi* 公正人士).³⁹¹ The new law obviously tries to introduce new mechanisms and outsiders to the conservative judicial culture though it is too early to see the results.

3.2.2.2. Reinforced Sentencing Pattern

The judiciary of Taiwan had been criticized for its persistent lenient sentences.³⁹² Outsiders were often puzzled as to why judges always adhered to lenient sentences. One scholar even described judges' sentencing patterns as a big black box due to its lack of transparency.³⁹³ In response to the criticism, the Judicial Yuan tried to introduce sentencing guidelines but did not succeed.³⁹⁴ Despite the criticisms and efforts, judges still follow their individual sentencing

³⁸⁹ Art. 35(a) of the Judges Act.

³⁹⁰ Art. 35(c) of the Judges Act.

³⁹¹ Art. 33(a) of the Judges Act.

³⁹² See Ke Yaocheng (柯耀程), *Xingfa Cailiang de Bianqian yu Zhanwang* (刑罰裁量的變遷與展望) [*The Change and Prospect for the Discretion in Criminal Punishment*], in KUASHIJI FAXUE XINSIWUI (跨世紀法學新思維) [NEW LEGAL THOUGHTS ACROSS NEW CENTURY] 526-527 (Wang Zhaopeng (王兆鵬) ed., 2006) (calling for Taiwan's development of a sentencing theory); Song Mingxi (宋名晰), *Meiguo Lianbang Liangxing Zhunju de Jianzhi Jingyan Dui Woguo Liangxing Zhidu Gaige zhi Qishi* (美國聯邦量刑準據的建置經驗對我國量刑制度改革之啓示) [*The Inspiration of the Establishment of the U.S. Federal Sentencing Guidelines for the Reform in the Sentencing System of Taiwan*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.181, 2011, at 1, 5.

³⁹³ Song Mingxi (宋名晰), *supra* note 392, at 3.

³⁹⁴ The Judicial Yuan tried to establish sentencing guidelines in 2005, see Liu Zhiyuan (劉志原), *Faguan Ding Xingqi, Yiu Gongshi Kexun* (法官定刑期有公式可循) [*Future Formula for Judges' Decision on Sentences*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Mar. 14, 2005, at Shehui Xinwen (社會新聞) [Social News], available at <http://www.libertytimes.com.tw/2005/new/mar/14/today-so6.htm>. However, it did not succeed, see Song Mingxi (宋名晰), *supra* note 392, at 9. In fact, the Judicial Yuan developed a sentences database for sexual offenses but it only collected previous sentences, instead of creating new sentencing guidelines. See *Sifayuan Liangxing Zixun Xitong* (司法院量刑資訊系統) [*Judicial Yuan Information System for Sentences*], JUDICIAL YUAN,

patterns.³⁹⁵ The persistence of these sentencing patterns could relate to the criminal legal framework and the disciplinary judicial culture.

According to Article 310 of the Code of Criminal Procedure, when a judge finds a defendant guilty, he or she shall explain in the “reasoning” section of the judgment how he or she sentences the defendant in light of Article 57 and 58 of the Criminal Code.³⁹⁶ Article 57 sets a general rule for sentencing and provides ten circumstances that judges should take into account:

The court shall base its sentence on the liability of the offender and take into account all the circumstances. In addition, special attention shall be given to the following circumstances: (1) the motive and purpose of the offense, (2) the stimulation perceived at the moment of committing the offense, (3) the means used for the commission of the offense, (4) the offender’s living condition, (5) the disposition of the offender, (6) the education and intelligence of the offender, (7) relationship between the offender and the victim, (8) the seriousness of the offender’s obligation violation, (9) the danger or damage caused by the offense, and (10) the offender’s attitude after committing the offense.³⁹⁷

Article 58 sets an additional rule for deciding the amount of a fine,

When imposing a fine, the financial ability of the offender and the proceeds of the crime shall be considered in addition to the provisions of the preceding article. Where the proceeds exceed the maximum fine, the fine may be increased at discretion within the limit of the proceeds.³⁹⁸

The term “all the circumstances” in Article 57 is so general that in practice a judge usually describes several circumstances but does not explain how he or she considers all the

<http://www.judicial.gov.tw/revolution/judReform06.asp> (last visited Jun. 28, 2013).

³⁹⁵ Some researchers found the so-called judicial role orientation shaped within the contexts was usually more influential than judges’ personal values or preference on judges’ decision making. “Many judges appear to be motivated primarily by their role orientation—that is, their secondary perceptions of what a judge should do—and not by their personal preferences.” C. K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURT* 136 (2006). “A role orientation is a psychological construct which is the combination of the occupant’s perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge.” James L. Gibson, *Judges Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 *Am. Pol. Sci. Rev.* 911, 917 (1978). See Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influence on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 *N.Y.U. L. REV.* 1377, 1384 (1998) (finding that the prior rulings powerfully influenced judges in reaching a decision).

³⁹⁶ Art. 310 of the Code of Criminal Procedure.

³⁹⁷ Art. 57 of the Criminal Code.

³⁹⁸ Art. 58 of the Criminal Code.

circumstances and reaches the final conclusion.³⁹⁹ Although outsiders may be puzzled by judges' mysterious sentences, it is the sentencing pattern on the basis of previously decided sentences that powerfully influences judges' sentences.⁴⁰⁰ Whenever deciding a sentence, a judge usually refers to several previously decided cases with similar circumstances as a first step in developing a sentence; for example "an theft offender who stole a stranger's motorcycle on the street is usually sentenced to three months imprisonment" or "an DUI (drive under influence) offender who drove a sedan under the influence of alcohol but did not cause any accident is usually sentenced to 50 days criminal detention."⁴⁰¹ Then, he or she will compare the case at hand with the previously decided cases to see any significant difference such as the harm or danger caused by the offense, the evil of the wrongdoing, the suffering of the victim, the value of the proceeds of the crime, the prior conviction of the offender, the attitude of the offender at trial, the defendant's efforts to make restitution or reparation, or the motive for the commitment of the offense.⁴⁰² Depending on the significant differences, a judge may increase or decrease the default punishment as he or she sees appropriate.⁴⁰³ If the case is decided by a three-judge panel,

³⁹⁹ Song Mingxi (宋名晰), *supra* note 392, at 4; Wu Xunlong (吳巡龍), *Meiguo de Liangxing Gongshi Hua* (美國的量刑公式化) [*The Formulization for American Sentences*], 85 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.85, 2002, at 166, 175.

⁴⁰⁰ The analysis of the Judicial Yuan on its sexual offense cases database also suggested the existence of the sentencing pattern. See *Sifayuan Liangxing Zixun Xitong* (司法院量刑資訊系統) [*Judicial Yuan Information System for Sentences*], *supra* note 394.

⁴⁰¹ See Zhou Suxian (周愫嫻) & Bill Heberton, *Xingfa Shi Zhishi Jiegou yu Wenhua de Jingzi: Taiwan yu Yingguo Yianxing Zhongfa Qushi zhi Bijiao Yanjiu* (刑罰是知識結構與文化的鏡子：台灣與英國嚴刑重罰趨勢之比較研究) [*Punishment as a Reflection of Knowledge Structure and Culture: Judicial Sentencing in Taiwan and England/Wales*], 39 GUOLI TAIWAN DAXUE FAXUE LUNCONG (國立臺灣大學法學論叢) [NTU L.J.], no.2, 2010, at 433, 461 (explaining the starting point). See also, Lin Yanliang (林彥良), *Woguo Zhuzuoquan Fa Xingshi Anjian zhong Yingxiang Liangxing Yinsu zhi Yanjiu* (量刑刑事政策及量刑歷程之研究—以竊盜罪為例) [*Criminal Policy and the Practical Process of Sentencing—Taking Larceny as an Example*] 155 (Jun. 20, 2008) (unpublished M.S. thesis, Guoli Zhongzheng Daxue (國立中正大學) [National Chung Cheng University]) (on file with Nation Central Library) (describing the establishment of a starting point for sentencing in larceny cases).

⁴⁰² See Zhou Suxian (周愫嫻) & Bill Heberton, *supra* note 401, at 461 (describing the circumstances under which punishment should be increased or decreased). See also, Lin Yanliang (林彥良), *supra* note 401, at 157-159 (describing the factors affecting the increase or decrease of punishment in larceny cases).

⁴⁰³ See Lin Yanliang (林彥良), *supra* note 401, at 195-196 (describing the default penalties in larceny cases).

all judges will share their experiences in dealing with similar cases in order to reach the final conclusion.⁴⁰⁴

The starting point recognized by the judiciary is the key to judges' sentencing pattern for lenient sentences.⁴⁰⁵ One 2008 empirical study focusing on larceny cases found that judges' starting point in larceny cases is close to the minimum statutory punishment and most defendants received convertible sentences in regular larceny cases.⁴⁰⁶ The researcher concluded after interviewing a couple of judges and public prosecutors and analyzing the statistical data with respect to those larceny cases decided from 2000 to 2002:

Judges' sentences fall within a specific range. Only within the range, public prosecutors' requests for specific sentences or individual judges' sentences can be accepted by the judicial system. Some interviewees indicated that this operation could guarantee fairness and predictability. In reality, the specific range is close to the minimum statutory punishment and far away from the middle statutory punishment. The sentencing range from the middle to maximum statutory punishment is not considered by judges and is therefore symbolic. Overall, the sentencing pattern features lenient sentences close to the minimum statutory punishment.⁴⁰⁷

Judges' adherence to their sentencing pattern reflects their collective perspectives on crime and punishment. When judges believe the statutory punishment of a specific offense would be too severe to impose, they may try to avoid the statutory punishment.⁴⁰⁸ The ROC Judges' avoidance of harshness for the drug trafficking offenses shows their implicit disagreement with

⁴⁰⁴ Guo Yuzhen (郭豫珍), *Faguan Liangxing Yingxiang Yinsu zhi Shizheng Yanjiu: Yi Taiwan Gaodeng Fayuan 2002-2006 Qiangdao An Xingshi Panjue Weili* (法官量刑影響因素之實證研究：以台灣高等法院 2002-2006 強盜案刑事判決為例) [An Empirical Study on Influential Factors in Sentencing: Interpretation by the Judgment on Criminal Cases of Robbery of Taiwan High Court Between 2002-2006] 265 (Jun. 1, 2008) (unpublished Ph.D. dissertation, Zhongyang Jingcha Daxue (中央警察大學) [Central Police University]) (on file with Nation Central Library).

⁴⁰⁵ Zhou Suxian (周愷嫻) & Bill Heberton, *supra* note 401, at 461.

⁴⁰⁶ Lin Yanliang (林彥良), *supra* note 401, at 197.

⁴⁰⁷ *Id.*

⁴⁰⁸ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

the severity of the drug law. According to Taiwan's Drug Prevention Act,⁴⁰⁹ the statutory punishment for the trafficking of the first class drug such as heroin is either the death penalty or life imprisonment⁴¹⁰ and for the trafficking of a second class drug such as marijuana or methamphetamine is life imprisonment or imprisonment not less than seven years.⁴¹¹ By contrast, the statutory punishment for murder is death penalty, life imprisonment, or imprisonment not less than ten years⁴¹² and for robbery is imprisonment not less than five years.⁴¹³ In addition, Taiwan's drug law does not consider the weight of the trafficked drug; in other words, the minimum statutory punishment for the trafficking of 0.1 gram and 10 gram heroin is the same, life imprisonment.⁴¹⁴

While the drug law is extremely tough, the court usually exercises its privilege authorized by the Criminal Code to reduce criminal punishment in drug trafficking cases.⁴¹⁵ Article 59 of the Criminal Code provides, "A punishment may be reduced at discretion if the circumstances of the commission of the offense are so pitiable that even the minimum punishment is considered too severe."⁴¹⁶ This law authorizes judges a privilege to override the minimum statutory punishment. The Supreme Court of Taiwan has held that application of Article 59 is for only

⁴⁰⁹ Dupin Weihai Fangzhi Tiaoli (毒品危害防制條例) [Drug Prevention Act, hereinafter], Jul. 9, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6532, 2003, at 20.

⁴¹⁰ Art. 4(a) of the Drug Prevention Act.

⁴¹¹ Art. 4(b) of the Drug Prevention Act.

⁴¹² Art. 271(a) of the Criminal Code.

⁴¹³ Art. 328(a) of the Criminal Code.

⁴¹⁴ In Taiwan's drug law, the weight of trafficked drug is only a circumstance to "increase" punishment. See Art. 8(f), 11(c), 11(d), 11(e) and 11(f) of the Drug Prevention Act. See also, WANG HUANGYU (王皇玉), XINGFA YU SHEHUI GUIXUN—TAIWAN XINGSHI ZHICAI XINJIU SIWEI DE CHONGTU YU ZHUANBIAN (刑罰與社會規訓—台灣刑事制裁新舊思維的衝突與轉變) [CRIMINAL PUNISHMENT AND SOCIAL DISCIPLINE—THE CONFLICTS AND TRANSFORMATION UNDER THE NEW AND OLD THOUGHTS ON TAIWAN'S CRIMINAL PUNISHMENT] 200-201 (2009).

⁴¹⁵ Zhang Tianyi (張天一), *Dui Zhongxinghua Zhengce Xia Fanmai Dupinzui zhi Jiantao* (對重刑化政策下販賣毒品罪之檢討) [*The Examination on the Get-Tough Policy for Drug Trafficking Offenses*], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.180, 2010, at 97, 99.

⁴¹⁶ Art. 59 of the Criminal Code.

extremely exceptional circumstance. It can be used only when judges find the extra pitiable circumstances outside those circumstances listed in Article 57. Since the circumstance of the danger or damage caused by the offense is listed in Article 57(a)(9), judges should not take the same circumstance into consideration when applying Article 59.⁴¹⁷ Nevertheless, while the application of Article 59 is very rare in regular cases, lower courts have usually taken the weight of trafficked drug into consideration and applied Article 59 to drug trafficking cases, and the Supreme Court has tolerated this departure in the area of drug law.⁴¹⁸ According to a qualitative research study from 2008, the application of Article 59 of the Criminal Code was found in 90 percent first class drug trafficking cases.⁴¹⁹ The researcher pointed out her puzzling findings:

The statutory punishment for the first class drug trafficking offense is death penalty or life imprisonment; for the second class drug trafficking offense is life imprisonment or not less than seven years imprisonment. However, the reality is far from the statutes. It was very rare that an offender who committed the first class drug trafficking offense was sentenced to life imprisonment. Most offenders received reduced sentences to 15 years imprisonment. The proportion is at least 90 percent. On the other hand, no offender who committed the second class drug trafficking offense was sentenced to life imprisonment. It seems that judges preferred lenient sentences in drug trafficking cases. Do the findings here suggest that the statutory punishment for drug trafficking offenses is too severe?⁴²⁰

Judges' adherence to their sentencing pattern for drug trafficking cases embodies their

⁴¹⁷ Zuigao Fayuan (最高法院) [Sup. Ct.] Jan. 1, 1939, Minguo 28 (Shang) no.1064 Selected Criminal Judgment (中華民國 28 年 1 月 1 日最高法院 28 年上字第 1064 號刑事判例), <http://jirs.judicial.gov.tw/FJUD/>; Jul. 31, 1957, Minguo 46 (Taishang) no.935 Selected Criminal Judgment (中華民國 46 年 7 月 31 日最高法院 46 年台上字第 935 號刑事判例), <http://jirs.judicial.gov.tw/FJUD/>.

⁴¹⁸ See, e.g., Zuigao Fayuan (最高法院) [Sup. Ct.], Nov. 29, 2012, Minguo 101 (Taishang) No. 6121 Criminal Judgment (中華民國 101 年 11 月 29 日 101 年度台上字第 6121 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; Nov. 28, 2012, Minguo 101 (Taishang) No. 6010 Criminal Judgment (中華民國 101 年 11 月 28 日 101 年度台上字第 6010 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴¹⁹ Qiu Xiaoli (邱曉麗), Zhizao, Yunshu, Fanmei Duping Zui Liangxing Yingxiang Yinsu yu Liangxing Zhunze zhi Shizheng Yanjiu (製造、運輸、販賣毒品罪量刑影響因素與量刑準則之實證研究) [The Empirical Study on Factors Affecting Sentencing and Sentencing Pattern in Drug Trafficking Offenses] 162 (May 18, 2008) (unpublished M.S. thesis, Zhongyang Jingcha Daxue (中央警察大學) [Central Police University]) (on file with Nation Central Library).

⁴²⁰ *Id.*

collective perspectives on crime and punishment. Within the disciplinary judicial culture, individual judges have little choice but to follow. An obvious deviation from the pattern would be unacceptable in the judicial system. A judge may exercise his or her discretion to some extent, but he or she seldom departs from the conventional sentencing pattern because the judicial culture discourages such a departure. If a sentence is too severe or too lenient, not only would either parties challenge it by filing an appeal but the appellate system would also remedy the violation by reversing the sentence.⁴²¹ Too many appealed or reversed cases would lower the rate of final cases or the rate of upheld cases. This would be considered poor performance and would affect the judge's grade, bonus, promotion, and reputation in the system.⁴²² In such a closed and relatively small community, the consideration is critical because a judge's career is in fact heavily influenced by the grading or evaluating system.⁴²³ The sentencing patterns are therefore reinforced.⁴²⁴

A clash between judges' lenient sentences in sexual assault cases and societal protest gave rise to judicial reforms in 2012 aiming to change the lenient sentencing pattern and lessen the influence of the disciplinary judicial culture.

⁴²¹ See Lin Yanliang (林彥良), *supra* note 401, at 201 (discussing judges' adherence to the sentencing pattern in larceny cases).

⁴²² See Cai Jiongdun (蔡炯燉), *supra* note 379, at 139 (describing the importance of the rates in the judicial system).

⁴²³ In a 2008 empirical study, several Taiwan High Court judges admitted the existence of the consideration. See Guo Yuzhen (郭豫珍), *supra* note 404, at 282.

⁴²⁴ Even after the enactment of the Judges Act, the Evaluation Committee of the Judicial Yuan still used the rate of upheld cases to evaluate judges' performance. See Sifayuan Faguan Pingjian Weiyuanhui (司法院法官評鑑委員會) [Evaluation Committee of the Judicial Yuan], Aug. 6, 2012, Minguo 101 (Ping) no.1 Evaluation Decision (中華民國 101 年 8 月 6 日司法院法官評鑑委員會 101 年度評字第 1 號決議書), available at <http://www.judicial.gov.tw/revolution/judReform16-3.asp>; Sifayuan Faguan Pingjian Weiyuanhui (司法院法官評鑑委員會) [Evaluation Committee of the Judicial Yuan], Aug. 6, 2012, Minguo 101 (Ping) no.3 Evaluation Decision (中華民國 101 年 8 月 6 日司法院法官評鑑委員會 101 年度評字第 3 號決議書), available at <http://www.judicial.gov.tw/revolution/judReform16-3.asp>.

3.2.2.3. Recent Judicial Reform

Due to the intense political rivalry between the two major political parties in Taiwan, the KMT and the DPP, and their accusations that the other party's maneuvering the judiciary, interference with the judiciary has been carefully scrutinized.⁴²⁵ While judicial independence has shielded the judiciary from external interference, the pre-existing judicial culture remained and has even affected judicial accountability.⁴²⁶ The basic structure of the training at the JPTI and the merit system was almost entirely unchanged for 20 years.⁴²⁷ The Judicial Personnel Review Committee, in spite of the participation of some reformers, was an insiders' gathering; and all elections and evaluations in the system were operated by judges themselves.⁴²⁸ Despite the conclusions of the National Judicial Reform Conference, the reform proposals focusing on the judicial culture failed due to the strong resistance from the judicial system and the conflicts among different interest groups.⁴²⁹ Not until the judicial culture clashed with the Taiwanese society at large in recent years has the internal judicial culture been forced to change. Prior to that judges operated the system with their own rules regardless of the changing society. Finally,

⁴²⁵ For example, a Supreme Court judge was compelled to retire in 2011 because he was discovered that he ever lobbied the lower court judges for his son's hit-and-run case. *See* Xiang Chengzhen & Fu Chaobiao (項程鎮&傅潮標), *Xiao Yanggui, Wen Yaoyuan, Cizhi Huozhun* (蕭仰歸、溫耀源、辭職獲准) [*Judge Xiao Yanggui and Wen Yaoyuan's Resign Approved*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Aug. 16, 2011, at Shehui Xinwen (社會新聞) [Social News], available at <http://www.libertytimes.com.tw/2011/new/aug/16/today-so3.htm>.

⁴²⁶ *See* Su Yongqin (蘇永欽), *supra* note 280, at 6 (arguing that the over-protected judicial independence would lower the judicial efficiency); Wang Jinshou (王金壽), *supra* note 287, at 118 (analyzing the tension between judicial independence and judicial accountability).

⁴²⁷ *See* Wang Taisheng (王泰升), *Faguan yu Jianchaguan zhi Qucai yu Xunlian* (法官與檢察官之取才與訓練) [Selection and Training for Judges and Public Prosecutors], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 547 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010) (describing the ongoing failures to reform the selection and training for judges).

⁴²⁸ *See* Wang Jinshou (王金壽), *supra* note 287, at 142, 145 (discussing the limits of the judicial reform and describing some problems caused by election).

⁴²⁹ *See* Wong Yuesheng (翁岳生), *supra* note 165, at 52-60.

judges' adherence to their established sentencing patterns, which was reinforced by the judicial culture, gave rise to the recent judicial reform.

Beginning in 2010, the following events with respect to judges' sentencing patterns drew nationwide attention to the judicial culture and surprisingly led to the passage of the Judges Act in 2011. In 2010, one Kaohsiung District Court decision that found the defendant guilty of the offense of having sexual intercourse with a person under the age of 14 and sentenced the defendant to three years and two months imprisonment sparked the flame.⁴³⁰ According to the facts found in the court decision, the defendant was a male adult and the victim was a six years old female child. In February of 2010, the defendant met the victim outside a public library. The defendant had the victim sit on his left thigh and then intentionally inserted one of his fingers into the victim's vagina. After the investigation, the public prosecutor charged the defendant for the aggravated sexual offense prescribed in Article 222 of the Criminal Code. Article 222(b)(1) provides that a person who has sexual intercourse⁴³¹ with another under the age of 14 by the means of violating his or her will shall be sentenced to imprisonment for not less than seven years. At the trial, the defendant denied the charge and argued that he did not insert his finger into the victim's vagina. The court found the defendant guilty based on the statement of an eyewitness and the victim's medical report. Given no evidence that could show the six-year-old victim ever resisted, the court denied the public prosecutor's request for the application of Article 222. Instead, the court found the defendant guilty of the sexual offense prescribed in Article 227. Article 227(a) provides that a person who has sexual intercourse with another under the age of 14

⁴³⁰ Taiwan Kaohsiung Difang Fayuan (臺灣高雄地方法院) [Kaohsiung Dist. Ct.], Jun. 18, 2010, Minguo 99 (Su) No. 422 Criminal Judgment (中華民國 99 年 6 月 18 日 99 年度訴字第 422 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴³¹ Art. 10 of the Criminal Code provides that the definition of "sexual intercourse" in the Criminal Code includes the insertion of an object into another person's vagina.

shall be sentenced to imprisonment for not less than three years. Finally, the court sentenced the defendant who pleaded not guilty to three years and two months imprisonment, only slightly higher than the three years minimum statutory imprisonment.

The court decision gave rise to an angry backlash. One of the most popular newspapers, the Apple Daily, published an exclusive news report on August 15, 2010 denouncing the court decision for its lack of common sense.⁴³² The report raised two questions. “Does the insertion of something into a six-year-old child’s vagina violate her will per se?” “Does one criminal like this deserve a lenient sentence?” For the former question, the court did not think so; for the latter question, the court did think so. In fact, the district court’s application of law did follow a series of Supreme Court decisions⁴³³ and the lenient sentence did not go astray from the shared sentencing patterns among judges given the defendant’s clean crime record and medical diagnosis of schizophrenia. However, the Apple Daily disagreed with both answers and argued that sexually abusing a six-year-old child of course violated the child’s will and should be punished heavily.⁴³⁴

The Apple Daily on September 1, 2010 published another exclusive news report on the

⁴³² Guo Zhiyu & Qiu Junji (郭芷余&邱俊吉), *Huangmiu Panjue, Zongrong Selang: Nanzi Xingqin Liusui Wa, Qingpan Sannian Eryue, Faguan Jingcheng “Weiwei Nutong Yiyuan”* (荒謬判決，縱容色狼：男子性侵六歲娃，輕判三年二月，法官竟稱「未違女童意願」) [*Ridiculous Decision Tolerating Sexual Offender: Man Sexually Abusing Six Years Old Girl Was Sentenced to Three Years and Two Months Because Judges Said “No Violation of Her Will”*], PINGGUO RIBAO (蘋果日報) [APPLE DAILY], Aug. 15, 2010, at A01, available at <http://www.appledaily.com.tw/appledaily/article/headline/20100815/32739146/>.

⁴³³ Zuigao Fayuan (最高法院) [Sup. Ct.], Jul. 9, 2009, Minguo 98 (Taishang) No. 3927 Criminal Judgment (中華民國 98 年 7 月 9 日 98 年度台上字第 3927 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; Dec. 24, 2009, Minguo 98 (Taishang) No. 7762 Criminal Judgment (中華民國 98 年 12 月 24 日 98 年度台上字第 7762 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; Feb. 4, 2010, Minguo 99 (Taishang) No. 717 Criminal Judgment (中華民國 99 年 2 月 4 日 99 年度台上字第 717 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; Mar. 11, 2010, Minguo 99 (Taishang) No. 1390 Criminal Judgment (中華民國 99 年 3 月 11 日 99 年度台上字第 1390 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>; Apr. 15, 2010, Minguo 99 (Taishang) No. 2242 Criminal Judgment (中華民國 99 年 4 月 15 日 99 年度台上字第 2242 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴³⁴ Guo Zhiyu & Qiu Junji (郭芷余&邱俊吉), *supra* note 432.

same application of law by the Supreme Court.⁴³⁵ The Supreme Court decision on August 5, 2010⁴³⁶ dealt with an appeal from the Taiwan High Court Kaohsiung Branch Court.⁴³⁷ In its decision, the Supreme Court first mentioned the lower court's finding of facts. The defendant was a male adult and the victim was a three-year-old female child. The defendant friended the victim's grandmother. At noon on March 29, 2006, the defendant told the grandmother he would give the victim a ride. With the grandmother's consent, he took the victim out, but to his residence. Later in his residence, the defendant took the victim's clothes off and intentionally inserted his finger and straw into the victim's vagina. He stopped when the victim started to cry. After the victim was sent back home, she told her mother what happened to her.

The Supreme Court, following its series of court opinions, pointed out that if no evidence could support the violation of the victim's will, the court only could apply the regular sexual offense in Article 227, not the aggravated sexual offense in Article 222, even though the defendant did take advantage of the innocence of the child. Although the lower court relied its finding on the victim's statement that she saw the defendant insert his finger and straw into her vagina and the defendant's penis eject some white liquid, throughout the statement nothing could support the violation. Without the evidence with respect to the violation of the victim's will, the lower court erred in finding the violation as well as the application of the aggravated sexual offense. Therefore, the Supreme Court remanded the lower court's decision and ordered a new

⁴³⁵ Lai Xinying & Guo Zhiyu (賴心瑩&郭芷余), *Kewu, Faguan Yiucheng Weiwei Yiyuan* (可惡·法官又稱未違意願) [*Judges Said No Violation of Her Will Again*], PINGGUO RIBAO (蘋果日報) [APPLE DAILY], Sep. 1, 2010, at A01, available at <http://www.appledaily.com.tw/appledaily/article/headline/20100901/32779982/>.

⁴³⁶ Zuigao Fayuan (最高法院) [Sup. Ct.], Aug. 5, 2010, Minguo 99 (Taishang) No. 4894 Criminal Judgment (中華民國 99 年 8 月 5 日 99 年度台上字第 4894 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴³⁷ Taiwan Gaodeng Fayuan Kaohsiung Fenyuan (臺灣高等法院高雄分院) [Taiwan High Ct. Kaohsiung Branch Ct.], Sep. 24, 2008, Minguo 97 (Shangsu) No. 1008 Criminal Judgment (中華民國 97 年 9 月 24 日 97 年度上訴字第 1008 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

trial for further investigation.

The Apple Daily's exclusive report condemned the Supreme Court's ignorance of people's feelings and common sense.⁴³⁸ This time the news report stirred a fury that led to the "White Rose" movement.⁴³⁹ At first, the White Rose movement was set up on the Facebook social network website to collect signatures in support of its two major claims: the government should provide legal protection for young sexual victims and those "dinosaur judges," who ignored the changing society as if they would have lived in the ancient Jurassic period, should be fired.⁴⁴⁰ Later, the movement collected over 270,000 signatures and launched a rally of thousands in front of the Presidential Office.⁴⁴¹ In response to the pressure, the government promised to amend the criminal law to clarify the legal issue⁴⁴² and the Supreme Court held a meeting of criminal court judges on September 7, 2010 to update its former application of law.⁴⁴³ Finally, the criminal court judges of the Supreme Court reached the consensus that for those victims under seven years old, the aggravated sexual offense in Article 222 should apply.⁴⁴⁴ For those victims already seven but under 14, the Supreme Court distinguished two situations according to whether a

⁴³⁸ Lai Xinying & Guo Zhiyu (賴心瑩&郭芷余), *supra* note 435.

⁴³⁹ For a general introduction to the movement, see Huang Yijing (黃以敬), *Xiao Dangan: Bai Meigui Yundong* (小檔案：白玫瑰運動) [*Profile for White Rose Movement*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Apr. 1, 2011, at Jiaodian Xinwen (焦點新聞) [Focus News], available at <http://www.libertytimes.com.tw/2011/new/apr/1/today-fo3-2.htm>.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² Ko Shu-ling, *Ma Urges Passage of Judicial Reform*, TAIPEI TIMES, Sep 26, 2010, at Page 1, available at <http://www.taipeitimes.com/News/front/archives/2010/09/26/2003483814>.

⁴⁴³ Xiang Chengzhen, Xie Wenhua, Bao Jianxin, Peng Xianjun & Yan Ruojin (項程鎮、謝文華、鮑建信、彭顯鈞 & 顏若瑾), *Zuigao Fayuan Xinshiting Jueyi: Xingqin 7 Sui Yixia Yutong, Zuishao Pan 7 Nian* (最高法院刑事庭決議：性侵7歲以下幼童，最少判7年) [*Consensus of the Criminal Court Judges of the Supreme Court: At Least Seven Years Imprisonment Given to Sexual Offenders If Victims Not More than Seven Years Old*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Sep. 8, 2010, at Shehui Xinwen (社會新聞) [Social News], available at <http://www.libertytimes.com.tw/2010/new/sep/8/today-so3.htm>.

⁴⁴⁴ Zuigao Fayuan (最高法院) [Sup. Ct.] Sep. 7, 2010, Minguo 99 no.7 Criminal Court Judges Consensus (中華民國99年9月7日最高法院99年度第7次刑事庭會議決議), 52 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.11, 2010, at 226-232.

victim agreed with the sexual intercourse or not. If yes, the regular sexual offense in Article 227 should apply and if not, the aggravated sexual offense in Article 222 should apply.⁴⁴⁵ However, the dissatisfaction with the “dinosaur judges” was not quelled until 2012.

In March 2011, President Ma Ying-jeou (馬英九) nominated the Supreme Court Judge Shao Yanling (邵燕玲) as a Grand Justice. While awaiting the approval from the Legislative Yuan, Shao’s leading role in the series of controversial sexual offense decisions was discovered.⁴⁴⁶ Due to the sharp criticisms from legislators, woman right groups, and White Rose leaders of Shao’s “dinosaur” records, Ma apologized for the nomination in person⁴⁴⁷ and Shao gave up the nomination.⁴⁴⁸ Moreover, the White Rose movement stimulated a new wave judicial reform on the judicial culture.⁴⁴⁹ Beginning in 1999, specialized bills proposed by the Judicial Yuan that

⁴⁴⁵ Some scholars and judges believed that the Supreme Court, by making the new rules, in fact created a new law and thus violated the legislative power. See Huang Rongjian (黃榮堅), *2010 Nian Xingshifa Fazhanhuigu: Yuwang Niandai, Yuwang Xingfa?* (2010 年刑事法發展回顧：慾望年代，慾望刑法?) [*Retrospect for the Development of Criminal Law in 2010: Desire Era and Desire Criminal Law?*], 40 GUOLI TAIWAN DAXUE FAXUE LUNCONG (國立臺灣大學法學論叢) [NTU L.J.] 1809-1811 (2010); Qian Jianrong (錢建榮), *Zhongdian Zai Youwu Weifan Yiyuan de Fangfa: Wei Konglong Faguan Hanyuan* (重點在有無違反意願的方法：為恐龍法官喊冤) [*Point Should be the Method for Violation of Will: Defend Dinosaur Judges*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.174, 2011, at 1; Xu Weiqun (徐偉群), *Xuyao Fanzhuan de Bushi Falü, Shi Fajie de Zhishi Zhuangtai: Qiangzhi Xingjiao Zui Xiufa Yinggai Tingzhi* (需要翻轉的不是法律，是法界的知識狀態：強制性交罪修法應該停止) [*Not Law Needed to Be Reversed, But Knowledge of Jurists: Stop the Legislation for Amendments to Sexual Offense*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.175, 2011, at 1.

⁴⁴⁶ Wang Yuzhong, Zeng Weizhen, Xie Wenhua, Xiang Chengzhen & Yang Guowen (王寓中、曾韋禎、謝文華、項程鎮&楊國文), *Zhengyi Faguan Shao Yanling, Ma Timing Dafaguan* (爭議法官邵燕玲，馬提名大法官) [*Ma Nominates Controversial Judge Shao Yanling*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Mar. 31, 2011, at Touban Xinwen (頭版新聞) [Headline News], available at <http://www.libertytimes.com.tw/2011/new/mar/31/today-t1.htm>.

⁴⁴⁷ Mo Yan-chih, *Ma apologizes for nomination of judge*, TAPEI TIMES, Apr 02, 2011, at page 1, available at <http://www.taipeitimes.com/News/front/archives/2011/04/02/2003499703>.

⁴⁴⁸ Ko Shu-ling, *Nominee for Grand Justice replaced*, TAPEI TIMES, Apr 01, 2011, at page 1, available at <http://www.taipeitimes.com/News/front/archives/2011/04/01/2003499624>; Wang Yuzhong & Xiang Chengzhen (王寓中&項程鎮), *Timing Konglong Dafaguan, Ma Xiao Daoqian* (提名恐龍大法官，馬蕭道歉) [*Ma and Hsiao Apologize for the Nomination of the Dinosaur Judge*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Apr. 1, 2011, at Touban Xinwen (頭版新聞) [Headline News], available at <http://www.libertytimes.com.tw/2011/new/apr/1/today-t1.htm>.

⁴⁴⁹ Jiang Shiming (姜世明), *Dui Faguan Fa Yidu Faan zhi Pinggu* (對法官法一讀法案之評估) [*Evaluation on the First Reading Judges Act*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.169, 2011, at 4; Liu Zhiyuan (劉志原), *Meigui de Ci, Ciji Tingzhi 22 Nian Faguan Fa* (玫瑰的刺，刺激停滯 22 年法官法) [*Thorns of Roses*

gave judges special status different from regular government officials, in order to provide more personal protection, and to hold judges accountable had been blocked in the Legislative Yuan because of the conflicting perspectives among the Judicial Yuan, Ministry of Justice, and many interest groups.⁴⁵⁰ The Judicial Yuan emphasized the need for personal protection for judges and a self-discipline mechanism.⁴⁵¹ The civil judicial reform groups, including lawyers, highlighted an external oversight mechanism and maintained that only the introduction of outsiders into the system could hold judges accountable.⁴⁵² The Ministry of Justice insisted on the application of the specialized law to public prosecutors.⁴⁵³ Because no consensus could be achieved, the draft Judges Act languished in the Legislative Yuan for many years.⁴⁵⁴ The Legislative Yuan finally passed the Judges Act on June 14, 2011 thanks to the White Rose movement.⁴⁵⁵ Compared with the judicial reform in the 1990s focusing on judicial independence, the new legislation for the Judges Act tried to strike a balance between judicial independence and judicial accountability.⁴⁵⁶ To change the long-term judicial culture and hold judges accountable for their decisions, the new

Revive the Legislation of Judges Act Stagnant for 22 Years], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Sep. 26, 2010, at Jiaodian Xinwen (焦點新聞) [Focus News], available at <http://www.libertytimes.com.tw/2010/new/sep/26/today-fo7.htm>.

⁴⁵⁰ The perspective of the Judicial Yuan, see Wong Yuesheng (翁岳生), *supra* note 165, at 58.

⁴⁵¹ See Qui Yianling, Yang Jiuling & Wang Yuzhong (邱燕玲、楊久瑩&王寓中), *Faguan Fa Caoan, Chaoye Banben Jiaoli* (法官法草案·朝野版本角力) [*Wrestling Between the Ruling and Opposition Parties' Draft Bills for Judges Act*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Aug. 29, 2010, at Jiaodian Xinwen (焦點新聞) [Focus News], available at <http://www.libertytimes.com.tw/2010/new/aug/29/today-fo1.htm>.

⁴⁵² The view of the civil judicial reform groups, see Lin Fengzheng (林峰正), *Faguan Fa de Weijing Zhi Gong* (法官法的未竟之功) [*The Unfinished Work for the Judges Act*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.179, 2011, at 1-3.

⁴⁵³ See Tang Jingping & Huang Hongsen (湯京平&黃宏森), *supra* note 195, at 88-89 (describing prosecutors' insistence on the inclusion of their quasi-judge status in the Judges Act).

⁴⁵⁴ The Judicial Yuan sent the bill of the Judges Act to the Legislative Yuan in 1988. Though the Legislative Yuan discussed the bill for many times, it never succeeded. Wong Yuesheng (翁岳生), *supra* note 165, at 58.

⁴⁵⁵ Judges Act, Jul. 6, 2011, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6982, 2011, at 20.

⁴⁵⁶ The tension, see SU YONGQIN (蘇永欽), XUNZHAO GONGHEGUO (尋找共和國) [LOOKING FOR THE REPUBLIC] 336-341 (2008); Wang Jinshou (王金壽), *supra* note 287, at 143.

law introduced outsiders into the judicial system.⁴⁵⁷ The influence of the recent judicial reform is too new to see any results, but the ROC judges' long-term adherence to the sentencing pattern prior to the recent judicial reform could mirror the influence of the judicial culture.

3.3. Conclusion

Taiwan's judicial reform that started from the early 1990s successfully introduced judicial independence to the system. In the past 20 years, judicial independence became a paramount principle in Taiwan in part because of the development of bipartisan politics. Any external interference with the judiciary was sensitive. Meanwhile, under the bloodless transformation, the basic structure of the government such as personnel, organization, and ideology shaped by the authoritarian regime did not disappear entirely.⁴⁵⁸ Internal to the judicial system, the disciplinary judicial culture established and enhanced by the authoritarian regime remained intact until the most recent judicial reforms. Within the disciplinary judicial culture, judges were encouraged to follow, not create. Therefore, the sentencing pattern which reflected judges' collective perspective on crime and punishment was consolidated. Similarly, while Taiwan established its criminal IP legal system under the U.S. Special framework to demand harsher punishment, judges still followed their sentencing pattern within the contexts of judicial independence and judicial culture to deliver lenient sentences. To improve judges' resistance, in the 1990s Taiwan

⁴⁵⁷ For example, the Judicial Personnel Review Committee (人事審議委員會), and the Judges Appointment Committee (法官遴選委員會) and the Judges Evaluation Committee (法官評鑑委員會) have representatives from lawyers, prosecutors, scholars and due persons. See Art. 4(b), 7(c) and 34(a) of the Judges Act.

⁴⁵⁸ So far, Taiwan has not dealt with the historical injustice caused by the authoritarian regime seriously. "The ruling elites of the previous Kuomintang (KMT) authoritarian regime continued to rule Taiwan for more than ten years after the end of decades of martial law. The mass media, which very much benefited from press monopolization during the martial law era, continued to lead public opinion as the mainstream media. Although some measures of reparation for victims were provided, the issue of retributive justice was never brought into the political arena or public discourses. In 2000, thirteen years after the lifting of martial law as the first move toward democratization, the opposition gained power for the first time in Taiwan's history. The new government, however, never raised the issue of retributive justice." Naiteh Wu, *Transition without Justice, or Justice without History: Transitional Justice in Taiwan*, in *POLITICAL CHALLENGES AND DEMOCRATIC INSTITUTIONS: INTERNATIONAL AND TAIWAN'S PERSPECTIVES* 95 (S. Philip Hsu & Chang-Ling Huang eds., 2007).

launched a series of judicial reforms toward a punishment regime. In the next two chapters, these judicial reforms will be detailed and discussed.

Chapter 4 Taiwan's Legal and Judicial Reforms Prior to 2008

This chapter will describe the relationship between U.S. efforts to reduce intellectual property (IP) piracy in Taiwan with threats of trade sanctions under its Special 301 framework, and the evolution of Taiwan's criminal IP laws enacted in response to those pressures. At the same time that the United States was pressuring Taiwan to implement a harsher system of punishments for dealing with IP piracy, democratization in Taiwan provided the Republic of China (ROC) judiciary with more autonomy, which judges could use to ameliorate the perceived unjust results of U.S. demands. This chapter will analyze the relationship between external U.S. pressure on Taiwan to impose harsher IP piracy penalties and internal strategies of resistance mounted by local ROC judges committed to strengthening the rule of law in Taiwan.

The first half of this chapter will focus on Taiwan's reforms in establishing a criminal IP legal framework. Even before the arrival of the U.S. Special 301 framework, Taiwanese elites had voluntarily modernized their IP law. At the early stage, Taiwan emphasized local interests and competition, but tried to evade providing legal protection for foreigners for fear of its impact on economic development and education. Later, under the Special 301 framework, due to its huge interests in copyright matters, the United States especially intensified its oversight over Taiwan's copyright legislation. Thus, even though Taiwan's legislators attempted to balance local interests with U.S. demands, in the end, local autonomy legislation yielded to foreign pressure with respect to criminal copyright law. By contrast, thanks to fewer U.S. interests at stake, autonomy in trademark survived U.S. oversight. The difference gave rise to two different models for criminal enforcement of IP. In Taiwan's copyright regime, judges, with limited discretion in sentencing, had to impose harsh punishment on both serious and petty copyright infringers. On the other hand, judges enjoyed broad discretion in sentencing trademark infringers. The overly

harsh copyright law inevitably resulted in difficult ethical challenges for Taiwanese judges.

The second half of this chapter will turn to Taiwan's reforms to enforce its criminal IP law and judges' response to them. On the one hand, shielded by newly gained judicial independence, ROC judges were able to exercise their judicial power more autonomously. On the other hand, pressed by the U.S., Taiwan engaged in a large number of criminal IP prosecutions. To avoid injustice as a result of the intensive prosecutions and convictions, the ROC judiciary generally gave criminal IP defendants lenient sentences such as "convertible" imprisonment¹ or criminal detention,² or placed them on probation.³ The U.S. responded by lodging complaints in the context of trade negotiations with Taiwan, and in response to those trade pressures related to the ROC judiciary's reluctance to impose draconian punishments, the ROC Executive Yuan and Legislative Yuan raised mandatory sentences in the copyright law to narrow judges' discretion in sentencing and the ROC Judicial Yuan also launched judicial reforms in order to increase judicial support for strong IP protection. In the past two decades, the ROC Judicial Yuan⁴ tried to influence judicial sentencing behavior by issuing administrative directives regarding sentencing and setting up specialized IP divisions in individual courts. However, judicial independence was growing in Taiwan as a result of democratization, and as a result, both measures were ultimately found to be politically sensitive and did not penetrate the judiciary.

¹ As mentioned in Chapter 3, in Taiwan's Criminal Code, a sentence to not more than six months imprisonment can be automatically converted into a fine. A defendant who receives a convertible sentence can pay a fine to avoid imprisonment.

² As mentioned in Chapter 3, according to Taiwan's Criminal Code, criminal detention is imprisonment less than 60 days.

³ As mentioned in Chapter 3, according to Taiwan's Criminal Code, when a judge sentences a defendant, he or she can place the defendant on probation. A sentence with probation will be suspended during the period of the probation and will become invalid after the probation expires.

⁴ According to the ROC Constitution, the Executive Yuan is the executive branch of the government, the Legislative Yuan is the legislative branch of the government, and the Judicial Yuan is the judicial branch of the government. The Judicial Yuan is an institution responsible for judicial administration.

4.1. Taiwan's Legal Reforms in Criminal IP Legislation

4.1.1. Criminal IP Legislation Prior to the Special 301 Framework

Before the 1990s, Taiwan had modernized its copyright and trademark laws and enhanced criminal protection for IP rights. At that time, the Taiwanese elites hoped to establish a legal framework beneficial to local interests, but were alert to foreign demands. Because foreign pressure was not closely linked to foreign trade, Taiwan was able to develop its IP law autonomously and usually weighed local interests against foreign demands. While Taiwan harmonized its IP law to provide more protection, discriminatory measures against foreigners still existed. In fact, the legislation during this period of time reflects Taiwanese elites' self-awareness that IP law might enhance Taiwan's economic growth as well as a suspicion that foreign countries might take advantage of IP law to hinder local development. Thus, though Taiwan started to strengthen its criminal IP law, this demonstrated Taiwan's eagerness for economic development and transformation, not a general commitment to strong IP enforcement.

4.1.1.1. Copyright Legislation Prior to the Special 301 Framework

After the 1949 defeat in Mainland China, the KMT government retreated to Taiwan with its Copyright Act.⁵ Due to ongoing military skirmishes between Taiwan and China⁶ as well as Taiwan's insecure economy, the Taiwanese government and society scarcely considered

⁵ The Copyright Act of Taiwan can date back to the Copyright Act of Qing Dynasty in 1910. After the 1911 revolution, the new republican government continued to use the Qing copyright law. Later, the provisional Beiyang government enacted the Copyright Act of 1915, which was followed by the Nationalist government's Copyright Act of 1928. Because the later legislation is based on the former one, the 1910, 1915 and 1928 copyright laws are quite similar. *See* WILLIAM P. ALFORD, *TO SEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 36, 42, 45, 49 (1995); MA XIAOLI (马晓丽), *JINDAI ZHONGGUO ZHUZUOQUAN FA DE KUNJING YU JUEZE (近代中国著作权法的困境与抉择) [THE DILEMMA OF THE CONTEMPORARY CHINESE COPYRIGHT LAW]* 107, 109, 114, 115 (2011).

⁶ The First and Second Taiwan Strait Crisis happened in 1954 and 1958. *See* DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 120, 122 (2003).

copyright law issues at all during the 1950s.⁷ As Taiwan's situation became more stable and its economy started to develop in the 1960s, copyright piracy became serious.⁸ Taiwanese not only reprinted foreign books for domestic use but also exported them to foreign countries.⁹ A few foreign countries were concerned over Taiwan's piracy and urged Taiwan to sign international copyright treaties for more protection of copyright, but Taiwan, taking the impacts on its education and economy development into consideration, did not accept these proposals.¹⁰

Despite Taiwan's growing piracy, foreign copyright owners did not seek copyright protection in Taiwan enthusiastically. This can be traced to the copyright registration requirements in effect at that time. Because a copyright registration was a prerequisite for copyright protection in Taiwan prior to 1985, the number of registered foreign works could fairly represent foreigners' efforts to seek copyright protection. The following table shows how many copyright registrations were approved by the Taiwanese government each year from 1950 to 1980.

⁷ Shi Wengao (施文高), *ZHUZUOQUAN FAZHI YUANLUN (著作權法制原論) [COPYRIGHT LEGAL THEORY]* 201 (1981).

⁸ *Id.* at 201-202.

⁹ *Id.* at 202, 337. For example, some Taiwanese publishers reprinted the Encyclopedia Britannica and sold the pirated books to the United States at a much cheaper price in the late 1950s. The United States therefore negotiated this issue with Taiwan in 1960.

¹⁰ The debate over this issue in the 1960s, *see Id.* at 202-207. Early in 1920, when requested by France to join the Berne Convention, the Chinese government did not accept the proposal, either. *See* MA XIAOLI (马晓丽), *supra* note 5, at 96.

Table 4-1 Copyright Registration from 1950 to 1980

Year	Registration Approved						No Approval Required	
	Native Language Literary Works	Foreign Language Literary Works	Phono-Records	Music	Others	Total	Plate	Revoked
1950	1					1		
1951	7					7		
1952	19				1	20		
1953	21					21		
1954	22					22		
1955	23	4				27		
1956	41	4			1	46		
1957	90	10	11		2	113		2
1958	151	9	18	1	1	180		1
1959	187	2	7	1	2	199		1
1960	135	2	5		16	158		
1961	100	7	3		2	112		1
1962	86	4	7			97		1
1963	94	9	35		20	158		3
1964	77	14	14	1	1	107		1
1965	129	39	20	1		189		19
1966	138	124	12	1		275	4	1
1967	201	129	10	1		341	1	6
1968	157	228	6	2		393	2	1
1969	192	188	1	6	2	389	1	3
1970	215	120	4	24	1	364		2
1971	403	255	2	74	5	739	3	1
1972	429	405	2	108	2	946	4	2
1973	522	394	4	270	1	1191	2	3
1974	403	285	2	142	14	846	3	2
1975	427	316	2	67	12	824	9	2
1976	630	342	3	135	21	1131	7	10
1977	649	413	28	305	12	1407	8	45
1978	618	389	34	254	19	1314	15	18
1979	606	506	29	414	75	1630	19	13
1980	658	347	22	624	57	1708	7	29

Source: SHI WENGAO (施文高), ZHUZUOQUAN FAZHI YUANLUN (著作權法制原論) [COPYRIGHT LEGAL THEORY] 191 (1981).

Based on the statistics above, the following table shows the average annual approved registrations for all works and for foreign language works during the three decades, the 1950s,

1960s and 1970s. The average annual approved registrations for all works in the three decades were 63.6, 221.9 and 1039.2 respectively, while the registrations for foreign language works were 2.9, 74.4 and 342.5 respectively. The data suggests that foreign copyright owners did not pursue copyright protection enthusiastically until the 1970s.

Table 4-2 Average Annual Approved Copyright Registrations

Year	All	Native Language Literary Works	Foreign Language Literary Works	Other Works
1950-1959	63.6	56.2	2.9	4.5
1960-1969	221.9	130.9	74.4	16.6
1970-1979	1039.2	490.2	342.5	206.5

Source: Table 4-1.

Although foreign countries and copyright owners did not take significant action in the 1960s, the Taiwanese government voluntarily revised its copyright law in 1964. Finding that the existing copyright law did not provide enough deterrence for rampant unauthorized reprinting,¹¹ as well as the fact that the petition was filed by several major local publishers requesting legal protection for their investments in republishing ancient Chinese literary works,¹² the Legislature Yuan raised criminal punishment for copyright offenses and provided *sui generis* “plate rights” for these local publishers.¹³

The 1964 Copyright Act criminalized any copyright infringement including economic right

¹¹ The second reading legislative materials for the Copyright Act of 1964, 53 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.33, Jun. 23, 1964, at 27.

¹² The discussion on the plate right issue in the Legislative Yuan, see the first reading legislative materials of the Copyright Act of 1964, 51 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.29, Jun. 12, 1962, at 132-137.

¹³ Zhonghua Minguo 53 Nian Zhuzuoquan Fa (中華民國 53 年著作權法) [Copyright Act of 1964], Jul. 10, 1964, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.1556, 1964, at 1; LINIAN ZHUZUOQUAN FAGUI HUIBIAN ZHUANJI (歷年著作權法規彙編專輯) [COLLECTION OF HISTORICAL COPYRIGHT LAWS] 54 (Jingjibu Zhihui Caichan Ju (經濟部智慧財產局) [Taiwan Intellectual Property Office] ed., 2005). Article 22 of the new law provided, “For a work that has no copyright or its copyright has expired, a plate maker who arranges and prints the work and duly records it in accordance with this Act, shall enjoy the 10-year exclusive right to reprint the work with the plate. Whoever is not the plate maker shall not photocopy the work based on the plate.”

infringement and moral right infringement.¹⁴ It also raised punishment for the offense for career offenders in particular.¹⁵ The maximum punishment for unauthorized reproduction was two-year imprisonment,¹⁶ while the maximum punishment for other economic right infringements was one-year imprisonment.¹⁷ A career offender for a copyright offense might be sentenced up to three-year imprisonment.¹⁸ Whoever infringed another's moral rights would be fined.¹⁹ Though every copyright infringement had its corresponding criminal punishment, the 1964 Copyright Act did not mention whether or not a foreigner's right was recognized.²⁰

Throughout the legislative process all amendments were proposed by the government at the urging of local publishers, and no foreign government or copyright owner was involved. It should therefore not be surprising that the revised articles of the 1964 Copyright Act did not change any provisions that discriminated against foreigners. At that time, according to an administrative ordinance, one of the requirements for a foreigner's work to be protected was the

¹⁴ Art. 33(b) of the Copyright Act of 1964 punished any economic right infringement. Art. 20 and 21 punished any moral right infringement.

¹⁵ According to the interpretation of the Supreme Court of Taiwan, a career offender (*changye fan* 常業犯) was the one who took a specified offense as his or her occupation and lived on the specified offense. *See* Zuigao Fayuan (最高法院) [Sup. Ct.], Sep. 22, 2004, Minguo 93 (Taishang) No. 4967 Criminal Judgment (中華民國 93 年 9 月 22 日 93 年度台上字第 4967 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>. Thus, the copyright offense for career offenders was the offense that someone took a specific copyright offense as his or her occupation and lived on the specific copyright offense.

¹⁶ "Whoever reprints a registered work without authorization shall be imprisoned not more than two years and may be fined not more than two thousand yuan." Art. 33(a) of the Copyright Act of 1964.

¹⁷ "Whoever counterfeits copyrighted works or employs a similar method to infringe copyright shall be imprisoned not more than one year or criminally detained, and either may be fined not more than one thousand yuan." Art. 33(b) of the Copyright Act of 1964.

¹⁸ "Whoever makes commission of the foregoing criminal infringement as an occupation shall be imprisoned not more than three years and may be fined not more than three thousand yuan." Art. 33(c) of the Copyright Act of 1964. In Taiwan, an offense for career offenders is an independent offense. The offense for career theft offenders punished a person who had a habit of committing theft crimes. A person's prior convictions were not necessary for the establishment of the offense though they were always the important consideration to establish the criminal "habit." If someone who committed one or more theft offenses and was found the criminal "career," he or she would be sentenced once for the single offense for career offenders. In the United States, a career offender is a legal reason to sentence a convict to more serious punishment.

¹⁹ Art. 34 & 35 of the Copyright Act of 1964.

²⁰ It was later articulated in Art. 17 of the Copyright Act of 1985.

reciprocal protection provided by the foreign country.²¹ No country except the United States²² had entered into a valid copyright treaty with Taiwan, so in theory Taiwan denied copyright protection for all foreigners except Americans. In practice, however, even though U.S. copyright owners should be protected by a bilateral treaty between the United States and ROC, they could still not claim their right to translation because the provision with respect to the right to translation in the bilateral treaty was reserved by both sides.²³²⁴²⁵ Since the new law did not

²¹ Art. 14 of the Enforcement Rules of the Copyright Act of 1928. Zhonghua Minguo 17 Nian Zhuzuoquan Fa Shixingsize (中華民國 17 年著作權法施行細則) [Enforcement Rules of the Copyright Act of 1928], cited in SHI WENGAO (施文高), *supra* note 7, at 339; 1 LUO MINGTONG (羅明通), ZHUZUOQUAN FA LUN (著作權法論) [COPYRIGHT LAW] 330 (6th ed. 2005).

²² United States-Republic of China Treaty of Friendship, Commerce, and Navigation with Accompanying Protocol, 63 Stat. 1299, TIAS 1871, 6 Bevans 761, 25 UNTS 69 [hereinafter cited as FCN Treaty]. The FCN Treaty is still recognized by the United States as a treaty in force between the United States and Taiwan (Republic of China), see *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011*, UNITED STATES DEPARTMENT OF STATE, <http://www.state.gov/documents/organization/169274.pdf> (last visited Jun. 28, 2013). In addition, the U.S. Court of Appeals for the Second Circuit also held in 1992, “[T]he FCN treaty is still in effect by virtue of both Congress’ enactment of the TRA and the Executive Branch’s position that the FCN has remained in effect, and that the actions of both of these branches do not violate the Constitution. The FCN is a valid ‘treaty’ for purposes of Section 104(b)(1) of the Copyright Act. Accordingly, the district court correctly held that the Programs enjoy copyright protection, and defendants are liable for copyright infringement.” *New York Chinese TV Programs Inc. v. U.E. enterprises Inc.*, 954 F.2d 847, 854 (2nd Cir. 1992).

²³ When signing the FCN treaty with Republic of China, “[t]he Government of the United States of America does not accept Section 5(c) of the Protocol relating to protection against translations of literary and artistic works, and with the understanding that United States interests in this respect will be interpreted in accordance with the provisions of the Treaty as to Commercial Relations signed at Shanghai, October 8, 1903, until further negotiations and agreement concerning translations are forthcoming.” Section 5(c) of the Protocol of the FCN Treaty provided, “So long as the laws and regulations of either High Contracting Party do not accord to its own nationals, corporations and associations protection against translations, the provisions of the third sentence of Article IX shall not be construed to obligate that High Contracting Party to accord to nationals, corporations or associations of the other High Contracting Party protection against translations.” Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, U.S.-China, 63 Stat. 1299.

²⁴ Article 11 of the Treaty for the Extension of Commercial Relations between the United States and China provided, “Whereas the Government of the United States undertakes to give the benefits of its copyright laws to the citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens: ... It is understood that Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works written or of maps compiled by a citizen of the United States...” Treaty for the Extension of Commercial Relations, Oct. 8, 1903, U.S.-China, 33 Stat. 2208.

²⁵ “In fact, neither Taiwan nor the U.S. strictly adhered to these copyright provisions. The chief problem with the treaties was their exemption of translation rights: the ROC was not obligated to protect translation rights of U.S. works. However, copyright negotiations between the U.S. and Taiwan led Taiwan in 1985 to issue administrative rulings granting U.S. copyright holders the same treatment received by domestic holders (so-called ‘national treatment’). Thus, until 1985, Taiwan was theoretically at liberty to translate U.S. literary and artistic works without violating any U.S.-Taiwan bilateral agreement.” Jean Lin, Comment, *The U.S.-Taiwan Copyright Agreement: Cooperation or Coercion?*, 11 UCLA PAC. BASIN L.J. 155, 170-171 (1992).

address the discrimination against foreigners at all,²⁶ it is reasonable to infer that the revision was spurred by local interests, not foreign pressure.

In 1985, Taiwan made significant changes to its Copyright Act. The bill was sent to the Legislative Yuan in 1983 and passed on June 28, 1985,²⁷ just three months before the first U.S.-Taiwan copyright negotiation in October 1985.²⁸ Taiwan tried to modernize its copyright law in several aspects. The new law recognized new media of creation like computer software as one of the subject matters of copyright²⁹ though only twenty other countries recognized specific intellectual property rights in computer software at that time.³⁰ To balance the disadvantage as a result of strong copyright protection, the new law for the first time introduced a compulsory licensing provision for visual-audio works³¹ as well as fair use provisions for limited circumstances such as educational use,³² governmental Braille use,³³ and public institution use.³⁴

While the new law tried to provide more copyright protection for local copyright owners, it still discriminated against foreigners. For example, it removed mandatory registration for native copyright owners. Prior to 1985, copyright could be secured only by registration.³⁵ The registration requirement was lifted if the copyright owner was a native. A native author automatically acquired copyright upon the completion of his or her work and could exercise it

²⁶ SHI WENGAO (施文高), *supra* note 7, at 388-389.

²⁷ Zhonghua Minguo 74 Nian Zhuzuoquan Fa (中華民國 74 年著作權法) [Copyright Act of 1985], Jul. 10, 1985, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.4475, 1985, at 1.

²⁸ 1 LUO MINGTONG (羅明通), *supra* note 21, at 59.

²⁹ Art. 4 of the Copyright Act of 1985.

³⁰ Michael M. Hickman, Comment, *Protecting Intellectual Property in Taiwan: Non-Recognized United States Corporations and Their Treaty Right of Access to Courts*, 60 WASH. L. REV. 117, 172 (1984).

³¹ Art. 20(a) of the Copyright Act of 1985.

³² Art. 29(a) & 31 of the Copyright Act of 1985.

³³ Art. 30 of the Copyright Act of 1985.

³⁴ Art. 32 of the Copyright Act of 1985.

³⁵ Art. 23 of the Copyright Act of 1928; Art. 19(a) of the Copyright Act of 1944, 1949, and 1964.

freely without registration.³⁶ After the new law, whether or not to register a work was at the author's discretion.³⁷ On the contrary, the 1985 copyright law still required registration for a foreign work to be protected.³⁸ Moreover, a foreign author's work was allowed to be registered only under either of the circumstances: (1) the initial publication of the work was in the territory of Republic of China³⁹ or (2) a citizen of ROC could enjoy the reciprocal protection in the foreign country.⁴⁰ These discriminatory and cumbersome legal procedures made pursuing copyright protection for a foreign work in Taiwan quite difficult.

Nevertheless, in response to foreign pressure, the new law removed an obstacle that barred foreigners' access to Taiwanese court. The new law authorized an unrecognized foreign legal person to file a criminal complaint or a private criminal prosecution in case the same reciprocal protection was provided to a Taiwanese citizen.⁴¹ This revision was to solve the controversy arising from the Apple Computer case in 1982.⁴² In 1982, Apple Computer instituted a private prosecution in Taiwan charging several Taiwanese defendants of criminal copyright infringement by manufacturing "Apolo II" computers and affiliated software.⁴³ The district court dismissed the case on the basis of a 1931 Judicial Yuan Interpretation that an unrecognized foreign company was not allowed to file a private prosecution if it was not a legal person in ROC.⁴⁴

³⁶ Art. 15(a) of the Copyright Act of 1985.

³⁷ 1 LUO MINGTONG (羅明通), *supra* note 21, at 57.

³⁸ Art. 17(a) & (b) of the Copyright Act of 1985. The official reason for the discrimination was to prevent the flood of litigations filed by foreigners, *see* the legislative materials for the committee consideration of the Copyright Act of 1964, 73 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.79, May 21, 1984, at 159; the debate over the discrimination in the Legislative Yuan, 74 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.1, Oct. 29, 1984, at 2-5.

³⁹ Art. 17(a)(1) of the Copyright Act of 1985.

⁴⁰ Art. 17(a)(2) of the Copyright Act of 1985.

⁴¹ Art. 17(c) of the Copyright Act of 1985.

⁴² The discussion on this case, *see* Hickman, *supra* note 30, at 117.

⁴³ In Taiwan, a direct victim is authorized to institute a private prosecution by Article 319(a) of the Code of Criminal Procedure.

⁴⁴ Sifayuan (司法院) [Judicial Yuan], Aug. 7, 1931, Minguo 20 (Yuan) No. 533 Interpretation (中華民國 20 年 8 月 7 日司法院 20 年院字第 533 號解釋), 2 Sifayuan Jieshi Huibian (司法院解釋彙編) [Collection of Judicial Yuan

Since Apple Computer was an American company that had not been recognized and admitted to do business in Taiwan, its private prosecution was illegitimate.⁴⁵ On appeal, Apple Computer argued that the bilateral treaty between the United States and ROC gave it the right to initiate a private criminal prosecution irrespective of any recognition to do business under municipal law.⁴⁶ Although the appellate court did not address the merits of the treaty issue, it nevertheless vacated the judgment of dismissal and remanded for a trial on the merits. At the retrial, the Taiwanese court sentenced all defendants to nine-month imprisonment but placed them on three-year probation owing to their settlement with Apple Computer.⁴⁷ To avoid the conflict that a foreign legal person was awarded copyright pursuant to copyright law but could not exercise it due to another procedural obstacle in the other laws, the new law thus overrode the judicial interpretation to authorize an unrecognized foreign legal person the right to file a criminal complaint or a private prosecution.⁴⁸

To effectively deter rampant piracy, the 1985 Copyright Act provided more complete criminal copyright protection.⁴⁹ The new law reclassified and redefined all criminal offenses. All copyright offenses were prescribed in an independent criminal section in the Copyright Act and copyright offenses were divided into two categories, economic right infringement and moral right infringement.

Interpretations] 455 (Judicial Yuan ed., 1989).

⁴⁵ Taiwan Taipei Difang Fayuan (臺灣臺北地方法院) [Taiwan Taipei Dist. Ct.], Jan. 28, 1983, Minguo 72 (Zi) No. 870 & 897 Criminal Judgment (中華民國 72 年 1 月 28 日 71 年度自字第 870、897 號刑事判決).

⁴⁶ Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Ct.], Mar. 14, 1983, Minguo 72 (Shangsu) No. 806 Criminal Judgment (中華民國 72 年 3 月 14 日 72 年度上訴字第 806 號刑事判決).

⁴⁷ The convictions and sentences were finally confirmed by the Supreme Court. *See* Zuigao Fayuan (最高法院) [Sup. Ct.], Jun. 6, 1985, Minguo 74 (Taishang) No. 2963 Criminal Judgment (中華民國 74 年 6 月 6 日 74 年度台上字第 2963 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴⁸ *See* the first reading legislative materials, 72 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.80, Oct. 4, 1983, at 412.

⁴⁹ *See* the first reading legislative materials, 72 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.80, Oct. 4, 1983, at 413.

In the category of economic right infringement, there were four types of offenses: (1) the offenses for copyright infringement, (2) the offenses for career copyright offenders, (3) the offenses for petty copyright infringement, and (4) the offenses for plate right infringement. Taiwan's copyright law enumerated individual economic rights⁵⁰ such as right to reproduction, right to public performance, and right to public display, and only enumerated statutory economic rights could receive copyright protection.⁵¹ Article 38(a) protected an author's right to reproduction. Whoever reproduced a copyrighted work without authorization would be sentenced to six-month to three-year imprisonment either with or without a fine up to 30,000 "yuan" (currency unit used before 1949).⁵² Article 38(b) prevented the distribution of an infringing article upon an author's right to reproduction. Whoever sold or rented an infringing article as a result of the Article 38(a) offense, displayed or possessed such an infringing article with the intent to sell or rent, or assigned such an infringing article with the intent to profit would be sentenced to two-month to two-year imprisonment either with or without a fine up to 20,000 yuan.⁵³ Article 39(a) protected an author's other economic rights. Whoever infringed an author's economic rights other than right to reproduction would be sentenced to two-month to two-year

⁵⁰ Chapter 4 of the Copyright Act of 1985; Art. 38-48. "Copyright legislation in some countries defines the right to exploit copyrighted works through intangible means in the most general terms, as an exclusive right to communicate, while legislation in other countries creates discrete rights of performance, recitation, broadcasting and display." PAUL GOLDSTEIN, *INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS* 235 (2nd ed. 2008).

⁵¹ Art. 4(b) of the Copyright Act of 1985. See 1 LUO MINGTONG (羅明通), *supra* note 21, at 98 (describing the enumeration of the copyright law).

⁵² Art. 38(a) of the Copyright Act of 1985. The term "yuan" here is the currency unit used by the KMT government before 1949. According to Article 2 of the Exchange of the Currency Unit in Laws and Regulations to NT Dollar Act, one yuan is equal to three New Taiwan (NT) dollars. Xianxing Fagui Suoding Huobi Danwei Zhesuan Xintaibi Tiaoli (現行法規所定貨幣單位折算新臺幣條例) [Exchange of the Currency Unit in Laws and Regulations to NT Dollar Act], Jul. 17, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5595, 1992, at 6. The predecessor of the law is an administrative order (Yinyuan ji Yinyuan Duihuanquan Faxing Banfa 銀元及銀元兌換卷發行辦法), which was authorized by the 1948 Martial Law (Dongyuan Kanluan Shiqi Linshi Tiaokuan 動員戡亂時期臨時條款).

⁵³ Art. 38(b) of the Copyright Act of 1985.

imprisonment either with or without a fine up to 20,000 yuan.⁵⁴ Article 39(b) punished the distribution of an infringing article upon an author's other economic rights. Whoever sold or rented an infringing article as a result of the Article 39(a) offense, displayed or possessed such an infringing article with the intent to sell or rent, or assigned such an infringing article with the intent to profit would be sentenced to two-month to one-year imprisonment either with or without a fine up to 10,000 yuan.⁵⁵

The copyright law also raised punishment for "career copyright offenders."⁵⁶ According to the interpretation of the Supreme Court of Taiwan, a career offender was the one who took a specified offense as an occupation and lived on the specified offense.⁵⁷ The 1985 copyright law provided that a career offender for copyright offenses in Article 38 and 39 should be sentenced to six-month to five-year imprisonment either with or without a fine up to 50,000 yuan.⁵⁸ Until the criminal law of Taiwan abolished all offenses for career offenders in 2006, the offense for career copyright offenders had been the most serious offense in copyright law.

Taking the relatively little harm of some specific copyright infringement into consideration, the legislature punished petty copyright infringement prescribed in Article 41 with a fine rather than imprisonment. Whoever violated Article 13(b), 18, or 19 would be sentenced to a fine up to 10,000 yuan. Article 13(b) prohibited translation of a native author's work without his or her authorization.⁵⁹ Article 18 protected a performer's right to his or her performance. A performer

⁵⁴ Art. 39(a) of the Copyright Act of 1985.

⁵⁵ Art. 38(b) of the Copyright Act of 1985.

⁵⁶ In the United States, the term "career offender" usually indicates a habitual offender or serious recidivist. See Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705 (2006) (discussing the criminal policy for habitual offender laws in the United States).

⁵⁷ Zuigao Fayuan (最高法院) [Sup. Ct.], Sep. 22, 2004, Minguo 93 (Taishang) No. 4967 Criminal Judgment (中華民國 93 年 9 月 22 日 93 年度台上字第 4967 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁵⁸ Art. 40 of the Copyright Act of 1985.

⁵⁹ Art. 13(b) of the Copyright Act of 1985. An author had the exclusive right to translation for 30 years, see Art.

of a speech, play, show, or dance had the exclusive right to his or her performance and others should not record performance without the performer's authorization.⁶⁰ Article 19 provided that a work on a newspaper or in a magazine should not be republished if there was an indication that republishing was not agreed.⁶¹

The 1985 Copyright Act not only recognized the offenses for moral right infringement but also raised punishment for them.⁶² Article 25 provided that whoever inherited or was assigned a copyright should not distort or mutilate the work, or alter or hide the name of the author.⁶³ Article 26 provided that anyone should not distort or mutilate an uncopyrightable work or a work in public domain, or alter or hide the name of the author of such a work.⁶⁴ Article 27 prohibited false representation of an author.⁶⁵ The statutory punishment for violation of Article 25 or 27 was two-month to six-month imprisonment either with or without a fine up to 5,000 yuan.⁶⁶ The punishment for violation of Article 26 was two-month to one-year imprisonment either with or without a fine up to 10,000 yuan.⁶⁷

After prescribing all copyright crimes and their corresponding primary penalties, the new law set up a general rule for the supplementary penalty of confiscation in Article 46 that any infringing good or product, or any facility, equipment or article used for criminal copyright infringement should be confiscated.⁶⁸ Taking a legal person's capacity of copyright infringement

13(a) of the Copyright Act of 1985.

⁶⁰ Art. 3(a)(18) & 18 of the Copyright Act of 1985. However, a performer's performance had to be original to receive the exclusive right. Thus, the rights to performance here was different with the neighboring right established later in 1998. *See* 1 LUO MINGTONG (羅明通), *supra* note 21, at 121.

⁶¹ Art. 19(a) of the Copyright Act of 1985.

⁶² Art. 43 & 44 of the Copyright Act of 1985.

⁶³ Art. 25 of the Copyright Act of 1985.

⁶⁴ Art. 26 of the Copyright Act of 1985.

⁶⁵ Art. 27 of the Copyright Act of 1985.

⁶⁶ Art. 43 of the Copyright Act of 1985.

⁶⁷ Art. 44 of the Copyright Act of 1985.

⁶⁸ Art. 46 of the Copyright Act of 1985.

into account, the new law established a legal person's criminal liability in Article 48.⁶⁹ If a representative of a legal person committed a copyright offense, the legal person should be sentenced to a fine prescribed in the offense. In the end, the procedural rule that all offenses should be prosecuted upon a direct victim's complaint was provided in Article 47.⁷⁰

Here is the table outlining the criminal section of the 1985 Copyright Act:

⁶⁹ Art. 48 of the Copyright Act of 1985.

⁷⁰ Art. 47 of the Copyright Act of 1985.

Table 4-3 Criminal Provisions of the 1985 Copyright Act

Offenses & Primary Punishment	Economic Rights	Right to Reproduction	§ 38(a): unauthorized reproduction of a copyrighted work	1. 6m to 3y imprisonment 2. with or without a fine up to 30,000 yuan
			§ 38(b): distribution of an infringing article as a result of the § 38(a) offense	1. 2m to 2y imprisonment 2. with or without a fine up to 20,000 yuan
		Other Rights	§ 39(a): copyright infringement by a method other than reproduction	1. 2m to 2y imprisonment 2. with or without a fine up to 20,000 yuan
			§ 39(b): distribution of an infringing article as a result of the § 39(a) offense	1. 2m to 1y imprisonment 2. with or without a fine up to 10,000 yuan
			§ 40: career offender for criminal copyright infringement in § 38 and § 39	1. 6m to 5y imprisonment (unconvertible) 2. with or without a fine up to 50,000 yuan
		§ 41: petty infringement	a fine up to 10,000 yuan	
		§ 42: plate right infringement	1. 2m to 1y imprisonment 2. with or without a fine up to 10,000 yuan	
	Moral Rights	§ 43: distortion or mutilation of a copyrighted work, or false representation of an author	1. 2m to 6m imprisonment 2. with or without a fine up to 5,000 yuan	
		§ 44: distortion of an uncopyrightable work or a work in public domain	1. 2m to 1y imprisonment 2. with or without a fine up to 10,000 yuan	
	Supplementary Punishment	§ 46: confiscation of an infringing good or product, or any facility, equipment, or article used for copyright infringement		
Extension of Liability	§ 48: criminal liability for a legal person			
Procedural Rule	§ 47: prosecution upon a direct victim's complaint; § 17(c): unrecognized foreign legal person's right to file a complaint or initiate a private prosecution			

Source: Compiled by the author.

Note: m: month; y: year; 1 yuan: 3 New Taiwan dollars.

The overall increase of punishment for all copyright offenses in the 1985 copyright law was significant because it was the first time that Taiwan tried to reform judges' lenient sentencing and turned to end users. The new law narrowed a judge's discretion in sentencing in three ways. First

of all, aside from the offenses for petty copyright infringement, the primary punishment for all copyright offenses was imprisonment either with or without a fine. Thus, a judge was no longer allowed to sentence a copyright infringer to criminal detention (less than 60-day imprisonment) or an independent fine. Secondly, by setting the minimum punishment for the offense of unauthorized reproduction in Article 38(a) at six-month imprisonment, it actually restricted a judge's discretion in sentencing a defendant to a convertible jail term. As mentioned in the last chapter, a sentence to six-month or less imprisonment could be converted into a fine if the maximum punishment for the offense was not more than three-year imprisonment.⁷¹ If a judge did not want to jail an Article 38(a) defendant, his or her only option was to sentence the defendant to exactly the minimum six-month imprisonment or place the defendant on probation. Thirdly, the new law raised the maximum punishment for the offense for career copyright offenders to five-year imprisonment. Because one of the requirements for a convertible jail term was the maximum punishment of three-year imprisonment or less, the new law made conversion unavailable by raising the maximum punishment from three-year to five-year imprisonment. Thus, without probation, a career copyright offender had to serve a real jail term.

In sum, distribution of an infringing article was not punishable prior to 1985. The 1985 copyright law started to punish end users who distributed an infringing article with certain intent. In a country with rampant piracy, this approach in fact criminalized the majority of common people. Beginning in 1985, harsh statutory punishment and broad scope criminalization were the pillars of the criminal copyright law of Taiwan.

⁷¹ Art. 41 of the Criminal Code of 1934. After 2001, the maximum punishment requirement was adjusted up to five-year imprisonment.

4.1.1.2. Trademark Legislation Prior to the Special 301 Framework

The same route to modernization can be found in trademark law, too. After the KMT brought the Trademark Act to Taiwan in 1949, the first modernization occurred in 1972.⁷² The new law switched from the first-to-use doctrine to the first-to-file doctrine⁷³ and shortened the validity period of a registered trademark from 20 years to 10 years from the date of registration.⁷⁴ Neither of these rules had ever been changed since they were introduced in the late Qing Dynasty.⁷⁵ The legislature also restored criminal provisions that were entirely removed by the KMT government in 1930.⁷⁶⁷⁷ From 1930 to 1972, the Criminal Code was used to punish trademark infringement as a form of crime against industrial and commercial order.

Taiwan expanded the scope of trademark crimes and raised criminal punishment against trademark infringers prior to the U.S. Special 301 framework as well. The 1972 trademark law

⁷² Zhonghua Minguo 61 Nian Shangbiao Fa (中華民國 61 年商標法) [Trademark Act of 1972], Jul. 4, 1972, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.2438, 1972, at 1. The trademark law of Taiwan can date back to the Provisional Code of Trademark Registration (Shangbiao Zhuze Shibao Zhangcheng 商標註冊試辦章程) [hereinafter Provisional Code] promulgated by the Qing government in 1904. Given the considerable commercial interests within China, foreign powers pushed China to enact trademark legislation. The Ministry of Commerce (Shangbu 商部) of the Qing government finally asked the Japanese government to help it to introduce a trademark law according to the treaties of commerce and navigation with Great Britain, the United States, and Japan from 1902 to 1903. At that time, Japanese industrial firms engaged in manufacturing counterfeits of the goods of Western firms but suffered trademark infringement by Chinese manufacturers. In order to justify Japanese merchants' manufacturing counterfeits of Western products and yet prohibiting Chinese merchants from copying Japanese products, the Japanese government in 1905 sent two staff members of its Patent Bureau to China to design the Provisional Code as well as introduce the first-to-file principle for the best interest of Japan. See TAN LOKE KHOON & CLIFFORD BORG-MARKS, TRADE MARK LAW IN THE PEOPLE'S REPUBLIC OF CHINA 11 (1998); TAN LOKE KHOON, PIRATES IN THE MIDDLE KINGDOM: THE ENSUING TRADEMARK BATTLE 5 (2nd ed. 2007); WANG DUCUN (汪渡村), SHANGBIAO FA LUN (商標法論) [TRADEMARK LAW] 2 (2008).

⁷³ Art. 36 of the Trademark Act of 1972.

⁷⁴ Art. 24 of the Trademark Act of 1972.

⁷⁵ Art. 5 & 6 of the Provisional Code of 1904 provided that unless successfully opposed, registration would be granted to the first to file. Art. 9 of the Provisional Code of 1904 provided that the duration for trademark registration was 20 years.

⁷⁶ Zhonghua Minguo 19 Nian Shangbiao Fa (中華民國 19 年商標法) [Trademark Act of 1930], see WANG SHUMING (王叔明), SHANGBIAO FA (商標法) [TRADEMARK LAW] 109-118 (1936); NORWOOD F. ALLMAN, CHINESE TRADE-MARK LAW, REGULATIONS AND CLASSIFICATION OF MERCHANDISE 1-6 (1931).

⁷⁷ The removal of criminal provisions, see Wang Shuming (王叔明), *supra* note 76, at 9; 1 XIE ZHENMIN & ZHANG ZHIBEN (谢振民&张知本), ZHONGHUA MINGUO LIFASHI (中华民国立法史) [THE LEGISLATIVE HISTORY OF REPUBLIC OF CHINA] 606 (2000).

restored criminal provisions that were removed in 1930. Because the trademark offenses in the Criminal Code did not entirely cover all unauthorized use of a registered mark, the 1972 trademark law further subjected the following trademark infringements to the criminal punishment prescribed in Article 253 of the Criminal Code: (1) any unauthorized use of a mark identical with or similar to a registered mark in respect of the identical or similar goods⁷⁸ and (2) any unauthorized application of a mark identical with or similar to a registered mark to an advertisement, label, instruction manual, price list, or similar document in respect of the identical or similar goods.⁷⁹ In addition, any ongoing misappropriation of a registered mark as the name of a company or business was subject to: imprisonment for not more than one year, criminal detention, or a fine of not more than two thousand yuan.⁸⁰

Like the 1985 copyright law, Taiwan revised its Trademark Act in 1983 to raise punishment for trademark offenses and create new trademark offenses.⁸¹ Prior to 1983, the punishment for unauthorized use of a registered mark was referred to that prescribed in Article 253 of the Criminal Code. The maximum punishment for Article 253 was two-year imprisonment. The 1983 Trademark Act did not refer to the Criminal Code any longer but articulated criminal punishment for offenses enumerated in Article 62(1) and (2); moreover, the new law raised the maximum punishment for offenses enumerated in Article 62(1) and (2) from two-year to five-year imprisonment.⁸² This reform in fact narrowed judges' discretion in sentencing a trademark offender to convertible imprisonment or criminal detention because of the five-year maximum

⁷⁸ Art. 62(a)(1) of the Trademark Act of 1972.

⁷⁹ Art. 62(a)(2) of the Trademark Act of 1972.

⁸⁰ Art. 63 of the Trademark Act of 1972.

⁸¹ *Zhonghua Minguo 72 Nian Shangbiao Fa* (中華民國 72 年商標法) [Trademark Act of 1983], Jan. 26, 1983, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.4091, 1983, at 1. The reason for the legislation, *see* 71 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.103, Dec. 24, 1982, at 936.

⁸² Art. 62(a) of the Trademark Act of 1983.

imprisonment.⁸³ After 1983, those who violated Article 62 of the Trademark Act had to serve a real jail term if he or she was not placed on probation by the court.⁸⁴

To improve Taiwan's international reputation, avoid foreign protests or trade retaliation, and protect consumers from being swindled, the 1983 trademark law created new offenses in Article 62*bis* and 62*ter* to punish unauthorized use of an unregistered foreign well-known mark as well as circulation of infringing goods.⁸⁵ Article 62*bis*(a) provided, "Whoever with the intent to defraud others uses a mark identical with or similar to an unregistered foreign well-known mark in respect of the identical or similar goods shall be sentenced to imprisonment for not more than three years or criminal detention; in lieu thereof, or in addition thereto, a fine of not more than thirty thousand yuan may be imposed."⁸⁶ To establish the offense for a foreign well-known mark, the reciprocal protection of the foreign country was required.⁸⁷ Article 62*ter* prohibited circulation of infringing goods as a result of the violation of Article 61 or 62*bis*. "Whoever with the knowledge that a product is a result of the violation of Article 61 or 62*bis* sells the product, displays the product with the intent to sell, or exports or imports the product shall be sentenced to imprisonment for not more than one year or criminal detention; in lieu thereof, or in addition thereto, a fine of not more than ten thousand yuan may be imposed."⁸⁸ By prohibiting circulation of infringing goods in a country with rampant piracy, the 1983 trademark law also established a

⁸³ Prior to 2001, a sentence to six months imprisonment or less could be converted into a fine if the maximum punishment for the offense was three years imprisonment or less. In 2001, the Legislative Yuan changed the requirement for the maximum punishment to "five years imprisonment or less" for more conversion as well as less short-term imprisonment. *See* *Zhonghua Minguo 90 Nian Xingfa* (中華民國 90 年刑法) [Criminal Code of 2001], Jan. 10, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6375, 2001, at 2. The reason for the legislation, *see* 90 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.5, Jan. 4, 2001, at 333.

⁸⁴ Prior to 1985, the maximum punishment for the most serious offense in the Copyright Act, the offense for career offenders, was three years imprisonment (Art. 33(c) of the Copyright Act).

⁸⁵ The reason for the legislation, *see* 72 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.4, Jan. 11, 1983, at 18.

⁸⁶ Art. 62*bis*(a) of the Trademark Act of 1983.

⁸⁷ Art. 62*bis*(b) of the Trademark Act of 1983.

⁸⁸ Art. 62*ter* of the Trademark Act of 1983.

significant criminal population.

To protect a foreign legal person's access to the ROC judiciary, the Trademark Act was revised again in 1985.⁸⁹ Similar to Article 17(c) of the Copyright Act of 1985,⁹⁰ Article 66*bis* of the Trademark Act authorized an unrecognized foreign legal person to file a complaint, a private prosecution, or a civil action in Taiwan.⁹¹

Here is the table outlining the criminal section of the 1985 Trademark Act:

Table 4-4 Criminal Provisions of the 1985 Trademark Act

Offenses & Primary Punishment	§ 62(a)(1)	unauthorized use of a mark identical with or similar to a registered mark	1. 2m to 5y imprisonment (unconvertible) 2. criminal Detention (unconvertible) 3. a fine up to 50,000 yuan 4. 1 or 2 with or without a fine up to 50,000 yuan
	§ 62(a)(2)	application of a mark identical with or similar to a registered mark to documents	1. 2m to 5y imprisonment (unconvertible) 2. criminal Detention (unconvertible) 3. a fine up to 50,000 yuan 4. 1 or 2 with or without a fine up to 50,000 yuan
	§ 62 <i>bis</i>	unauthorized use of a mark identical with or similar to an unregistered foreign famous mark	1. 2m to 3y imprisonment 2. criminal Detention 3. a fine up to 30,000 yuan 4. 1 or 2 with or without a fine up to 30,000 yuan
	§ 62 <i>ter</i>	sell, display with the intent to sell, export or import infringing goods	1. 2m to 1y imprisonment 2. criminal Detention 3. a fine up to 10,000 yuan 4. 1 or 2 with or without a fine up to 10,000 yuan
Supplementary Punishment	§ 62 <i>quater</i>	confiscation of an infringing good or product, or any facility, equipment, or article used for a trademark offense	
Procedural Rule	§ 66 <i>bis</i>	unrecognized foreign legal person's right to file a complaint or initiate a private prosecution	

Source: Compiled by the author.

Note: m: month; y: year; 1 yuan: 3 New Taiwan dollars.

⁸⁹ Zhonghua Minguo 74 Nian Shangbiao Fa (中華民國 74 年商標法) [Trademark Act of 1985], Nov. 29, 1985, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.4536, 1985, at 5.

⁹⁰ See 4.1.1.1.

⁹¹ Art. 66*bis* of the Trademark Act of 1985.

4.1.1.3. Autonomous Legislation Prior to the Special 301 Framework

Prior to the U.S. Special 301 framework, Taiwan had autonomously modernized and reformed its copyright and trademark laws. As an American commentator indicated that the autonomy represented Taiwanese elites' self-awareness of the potential of IP:

Even without the threat of Super 301, Taiwan's economic progress has generated internal pressure to harmonize its copyright system with its global trade and development policies. Perceiving its future to be closely linked to the growing information economies of the West, Taiwan is weighing copyright policies in terms of how they may promote and attract industrial activity and local authorship in high technology, thereby serving as a crucial factor in its international commercial relations. Thus, although Taiwan has been a large-scale producer and supplier of pirated products, the Taiwanese government began to show a strong commitment to intellectual property protection during the 1980s. The government's new position evolved as swiftly as Taiwan's development into a budding economic power.⁹²

Under an ideology favoring local development, the Taiwanese government established a legal framework beneficial to local interests but it also maintained some discriminatory measures that could discourage foreign IP owners. On the surface, Taiwan seemed to respond to foreign pressure by opening its door to foreigners; however, the remaining requirement for registration or reciprocal protection showed Taiwan's vigilance against foreigners. Since Taiwan's autonomous legislation was based mainly on local interests, the reforms on criminal IP law such as narrowing judges' discretion and expanding the scope of IP crimes should represent an indigenous strategy for economic development and transformation. Nevertheless, the Taiwanese government did not intensify the enforcement of the newly established criminal IP law to fill the gap between the normative regulation and rampant piracy.⁹³ Later, both Taiwan's criminal IP law and its

⁹² Lin, *supra* note 25, at 171-172.

⁹³ According the statistics of the Judicial Yuan, Taiwanese district court convicted 384, 364, 366, 311, and 355 criminal copyright defendants and 308, 209, 188, 327, and 223 criminal trademark defendants from 1993 to 1997. In 2002, 1,196 criminal copyright defendants were convicted while 560 criminal trademark defendants were convicted. See SIFAYUAN (司法院) [JUDICIAL YUAN], 2002 SIFA TONGJI NIANBAO (司法統計年報) [JUDICIAL STATISTICS YEARBOOK] 8-174, 8-175 (2003), available at <http://www.judicial.gov.tw/juds/>.

enforcement was reinforced by the U.S. Special 301 framework; however, when filling the gap between law and society with harsh criminal IP law and extensive prosecution, the strategy clashed with the newly gained judicial independence and long lasting judicial culture.

4.1.2. Copyright Legislation under the Special 301 Framework

To balance its huge trade deficit, the United States started to link trade with IP in the late 1980s. Under the so-called Special 301 framework, the United States made use of trade retaliation as leverage to force other foreign countries to establish and enforce a legal framework to protect U.S. IP rights. Because of the strong competitiveness and innovation of its computer software and motion picture industries, the United States was eager to open foreign markets and remove foreign trade barriers for its copyright products. Given its huge interests in copyright matters, the U.S. oversight over foreign copyright legislation and enforcement was most serious and sensitive. The United States kept pressing Taiwan to reinforce its system of punishments for dealing with IP piracy. Taiwan's copyright legislation during the 1990s and 2000s was therefore centered on deterrence of criminal copyright law including expanding the scope of copyright crimes, narrowing judges' discretion in sentencing, and setting specific offenses as a public crime. When struggling to reconcile U.S. demands with local interests, Taiwan tried to negotiate a compromise but efforts failed due to the unique U.S.-Taiwan political, economic, and trade relations.

4.1.2.1. Copyright Legislation in the 1990s

In the second half of the 1980s, the advent of video cassettes and recorders worsened Taiwan's copyright piracy. As one commentator observed:

Taiwan's video parlors, which have severely injured U.S. motion picture companies, offer another example of piracy. Taiwan once featured more than 1,000 miniature movie houses, locally called "MTVs." MTVs used ordinary video cassette machines to serve audiences as small as two or three people,

offering privacy, service, and a large selection of movies. Proprietors of these MTVs often showed pirated copies of movies.⁹⁴

Because most of the movies presented in MTV stores were produced by the U.S. motion pictures industry, the U.S. government expressed its great concern with MTV stores' serious piracy. The 1989 Special 301 Report placed Taiwan on the Priority Watch List and demanded Taiwan to solve the MTV piracy.⁹⁵ Following the U.S.-Taiwan Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works on June 27, 1989 (the Audiovisual Works Agreement),⁹⁶ Taiwan revised its Copyright Act in 1990 to set up an explicit rule outlawing any unauthorized presentation of motion pictures in MTV stores.⁹⁷ Because the U.S. motion picture industry was reluctant to authorize MTV stores, almost every MTV store became an illegal business.⁹⁸ While identified by the United States on the Priority Watch List in 1989, the Watch List in 1990 and 1991, and as a Priority Foreign Country in 1992, Taiwan started to crack down on illegal MTV stores to avoid trade retaliation.⁹⁹ According to one researcher, there were about 1,400 MTV stores all over Taiwan in 1989 while only 162 stores survived in 1991.¹⁰⁰

Soon after Taiwan was identified as a Priority Foreign Country by the USTR on April 29, 1992, the Legislative Yuan passed the 1992 Copyright Act on May 22, 1992.¹⁰¹ According to the

⁹⁴ Lin, *supra* note 25, at 169.

⁹⁵ The Supreme Court of Taiwan confirmed MTV's presentation of motion pictures did infringe copyright owners' right to public performance. *See* Zuigao Fayuan (最高法院) [Sup. Ct.], Jan. 22, 1990, Minguo 79 (Taishang) No. 90 Criminal Judgment (中華民國 79 年 1 月 22 日 79 年台上字第 90 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁹⁶ *Selected AIT-TECRO Agreements*, AMERICAN INSTITUTE IN TAIWAN (AIT), <http://www.ait.org.tw/en/ait-tecro-agreements.html> (last visited Jun. 28, 2013). According to the National Archives and Records Administration (77 Fed. Reg. 20056), the agreement is in force so far.

⁹⁷ Zhonghua Minguo 79 Nian Zhuzuoquan Fa (中華民國 79 年著作權法) [Copyright Act of 1990], Jan. 24, 1990, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5199, 1990, at 7.

⁹⁸ Wang Weijing (王維菁), *Zhuzuoquan yu Taiwan Yingshi Chanye de Zhengzhi Jingji Fenxi: Zhuzuoquan Fa, Yingshi Chanye yu Shichang Kongzhi Shi* (著作權與台灣影視產業的政治經濟分析：著作權法、影視產業與市場控制史) [*The Political and Economic Analysis on Copyright and Taiwan's Video and TV Industry*], XINWENXUE YANJIU (新聞學研究) [MASS COMMUNICATION RESEARCH], no.111, 2012, at 129, 149.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Zhonghua Minguo 81 Nian 6 Yue Zhuzuoquan Fa (中華民國 81 年 6 月著作權法) [Copyright Act of June

legislative materials, the main purpose of this legislation was to: (1) fix problems of the present copyright law, (2) incorporate the copyright agreement with the United States into the copyright law, (3) respond to local opinions on copyright law, and (4) comply with the GATT (General Agreement on Tariffs and Trade) standards for copyright protection.¹⁰² In fact, the representative of the Executive Yuan initialed the bilateral copyright agreement with the United States early in 1989¹⁰³ but it was not entirely ratified by the Legislative Yuan until 1993.¹⁰⁴ Nevertheless, Taiwan still amended its copyright law to embody most major clauses of the initialed agreement.

The 1992 legislation made many important changes to the copyright law. First, the new law gave foreigners reciprocal protection and removed the discriminatory requirement for registration.¹⁰⁵ Second, the new law redefined moral rights¹⁰⁶ as: (1) right of disclosure,¹⁰⁷ (2)

1992], Jun. 10, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5579, 1992, at 1.

¹⁰² The second reading legislative materials of the Copyright Act of May 22, 1992, 81 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.36, May 1, 1992, at 10. Soon after the passage on May 22, 1992, the Legislative Yuan passed another revision on June 19, 1992. In the later revision, only Article 53 of the Copyright Act was amended to expand the scope of the fair use doctrine for Braille use. Thus, the Copyright Act was revised twice in 1992. Zhonghua Minguo 81 Nian 7 Yue Zhuzuoquan Fa (中華民國 81 年 7 月著作權法) [Copyright Act of July 1992], Jul. 6, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5590, 1992, at 1.

¹⁰³ “Concerning Taiwan, the Interim Review stressed Taiwan’s ‘substantial progress’ in enforcement matters and ‘a strong commitment’ to improving the environment for protection of intellectual property rights. In particular, the USTR noted Taiwan’s initialing of a bilateral copyright agreement, issuance of a senior-level public policy statement stressing the importance of intellectual property protection, establishment of regional task forces of police and prosecutors, and imposition of sanctions against infringers.” Judith H. Bello & Alan F. Holmer, “*Special 301*”: *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT’L L.J. 259, 271 (1990). The Agreement was initialed in July 1989, *id.* at 271 n.91.

¹⁰⁴ *Selected AIT-TECRO Agreements*, AIT, <http://www.ait.org.tw/en/ait-tecro-agreements.html> (last visited Jun. 28, 2013). Taiwan’s Legislative Yuan reserved eight clauses in the copyright agreement because it did not agree with giving an author exclusive right to parallel importation and providing retroactive protection for copyrighted works falling within public domain in light of former copyright law. The discussion on the eight reserved clauses in the Legislative Yuan, *see* the committee consideration legislative materials, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.11, Feb. 26, 1993, at 3-12.

¹⁰⁵ Art. 4 of the Copyright Act of May 1992.

¹⁰⁶ *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353 (2006) (describing and analyzing the civil law concept of moral rights).

¹⁰⁷ “The author of a work shall enjoy the right to publicly disclose the work.” Art. 15(a) of the Copyright Act of May 1992.

right of attribution,¹⁰⁸ and (3) right of integrity.¹⁰⁹ Third, mirroring the Berne Convention,¹¹⁰ the term for economic right protection was extended to “no less than the life of the author and fifty years after his or her death.”¹¹¹ Fourth, with reference to Section 107 of the U.S. copyright law,¹¹² the new law installed a general fair use doctrine with four factors in determining whether or not a particular use was fair.¹¹³ Fifth, a compulsory license for Chinese translation could be granted by the government.¹¹⁴ Sixth, the new law reclassified copyright crimes, expanded the scope of copyright crimes, and raised punishment for copyright offenses.

Article 91 punished the infringement of an author’s economic right to reproduction, while Article 92 punished the infringement of an author’s other economic rights. Article 91(a) still dealt with unauthorized reproduction of a copyrighted work.¹¹⁵ The new law distinguished Article 91(b) from 91(a) to punish the same conduct but with the intent to sell or rent. The punishment for the Article 91(b) offense was six-month to five-year imprisonment either with or without a fine, which was almost the same as the burglary offense in Article 321 of the Criminal Code.¹¹⁶ Article 92 punished an offender who used public recitation,¹¹⁷ public broadcasting,¹¹⁸

¹⁰⁸ “The author of a work shall have the right to indicate its name, a pseudonym, or no name on the original or copies of the work, or when the work is publicly disclosed.” Art. 16(a) of the Copyright Act of May 1992.

¹⁰⁹ “The author shall enjoy the right to keep the integrity of his or her work.” Art. 17(a) of the Copyright Act of May 1992.

¹¹⁰ Art. 7(1) of the Berne Convention.

¹¹¹ Art. 30(a) of the Copyright Act of May 1992. Prior to 1992, the term was an author’s lifetime plus 30 years.

¹¹² 17 U.S.C. § 107.

¹¹³ Art. 65 of the Copyright Act of May 1992.

¹¹⁴ Art. 67(a) of the Copyright Act of May 1992 provided that a compulsory license for a work’s Chinese translation could be granted by the government agency if a work, one year after its first publication, had not been translated into Chinese anywhere in the world except the Mainland China.

¹¹⁵ Art. 91(a) of the Copyright Act of May 1992.

¹¹⁶ Art. 91(b) of the Copyright Act of May 1992.

¹¹⁷ “Public recitation means to communicate the content of a work to the public by spoken words or other means.” Art. 3(a)(6) of the Copyright Act of May 1992.

¹¹⁸ “Public broadcast means to communicate to the public the content of a work through sounds or images by means of transmission of information by a broadcasting system of wire, wireless, or other equipment.” Art. 3(a)(7) of the Copyright Act of May 1992.

public presentation,¹¹⁹ public performance,¹²⁰ public display,¹²¹ adaption,¹²² rental,¹²³ or other similar means to infringe an author's economic right with two-month to three-year imprisonment either with or without a fine.

The new law also increased punishment for the offense for career offenders. Whoever took either one of the offenses enumerated in Article 91, 92, and 93, as a career should be sentenced to one-year to seven-year imprisonment either with or without a fine.¹²⁴ Prior to 1992, the offense for career offenders in the copyright law was limited to economic right infringement.¹²⁵ Because Article 93(a)(1) of the new law punished moral right infringements, the new law therefore expanded the scope of the offense for career offenders to moral right infringement.

In addition, the new law created new offenses for violation of a fair use. According to Article 59(a) of the 1992 Copyright Act, whoever owned a legal copy of computer software had the right to adapt the software for the sole purpose of accommodating it to a computer, or reproduced it for the sole purpose of backup.¹²⁶ Article 59(b) provided that the owner should destroy the adapted or reproduced copy if he or she assigned the original legal copy to another person.¹²⁷ Also, Article 64 required those who invoked a fair use to indicate the source of the

¹¹⁹ "Public presentation means to use single- or multiple-unit audiovisual devices, or other methods of transmitting images, to communicate the content of a work to the public at the place of transmission or at a specified place outside the place of transmission." Art. 3(a)(8) of the Copyright Act of May 1992.

¹²⁰ "Public performance means to act, dance, sing, play a musical instrument, or use other means to communicate the content of a work to a public that was present at the scene." Art. 3(a)(9) of the Copyright Act of May 1992.

¹²¹ "Public display means to display the content of a work to the public." Art. 3(a)(10) of the Copyright Act of May 1992.

¹²² "Adaptation means to create another work based upon a preexisting work by translation, musical arrangement, revision, filming, or other means." Art. 3(a)(11) of the Copyright Act of May 1992.

¹²³ An author of a work has the exclusive right to rent the work. Art.29 of the Copyright Act of May 1992.

¹²⁴ Art. 94 of the Copyright Act of May 1992.

¹²⁵ Art. 40 of the Copyright Act of 1985.

¹²⁶ Art. 59(a) of the Copyright Act of May 1992.

¹²⁷ Art. 59(b) of the Copyright Act of May 1992.

used work.¹²⁸ A violator of Article 59(b) or 64 was subject to a fine of up to 50,000 NT.¹²⁹

Except for a few new offenses,¹³⁰ the 1992 Copyright Act raised the overall punishment for copyright infringement to a certain extent. First of all, the most serious offense was still the offense for career offenders. While the maximum punishment was raised from five-year to seven-year imprisonment, the minimum punishment was increased from six-month to one-year imprisonment. The punishment was more serious than that of burglary.¹³¹ Secondly, prior to 1992, apart from the offense for career offenders, all offenses in the copyright law were convertible because their maximum imprisonment did not exceed three years.¹³² Pursuant to Article 41(a) of the Criminal Code at that time, a sentence to not more than six months imprisonment or criminal detention could be converted into a fine if the maximum imprisonment

¹²⁸ Art. 64 of the Copyright Act of May 1992.

¹²⁹ Art. 96 of the Copyright Act of May 1992.

¹³⁰ Art. 93(a)(2) dealt with an author's right to exportation on an article reproduced under a compulsory license while Art. 93(a)(3) secured an author's right to distribution, importation, and utilization. The punishment for the offenses in Art. 93 was two-month to two-year imprisonment either with or without a fine. Art. 93(a)(2) punished the violation of Art. 70, which prohibited the exportation of a translation or sound recording reproduced under a compulsory license. Art. 93(a)(3) punished copyright infringements by either one of the means enumerated in the Art. 87. Art. 87(a)(2) provided that whoever with the knowledge that an article was a result of copyright or plate right infringement should not: (1) distribute the infringing article; (2) possess the infringing article with the intent to distribute it; or (3) assign the infringing article with the intent to profit. Art. 87(a)(3) provided that the importation of a reproduced article would be an infringement if: (1) the reproduction infringed any copyright or plate right in the territory of the Republic of China; and (2) the importation was under the intent of distribution in the territory of the Republic of China. Art. 87(a)(4) provided that whoever with the knowledge that a reproduced copy of computer software was a result of economic right infringement should not utilize it for direct profit. The new law created new offenses for the violation of a fair use. According to Art. 59(a) of the 1992 Copyright Act, whoever owned a legal copy of computer software had the right to adapt the software for the sole purpose of accommodating it to a computer, or reproduced it for the sole purpose of backup. Art. 59(b) provided that the owner should destroy the adapted or reproduced copy if he or she assigned the original legal copy to another person. Also, Art. 64 required those who invoked a fair use to indicate the source of the used work. A violator of Art. 59(b) or 64 was subject to a fine of up to 50,000 NT. In addition to economic right infringement, the 1992 Copyright Act criminalized moral right infringements with 2-month to 2-year imprisonment either with or without a fine. Art. 93(a)(1) punished the infringement of the redefined moral rights in Art. 15 to 17. Art. 93(a)(3) punished the violation of Art. 87(a)(1), which provided that whoever should not utilize an article by the means that would injure the author's reputation. Corresponding to the protection for an author's moral rights after his or her death in Art. 18, Art. 95(a)(1) punished the violation of Art. 18 but the punishment was less serious than that for moral right infringements during an author's lifetime.

¹³¹ Art. 321(a) of the Criminal Code. The punishment for the offense is 6-month to 5 year imprisonment either with or without a fine.

¹³² See Table 4-3.

for the offense was not more than three years imprisonment. The new 1992 law, by setting the maximum punishment for unauthorized reproduction with the intent to sell or rent at five-year imprisonment, entirely excluded any possibility of conversion for the offense.

Here is the table outlining the criminal section of the 1992 Copyright Act:

Table 4-5 Criminal Provisions of the 1992 Copyright Act

Offenses & Primary Punishment	Economic Rights	Right to Reproduction	§ 91(a): unauthorized reproduction of a copyrighted work	1. 6m to 3y imprisonment 2. with or without a fine up to 200,000 NT
			§ 91(b): § 91(a) with the intent to sell or rent	1. 6m to 5y imprisonment 2. with or without a fine up to 300,000 NT
		Right to: 1. Public Recitation 2. Public Broadcasting 3. Public Presentation 4. Public Performance 5. Public Display 6. Adaption 7. Rental	§ 92(a): making use of either of the following methods to infringe copyright: 1. public recitation 2. public broadcasting 3. public presentation 4. public performance 5. public display 6. adaption 7. rental	1. 2m to 3y imprisonment 2. with or without a fine up to 150,000 NT
		Right to Exportation	§ 93(a)(2): violation of § Art. 70 (exportation of an copy reproduced under a compulsory license)	1. 2m to 2y imprisonment 2. with or without a fine up to 100,000 NT
		Right to Distribution	§ 93(a)(3): violation of Art. 87(a)(2) (distribution of an infringing article with the knowledge of the infringement, display or possession of an infringing article with the knowledge of the infringement and with the intent to distribute, or assignment of an infringing article with the knowledge of the infringement and with the intent to profit)	1. 2m to 2y imprisonment 2. with or without a fine up to 100,000 NT
		Right to Importation	§ 93(a)(3): violation of Art. 87(a)(3)	1. 2m to 2y imprisonment

		(importation of an article which was reproduced without a copyright or plate right owner's authorization)	2. with or without a fine up to 100,000 NT
	Right to Utilization for Computer Software	§ 93(a)(3): violation of Art. 87(a)(4) (commercial use of a reproduced article which was a result of economic right infringement of computer software with the knowledge of the infringement)	1. 2m to 2y imprisonment 2. with or without a fine up to 100,000 NT
		§ 94: career offender for a § 91, § 92, or § 93(a)(2)-(3) offense	1. 1y to 7y imprisonment 2. with or without a fine up to 450,000 NT
		§ 95(a)(2)-(3): violation of Art. 79 or 87(a) to infringe plate rights	1. 2m to 1y imprisonment 2. with or without a fine of 50,000 NT
	Moral Rights	§ 93(a)(1): moral right infringement during the author's lifetime	1. 2m to 2y imprisonment 2. with or without a fine up to 100,000 NT
		§ 94: career offender for a § 93(a)(1) offense	1. 1y to 7y imprisonment 2. with or without a fine of 450,000 NT
		§ 95(a)(1): moral right infringement after the author's death	1. 2m to 1y imprisonment 2. with or without a fine up to 50,000 NT
	Violation of Fair Use	§ 96: violation of Art. 59(b) or 64 (violation of fair use: assignment of computer software without destroying the adapted or backup copy, or fair use without disclosing the source)	a fine up to 50,000 NT
Supplementary Punishment	§ 98: confiscation of articles used for or gained by committing a copyright offense from § 91 to 95		
Extension of Liability	§ 101: criminal liability for a legal person		
Procedural Rule	§ 100: prosecution upon a direct victim's complaint but for § 94, 95(a)(1), and 97 offenses		
	§ 102: unrecognized foreign legal person's right to file a complaint or initiate a private prosecution		

Source: Compiled by the author.

Note: m: month; y: year.

Though the 1992 Copyright Act, with reference to Article 14(a) of the initialed U.S.-Taiwan

Copyright Protection Agreement,¹³³ already provided that whoever, with the intent of distribution, imported reproduced copies of a work, should be liable for copyright infringement if in Taiwan the reproduction infringed the author's exclusive right to reproduction,¹³⁴ the Taiwanese government in a later interpretation indicated that Taiwan only prohibited the importation of a pirated work, not an authorized copy in the foreign country.¹³⁵ From Taiwan's perspective, if the copyright law prohibited all parallel importation and gave foreign copyright owners the exclusive right to importation, foreign firms would be able to monopolize the importation and price of foreign copyright products and Taiwan had to pay more for advanced technology and knowledge.¹³⁶ Therefore, Taiwan's interpretation was to alleviate the impact brought by the copyright law in favor of foreign copyright owners. On the other side, to secure the price discrimination measure of U.S. copyright industry from parallel importation, the United States immediately expressed its dissatisfaction with Taiwan's unilateral interpretation and warned Taiwan that it would give rise to a further Special 301 action.¹³⁷ In response to the

¹³³ Art. 14(a) of the Agreement for the Protection of Copyright between the American Institute in Taiwan and the Coordination Council for North American Affairs provides, "Infringing copies of a work protected in accordance with this Agreement shall be liable to seizure in either territory where such work enjoys legal protection. An infringing copy shall mean a copy of such work that infringes any of the exclusive rights provided in domestic law and in this Agreement including a copy which is imported into the territory represented by either Party where, if made in such territory by the importer, would constitute an infringement of the copyright." *Selected AIT-TECRO Agreements*, AIT, <http://www.ait.org.tw/en/ait-tecro-agreements.html> (last visited Jun. 28, 2013).

¹³⁴ Art. 87(a)(3) of the Copyright Act of 1992.

¹³⁵ Zhonghua Minguo 81 Nian 11 Yue 3 Ri Neizhengbu Tai (81) Nei Zhu Zi Di 8186845 Hao Han (中華民國 81 年 11 月 3 日內政部台(81)內著字第 8186845 號函) [Ministry of Interior, Nov. 3, 1992, (Tai (81) Neizhu) No. 8186845 Interpretation]. According to the legislative materials of the 1992 Copyright Act, the chair of the Copyright Committee of the Ministry of Interior, Wang Quanlu (王全祿), explained the parallel importation provision in the Legislative Yuan on Oct. 7, 1991, "Article 87(a)(3) is about parallel importation. For example, someone made unauthorized copies in Singapore and then imported the pirated copies into Taiwan." See the legislative materials for committee consideration of the Copyright Act of May 1992, 80 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.82, Oct. 7, 1991, at 286.

¹³⁶ See XIE MINGYANG (謝銘洋), ZHIHUICAICHANQUAN ZHI ZHIDU YU SHIWU (智慧財產權之制度與實務) [INTELLECTUAL PROPERTY SYSTEM AND PRACTICE] 19-20 (1995) (noting the negative effects caused by the ban on parallel importation in Taiwan's copyright law).

¹³⁷ The Bureau of National Affairs, *Intellectual Property: Taiwan, Facing Section 301 Action, Approves Copyright Reform Legislation*, 10 Int'l Trade Rep. (BNA) 701 (Apr. 28, 1993); 1 LUO MINGTONG (羅明通), *supra* note 21, at 70-71.

pressure, Taiwan soon passed an amendment to the Copyright Act in 1993 to recognize a copyright owner's right to importation.¹³⁸ After 1993, any unauthorized parallel importation was treated as illegal distribution and would be subject to the criminal punishment of Article 93(a)(3) except for a very limited quantity of copies for personal, governmental, or non-profit use.¹³⁹

4.1.2.2. Copyright Legislation in the 2000s

Compared with the copyright reforms in the 1990s focusing on imposing harsh criminal penalties, the copyright reforms in the 2000s targeted ubiquitous piracy associated with digital technology and the Internet. Owing to the unique political and economic ties between the United States and Taiwan, Taiwan's accession to the WTO in 2002 did not change the way that the United States utilized its Special 301 to influence Taiwan's copyright legislation. Similar to the ROC legislature's reservation from the Agreement for the Protection of Copyright between the American Institute in Taiwan and the Coordination Council for North American Affairs (U.S.-Taiwan Copyright Agreement)¹⁴⁰ in the early 1990s, the Taiwanese legislature's attempt to develop an autonomous legal framework in the 2000s backfired.

Following the adoption of the World Intellectual Property Organization (WIPO) Copyright

¹³⁸ Zhonghua Minguo 82 Nian Zhuzuoquan Fa (中華民國 82 年著作權法) [Copyright Act of June 1993], Apr. 24, 1993, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5709, 1993, at 1, art. 87(a)(3)-(4). See also Zhang Zhongxin (章忠信), *Xin Zhuzuoquan Fa "Sanbuquan" Xiangguan Guiding zhi Jiantao* (新著作權法「散布權」相關規定之檢討) [Examination on Right of Distribution and Related Rules in New Copyright Law], 2 ZHENGDA ZHIHUICAICHAN PINGLUN (政大智慧財產評論) [NCCU INTELL. PROP. REV.], no.1, 2004, at 49, 67-68 (noting the backgrounds of the legislation).

¹³⁹ Art. 87bis of the Copyright Act of 1993. The interpretation of right to importation, see XIAO XIONGLIN (蕭雄淋), ZHUZUOQUAN FA LUN (著作權法論) [COPYRIGHT LAW] 168 (2007); 1 LUO MINGTONG (羅明通), *supra* note 21, at 595.

¹⁴⁰ *Selected AIT-TECRO Agreements*, AIT, <http://www.ait.org.tw/en/ait-tecro-agreements.html> (last visited Jun. 28, 2013). Taiwan's Legislative Yuan reserved eight clauses in the copyright agreement because it did not agree with giving an author exclusive right to parallel importation and providing retroactive protection for copyrighted works falling within public domain in light of former copyright law. The discussion on the eight reserved clauses in the Legislative Yuan, see the committee consideration legislative materials, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.11, Feb. 26, 1993, at 3-12.

Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 1996,¹⁴¹ the United States enacted the Digital Millennium Copyright Act (DMCA) in 1998 in response to a surge of copyright infringement as a result of digitalization and the Internet.¹⁴² Since 2001, Taiwan had been upgraded by the United States from the Special 301 Watch List to Priority Watch List due to its considerable exportation of pirated works in the form of optical media such as CDs. After its accession to the WTO in 2002, Taiwan also sought a free trade agreement with the United States.¹⁴³ With the leverage that those negotiations gave it, the United States could insist that Taiwan transplant international and U.S. legislation into Taiwan's copyright law¹⁴⁴ and provide more criminal protection against piracy caused by digital technology and the Internet.¹⁴⁵ At the same time, the Taiwanese society was facing polarized opinions on criminal copyright policy. The National Cheng Kung University (NCKU) MP3 Incident in April 2001 in which the police raided a student dormitory of NCKU because a few students had engaged in music and video MP3 file-sharing triggered a student movement that challenged the justification of criminal copyright law.¹⁴⁶ On the other hand, given the lost profits caused by Taiwan's

¹⁴¹ WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/94 [hereinafter WIPO Copyright Treaty]; WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/95 [hereinafter WIPO Phonograms Treaty]; Agreed Statements Concerning the WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/96 [hereinafter Agreed Statements]. For a general introduction, see Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

¹⁴² Digital Millennium Copyright Act, Pub. L. 105-304, § 101, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

¹⁴³ Bureau of National Affairs, *Intellectual Property: USTR Holds Intellectual Property Talk with Taiwan, Setting Off Talk of Possible FTA*, 19 INT'L TRADE REP. (BNA) 1786 (Oct. 17, 2002); *Intellectual Property: Bilateral Agreements: U.S.-Taiwan Free Trade Agreement Several Years Away, U.S. Official Says*, 20 INT'L TRADE REP. (BNA) 276 (Feb. 6, 2003).

¹⁴⁴ Zhang Zhongxin (章忠信), *Jiushier Nian Xin Xiuzheng Zhuzuoquan Fa Jianxi* (九十二年新修正著作權法簡析) [Brief Analysis on the Newly Revised 2003 Copyright Act], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [Taiwan L. Rev.], no.103, 2003, at 103, 105-106.

¹⁴⁵ *Id.* at 103.

¹⁴⁶ *Students Rally Behind Colleagues Targeted in Police Crackdown*, TAIPEI TIMES, Apr. 15, 2001, at 2, available at <http://www.taipetimes.com/News/local/archives/2001/04/15/0000081761> (last visited Jun. 28, 2013). In April, 2001, several police officers and a prosecutor, following an anonymous letter of accusation, raided a dormitory of the National Cheng Kung University (國立成功大學) in Tainan City (臺南市). The raid was successful but flawed. Although a few computers containing pirated songs and movies were seized, the search was conducted without any

rampant piracy, Taiwan's sound recording industry and pop music singers marched in 2002 calling for stronger criminal copyright protection.¹⁴⁷ Thus, the intentions behind the 2003 Copyright Act contained different or even conflicting perspectives.¹⁴⁸

First, the new law confirmed a copyright owner's right to temporary reproduction¹⁴⁹ and a right to public transmission.¹⁵⁰ The former meant that though not permanently fixed in a computer, an unauthorized temporary copy in the internal RAM (Random Access Memory) of a computer was subject to criminal and civil liability for unauthorized reproduction.¹⁵¹ For example, when watching an infringing online streaming video or operating an infringing online software, a user would be liable for copyright infringement due to the unauthorized temporary copy automatically being reproduced in his or her computer.¹⁵² The latter meant that only a copyright owner had the exclusive right to put his or her copyrighted work on the Internet for others to download or enjoy the work on demand. Second, the Legislative Yuan provided legal protection for Digital Rights Management (DRM),¹⁵³ but deliberately skipped the Technological

search warrant. When 14 students were under investigation, a student movement was organized to question the action of the government. See Chen Qinglin (陳慶霖), *Benxiao Xuesheng Yishe Qinfan Zhuzuoquan Fa Shijian Shilu* (本校學生疑涉侵犯著作權法事件實錄) [*Memoir on the NCKU Students Copyright Event*], NATIONAL CHENG KUNG UNIVERSITY, <http://www.ncku.edu.tw/~lifeguid/chinese/soccer/soccer/s02.doc> (last visited Jun. 28, 2013).

¹⁴⁷ Joyce Huang, *Taiwan's music industry mourns lost profits*, TAIPEI TIMES, Apr. 5, 2002, at 1, available at <http://www.taipetimes.com/News/front/archives/2002/04/05/0000130587> (last visited Jun. 28, 2013).

¹⁴⁸ *Zhonghua Minguo 92 Nian Zhuzuoquan Fa* (中華民國 92 年著作權法) [Copyright Act of 2003], Jul. 9, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6532, 2003, at 43.

¹⁴⁹ Art. 3(a)(5) of the Copyright Act of 2003.

¹⁵⁰ Art. 3(a)(10) of the Copyright Act of 2003.

¹⁵¹ The U.S. copyright law on temporary reproduction, see Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245 (2001).

¹⁵² The examples, see Lan Hongren (藍弘仁), *Woguo Zhuzuoquan Fa Guanyu "Zhanshixing Chongzhi" Xiuzheng Duiyu Diannaochengshi Zhuzuo Yinxiang zhi Pingxi* (我國著作權法關於「暫時性重製」修正對於電腦程式著作影響之評析) [*Comment and Analysis on the Influence of the Revised Temporary Reproduction in Taiwan's Copyright Law on Computer Software Work*], 105 YUEDAN FAXUE Zazhi (月旦法學雜誌) [TAIWAN L. REV.], no.105, 2004, at 108, 117.

¹⁵³ “‘Electronic rights management information’ means electronic information presented on the original or copies of a work, or at the time of communication of content of a work to the public, sufficient to identify the work, the name of the work, the author, the economic rights holder or person licensed thereby, and the period or conditions of exploitation of the work, including numbers or symbols that represent such information.” Art. 3(a)(17) of the Copyright Act of 2003.

Protection Measures (TPM) proposed by the Executive Yuan.¹⁵⁴ While prescribing that the DRM information attached by a copyright owner onto copies of a copyrighted work should not be removed or altered,¹⁵⁵ Taiwanese legislators turned down the TPM proposal that any circumvention of technological protection measures used by copyright owners to control access to their works should be subject to criminal and civil liability for fear that it might overprotect foreign copyright owners' price discrimination strategy and thereby hindered free flow of information.¹⁵⁶ Third, the new law raised the maximum imprisonment for some specified copyright crimes but decriminalized a few copyright offenses and tried to make the overall criminal copyright law more reasonable.¹⁵⁷

¹⁵⁴ The TPM provisions were later added to the Copyright Act in 2004. Art. 3(a)(18) of the Copyright Act of 2004. "The growth of digital media and the expansion of global electronic communications networks have revolutionized the ways in which information is created, distributed, and accessed. Although these changes have made possible many new forms of creativity and processes for exchanging ideas, they have also dramatically facilitated the unauthorized reproduction and distribution of copyrighted works. The ensuing mass copyright infringement threatened traditional business models in the music, film, broadcasting, and video game industries. In an attempt to stifle such piracy, the media industry has implemented various strategies with a predilection for technological solutions and for the toughening of copyright laws. Indeed, content producers have embedded technologies in media software and hardware to control the way in which consumers can access, use, and copy digital media. These technologies are commonly known as 'Digital Rights Management' systems (DRMs) but are referred to in legal instruments as 'Technological Protection Measures' (TPMs)." Jane Winn & Nicolas Jondet, *A New Deal for End Users? Lessons from a French Innovation in the Regulation of Interoperability*, 51 WM. & MARY L. REV. 547, 550 (2009). In addition, "[d]igital rights management (DRM) is a catch-all term referring to any of several technologies used to enforce pre-defined limitations on the use and transfer of copyrighted digital content. The content most commonly restricted by DRM includes music, visual artwork, computer and video games and movies, but DRM can be applied to any digital content. First-generation DRM software merely sought to control copying. Second-generation DRM schemes seek to control viewing, copying, printing, altering and everything else that can be done with digital content... In addition, DRM usually includes a set of legal permissions, frequently expressed as a licensing agreement, which establish what one can and cannot do with the work. The term digital rights management is also confused with the term technical protection measures (TPM). This term refers to technologies that control and/or restrict the use of and access to digital media content on electronic devices with such technologies installed. Increasingly, DRM relies on TPMs to implement these controls and restrictions." *Fact Sheet: Digital Rights Management and Technical Protection Measures*, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, http://www.priv.gc.ca/resource/fs-fi/02_05_d_32_e.asp (last visited Jun. 28, 2013).

¹⁵⁵ Art. 80bis of the Copyright Act of 2003.

¹⁵⁶ The discussion on this issue in the legislative, see the committee consideration legislative materials, 92 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.26, Apr. 23, 2003, at 363-366; Zhang Zhongxin (章忠信), *supra* note 144, at 118; Feng Zhenyu (馮震宇), *Shuwei Neirong zhi Baohu Yu Keji Baohu Cuoshi—Falü, Chanye yu Zhengce De Kaoliang* (數位內容之保護與科技保護措施—法律、產業與政策的考量) [*Protection for Digital Contents and Technological Protection Measures*], YUEDAN FAXUE Zazhi (月旦法學雜誌) [TAIWAN L. REV.], no.105, 2004, at 68, 69.

¹⁵⁷ For a general introduction of the legislation, see 1 LUO MINGTONG (羅明通), *supra* note 21, at 91-92; Zhang

To quell the U.S. accusation that Taiwan was one of the major sources of global optical media piracy,¹⁵⁸ the new law treated copyright infringement involving optical discs as an aggravated offense as well as a public crime. Two extra offenses were added to the copyright law and were punished more seriously. Article 91(c) punished unauthorized reproduction of a copyrighted work by duplicating an optical disc¹⁵⁹ and Article 91bis(c) punished unlawful distribution of an infringing optical disc.¹⁶⁰ Both offenses, together with the offense for career offenders, were the only public crimes in the copyright law.¹⁶¹ During the legislation, some legislators in favor of music and movie industries introduced a bill that tried to treat most of copyright offenses as a public crime but failed.¹⁶² Besides, the new law increased the minimum and maximum amount of every fine in all offenses by three to ten times,¹⁶³ and criminalized the conduct which removed or altered DRM information.¹⁶⁴

Nonetheless, the 2003 Copyright Act made a few surprising changes. First, the new law not only redefined commercial-scale and non-commercial-scale offenses but also lowered the minimum imprisonment for all offenses. Prior to 2003, any unauthorized reproduction was punishable, and commercial-scale and non-commercial-scale offenses were separated in order to increase punishment for the former. The requirement for the establishment of a commercial-scale offense was “the intent to sell or rent.”¹⁶⁵ The new law replaced “the intent to sell or rent” with

Zhongxin (章忠信), *supra* note 144, at 113-116.

¹⁵⁸ Office of the USTR, *2000 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, <http://www.keionline.org/ustr/2000special301> (last visited Jun. 28, 2013).

¹⁵⁹ Art. 91(c) of the Copyright Act of 2003.

¹⁶⁰ Art. 91bis(c) of the Copyright Act of 2003.

¹⁶¹ Art. 100 of the Copyright Act of 2003. A prosecutor had to investigate and prosecute the crime even without a victim's complaint.

¹⁶² The bills, *see* the first reading legislative materials, 91 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.30, Apr. 30, 2002, at 183-187; 91 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.33, May 10, 2002, at 422-426.

¹⁶³ Zhang Zhongxin (章忠信), *supra* note 144, at 113.

¹⁶⁴ Art. 96bis of the Copyright Act of 2003.

¹⁶⁵ The commercial-scale offenses, *see* Art. 91(b) of the Copyright Act of 1992.

“the intent to profit” to expand the scope of a commercial-scale offense because a consideration in a transaction could easily establish the intent to profit.¹⁶⁶ On the other hand, the new law lowered the minimum imprisonment from six-month to two-month for both commercial-scale and non-commercial-scale unauthorized reproduction offenses. Prior to 2003, the minimum and maximum imprisonment term for non-commercial unauthorized reproduction was six months and three years¹⁶⁷ and for commercial unauthorized reproduction six months and five years.¹⁶⁸ Since the six-month minimum imprisonment was to narrow judges’ discretion in sentencing a defendant to a convertible jail term, the new law that lowered the minimum imprisonment to two months in fact restored judges’ discretion.¹⁶⁹

Second, prior to 2003, statutory primary punishment for every copyright offense was imprisonment either with or without a fine.¹⁷⁰ As mentioned in Chapter 2, there are three basic statutory primary penalties in Taiwan: imprisonment, criminal detention, and a fine. According to the definition in the Criminal Code, imprisonment is confinement for at least two months and criminal detention is confinement less than 60 days. Thus, a copyright offender should be sentenced to at least two-month confinement before 2003. The 2003 Copyright Act added criminal detention as one of statutory primary penalties and gave judges more discretion in sentencing.¹⁷¹

Third, the conversion rule in the Criminal Code was amended in 2001.¹⁷² Before 2001, a

¹⁶⁶ See the second reading legislative materials, 91 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.30, Apr. 30, 2002, at 183-187.

¹⁶⁷ Art. 91(a) of the Copyright Act of 1992.

¹⁶⁸ Art. 91(b) of the Copyright Act of 1992.

¹⁶⁹ The reason for the legislation, see the first reading legislative materials, 91 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.45, Jun. 18, 2002, at 269, 295, 296; Zhang Zhongxin (章忠信), *supra* note 144, at 114.

¹⁷⁰ The only exception was the offense for violation of fair use in Art. 96 of the Copyright Act of 1992.

¹⁷¹ Zhang Zhongxin (章忠信), *supra* note 144, at 114-115. After the revision, criminal detention became one of the options for sentencing except for the offense for career offenders.

¹⁷² Zhonghua Minguo 90 Nian Xingfa (中華民國 90 年刑法) [Criminal Code of 2001], Jan. 10, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6375, 2001, at 2.

sentence to not more than six-month imprisonment or criminal detention could be converted into a fine if the maximum punishment of the offense was not more than three-year imprisonment. The requirement for an offense with three-year maximum imprisonment was changed to five-year in order to increase conversion and decrease short-term imprisonment. This legislation was very critical to criminal copyright law because almost all copyright offenses became convertible after the 2001 revision.¹⁷³ After the 2001 Criminal Code expanded judges' discretion in sentencing, the 2003 Copyright Act did not raise the minimum or maximum imprisonment for copyright offenses correspondingly. Thus, the overall severity of criminal copyright law decreased.

Fourth, with regard to the rigidity of criminal copyright law, the new law reduced it by decriminalizing some non-commercial copyright infringement, all moral right infringement, some plate right infringement, and parallel importation (gray market).¹⁷⁴ Prior to 2003, regardless of the quality or quantity of copyright infringement, almost every copyright infringement was criminalized. With reference to the criminalization standards in the U.S.

¹⁷³ Only the offense for career offenders was unconvertible because the minimum imprisonment was one-year while the maximum imprisonment was seven-year.

¹⁷⁴ Zhang Zhongxin (章忠信), *supra* note 144, at 114-115. The new law, by decriminalizing parallel importation, subjected unauthorized parallel importation only to civil liability though it might raise tension with Article 14(1) of the 1993 U.S.-Taiwan Copyright Protection Agreement that required Taiwan to outlaw unauthorized parallel importation. According to the legislative materials though Article 14(1) of the 1993 U.S.-Taiwan Copyright Protection Agreement required Taiwan to outlaw unauthorized parallel importation, it did not articulate whether or not unauthorized parallel importation should be subject to criminal liability. Given that the overall software price in Taiwan was much higher than that in other countries due to the rigid restriction on unauthorized parallel importation, the legislature, therefore, decriminalized unauthorized parallel importation and subjected it only to civil liability. *See* LINIAN ZHUZUOQUAN FAGUI HUIBIAN ZHUANJI (歷年著作權法規彙編專輯) [COLLECTION OF HISTORICAL COPYRIGHT LAWS], *supra* note 13, at 430. Art. 14(a) of the Copyright Agreement provides, "Infringing copies of a work protected in accordance with this Agreement shall be liable to seizure in either territory where such work enjoys legal protection. An infringing copy shall mean a copy of such work that infringes any of the exclusive rights provided in domestic law and in this Agreement including a copy which is imported into the territory represented by either Party where, if made in such territory by the importer, would constitute an infringement of the copyright." *Selected AIT-TECRO Agreements*, AIT, <http://www.ait.org.tw/en/ait-tecro-agreements.html> (last visited Jun. 28, 2013).

copyright law,¹⁷⁵ the new law not only distinguished non-commercial-scale infringement but also criminalized non-commercial-scale infringement under either of the following circumstances: (1) the total number of reproduced copies was more than five, or (2) the total retail value of infringed copies was more than 30,000 NT.¹⁷⁶

Overall, the 2003 Copyright Act demonstrated Taiwan's efforts to develop its copyright law autonomously. The new law tried to balance different interests in the Taiwanese society, and strike a balance between copyright protection and free flow of information.¹⁷⁷ Taiwanese legislators also tried to reduce the rigidity of the prior criminal copyright law. However, the backlash from the United States soon pushed them back to a more rigid approach.

Table 4-6 Criminal Provisions of the 2003 Copyright Act

Offenses & Primary Punishment	Right to Reproduction	§ 91(a): reproduction of a work with the intent to profit to infringe others' economic rights	1. 2m to 5y imprisonment 2. criminal detention 3. 1 or 2 with or without a fine from 200,000 to 2 million NT
		§ 91(b): reproduction of a work without the intent to profit but for certain quality or quantity to infringe others' economic rights	1. 2m to 3y imprisonment 2. criminal detention 3. a fine up to 750,000 NT 4. 1 or 2 with or without a fine up to 750,000 NT
		§ 91(c): § 91(a) involved with optical discs	1. 2m to 5y imprisonment 2. criminal detention 3. 1 or 2 with or without a fine from 500,000 to 5 million NT
	Right to Distribution ¹⁷⁸	§ 91bis(a): assignment of the ownership of an original work or its copy with the intent to	1. 2m to 3y imprisonment 2. criminal detention 3. a fine up to 750,000 NT

¹⁷⁵ 17 U.S.C. § 506(a)(1) provides, "Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18 if the infringement was committed —(A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution."

¹⁷⁶ Art. 91(b), 91bis(b), 92(b), and 93(b) of the Copyright Act of 2003. Zhang Zhongxin (章忠信), *supra* note 144, at 114.

¹⁷⁷ At least one commentator indicated that the legislators' passion, though tried to make the criminal punishment more reasonable, lowered the quality and consistency of the copyright law. See Zhang Zhongxin (章忠信), *supra* note 144, at 119.

¹⁷⁸ Not limited to an infringing article.

	profit to infringe others' economic rights	4. 1 or 2 with or without a fine up to 750,000 NT
	<p>§ 91bis(b):</p> <p>1. assignment of the ownership of an original work or its copy without the intent to profit but for certain quality or quantity to infringe others' economic rights</p> <p>2. public display or possession of an original work or its copy without the intent to profit but for certain quality or quantity to infringe others' economic rights</p>	<p>1. 2m to 2y imprisonment</p> <p>2. criminal detention</p> <p>3. a fine up to 500,000 NT</p> <p>4. 1 or 2 with or without a fine up to 500,000 NT</p>
	§ 91bis(c): § 91bis(a) involved with optical discs	<p>1. 2m to 3y imprisonment</p> <p>2. criminal detention</p> <p>3. 1 or 2 with or without a fine up to 1,500,000 NT</p>
<p>Right to</p> <p>1. Public Recitation</p> <p>2. Public Broadcasting</p> <p>3. Public Presentation</p> <p>4. Public Performance</p> <p>5. Public Transmission</p> <p>6. Public Display</p> <p>7. Adaption</p> <p>8. Compilation</p> <p>9. Rental</p>	<p>§ 92(a): making use of either of the following methods with the intent to profit to infringe others' economic rights:</p> <p>1. public Recitation</p> <p>2. public broadcasting</p> <p>3. public presentation</p> <p>4. public performance</p> <p>5. public transmission</p> <p>6. public display</p> <p>7. adaption</p> <p>8. compilation¹⁷⁹</p> <p>9. rental</p>	<p>1. 2m to 3y imprisonment</p> <p>2. criminal detention</p> <p>3. 1 or 2 with or without a fine up to 750,000 NT</p>
	<p>§ 92(b): making use of either of the methods in § 92(a) without the intent to profit but for certain quality or quantity to infringe others' economic rights</p>	<p>1. 2m to 2y imprisonment</p> <p>2. criminal detention</p> <p>3. a fine up to 500,000 NT</p> <p>4. 1 or 2 with or without a fine up to 500,000 NT</p>
Right to Exportation	<p>§ 93(a)(1): violation of § 70 with the intent to profit (exportation of an copy reproduced under a compulsory license)</p>	<p>1. 2m to 2y imprisonment</p> <p>2. criminal detention</p> <p>3. 1 or 2 with or without a fine up to 500,000 NT</p>
	<p>§ 93(b): violation of § 70 without the intent to profit but for certain quality or quantity</p>	<p>1. 2m to 1y imprisonment</p> <p>2. criminal detention</p> <p>3. a fine up to 250,000 NT</p> <p>4. 1 or 2 with or without a fine up to 250,000 NT</p>
Plate Rights	<p>§ 93(a)(2): violation of § 87(a)(2) with the intent to profit (distribution of an article</p>	<p>1. 2m to 2y imprisonment</p> <p>2. criminal detention</p> <p>3. 1 or 2 with or without a fine up</p>

¹⁷⁹ Added in 1998.

		which was a result of plate right infringement with the knowledge of the infringement, or public display or possession of an article which was a result of plate right infringement with the intent of distribution and with the knowledge of the infringement)	to 500,000 NT
		§ 93(b): violation of § 87(a)(2) without the intent to profit but for certain quality or quantity	1. 2m to 1y imprisonment 2. criminal detention 3. a fine up to 250,000 NT 4. 1 or 2 with or without a fine up to 250,000 NT
	Right to Importation ¹⁸⁰	§ 93(a)(2): violation of § 87(a)(3) with the intent to profit (importation of an article which was reproduced without a copyright or plate right owner's authorization)	1. 2m to 2y imprisonment 2. criminal detention 3. 1 or 2 with or without a fine up to 500,000 NT
		§ 93(b): violation of § 87(a)(3) without the intent to profit but for certain quality or quantity	1. 2m to 1y imprisonment 2. criminal detention 3. a fine up to 250,000 NT 4. 1 or 2 with or without a fine up to 250,000 NT
	Right to Utilization for Computer Software	§ 93(a)(2): violation of § 87(a)(5) with the intent to profit (commercial utilization of a reproduced article which was a result of economic right infringement of computer software with the knowledge of the infringement)	1. 2m to 2y imprisonment 2. criminal detention 3. 1 or 2 with or without a fine up to 500,000 NT
		§ 93(b): violation of § 87(a)(5) without the intent to profit but for certain quality or quantity	1. 2m to 1y imprisonment 2. criminal detention 3. a fine up to 250,000 NT 4. 1 or 2 with or without a fine up to 250,000 NT
	Right to Distribution	§ 93(a)(2): violation of § 87(a)(6) with the intent to profit (distribution of an article which was a result of economic right infringement by a method other than assignment of ownership or rental and with the knowledge of the infringement, or public display or possession of an article which was a result of economic right infringement	1. 2m to 2y imprisonment 2. criminal detention 3. 1 or 2 with or without a fine up to 500,000 NT

¹⁸⁰ It was the importation of an infringing article.

		with the knowledge of the infringement and with intent to distribute it)	
		§ 93(b): violation of § 87(a)(6) without the intent to profit but for certain quality or quantity	1. 2m to 1y imprisonment 2. criminal detention 3. a fine up to 250,000 NT 4. 1 or 2 with or without a fine up to 250,000 NT
	Offense for Career Offenders	§ 94(a): a career offender for § 91(a), § 91(b), § 91bis, § 92 or § 93	1. 1y to 7y imprisonment 2. with or without a fine from 300,000 to 3 million NT
		§ 94(b): a career offender for § 91(c)	1. 1y to 7y imprisonment 2. with or without a fine from 800,000 to 8 million NT
	Right to Translation	§ 95: violation of § 112 (reproduction of an unauthorized translation which was completed prior to 1992, or sales of such a reproduced translation)	1. 2m to 1y imprisonment 2. criminal detention 3. a fine from 20,000 to 250,000 NT 4. 1 or 2 with or without a fine from 20,000 to 250,000 NT
	Offense for Violation of Fair Use	§ 96: violation of § 59(b) or 64 (violation of fair use: assignment of computer software without destroying its adapted or backup copy, or fair use without disclosing the source)	a fine up to 50,000 NT
	Right to DRM	§ 96bis: violation of § 80bis (removal or alteration of DRM information)	1. 2m to 1y imprisonment 2. criminal detention 3. a fine from 20,000 to 250,000 NT 4. 1 or 2 with or without a fine from 20,000 to 250,000 NT
Supplementary Punishment	§ 98: confiscation of articles used for or gained by committing any offense from § 91 to § 96bis; if the offense was § 91(c) or § 91bis(c), the confiscation were not limited to the defendant's belongings		
Extension of Liability	§ 101: criminal liability for a legal person		
Procedural Rule	§ 100: prosecution upon a direct victim's complaint but for Article § 91(c), § 91bis(c), and § 94 offenses		
	§ 102: unrecognized foreign legal person's right to file a complaint or initiate a private prosecution		

Source: Compiled by the author.

Note: m: month; y: year.

In the ensuing trade negotiations, the United States expressed its disappointment with the

2003 Copyright Act, especially for the amendments to the criminal section.¹⁸¹ Because of the American pressure, the Executive Yuan and Legislative Yuan soon worked together to revise the Copyright Act in 2004, just one year after the passage of the 2003 Copyright Act.¹⁸² The new law recognized legal protection for Technological Protection Measures (TPM) that were intentionally skipped by the legislature in the last revision, and restored several criminal provisions that were just removed or altered.¹⁸³

The de-criminalization provisions of the 2003 Copyright Act were almost entirely reversed in 2004. The new law restored the criminalization model prior to 2003; that is, any copyright infringement was criminalized regardless of the degree of the harm caused by copyright infringement. The difference between non-commercial-scale infringement and commercial-scale infringement and the criminalization threshold for non-commercial-scale infringement was entirely removed.¹⁸⁴ The *mens rea* requirement “with the intent to sell or rent” before 2003 was restored to replace the “with the intent to profit” requirement established in 2003.¹⁸⁵ Thus, any

¹⁸¹ Luo Tianbin (羅添斌), *Bao Dao Ge Yu Wo Qianghua Zhicaiquan Baohu* (包道格籲我強化智財權保護) [Douglas Paal Calling for Stronger Intellectual Property Protection], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Oct, 19, 2003, at Shenghuo Xinwen (生活新聞) [Life News], available at <http://www.libertytimes.com.tw/2003/new/oct/19/today-life2.htm>; “In a speech at a new Taipei think tank, Douglas Paal also accused Taiwanese lawmakers of making last-minute changes that weakened a copyright bill that passed in a recent legislative session. Lawmakers watered down the bill by softening the penalties for pirates, said Paal, the director of the American Institute in Taiwan, the *de facto* U.S. Embassy.” William Foreman, *Envoy Warns Taiwan on Copyright Piracy*, ASSOCIATED PRESS, Sep. 8, 2003, <http://www.apnewsarchive.com/2003/Envoy-Warns-Taiwan-on-Copyright-Piracy/id-a629c8bbd6f2084b17a329d06ace4a8b> (last visited Jun. 28, 2013).

¹⁸² *Zhonghua Minguo 93 Nian Zhuzuoquan Fa* (中華民國 93 年著作權法) [Copyright Act of 2004], Sep. 1, 2004, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6592, 2004, at 18. The legislature, with little discussion and negotiation among agencies, interest groups and legislators, passed the 2004 Copyright Act, which was proposed by the legislators of the ruling party, DPP, not the government. The bill, *see* 93 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.15, Mar. 12, 2004, at 147-169.

¹⁸³ *See* 1 LUO MINGTONG (羅明通), *supra* note 21, at 92-95 (listing the changes brought by the 2004 new law).

¹⁸⁴ The legislative reasons for the removal, *see* the first reading legislative materials, 93 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.15, Mar. 12, 2004, at 164. *See also* 2 LUO MINGTONG (羅明通), *supra* note 21, at 560-561.

¹⁸⁵ Art. 91(b) of the Copyright Act of 2004.

unauthorized reproduction of a copyrighted work¹⁸⁶ or any distribution of an infringing article with the knowledge of the infringement¹⁸⁷ was a copyright offense. Furthermore, the minimum imprisonment for several offenses was restored to six-month imprisonment to narrow judges' discretion in sentencing a defendant to a convertible imprisonment. For example, the minimum punishment for the offense of unauthorized reproduction with the intent to sell or rent,¹⁸⁸ the same offense involving optical discs,¹⁸⁹ and the offense of unauthorized distribution involving optical discs¹⁹⁰ was restored to six-month imprisonment in 2004. Besides, moral right infringement was criminalized again.¹⁹¹

Since 2004, criminal provisions in Taiwan's criminal IP law have been unchanged except the offense for career offenders was removed in 2006¹⁹² and one criminal provision that explicitly outlawed peer-to-peer file-sharing software and service was added in 2007.¹⁹³ Here is

¹⁸⁶ Art. 91(a) of the Copyright Act of 2004.

¹⁸⁷ Art. 91bis(a) of the Copyright Act of 2004.

¹⁸⁸ Art. 91(b) of the Copyright Act of 2004.

¹⁸⁹ Art. 91(c) of the Copyright Act of 2004.

¹⁹⁰ Art. 91bis(c) of the Copyright Act of 2004.

¹⁹¹ Art. 93(a)(1) of the Copyright Act of 2004.

¹⁹² As mentioned in Chapter 2, Taiwan abolished the "consecutive offense" in the Criminal Code on July 1, 2006 due to the under-deterrence as a result of the overbroad interpretation of the legal term that always treated multiple separable offenses as one single consecutive offense. Since an offense for career offenders in its nature was a consecutive offense, the legislature removed the consecutive offense together with all offenses for career offenders including the most serious offense in the Copyright Act. See *Zhonghua Minguo 95 Nian Zhuzuoquan Fa* (中華民國 95 年著作權法) [Copyright Act of 2006], May 30, 2006, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6691, 2006, at 37. After 2006, a person who committed multiple copyright offenses should receive multiple sentences and be punished more seriously in theory. However, many judges developed the so-called "collective crime" or "continuous crime" theory to treat multiple copyright offenses as one single offense. See Xiao Hongyi (蕭宏宜), *Qinhai Zhuzuoquan Xingwei Shu Rending Wenti* (侵害著作權行為數認定問題), 23 DONGWU FALÜ XUEBAO (東吳法律學報) [SOOCHOW L. REV.], no.2, 2011, at 69, 69 n.1, 88-90.

¹⁹³ The Copyright Act was amended in 2007 to respond to online file-sharing service and software. Prior to the 2007 legislation, Taiwan's sound recording industry filed several criminal complaints to ask prosecutors and courts to confirm the illegality of unauthorized online file-sharing service and software. See Bill Heaney, *Music industry rejoices over file-sharing victory*, *TAIPEI TIMES*, Nov. 27, 2003, at Page 10, available at <http://www.taipeitimes.com/News/biz/archives/2003/11/27/2003077458>. Among these cases, the district court decisions for the Kuro and EZpeer cases in 2005 were most crucial to the later legislation. Both cases involved online file-sharing service and software. In the Kuro case, the prosecutor indicted the Kuro Company, the president, two managers, and one customer for criminal copyright infringement. See Bill Heaney, *File-sharing site calls suit futile*, *TAIPEI TIMES*, Dec. 6, 2003, at Page 1, available at <http://www.taipeitimes.com/News/front/archives/2003/12/06/2003078502>. The Kuro court found all defendants

the table outlining the criminal section of the 2004 Copyright Act:

guilty and convicted the president, managers and company of the copyright offense for taking commission of unauthorized reproduction as an occupation and the customer of the copyright offense for unauthorized reproduction of a copyrighted work. According to the facts found by the court, the company, president, and managers foresaw that their service and software enabling customers to share files online with each other would give rise to unauthorized reproduction. Regardless of any copyright infringement, they still set up a centralized server that allowed a customer, by using the Kuro software to connect to the Kuro server, to search and then download copyrighted songs from other customers' computers. Each customer was charged 99 NT dollars per month for the company's service while the software was free of charge. One of the defendants, the customer, downloaded 970 songs within four months. There was no copyright authorization acquired by anyone of the defendants. Finally, the Kuro court sentenced the president to two-year imprisonment, each manager to three-year imprisonment, and the company to a fine of three million NT dollars. The customer was sentenced to four-month imprisonment as well as placed to three-year probation. *See* Taiwan Taipei Difang Fayuan (臺灣臺北地方法院) [Taiwan Taipei Dist. Ct.], Sep. 9, 2005, Minguo 94 (Su) No. 2146 Criminal Judgment (中華民國 94 年 9 月 9 日 92 年度訴字第 2146 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>. On the contrary, the district court decision for the EZpeer case surprised the sound recording industry of Taiwan. *See* Jessie Ho, *EZpeer Found Not guilty in Landmark Copyright Verdict*, *TAIPEI TIMES*, Jul. 1, 2005, at 1, available at <http://www.taipeitimes.com/News/front/archives/2005/07/01/2003261705>. The prosecutor charged the EZpeer Company and its president with the copyright offense of taking commission of unauthorized reproduction as an occupation. The district court rejected all complaints and acquitted the defendants. The court found that although EZpeer did provide service and software for customers to share files online for profits, yet no evidence showed that the service or software at issue was centralized and necessarily gave rise to copyright infringement. Given the possibility of legal file sharing and little control over individual customers' copyright infringement, the court viewed the service and software of EZpeer as a neutral technological tool like a video recorder. Since what EZpeer provided was a mere tool, it was hard to say that the defendants foresaw and facilitated individual customers' copyright infringement. *See* Taiwan Shilin Difang Fayuan (臺灣士林地方法院) [Taiwan Shilin Dist. Ct.], Jun. 30, 2005, Minguo 94 (Su) No. 728 Criminal Judgment (中華民國 94 年 6 月 30 日 92 年度訴字第 728 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>. The inconsistency between the Kuro and EZpeer courts in online file-sharing technology led to a revision to the Copyright Act in 2007. The 2007 Copyright Act punished those who with the intent of copyright infringement provided the public with software or other technology that enabled the public to reproduce or transmit copyrighted works without authorization and thereby gained profit. After the revision, regardless of a centralized system, the provision of online file-sharing software or service without a mechanism to effectively filter copyright infringement was outlawed in Taiwan. *Zhonghua Minguo 96 Nian Zhuzuoquan Fa* (中華民國 96 年著作權法) [Copyright Act of 2007], Jul. 11, 2007, *ZONGTONGFU GONGBAO* (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6752, 2007, at 74.

Table 4-7 Criminal Provisions of the 2004 Copyright Act

Offenses & Primary Punishment	Right to Reproduction	§ 91(a): unauthorized reproduction of a work to infringe others' economic rights	1. 2m to 3y imprisonment 2. criminal detention 3. a fine up to 750,000 NT 4. 1 or 2 with or without a fine up to 750,000 NT
		§ 91(b): unauthorized reproduction of a work with the intent to sell or rent to infringe others' economic rights	1. 6m to 5y imprisonment 2. with or without a fine from 200,000 to 2 million NT
		§ 91(c): § 91(b) involved with optical discs	1. 6m to 5y imprisonment 2. with or without a fine from 500,000 to 5 million NT
	Right to Distribution	§ 91bis(a): unauthorized assignment of the ownership of an original work or its copy to infringe others' economic rights	1. 2m to 3y imprisonment 2. criminal detention 3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
		§ 91bis(b): 1. distribution of an article which was the result of economic right infringement with the knowledge of the infringement 2. public display or possession of an article which was the result of economic right infringement with the knowledge of the infringement and with the intent of distribution	1. 2m to 3y imprisonment 2. with or without a fine from 70,000 to 750,000 NT
		§ 91bis(c): § 91bis(b) involved with optical discs except the discs were a result of the violation of § 87(a)(4)	1. 6m to 3y imprisonment 2. with or without a fine from 200,000 to 2 million NT
	Right to: 1. Public Recitation 2. Public Broadcasting 3. Public Presentation 4. Public Performance 5. Public Transmission 6. Public Display 7. Adaption 8. Compilation	§ 92: unauthorized use of either of the following methods to infringe others' economic rights: 1. public recitation 2. public broadcasting 3. public presentation 4. public performance 5. public transmission 6. public display 7. adaption 8. compilation	1. 2m to 3y imprisonment 2. criminal detention 3. a fine up to 750,000 NT 4. 1 or 2 with or without a fine up to 750,000 NT

9. Rental	9. rental	
Moral Rights Infringement	§ 93(a)(1): violation of §15 to 17	1. 2m to 2y imprisonment 2. criminal detention
	§ 93(a)(3): violation of § 87(a)(1) (making use of a work by a method that would injure the author's reputation)	3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
Right to Exportation	§ 93(a)(2): violation of § 70 (exportation of an copy reproduced under a compulsory license)	1. 2m to 2y imprisonment 2. criminal detention 3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
Right to Importation	§ 93(a)(3): violation of § 87(a)(3) (importation of an article which was reproduced without a copyright or plate right owner's authorization)	1. 2m to 2y imprisonment 2. criminal detention 3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
Right to Utilization for Computer Software	§ 93(a)(3): violation of § 87(a)(5) (commercial utilization of a reproduced piece of computer software which was a result of economic right infringement with the knowledge of the infringement)	1. 2m to 2y imprisonment 2. criminal detention 3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
Right to Distribution	§ 93(a)(3): violation of Art. 87(a)(6) (distribution of an article which was a result of economic right infringement with the knowledge of the infringement and by a method other than assignment of ownership or rental, or public display or possession of an article which was a result of economic right infringement with the knowledge of the infringement and with intent to distribute it)	1. 2m to 2y imprisonment 2. criminal detention 3. a fine up to 500,000 NT 4. 1 or 2 with or without a fine up to 500,000 NT
Offense for Career Offenders	§ 94(a): career offender for § 91(a), § 91(b), § 91bis, § 92 or § 93	1. 1y to 7y imprisonment 2. with or without a fine from 300,000 to 3 million NT
	§ 94(b): career offender for § 91(c)	1. 1y to 7y imprisonment 2. with or without a fine from 800,000 to 8 million NT
Right to Translation	§ 95: violation of § 112 (reproduction of an	1. 2m to 1y imprisonment 2. criminal detention

		unauthorized translation completed prior to 1992, or sales of such a reproduced translation)	3. a fine from 20,000 to 250,000 NT 4. 1 or 2 with or without a fine from 20,000 to 250,000 NT
	Violation of Fair Use	§ 96: violation of § 59(b) or 64 (violation of fair use: assignment of computer software without destroying its adapted or backup copy, or fair use without disclosing the source)	a fine up to 50,000 NT
	Right to DRM	§ 96bis: violation of § 80bis (protection for digital right management information)	1. 2m to 1y imprisonment 2. criminal detention 3. a fine from 20,000 to 250,000 NT 4. 1 or 2 with or without a fine from 20,000 to 250,000 NT
	Right to TPM	§ 96bis: violation of § 80ter (protection for technological protection measures)	1. 2m to 1y imprisonment 2. criminal detention 3. a fine from 20,000 to 250,000 NT 4. 1 or 2 with or without a fine from 20,000 to 250,000 NT
Supplementary Punishment	§ 98: confiscation of articles used for or gained by committing any offense from § 91 to § 96bis; if the offense was § 91(c) or § 91bis(c), the confiscated articles were not limited to the defendant's belongings		
Extension of Liability	§ 101: criminal liability for a legal person		
Procedural Rule	§ 100: prosecution upon a direct victim's complaint except for Article § 91(c), § 91bis(c), and § 94 offenses		
	§ 102: unrecognized foreign legal person's right to file a complaint or initiate a private prosecution		

Source: Compiled by the author.

Note: m: month; y: year.

During the 1990s and 2000s, as a result of U.S. oversight and pressure, Taiwan's efforts to work out a political compromise between local interests and U.S. demands usually failed. Due to U.S. huge interests in copyright matters and Taiwan's uniquely vulnerable political and economic situation, the ROC government felt it had no choice but to accept U.S. demands to reconstruct its copyright law with an emphasis on criminal punishments. A Taiwanese professor who specializes in copyright law once lamented that Taiwan's copyright law was centered on criminalization:

After I spent so many years, I realize that I cannot deny that in Taiwan the copyright law is probably not a branch of civil law; instead, a branch of criminal

law may be more suitable... Every provision in the copyright law has a counterpart criminal sanction...¹⁹⁴

Two scholars from the PRC made the following comments on Taiwan's criminal copyright law:

There is a very high level of criminal protection of copyright in the Taiwan Copyright Act. Firstly, the level of criminal protection of copyright in Taiwan is higher than in TRIPs... Secondly, the Taiwan Copyright Act protects the property right and personal right of [copyright owners]... Thirdly, the criminal law about offences of infringing copyright, is relatively tough in the Taiwan Copyright Act.¹⁹⁵

The strategy behind the U.S. Special 301 framework was straightforward; that is, more punishment would bring more deterrence and more deterrence would decrease copyright piracy. Less copyright piracy would benefit U.S. copyright industry and therefore balance foreign trade deficits. However, whether a harsh criminal law can effectively fill the gap between law and society usually depends on the justification of criminal law.¹⁹⁶ In a democratic country, the task of the judiciary is to maintain rule of law and bring justice. If judicial independence can shield the judiciary from political influence, then the judiciary may be able to ameliorate the impact of what might otherwise be unjust laws.

Under the judicial independence ensuing from Taiwan's democratization, Taiwan's judiciary could implement law more autonomously than before. At the same time, the long-term judicial culture still prevailed in the judicial system. Judges could continue to base their decisions on the internal rules shaped by judicial culture. Therefore, when Taiwan's new criminal copyright law

¹⁹⁴ Zhang Yiyun (張懿云), Remarks at the Meeting of the "Xinban Zhuzuoquan Fa—Zhuzuoquan Baohu de Yidabu?" (「新版著作權法—著作保護的一大步？」座談會) [The "New Copyright Law—One Big Step for Copyright Protection" Meeting] (Oct. 15, 2003), in YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.106, 2004, at 106.

¹⁹⁵ Zhe Zhou & Xiaomin Liu, *Introduction to Copyright Protection by Criminal Law in Taiwan*, in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD 480-481 (Shizhou Wang ed., 2008).

¹⁹⁶ "Social forces determine 'the law,' meaning not the rules as such but the system in actual operation." LAWRENCE MEIR FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 91 (1975).

conflicted with local judges' perspectives on crime and punishment, judges had space to try to avoid the injustice caused by the draconian law. The United States' ongoing complaints about Taiwan's lenient sentencing confirm that the judiciary rejected harsh criminal laws by delivering lenient sentences.

4.1.3. Trademark Legislation under the Special 301 Framework

Taiwan independently revised its trademark law to raise punishment and expand the scope of criminalization before the Special 301 framework. Under the Special 301 framework, trademark law received less attention than copyright law. Surprisingly, Taiwan's autonomous legislation to lower punishment was not reversed by the United States.

Soon after Taiwan was identified as a Priority Foreign Country by the USTR on April 29, 1992, the Executive Yuan of Taiwan proposed to revise the Trademark Act on June 25, 1992 to: (1) recognize right of priority;¹⁹⁷ (2) streamline procedures for trademark registration; (3) raise the maximum amount of a fine for every trademark offense; (4) remove the criminal protection for unregistered foreign well-known marks;¹⁹⁸ (5) redefine service marks as marks used on articles, documents, publications, and advertisements to promote a service;¹⁹⁹ and (6) recognize

¹⁹⁷ The right of priority in Taiwan's trademark law means a trademark applicant may claim priority for his or her Taiwan application if it is filed within six months of the filing date of the first application outside the territory of Taiwan. However, the 1993 trademark law based right of priority on an international or bilateral treaty or agreement.

¹⁹⁸ According to the committee consideration legislative materials, the reason for the removal was that Art. 35 of the Fair Trade Act (Gongping Jiaoyi Fa 公平交易法) already had the identical offense. See 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.17, Mar. 8, 1993, at 228.

¹⁹⁹ See Art. 72 of the Trademark Act of 1993. Prior to 2003, a "trademark" in the Trademark Act was a mark used to identify the origin of a product, not a service. A mark used to identify the origin of a service was called a "service mark." The term "trademark" in the Trademark Act was redefined in 2003 to identify the origin of both. See WANG DUCUN (汪渡村), *supra* note 72, at 17.

certification marks²⁰⁰ and collective marks.²⁰¹²⁰² In fact, Taiwan just revised its Copyright Act on May 22, 1992 to raise the maximum amount of a fine for all copyright offenses.²⁰³

The Legislative Yuan passed the bill proposed by the Executive Yuan on November 30, 1993²⁰⁴ but surprisingly lowered the maximum punishment from five-year imprisonment to three-year imprisonment for the offense of unauthorized use of a registered mark.²⁰⁵ During the committee consideration, Chen Jianmin, a KMT legislator and also a former judge, expressed his concerns with the statutory punishment of Article 62 of the Trademark Act,

I support IP protection, but criminal punishment should be appropriate and fair and should not overdo in righting a wrong. A case involving an offense with five-year maximum imprisonment can be appealed to the Supreme Court and the maximum punishment becomes seven and half years if there is an aggravating factor. Compared with other offenses, the punishment is quite harsh... According to Article 41 of the Criminal Code, a sentence can be converted into a fine only if the maximum punishment for the offense is not more than three years imprisonment. The five-year maximum imprisonment of the trademark offense surely makes a big difference.²⁰⁶

When interrogated by a legislator, the representative of the Executive Yuan also admitted that the heaviest punishment ever imposed by a ROC court was only one-and-a-half-years imprisonment.²⁰⁷ Therefore, given the belief that the five-year maximum imprisonment was

²⁰⁰ A “certification mark” is a sign that is controlled by an organization, which has a supervisory capacity over certain goods and services, and that is used by units or individuals (other than the organization that owns the mark) to certify the origin, raw materials, manufacturing method, quality, or other special qualities of the relevant goods and services. *See* Art. 73 of the Trademark Act of 1993; WANG DUCUN (汪渡村), *supra* note 72, at 349-350.

²⁰¹ A “collective mark” is a sign that has been registered in the name of a group, association or other organization and that is intended to be used by the members of the organization in their commercial activities in order to indicate the user’s participation status. *See* Art. 74 of the Trademark Act of 1993; WANG DUCUN (汪渡村), *supra* note 72, at 357-358.

²⁰² The Executive Yuan’s official statement for legislation, *see* 81 LIFAYUAN GONGBAO (立法院公報) [Legis. Yuan Gaz.], no.54, Jun. 3, 1992, at 113-116.

²⁰³ *See* 4.1.2.1.

²⁰⁴ Zhonghua Minguo 82 Nian Shangbiao Fa (中華民國 82 年商標法) [Trademark Act of 1993], Dec. 22, 1993, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5810, 1993, at 1.

²⁰⁵ Art. 62 of the Trademark Act of 1993.

²⁰⁶ Chen Jianmin (陳健民), the address in committee consideration, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.37, May 27, 1993, at 388, 389.

²⁰⁷ Li Maotang (李茂堂), the address in committee consideration, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS.

disproportionate to other similar criminal offenses, the legislature autonomously passed a bill proposed by a few legislators to decrease the maximum punishment down to three-year imprisonment.²⁰⁸ Unlike the 2003 Copyright Act that was soon revised under U.S. pressure, the three-year maximum punishment in the 1993 Trademark Act is still in effect.

Taiwan rearranged and redefined criminal provisions in the Trademark Act in 2003.²⁰⁹ Like the Copyright Act, the 2003 Trademark Act set up an independent criminal section to accommodate all criminal provisions. All trademark offenses were redefined to expand their scope as well as to accord with the newly defined four categories of trademarks (trademarks, certification marks, collective marks, and collective trademarks). Article 81 of the new law continued to punish unauthorized use of a mark. It provided that whoever without authorization: (1) used a mark identical with a registered trademark or collective trademark in connection with the designated goods or designated services;²¹⁰ (2) used a mark identical with a registered trademark or collective trademark in connection with goods or services similar to the designated goods or designated services and hence caused a likelihood of confusion on relevant consumers;²¹¹ or (3) used a mark similar to a registered trademark or collective trademark in connection with goods or services identical with or similar to the designated goods or designated services and hence caused a likelihood of confusion on relevant consumers²¹² should be sentenced to imprisonment for not more than three-years imprisonment or criminal detention; in

YUAN GAZ.], no.37, May 27, 1993, at 390.

²⁰⁸ The proposal, *see* 82 LIFAYUAN GONGBAO (立法院公報) LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.37, May 27, 1993, at 393.

²⁰⁹ Zhonghua Minguo 92 Nian Shangbiao Fa (中華民國 92 年商標法) [Trademark Act of 2003], May 28, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6526, 2003, at 22. For a general introduction to the 2003 Trademark Act, *see* Xie Mingyang (謝銘洋), *Xinxiuzheng Shangbiao Fa Pingxi* (新修正商標法評析) [Comments and Analysis on Newly Revised Trademark Law], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.102, 2003, at 94.

²¹⁰ Art. 81(a)(1) of the Trademark Act of 2003.

²¹¹ Art. 81(a)(2) of the Trademark Act of 2003.

²¹² Art. 81(a)(3) of the Trademark Act of 2003.

lieu thereof, or in addition thereto, a fine of not more than 200 thousand New Taiwan dollars might be imposed.

Article 82 punished any intentional distribution of a counterfeit, “Whoever with the knowledge that a product is a result of the offense in Article 81 sells such a product, displays such a product with the intent to sell, imports such a product, or exports such a product shall be sentenced to not more than one-year imprisonment or criminal detention; in lieu thereof, or in addition thereto, a fine of not more than 50 thousand New Taiwan dollars may be imposed.”²¹³

Article 83 subjected a counterfeit as a result of a trademark offense or an article or document used for a trademark offense to criminal confiscation regardless of its ownership.²¹⁴

Here is the table outlining the criminal section of the Trademark Act of 2003:

²¹³ Art. 82 of the Trademark Act of 2003.

²¹⁴ Art. 83 of the Trademark Act of 2003.

Table 4-8 Criminal Provisions of the 2003 Trademark Act

Offenses & Primary Punishment	§ 81(a)(1)	unauthorized use of a mark identical with a registered mark or collective mark in relation to the same goods or service	1. 2m to 3y imprisonment 2. criminal Detention 3. a fine up to 200,000 NT 4. 1 or 2 with or without a fine up to 200,000 yuan
	§ 81(a)(2)	unauthorized use of a mark identical with a registered mark or collective mark in relation to the similar goods or service, and therefore cause likelihood of confusion	1. 2m to 3y imprisonment 2. criminal Detention 3. a fine up to 200,000 NT 4. 1 or 2 with or without a fine up to 200,000 yuan
	§ 81(a)(3)	unauthorized use of a mark similar to a registered mark or collective mark in relation to the same or similar goods or service, and therefore cause likelihood of confusion	1. 2m to 3y imprisonment 2. criminal Detention 3. a fine up to 200,000 NT 4. 1 or 2 with or without a fine up to 200,000 yuan
	§ 82	intentionally sell, display with the intent to sell, export or import a counterfeit as a result of an offense of § 82	1. 2m to 1y imprisonment 2. criminal Detention 3. a fine up to 50,000 NT 4. 1 or 2 with or without a fine up to 50,000 yuan
Supplementary Punishment	§ 83	criminal confiscation of an infringing good or product, or any facility, equipment, or article used for a trademark offense regardless of its ownership	
Procedural Rule	§ 70	unrecognized foreign legal person's right to file a complaint or initiate a private prosecution	

Source: Compiled by the author.

Note: m: month; y: year; 1 yuan: 3 New Taiwan dollars.

4.1.4. Two Different Punishment Regimes

Under the Special 301 framework, two different punishment regimes can be identified.

Taiwan's criminal trademark law was fairly broad in scope because almost any unauthorized use of a mark and distribution of a counterfeit was criminalized.²¹⁵ Nevertheless, it was not very

²¹⁵ Taiwan revised the Trademark Act again in 2011 and made a few changes to the criminal section. See Zhonghua Minguo 100 Nian Shangbiao Fa (中華民國 100 年商標法) [Trademark Act of 2011], Jun. 29, 2011, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6981, 2010, at 86. First, all criminal provisions were recodified. Before 2011, the Trademark Act had 94 articles. After the 2011 revision, the present Trademark Act has 111 articles. Second, to explicitly exclude a purchaser of an infringing good or service, the new law added an additional requirement "for the purpose of marketing" to the offense for unauthorized use of a mark. Art. 95(a) of the Trademark Act of 2011. The reason for the legislation, see 100 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.45, May 31, 2011, at 347. Third, the new law established two new offenses for the protection of certification marks because of the public's high reliance on certification marks in the modern society. Art. 96 of the Trademark Act of 2011. The reason for the legislation, see 100 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN

harsh because all Taiwan's trademark offenses can be converted into a fine. In the area of trademark law, while many prosecutions were brought, judges still enjoyed broad discretion in sentencing. Though the United States often reminded Taiwan to enforce trademark law, its interference with ROC law in this area was less pronounced than in copyright law because of different U.S. business pressure.²¹⁶ By contrast, Taiwan's copyright law, in addition to its broad scope, was so harsh that judges had little discretion in sentencing. When confronted with many prosecutions, judges had to face imposing harsh punishment on almost every infringer. This was because, in response to ongoing U.S. complaints about judges' lenient sentencing, Taiwan had more frequently amended its criminal copyright law than its criminal trademark law.

If the criminal copyright law was too harsh to be compatible with local judges' mission to carry out justice, it might post a "sticky norms" problem. Judges might follow their internal norms to avoid unjust results like Professor Dan M. Kahan at Yale Law School pointed out:

The resistance of law enforcers sometimes confounds the efforts of lawmakers to change social norms. Thus, as legislators expand liability for date rape, domestic violence, and drunk driving, police become less likely to arrest, public prosecutors to charge, jurors to convict, and judges to sentence severely. The conspicuous resistance of these decisionmakers in turn reinforces the norms that lawmakers intended to change.²¹⁷

Whenever a legislature enacts tough legislation in the form of stricter penalties for a crime where the gap between law and society is too large, judges routinely compensate by easing up in their respective contributions to enforcement.²¹⁸ Thus, in Taiwan's copyright regime, given

GAZ.], no.45, May 31, 2011, at 348.

²¹⁶ "Five special interest groups, IIPA, BSA, IACC, PMA, and INTA, and two U.S. corporations, Nintendo and Microsoft, actively engage in the Special 301 process by submitting comments and recommendations to the USTR and testifying before Congress." Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 98 (1994). According to this article, most of the interest groups focused on copyright piracy in Taiwan. *Id.* at 102-112.

²¹⁷ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

²¹⁸ *See id.* at 633 (describing several examples from date rape, smoking, domestic violence, drugs, drunk driving, to sexual harassment).

harsh statutory punishment and limited discretion in sentencing, judges might tend to avoid the enforcement of law.²¹⁹ On the contrary, in the trademark law regime, though faced with a large criminal population stemming from expansive criminalization and intensive prosecution, judges might be still willing to enforce the law because they could make use of their broad discretion to carry out their own justice.²²⁰

4.2. Taiwan's Judicial Reforms to Enforce Criminal IP Law

Under the U.S. Special 301 framework, Taiwan established its criminal IP legal system to protect IP rights as well as curb IP piracy. Thus, Taiwan enacted and revised its criminal IP law to introduce new offenses, expand the scope of IP offenses, and raise criminal punishment for IP offenses. In order to enforce its criminal IP law, Taiwan tried to strengthen legal institutions for more deterrence. Meanwhile, the judicial independence brought by Taiwan's democratization and judicial reform promoted judicial autonomy to better reflect rule of law ideals. To overcome the judiciary's resistance to enforce criminal IP law, Taiwan's Judicial Yuan introduced two major judicial reforms. One was the issuance of administrative directives with respect to sentencing and the other was the adjustment of court organization and case assignment rules for specialized IP divisions in individual courts. Because these directives were not authorized by law, this measure in fact conflicted with Taiwan's rule of law. Further, specialization did not succeed because of rotation rules and other disincentives to specializing in criminal IP law that are part of the long-term judicial culture.

4.2.1. Administrative Directives

4.2.1.1. Transformation of the Legal Status of Administrative Directives

In the United States, the federal court system is administered by the Administrative Office,

²¹⁹ Prof. Kahan named this method "hard shoves."

²²⁰ Prof. Kahan named this method "gentle nudges."

judicial councils of the circuit, judicial conferences of the circuit, Judicial Conferences of the United States, and the Federal Judicial Center.²²¹ The Administrative Office was directed by the Administrative Office Act of 1939 to assume from the Justice Department the ministerial functions of administration within the courts, including the payment of salaries and the allocation of funds.²²² The judicial council of the circuit, composed of the active circuit judges of each circuit, has to consider the quarterly reports of the Administrative Office and to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.”²²³ The judicial conference of the circuit, composed of all district and circuit judges of the circuit plus designated lawyers, is convened “for the purpose of considering the business of the courts and advising means of improving the administration of justice within [the] circuit.”²²⁴ The Judicial Conference of the United States, composed of the Chief Justice of the Supreme Court, the thirteen chief judges of the circuits, twelve district court judges and the chief judge of the Court of International Trade, is the national policy-making body for the judiciary, and supervises the Administrative Office.²²⁵ The Federal Judicial Center, governed by a Board of Directors made up of two active appellate judges and three active district court judges, together with the Director of the Administrative Office, is directed to conduct research, make recommendations to the Judicial Conference of the United States, provide continuing education programs, and assist the Judicial Conference of the United States and its committees.²²⁶

In the United States, judicial independence is secured by independent administration of the

²²¹ J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 BYU L. REV. 39, 45-46 (1978).

²²² *Id.* at 45.

²²³ *Id.*

²²⁴ *Id.* at 46.

²²⁵ Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 990 (1996).

²²⁶ Wallace, *supra* note 221, at 46-47.

judiciary by the judiciary.²²⁷ Of course, there is a tension between judicial administration and judicial independence because judicial administration with resources in its nature may influence judges' behavior.²²⁸ Nevertheless, complete preservation of decision autonomy that a judge has the full power to make a decision in the case before him is fundamental.²²⁹ Any administrative measures with respect to a judge's decision autonomy must find its ground on independent judicial administration empowered by the legislature and are subject to the scrutiny of the legislature.²³⁰ For example, "[o]nce the Supreme Court promulgates a rule, the rule is sent to Congress and becomes effective unless Congress affirmatively rejects it within a statutorily prescribed time."²³¹ Therefore, in the United States, administrative measures with respect to decision autonomy are not permissible if they are not authorized by law.

Similar to the U.S. 1939 judicial reform to transfer judicial administration power from the Department of Justice to Administrative Office, Taiwan transferred judicial administration power from the executive branch of the government to the judicial branch of the government in 1980. Before 1980, the Ministry of Judicial Administration (Sifa Xingzheng Bu 司法行政部) under the Executive Yuan was responsible for both judicial and prosecution administration. At that time, the Judicial Yuan was responsible only for the administration of three highest courts, the Supreme Court (Zuigao Fayuan 最高法院), Supreme Administrative Court (Zuigao Xingzheng

²²⁷ U.S. Supreme Court Justice Stephen G. Breyer addressed five components of judicial independence. "First, the constitutional protections that judges in the United States have; second, the independent administration of the judiciary by the judiciary; third, judicial disciplinary authority over the misconduct of judges; fourth, the manner in which we address conflicts of interest; and finally, how we assure that the judge's decisions are effective." Breyer, *supra* note 225, at 989.

²²⁸ "Conflict between the ideals of judicial independence and effective judicial administration is pervasive on a theoretical level." Wallace, *supra* note 221, at 51.

²²⁹ *Id.* at 56. Judge J. Clifford Wallace identified four categories of judicial independence as "logistical or housekeeping autonomy," "decision autonomy," and "trial practice and personal conduct autonomy." *Id.* at 55.

²³⁰ See Breyer, *supra* note 225, at 990 (noting the control over procedure and administrative independence).

²³¹ *Id.* at 991.

Fayuan 最高行政法院), and Commission on the Disciplinary Sanctions of Functionaries (Gongwuyuan Chengjie Weiyuanhui 公務員懲戒委員會) while the Ministry of Judicial Administration was responsible for the administration of high courts and district courts.²³² To separate judicial and prosecution administration,²³³ the 1980 Court Administration Act transferred the power of judicial administration to the Judicial Yuan²³⁴ and reorganized the Ministry of Judicial Administration as Ministry of Justice (Fawu Bu 法務部) to be responsible for the remaining prosecution administration.²³⁵ Since 1980, the Judicial Yuan, a bureaucratic institution outside Taiwan's regular court system, has been in charge of Taiwan's judicial administration.²³⁶

In order to maintain or improve the quality of court adjudication, the Judicial Yuan often issued internal directives to instruct judges how to apply law.²³⁷ When Taiwan was under KMT authoritarian rule, judicial power was used to consolidate the reign of the sole political party. Because the executive branch enjoyed enormous power, the bureaucratic Judicial Yuan had a

²³² Art. 87 of the Court Organization Act of 1932.

²³³ For a general introduction of the reform, see Huang Shaogu (黃少谷), *Shen Jian Fenli yu Sifa Gexin* (審檢分隸與司法革新) [*Separation of Judges and Prosecutors and Judicial Reform*], 31 FALING YUEKAN (法令月刊) [LAW MONTHLY], no.10, 1980, at 7.

²³⁴ Art. 87(a)(1) of the Court Organization Act of 1980.

²³⁵ Art. 87(b)(1) of the Court Organization Act of 1980.

²³⁶ Except for the Council of Grand Justices (大法官會議) and the Commission on the Disciplinary Sanctions Functionaries (公務員懲戒委員會), the Judicial Yuan does not exercise judicial power with respect to adjudication. Though Taiwan's judicial reform in the 1990s tried to incorporate the Judicial Yuan into Taiwan's court system, it did not succeed due to the disagreement from the legislature. See Wong Yuesheng (翁岳生), *Sifa Gaige Shi Zhounian de Huigu yu Zhanwang* (司法改革十週年的回顧與展望) [*The Tenth Anniversary of National Conference on Judicial Reform*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU 52-56 (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] (Tang Dezong & Huang Guochang (湯德宗與黃國昌) eds., 2010).

²³⁷ In PRC, “[t]o avoid appellate reversal, lower Chinese courts and judges rely on an ill-defined system of advisory requests (*qingshi*) to solicit the views of higher court and judges on how to decide pending cases... Party-run court responsibility systems manage the Chinese judiciary in a manner entirely consistent with how the rest of the bureaucracy is run.” See Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 58-59, 86 (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011).

close relationship with the executive branch and the ROC executive could always impose its will on the court system. In the early stages, it was taken for granted that judges should abide by directives, not challenge them, though Article 80 of the Constitution required judges adjudicate cases pursuant only to law. When the Council of Grand Justices of the Judicial Yuan was asked in 1973 whether the judicial administration's directives regarding application of law were binding to judges, it was so held in the Judicial Yuan No. 137 Interpretation,

With regard to the administrative orders of statutory interpretation handed down by the government agencies in accordance with their respective authorities, the court may not refuse to apply them if they are applicable to the case. However, a judge shall, based on his or her fair and honest belief in the accurate interpretation of the law, give a lawful and legitimate legal opinion on a controversy which requires an accurate judicial interpretation.²³⁸

Though Grand Justices acknowledged that Article 80 of the Constitution guaranteed judicial independence, they still hesitated to uphold it at that time. After Taiwan became a democratic country with more respect for the rule of law, the tension between judicial independence and Judicial Yuan's directives emerged. The Council of Grand Justices in 1987 reinterpreted the legal status of the Judicial Yuan's directives as nonbinding on judges' decision autonomy:

The provision that judges shall adjudicate independently according to law is specifically prescribed in Article 80 of the Constitution. Administrative rules adopted under the duty of seeking proper construction of laws by various government agencies may be applied by judges in the course of adjudication, who, not being bound thereby, may in a proper manner, express their opinion in light of the law, as stated in Interpretation No. 137 of this Court. Ordinances issued by the Judicial Yuan involving legal issues in the business of adjudication are merely references for judges, who again, are not bound thereby in the course of adjudication.²³⁹

²³⁸ Sifayuan (司法院) [Judicial Yuan], Dec. 14, 1973, (Shi) No. 137 Interpretation (司法院釋字第 137 號解釋), 1 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATIONS OF JUDICIAL YUAN GRAND JUSTICES] 446 (Judicial Yuan ed., 2009), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=137.

²³⁹ Sifayuan (司法院) [Judicial Yuan], Jun. 19, 1987, (Shi) No. 216 Interpretation (司法院釋字第 216 號解釋), 3 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATIONS OF JUDICIAL YUAN GRAND JUSTICES] 148 (Judicial Yuan ed., 2009), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=216.

Later in 2001, in order to clarify to what extent the Judicial Yuan could issue directives with respect to judicial administration to regulate judges, the Council of Grand Justices limited the Judicial Yuan's authority to procedural or technical rules, not substantive rules. Again, the Council insisted that judicial administration should be subject to judicial independence.

Both the preservation of judicial autonomy and the exercise of judicial supervisory powers shall aim at safeguarding judicial independence. As a result, while the highest judicial organ may prescribe rules governing judicial practice within the scope and for the purpose of judicial administration and supervision, it shall not violate the aforementioned principle of judicial independence. Based upon judicial autonomy, the highest judicial organ may prescribe and amend rules governing the details and technical matters of judicial procedures. Rules prescribed by the judicial administration within its supervisory powers may lawfully provide concerned laws and rules, interpretative materials within its jurisdiction, or legal opinions governing judicial practice, in addition to judicial administrative matters, for lower courts and judicial staffs in their legal enforcement and applications. However, judicial rules shall not be inconsistent with laws and these rules shall not add any further restrictions on the people's freedoms and substantive rights without the concrete and detailed delegation of law. Furthermore, Interpretation No. 216 rendered by this Yuan has made it expressly clear that when making judgments in concrete cases, judges shall not be bound by judicial rules that are involved with legal opinions. Nor shall enforcement outlines and precautionary matters prescribed by the Judicial Yuan within its supervisory power of judicial administration contradict the principle of judicial independence.²⁴⁰

Unlike the United States where the judiciary itself is responsible for judicial administration, Taiwan authorizes the power of judicial administration to an independent bureaucratic institution, the Judicial Yuan. Ideally, the Judicial Yuan would promote judicial independence on the one hand and provide effective judicial administration on the other hand. However, due to the ideology shaped by the KMT authoritarian rule, the Judicial Yuan used to inappropriately issue administrative directives with respect to judges' decision making. After Taiwan's democratization, the Judicial Yuan still issued administrative directives with respect to judges'

²⁴⁰ Sifayuan (司法院) [Judicial Yuan], Oct. 5, 2001, (Shi) No. 530 Interpretation (司法院釋字第 530 號解釋), 14 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATIONS OF JUDICIAL YUAN GRAND JUSTICES] 265 (Judicial Yuan ed., 2010), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

decision making, but they were advisory at most.

4.2.1.2. Administrative Directives on Criminal IP Enforcement

After Taiwan was identified on the Priority Watch List in the first Special 301 report in 1989, the Ministry of Justice on several occasions issued administrative directives to demand public prosecutors to enforce criminal IP law and oversee judges' lenient sentences. For example, the Ministry of Justice in 1992 ordered public prosecutors to review convertible sentences strictly.²⁴¹ "Only when provided with documents that could prove serving a real jail term would extraordinarily damage a defendant's health, education, occupation, or family, a public prosecutor should approve a convertible jail term to be converted into a fine."²⁴² In the same year, the Ministry of Justice also demanded local prosecutors' offices to assign specialized prosecutors to criminal IP cases.²⁴³ To implement Taiwan's Protecting Intellectual Property Rights Action Plan,²⁴⁴ the Ministry of Justice on May 6, 1992 ordered all public prosecutors to follow the following guidelines for the prosecution of criminal copyright, trademark, and patent cases, and announced that it would periodically and randomly supervise the implementation:²⁴⁵

(1) whenever filing a prosecution, a public prosecutor should realize infringements damaged the

²⁴¹ According to Art. 41 of the Criminal Code, a convertible jail term is subject to a public prosecutor's review. A convertible jail term should be approved of its conversion if the jail term will damage the offender's health, education, occupation, or family.

²⁴² Zhonghua Minguo 81 Nian 5 Yue 14 Ri Fawubu Fa (81) Jian Zi Di 07183 Hao Han (中華民國 81 年 5 月 14 日法務部法(81)檢字第 07183 號函) [Ministry of Justice, May 14, 1992, (Fa (81) Jian) No. 07183 Order], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.144, 1992, at 96.

²⁴³ Zhonghua Minguo 81 Nian 4 Yue 30 Ri Fawubu Fa (81) Jian Zi Di 06377 Hao Han (中華民國 81 年 4 月 30 日法務部法(81)檢字第 06377 號函) [Ministry of Justice, Apr. 30, 1992, (Fa (81) Jian) No. 06377 Order], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.144, 1992, at 96.

²⁴⁴ Jingjibu Guoji Maoyiju (經濟部國際貿易局) [Bureau of Foreign Trade of Department of Economic Affairs], *Baohu Zhihui Caichanquan Xingdong Jihua* (保護智慧財產權行動計畫) [Protecting Intellectual Property Rights Action Plan], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.146, 1992 at 94-108.

²⁴⁵ Zhonghua Minguo 81 Nian 5 Yue 6 Ri Fawubu Fa (81) Jian Zi Di 06677 Hao Han (中華民國 81 年 5 月 6 日法務部法(81)檢字第 06677 號函) [Ministry of Justice, May 6, 1992, (Fa (81) Jian) No. 06677 Order], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.144, 1992, at 94.

reputation of this country very much and were disadvantageous to economic development, and should request the court to impose a specified penalty, especially a heavy penalty for a serious case;²⁴⁶ (2) whenever receiving a court decision, a public prosecutor should review it carefully and appeal it if its sentencing was lenient or application of law was inappropriate;²⁴⁷ (3) whenever filing a prosecution, a public prosecutor should consider the profit gained by the defendant and request the court to impose a fine in addition to imprisonment or criminal detention for the purpose of raising the overall punishment;²⁴⁸ (4) whenever executing a convertible jail term, a public prosecutor should review conversion thoroughly and suspend the previous policy that emphasized conversion;²⁴⁹ and (5) whenever the police applied for a search warrant, a public prosecutor should expedite the proceedings and issue a warrant immediately if the application met legal requirements.²⁵⁰ One month later, the Ministry of Justice reiterated the foregoing guidelines and provided all prosecutors' office with the copy of Taiwan-U.S. understanding on copyright protection and the action plan.²⁵¹ Since then, the Ministry of Justice has often reminded prosecutors of the guidelines.²⁵²

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 94-95.

²⁴⁹ *Id.* at 95.

²⁵⁰ *Id.*

²⁵¹ *Zhonghua Minguo 81 Nian 6 Yue 26 Ri Fawubu Fa (81) Jian Zi Di 09366 Hao Han* (中華民國 81 年 6 月 26 日法務部法(81)檢字第 09366 號函) [Ministry of Justice, Jun. 26, 1992, No. 09366 Order], *FAWUBU GONGBAO* (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.146, 1992, at 78.

²⁵² For example, *Zhonghua Minguo 82 Nian 12 Yue 29 Ri Fawubu Fa 82 Jian Zi Di 27515 Hao Han* (中華民國 82 年 12 月 29 日法務部法 82 檢字第 27515 號函) [Ministry of Justice, Dec. 29, 1993, (Fa (82) Jian) No. 27515 Order], *FAWUBU GONGBAO* (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.164, 1993, at 76; *Zhonghua Minguo 83 Nian 3 Yue 7 Ri Fawubu Fa 83 Jian Zi Di 04455 Hao Han* (中華民國 83 年 3 月 7 日法務部法 83 檢字第 04455 號函) [Ministry of Justice, Mar. 7, 1994, (Fa (83) Jian) No. 04455 Order], *FAWUBU GONGBAO* (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.166, 1994, at 52; *Zhonghua Minguo 84 Nian 3 Yue 7 Ri Fawubu Fa 84 Jian Zi Di 05213 Hao Han* (中華民國 84 年 3 月 7 日法務部法 84 檢字第 05213 號函) [Ministry of Justice, Mar. 7, 1995, No. 05213 Order], *FAWUBU GONGBAO* (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.178, 1995, at 20; *Zhonghua Minguo 85 Nian 5 Yue 23 Ri Fawubu Fa 85 Jian Zi Di 12375 Hao Han* (中華民國 85 年 5 月 23 日法務部法 85 檢字第 12375 號函) [Ministry of Justice, May 23, 1996, (Fa (83) Jian) No. 12375 Order], *FAWUBU GONGBAO* (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.192, 1996, at 28; *Zhonghua Minguo 86 Nian 4 Yue 11 Ri Fawubu Fa 86 Jian*

In the meantime, the Judicial Yuan also issued a few directives with respect to the enforcement of criminal IP law. For example, the Judicial Yuan ordered courts to publicize a news release whenever sentencing a defendant to imprisonment more than one year,²⁵³ and to provide the Intellectual Property Office with court decisions for criminal copyright cases.²⁵⁴ Besides, the Judicial Yuan also issued the Taiwan High Court and Affiliated Courts Trial Guidelines for the Prevention of Trademark and Similar Crimes and the Protection of Economic Development (Trial Guidelines) in 1995 to demand judges' cooperation for more serious criminal punishment for (1) trademark offenses in the Criminal Code, (2) patent offenses in the Patent Act,²⁵⁵ (3) trademark offenses in the Trademark Act, and (4) other serious economic offenses.²⁵⁶ Article 3 of the Trial Guidelines provided that whenever deciding a sentence for an infringer, a

Zi Di 09915 Hao Han (中華民國 86 年 4 月 11 日法務部法 86 檢字第 09915 號函) [Ministry of Justice, Apr. 11, 1997, (Fa (86) Jian) No. 09915 Order], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.203, 1997, at 29; Zhonghua Minguo 91 Nian 4 Yue 8 Ri Fawubu Fa Jian Zi Di 0910012422 Hao Han (中華民國 91 年 4 月 8 日法務部法檢字第 0910012422 號函) [Ministry of Justice, Apr. 8, 2002, (Fajian) No. 0910012422 Order], FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZ.], no.278, 2002, at 24.

²⁵³ Zhonghua Minguo 82 Nian 5 Yue 3 Ri Sifayuan (82) Yuan Tai Ting Xing Yi Zi Di 07247 Hao Han (中華民國 82 年 5 月 3 日司法院(82)院台廳刑一字第 07247 號函) [Judicial Yuan, May 3, 1993, (Yuan Tai Ting Xing Yi) No. 07247 Order], 35 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.6, 1993, at 36.

²⁵⁴ Zhonghua Minguo 88 Nian 9 Yue 7 Ri Sifayuan (88) Yuan Tai Ting Xing Yi Zi Di 23244 Hao Han (中華民國 88 年 9 月 7 日司法院(88)院台廳刑一字第 23244 號函) [Judicial Yuan, Sep. 7, 1999, (Yuan Tai Ting Xing Yi) No. 23244 Order], 41 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.10, 1999, at 95.

²⁵⁵ The offenses for patent infringement in Taiwan's Patent Act were partly removed in 2001. Zhonghua Minguo 90 Nian Zhuanli Fa (中華民國 90 年專利法) [Patent Act of 2001], Oct. 24, 2001, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6424, 2001, at 20. *See also* Hubert Hsu, *Patents, in* INTELLECTUAL PROPERTY LAW IN TAIWAN 24, 118, 152 (Christopher Heath ed., 2003). All criminal provisions were completely removed in 2003. Zhonghua Minguo 92 Nian Zhuanli Fa (中華民國 92 年專利法) [Patent Act of 2003], Feb. 6, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6505, 2003, at 16. *See also* YANG CONGSEN (楊崇森), ZHUANLI FA LILUN YU YINGYONG (專利法理論與應用) [PATENT LAW: THEORIES & PRACTICE] 577 (2007).

²⁵⁶ Taiwan Gaodeng Fayuan ji Suoshu Fayuan Jiaqiang Shenpan Gongneng Fangzhi Fanghai Shangbiao Deng Fanzui Yi Weihu Guojia Jingji Fazhan Fangan (臺灣高等法院及所屬法院加強審判功能防制妨害商標等犯罪以維護國家經濟發展方案) [Taiwan High Court and Affiliated Courts Trial Guidelines for the Prevention of Trademark and Similar Crimes and the Protection of Economic Development], Sep. 25, 1995, Zhonghua Minguo 84 Nian 9 Yue 25 Ri Sifayuan (84) Yuan Tai Ting Xing Yi Zi Di 17966 Hao Han (中華民國 84 年 9 月 25 日司法院(84)院台廳刑一字第 17966 號函) [Judicial Yuan, Sep. 25, 1995, ((84) Yuan Tai Ting Xing Yi) No. 17966 Order] (revised and renamed in 2010) [hereinafter Trial Guidelines].

judge, in addition to the sentencing standards in Article 57 of the Criminal Code, should consider: (1) the harm to Taiwan's reputation in international trade and the influence to Taiwan's economic development; (2) the degree of the victim's suffering; (3) the unlawful profit that the defendant might gain; and (4) the harm to consumers. Article 6 asked judges to impose severe punishment especially on infringers who ran a business especially for trademark or patent infringement. Article 8 authorized courts to convene individually or jointly at any time to unify application of law and exchange opinions on sentencing. Article 11 asked individual courts to examine and improve the implementation of the guidelines periodically, while Article 12 required the Taiwan High Court to provide the Judicial Yuan every half of a year with an analysis and research report on court decisions in relation to the Trial Guidelines and refer the report to its affiliated courts for further improvement.

Compared with these specified "demands" from the Ministry of Justice that were binding on public prosecutors,²⁵⁷ judges were independent of the administrative directives with respect to substantive matters from the Judicial Yuan. These administrative directives issued by the Judicial Yuan not only had no authorization in law but also involved judges' discretion in sentencing. In light of the judicial independence principle confirmed by the Grand Justices, they were nonbinding to judges. Compelling judges to observe the directives was interference with the judiciary and was subject to being challenged or attacked by judges or outsiders, so the Judicial Yuan never took these directives seriously and did not hold judges accountable for implementing them.

²⁵⁷ "A public prosecutor shall comply with the order of his or her supervisory chief prosecutors." Art. 63(c) of the Court Organization Act.

4.2.2. Criminal IP Divisions

4.2.2.1. Allocation of Judicial Affairs under Judicial Autonomy

In Taiwan, there are several court divisions (*ting* 庭) in a court. Because three judges are required for a panel decision at district court and high court level, each court division in district courts and high courts should have at least three judges.²⁵⁸ At the highest level, because five judges are required for a panel decision, a court division at the Supreme Court should have at least five judges.²⁵⁹ The number of court divisions in a court depends on the caseload of the court.²⁶⁰ A chief judge (*tingzhang* 庭長) or the most senior judge in a court division should take the responsibility to preside over a case for which a penal decision is required.²⁶¹

As mentioned in Chapter 3, one of the most significant judicial reforms in the 1990s was judicial autonomy. After reformers' revolutionary action calling for judicial autonomy, including the administration of courts, a judicial conference replaced a representative of the Judicial Yuan in deciding the allocation of judicial affairs. Under the new judicial autonomy, the judicial conference has the authority to assign or transfer a judge to a specific court division including a civil, criminal, or specialized division. In the meantime, because of Taiwan's peaceful democratization, the judicial system shaped by conservative judicial culture was almost intact. Judges' appointment, training, and discipline were almost the same as before. Senior judges who were cultivated and promoted before still controlled the judicial system. As a consequence, the rotation rules and decisions, though decided by a judicial conference, were always grounded on seniority.²⁶²

²⁵⁸ Art. 3(a) & (b) of the Court Organization Act.

²⁵⁹ Art. 3(c) of the Court Organization Act.

²⁶⁰ Art. 14 of the Court Organization Act.

²⁶¹ Art. 4(a) of the Court Organization Act.

²⁶² To improve the conservativeness as a result of seniority, the Judicial Yuan tried to devise new rules based on

4.2.2.2. Specialized Divisions in IP

Unlike in the U.S. where threatening criminal prosecution to obtain advantage in civil action is prohibited by several state bar rules of professional conduct,²⁶³ Taiwan does not have any legislation, regulation, or rule on this issue.²⁶⁴ In Taiwan, criminal prosecution is much more advantageous than civil litigation from a plaintiff's perspective because: (1) common people are allowed to file a criminal complaint without hiring a lawyer; (2) criminal litigation is also free of charge; (3) public prosecutors and judges will shoulder the responsibility of collecting evidence and finding defendants; (4) coercive punishment can impose huge pressure on defendants; and (5) Taiwan's criminal procedure law allowed a victim to file an affiliated civil lawsuit in criminal proceedings without paying any adjudication fees.²⁶⁵ In addition, the Chinese traditional judicial system where criminal sanctions were commonly used by the government to solve disputes also fosters the practice.²⁶⁶ Until now, many common people still share the same idea that one of criminal court's tasks is to help recover loss. Thus, threats of criminal prosecution have been prevalent in Taiwan. For example, most medical malpractice cases have been filed in criminal court, not civil court.²⁶⁷

considerations other than seniority, *see* Chapter 3.

²⁶³ *See, e.g.*, Conn. Rules of Prof'l Conduct R. 3.4(7) (2010) ("A lawyer shall not... [p]resent, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."); S.C. Rules of Prof'l Conduct R. 4.5 (2009) (forbidding lawyers from engaging in threatening criminal prosecution "solely to obtain an advantage in a civil matter").

²⁶⁴ Taiwan's Attorney Regulation Act has nothing to do with this issue. Lüshi Fa (律師法) [Attorney Regulation Act], Nov. 12, 1992, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5644, 1989, at 1.

²⁶⁵ According to Taiwan's civil procedure law, before filing a civil lawsuit, a plaintiff has to pay the court an adjudication fee that amounts to about one percent of the value of the litigated property. Minshi Susong Fa (民事訴訟法) [Civil Procedure Act], Feb. 7, 2003, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6506, 2003, at 6, art. 77*quaterdecies*.

²⁶⁶ *See* LIN SHANTIAN (林山田), XINGFA DE GEXIN (刑法的革新) [REFORM OF CRIMINAL LAW] 132-133 (2001); Lin Shantian (林山田), *Lun Tebie Xingfa Feida Zheng zhi Bingyin* (論特別刑法肥大症之病因) [*On the Pathology for Over-Criminalization of Specialized Criminal Law*], 39 FALING YUEKAN (法令月刊) [LAW MONTHLY], no.1, 1988, at 8 (both analyzing the relationship between the over-criminalization in Taiwan's criminal law and the Chinese tradition, and arguing the necessity of decriminalization).

²⁶⁷ *See* Zhang Mingwei (張明偉), *Xingshi Guoshi Zeren zhi Jiantao: Yi Meiguo Xingshi Yiliao Anli Wei Li* (刑事過

Furthermore, Taiwan's IP law, especially copyright and trademark law, criminalizes almost any infringement, so Taiwan's IP owners have utilized criminal prosecution, instead of civil litigation, to remedy IP infringement. By pressing defendants with incoming criminal punishment, IP owners could usually gain superior bargaining power for compensation. The practice of utilizing criminal prosecution to press defendants for civil compensation (*yixing bimin* 以刑逼民) has made criminal court as the main battlefield of IP litigation.²⁶⁸

Given the importance of criminal IP litigation, Taiwan adjusted court organization and case assignment rules for more speedy trial and more appropriate adjudication. Before a general provision in the Court Organization Act of 1989,²⁶⁹ the Trademark Act and the Patent Act authorized a specialized court division to be established at district court and high court level in 1985²⁷⁰ and 1986.²⁷¹ Later, the legislature installed the same provision in the Copyright Act in 1998.²⁷² The idea behind specialized court divisions was not difficult to understand. By assigning IP cases to a few judges who sit in a specialized court division, IP cases might be better treated because those specified criteria set by the Judicial Yuan to select judges could be devised

失責任之探討：以美國刑事醫療案例為例 [A Discussion on Criminal Negligence: Based on Criminal Cases of Medical Malpractice in the United States], 39 GUOLI TAIWAN DAXUE FAXUE LUNCONG (國立臺灣大學法學論叢) [NTU L.J.], no.1, 2010, at 353, 357 (describing the practice of using criminal prosecution for civil compensation in medical malpractice cases); Wang Changmin (王昶閔), *Yiliao Jiufen, Ni Xiufa Sheli Tiaojie, Jiuji Shuanggui* (醫療糾紛，擬修法設立調解、救濟雙軌) [Medical Malpractice Disputes, Call for Channels for Mediation and Litigation], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Nov. 30, 2011, at Shenghuo Xinwen (生活新聞) [Life News], available at <http://www.libertytimes.com.tw/2011/new/nov/30/today-life16.htm> (noting the prevalence of criminal prosecution in the area of medical malpractice).

²⁶⁸ For a discussion on the strategy, see Zhang Zhongxin (章忠信), *Zhuzuoquan Qin Hai Xingwei zhi Xingshi Zhengce Jiantao* (著作權侵害行為之刑事政策檢討) [Review on Criminal Policy Regarding Copyright Infringement], WUANGUO FALÜ (萬國法律) [FORMOSA TRANSNATIONAL L. REV.], no.125, 2002, at 94.

²⁶⁹ *Fayuan Zuzhi Fa* (法院組織法) [Court Organization Act], Dec. 22, 1989, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5184, 1989, at 1. According to Art. 14 and 36 of the Court Organization Act, district courts and high courts shall set up civil and criminal divisions. The number of divisions depends on the caseload. If necessary, a specialized division can be set up as well.

²⁷⁰ Art. 66ter of the Trademark Act of 1985.

²⁷¹ Art. 88ter of the Patent Act of 1986.

²⁷² Art. 115ter of the Copyright Act of 1998.

accordingly. As a mandatory mechanism, the Judicial Yuan, in theory, should have influenced the judiciary more effectively and achieved the goal of speedy trial and appropriate adjudication more smoothly.

Here is the figure illustrating the criminal IP court proceedings prior to the establishment of the Intellectual Property Court and related procedures in 2008.

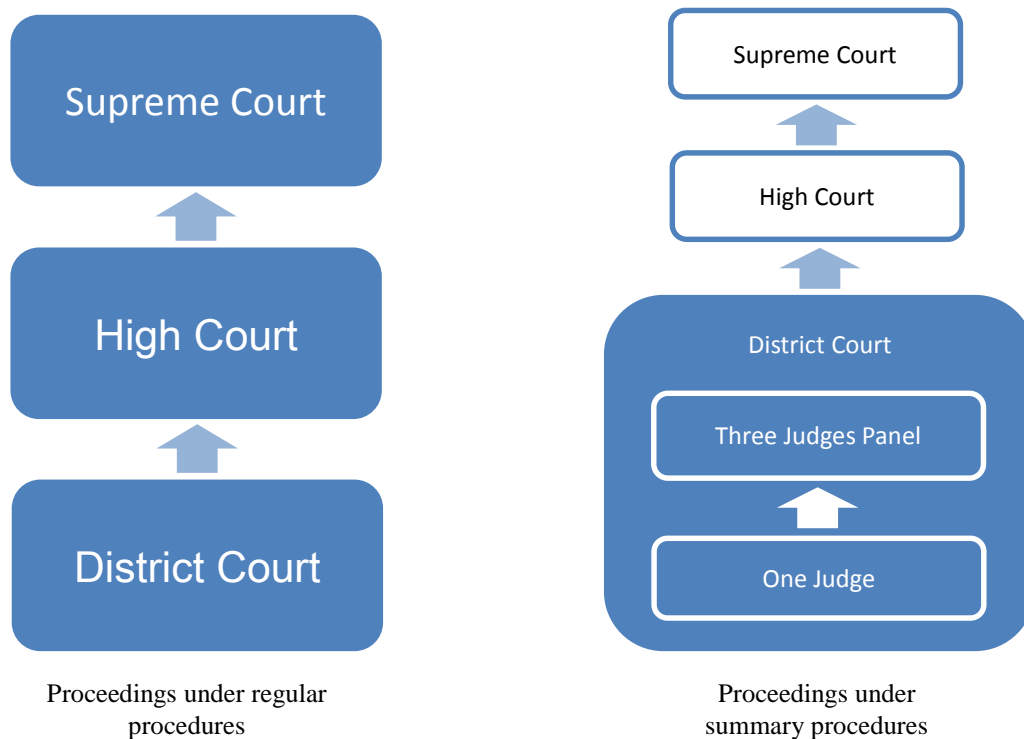


Figure 4-1 Court Proceedings for Criminal IP Litigation before 2008

In Taiwan, all criminal cases including criminal IP cases are adjudicated under regular procedures or summary procedures prescribed by the Code of Criminal Procedure. Before 2008, criminal IP cases were presided over by a few judges who sat in criminal IP divisions in criminal court.

The criminal procedure law provides for two major criminal procedures, regular procedures (*tongchang susong chengxu* 通常訴訟程序) and summary procedures (*jianyi susong chengxu*

簡易訴訟程序). Regular procedures begin with a formal prosecution filed by a public prosecutor to a district court.²⁷³ As soon as the district court receives the case, it will randomly assign the case to one of the criminal court judges.²⁷⁴ In the district court proceedings, a victim of the prosecuted crime is allowed to file an affiliated civil lawsuit.²⁷⁵ Whenever a criminal court judge makes his or her final decision for the criminal case, he or she can either adjudicate the affiliated civil case or refer it to civil court for further adjudication.²⁷⁶ After the criminal court delivers its court decision to close a criminal case, a losing party can appeal the case to the first tier appellate court, the High Court.²⁷⁷ The High Court's decision will be final except the case can pass the threshold for an appeal to the highest court, the Supreme Court.²⁷⁸

Summary procedures start when a prosecutor files a request for a summary judgment or the criminal court orders a switch from regular procedures to summary procedures.²⁷⁹ A summary judgment must be one that finds the defendant guilty.²⁸⁰ The sentence of a summary judgment must not be a real jail term, including: (1) a sentence of probation (regardless of with a convertible or unconvertible primary penalty); or (2) a convertible sentence (including a fine,

²⁷³ Xingshi Susong Fa (刑事訴訟法) [Code of Criminal Procedure], Jan. 28, 1967, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.1823, 1967, at 1, art. 264(a).

²⁷⁴ Art. 79(a) of the Court Organization Act. It authorizes a judges conference in individual courts to set up case assignment rules.

²⁷⁵ Art. 487(a) of the Code of Criminal Procedure.

²⁷⁶ Art. 501 & 504(a) of the Code of Criminal Procedure. In practice, most criminal court judges refer an affiliated civil case to the civil court. Otherwise, they have to deliver a criminal judgment and a civil judgment. See Huang Guochang (黃國昌), *Xingshi Fudai Minshi Susong Yisong Minshiting Hou zhi Hefa Yaojian Shencha—Yi Zuigaofayuan 98 Niandu Taishang Zi Di 1863 Hao Panjue Wei Xie* (刑事附帶民事訴訟移送民事庭後之合法要件審查—以最高法院 98 年度台上字第 1863 號判決為楔) [*The Legality Review for Affiliated Civil Litigation Referred to Civil Courts—Taking the Supreme Court Minguo 98 (Taishang) No. 1863 Criminal Judgment as Introduction*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.144, 2010, at 29, 38 (noting the operation of the judicial system).

²⁷⁷ Art. 361(a) of the Code of Criminal Procedure.

²⁷⁸ Art. 376 of the Code of Criminal Procedure.

²⁷⁹ Art. 449(a) & (b) of the Code of Criminal Procedure.

²⁸⁰ Art. 454(a) of the Code of Criminal Procedure.

criminal detention, or not more than six months imprisonment) without probation.²⁸¹ A summary case is presided over by only one judge who sits either in a criminal court or summary court.²⁸² A judge should deliver a summary judgment immediately after he or she authorizes the application of summary procedures.²⁸³ He or she can base the judgment merely on the case file provided by the prosecution,²⁸⁴ and no court hearing is required in summary procedures.²⁸⁵ If the court believes that a summary judgment is not appropriate, for example, the defendant should be jailed (an unconvertible term without probation) or the defendant would be found not guilty, the court should discontinue summary procedures and order a trial under regular procedures.²⁸⁶ A party can appeal a summary judgment to a three judge panel in the same district court²⁸⁷ except if the sentence of the summary judgment is identical to the one requested by the party.²⁸⁸ The panel must follow regular procedures to try the appellate case completely.²⁸⁹ If the panel overrules the appeal, the case is final;²⁹⁰ if the panel finds the defendant not guilty or sentences the defendant to a real jail term, the panel decision will be deemed to be a district court judgment made under regular procedures.²⁹¹ Under these circumstances, a losing party can appeal the case to the High Court.²⁹² Because of the streamlined proceedings, judges heavily rely on summary

²⁸¹ Art. 449(c) of the Code of Criminal Procedure.

²⁸² Art. 449*bis* of the Code of Criminal Procedure.

²⁸³ Art. 453 of the Code of Criminal Procedure.

²⁸⁴ Art. 449(a) of the Code of Criminal Procedure.

²⁸⁵ *Proviso* of Art. 449(a) of the Code of Criminal Procedure.

²⁸⁶ Art. 452 of the Code of Criminal Procedure.

²⁸⁷ Art. 455*bis*(a) the Code of Criminal Procedure.

²⁸⁸ Art. 455*bis*(b) the Code of Criminal Procedure.

²⁸⁹ Art. 455*bis*(c) the Code of Criminal Procedure.

²⁹⁰ Art. 455*bis*(c) the Code of Criminal Procedure.

²⁹¹ Zuigao Fayuan (最高法院) [Sup. Ct.], May 4, 2006, Minguo 95 (Taifei) No. 95 Criminal Judgment (中華民國 95 年 5 月 4 日 95 年度台非字第 95 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

²⁹² Zuigao Fayuan (最高法院) [Sup. Ct.], Jan. 17, 2002, Minguo 91 (Taifei) No. 21 Criminal Judgment (中華民國 91 年 1 月 17 日 91 年度台非字第 21 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>. See also Lin Junyi (林俊益), *Xingshi Jianyi Chengxu zhi Zuixin Xiuzheng* (刑事簡易程序之最新修正) [*The Most Updated Criminal Summary Procedures*], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.37, 1998, at 22, 23.

procedures to ease their heavy caseload.²⁹³

Like other criminal cases, criminal IP cases were adjudicated under either regular procedures or summary procedures by judges sitting in criminal IP divisions. In theory, a few judges should be carefully selected to sit in criminal IP divisions for their enthusiasm, experience, and knowledge in IP. These focused judges would facilitate high-quality adjudication of criminal IP cases. However, due to the following reasons, criminal IP divisions represent a nominal organization and they cannot bring significant changes to the system.

First, criminal procedures for criminal IP cases and those for regular cases were the same. In most criminal IP cases, especially after all criminal provisions in the Patent Act were completely removed in 2003, defendants pleaded guilty and no extra professional or advanced knowledge or experience was involved.²⁹⁴

Second, under Taiwan's judicial autonomy, it was the judicial conference who decided who could sit in a criminal IP division, not the Judicial Yuan or its representative, an appointed chief judge by the Judicial Yuan. It was impossible for the Judicial Yuan or its representative to select desirable judges.²⁹⁵

Third, judges sitting in criminal IP provisions were part-time and had to pay more attention to other regular criminal cases.²⁹⁶ Within Taiwan's judicial culture, judges had to compete with

²⁹³ See Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reform*, 49 VA. J. INT'L L. 651, 670-671 (2009) (providing the statistics about judges' inclination to summary procedures).

²⁹⁴ Zhang Daozhou (張道周), *Jianli Zhihui Caichan Quan Zhuanye Fayuan Yingyou zhi Gonggong Zhengce Bianlun* (建立智慧財產權專業法院應有之公共政策辯論) [*Public Policy Debate on the Establishment of Intellectual Property Specialized Court*], TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.], no.78, 2006, at 16, 19.

²⁹⁵ See LIN MENGHUANG (林孟皇), *JINRONG FANZUI YU XINGSHI SHENPAN* (金融犯罪與刑事審判) [FINANCIAL CRIME AND CRIMINAL TRIAL] 1 (2nd ed. 2011) (describing the relations between judges' autonomy and specialized divisions).

²⁹⁶ Geji Fayuan Faguan Banli Minxingshi ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事及特殊專業類型案件年度司法事務分配辦法) [Assignment Rules for Civil, Criminal and

each other for higher positions or better treatment; therefore, judges were very serious about fairness among them.²⁹⁷ Because criminal IP cases were only a small portion in all criminal cases and this category of cases was usually not difficult to deal with, the viewpoint that it was unfair for a judge to deal only with criminal IP cases was popular among judges. Thus, a judge in a criminal IP division had to play a dual role, a criminal IP division judge as well as a criminal court judge. In addition, judges' grades were decided by their routine performance. Those judges who closed more cases and were recognized by higher courts could gain advantages in the competition. Given the small proportion of criminal IP cases, it was inevitable for judges to pay more attention to regular criminal cases or at a minimum treat all cases equal.²⁹⁸

Fourth, due to the myth that a specialized division could expedite court proceedings and improve the quality of adjudication, the Judicial Yuan set up many different specialized divisions in individual courts including serious crime divisions, corruption crime divisions, sexual crime divisions, medical malpractice crime divisions, financial crime divisions, and traffic accident crime divisions.²⁹⁹ Since there had to be someone sitting in a specialized division, almost every

Specialized Case in Courts of Every Level], Oct. 11, 2001, *Zhonghua Minguo 90 Nian 10 Yue 11 Ri Sifayuan* (90) Yuan Tai Ting Si Yi Zi Di 24237 Hao Ling (中華民國 90 年 10 月 11 日司法院(90)院台廳司一字第 24237 號令) [Judicial Yuan, Oct. 11, 2001, No. 24237 Order], no.14 (later replaced by Geji Fayuan Faguan Banli Minxingshi yu Xingzheng Susong ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事與行政訴訟及特殊專業類型案件年度司法事務分配辦法) [Assignment Rules for Civil, Criminal, Administrative and Specialized Case in Courts of Every Level], May 30, 2012, *Zhonghua Minguo 101 Nian 5 Yue 30 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 1010015157 Hao Ling* (中華民國 101 年 5 月 30 日司法院院台廳司一字第 1010015157 號令) [Judicial Yuan, May 30, 2012, No. 1010015157 Order], 54 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.7, 2012, at 252, no.16).

²⁹⁷ See LIN MENGHUANG (林孟皇), *supra* note 295, at 1 (noting the influence of the judicial culture on specialized divisions).

²⁹⁸ See *id.* (noting the influence of the judicial culture on specialized divisions).

²⁹⁹ See Huang Jialie (黃嘉烈), *Youguan Zhuanye Fating zhi Sifagaige—Zhuanye Fating yu Zhuanye Faguan* (有關專業法庭之司法改革—專業法庭與專業法官) [Judicial Reform on Court Specialization—Specialized Divisions and Specialized Judges], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU 459-461 (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] (Tang Dezong & Huang Guochang (湯德宗與黃國昌) eds., 2010).

judge was assigned to at least one specialized division. Moreover, as a result of the heavy workload for some specialized divisions such as serious crimes divisions, judges were always reluctant to sit in specialized divisions. In the end, to be fair, judges had to rotate among all positions in all specialized divisions.³⁰⁰ In practice, judges were assigned to specialized IP divisions in a random order, not because of their enthusiasm, experience, or knowledge.

4.3. Conclusion

Under the Special 301 framework, Taiwan's reforms in criminal IP legislation created two different punishment regimes. In the copyright regime, because no autonomous legislation could survive U.S. oversight, criminal copyright law featured broad criminalization, harsh punishment, and judges' limited discretion in sentencing. By contrast, given less U.S. interests in trademark matters, Taiwan's criminal trademark law authorized judges to exercise broad discretion in sentencing even though broad criminalization created a large criminal population.

Theoretically, in a society where judges enjoy judicial independence, whether or not judges are willing to enforce criminal law and then fill the gap between law and society usually depends on the justification of criminal law.³⁰¹ Whenever criminal punishment is harsher than prevailing social norms would justify, judges may avoid the enforcement of criminal law in an effort to keep the law consistent with social norms. Under such circumstances, increasing criminal punishment through legislation may enhance judges' reluctance and then give rise to adverse effects. By contrast, if criminal punishment appears reasonable and justifiable in light of social norms, then judges may be more willing to enforce it. While Taiwan increased criminal punishment and narrowed judges' discretion in sentencing under U.S. pressure, Taiwan's

³⁰⁰ *See id.* at 462.

³⁰¹ "The effective enforcement of criminal law depends on the cooperation of a larger number of institutional actors." Kahan, *supra* note 217, at 642.

democratization also sparked off judicial independence. In the contexts of rule of law, judges might make use of their newly gained judicial power to try to avoid results that appeared unjust due to harsh criminal copyright law.

To undermine judicial resistance to strict enforcement of unpopular laws, Taiwan's Judicial Yuan tried imposing administrative directives and criminal IP divisions. Under Taiwan's authoritarian regime before the late 1980s, the Judicial Yuan could easily influence judges' decisions by issuing administrative directives. After Taiwan's judicial independence arrived, any administrative directive with regard to judges' decision making and without authorization of law was nonbinding on judges. Similarly, though the Judicial Yuan tried to establish criminal IP divisions in which few judges were appointed to deal with criminal IP cases, this measure ran afoul of Taiwan's judicial autonomy. It is the judicial conference, not a representative of the Judicial Yuan, that has the power of allocation of judicial affairs. Also, due to the judicial culture emphasizing fairness among judges and excessive court specialization, judges in fact rotated among many different specialized court divisions including criminal IP divisions.

To solve the ineffectiveness of the measures, the Judicial Yuan finally established the sole appellate court specializing in IP cases, the Intellectual Property Court, and the related procedures in 2008.

Chapter 5 Intellectual Property Court and Related Procedures

The focus of this chapter is on Taiwan's most important judicial reform under the U.S. Special 301 framework, the Intellectual Property Court (IPC) and related procedures. As a result of the IPC's criminal jurisdiction over all appellate criminal intellectual property (IP) cases, the United States lifted its Special 301 oversight of Taiwan in January 2009 in the belief that the reform would diminish the tendency for judges to give lenient sentences and also raise criminal punishment against IP infringers. The approach of the 2008 reform was to introduce further specialization to the judiciary; however, in order to succeed in changing judges' sentencing pattern, it would have to overcome resistance from judicial independence and judicial culture.

Because the Judicial Yuan's efforts in issuing administrative directives and creating specialized IP divisions had been ineffective, the Judicial Yuan launched a new judicial reform in 2008 to: (1) shift the jurisdiction over appellate criminal IP cases from regular appellate courts to one specialized appellate court; (2) encourage elite judges to sit in criminal and civil IP divisions in district court; and (3) develop sentencing guidelines to guide judges' sentences. All these measures aimed to harmonize and strengthen criminal punishments against IP infringers at both appellate and district court levels. Like the reforms described in Chapter 4, the 2008 reform had to face challenges as a result of judicial resistance to change.

In July 2008, Taiwan established a sole appellate court specializing in IP, the IPC. Unlike its counterpart in other countries usually focusing on patent issues, the IPC's broad jurisdiction covered civil, administrative, and criminal IP litigation.¹ With its criminal jurisdiction and

¹ For example, the U.S. Court of Appeals for Federal Circuit (CAFC), Germany's Federal Patent Court (Bundespatentgericht), and Korea's Korean Patent Court focus only on patent litigation. Japan's IP High Court focuses on civil and administrative IP litigation. For a general introduction to these patent courts, *See* Richard Linn, *The Future Role of the United States Court of Appeals for the Federal Circuit Now That It Has Turned 21*, 53 AM. U. L. REV. 735 (2004); Saša Bavec, *Scope of Protection: Comparison of German and English Courts' Case Law*, 8 MARQ. INTEL. PROP. L. REV. 255, 257-258 (2004); Kong-Woong Choe, *The Role of the Korean Patent Court*, 9

appellate position, the criminal bench of the IPC was expected to improve judges' lenient sentences. However, because the primary purpose for granting criminal jurisdiction to the IPC was to raise criminal punishment, not to remedy judges' lack of expertise in IP law, the result of creating a special IP court in Taiwan would not be the same as in other countries with special IP courts. Even though the IPC had only the narrow goal of reducing judicial discretion in sentencing in IP criminal cases, the narrow scope of its reform made it unlikely to overcome the judicial independence and judicial culture of Taiwan which had previously resisted harsher sentencing.

In addition to creating a special appellate level court, the 2008 reform tried to reduce the practice of frequent rotation in criminal IP divisions in district court. The practice of frequent rotation has the effect discouraging judges who were interested or specializing in IP law from sitting in criminal IP divisions. Thus, the Judicial Yuan started to certify those judges who were interested or specializing in IP as specialized judges in IP and provided them with incentives to sit in criminal IP divisions. By giving priority to certified specialized judges the Judicial Yuan hoped criminal IP cases could be adjudicated by these elite judges. However, this reform did not eliminate the practice of frequent rotation because the architects of the reform overlooked the internal "prefer civil court to criminal court" judicial culture in Taiwan. As a result of a strong preference among most judges for civil court appointments, almost all specialized judges in IP rushed to civil courts, not criminal courts. So the reform did not have the effect of increasing the number of specialized judges in IP hearing criminal cases, and the practice of rotating regular

FED. CIR. B.J. 473 (1999); Toshiko Takenaka, *Success or Failure? Japan's National Strategy on Intellectual Property and Evaluation of its Impact from the Comparative Law Perspective*, 8 WASH. U. GLOBAL STUD. L. REV. 379, 387 (2009). In addition, China is now debating whether to establish its IP court or not, *see* Li Jian, *Debating the Specialized Intellectual Property Court in the People's Republic of China*, 19 NO. 12 INTELL. PROP. & TECH. L.J. 17 (2007).

criminal court judges to criminal IP divisions continued.

To direct judges' sentences toward deterrence, the Judicial Yuan developed sentencing guidelines especially for criminal IP cases. Outside of the context of IP criminal cases, there are no sentencing guidelines in use in Taiwan. Furthermore, the legal status of these IP criminal sentencing guidelines under ROC law is unclear. This is because the Judicial Yuan promulgated its sentencing guidelines without a formal delegation of authority from the Legislative Yuan. Under Article 23 of the ROC Constitution, the Judicial Yuan lacks authority to legislate and so requires an express delegation from the Legislative Yuan to issue laws.

To have a closer look at the three measures in the 2008 reform and their limitations, the following sections are going to detail each of them, analyze their conflicts with the judicial independence and judicial culture, and then evaluate their effectiveness.

5.1. IPC's Jurisdiction over Criminal IP Cases

5.1.1. Justification for Court Specialization

A court specializing in a specific subject matter is not uncommon in modern society. The notion of specialization designates the creation of a court with a limited scope of jurisdiction compared to other courts within the system.² A specialized court equipped with specialist judges is usually used to improve judicial efficiency, expertise, and uniformity that regular courts cannot fulfill.³ Because court specialization is to hand specific subject matter cases to fewer judges sitting in a separate court, it may raise a doubt about manipulation or interference.⁴ Thus, to prevent undue interference with the judiciary, the justification for court specialization should be

² Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 248 (2011).

³ Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1675 (2008).

⁴ See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 256 (1996) (noting a specialized court like CAFC may be particularly susceptible to special interest group manipulation).

specific professional needs that regular courts cannot satisfy.

Court specialization arises especially when regular courts are helpless with cases involving highly professional knowledge. In regular courts, when faced with complicated or difficult cases in which highly professional knowledge is required, generalist judges lacking of expertise usually give rise to inefficiency, unprofessionalness, and inconsistency. Generalist judges without expertise may spend more time handling cases involving highly professional knowledge.⁵⁶ Because of the heavy caseload, they may not spare enough time to develop their expertise well but has to heavily rely on their incomplete comprehension on the testimony of expert witnesses.⁷ Due to their limited professional knowledge, generalist judges may in turn lead to inconsistent court decisions.⁸ In response, parties are rarely satisfied and convinced by the service of the regular courts. Therefore, in the area involving highly professional knowledge, a separate court equipped with specialist judges is devised to facilitate court proceedings, relieve congested dockets, foster expertise, strengthen uniformity of decisions, and improve parties' confidence.⁹

One justification for court specialization is the special need for judges' expertise. This is also the reason why court specialization often occurs in the area of patent. Prior to 1982, patent infringement cases were reviewed by all circuit courts. Due to the highly professional knowledge required to understand a patent issue and the U.S. Supreme Court's limited capacity to maintain

⁵ "Specialization can help judges work more efficiently." Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 20 (1995).

⁶ Also, "establishment of specialized courts would permit some or all cases in a particular subject area to be transferred out of the regional courts of general jurisdiction. If there are many cases directed to in this way, relief to the regional dockets would give the generalist judges more time to consider other matters. Even if there are very few cases, workload in the regional courts would be reduced so long as the cases transferred are complex enough that they would have taken up a disproportionate share of the generalist judges' time." Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377-378 (1990).

⁷ See *id.* at 378 (noting a specialized court's judge could quickly acquire experience in the courts' specialty).

⁸ See *id.* (noting specialization can lead to greater consistency).

⁹ Baum, *supra* note 3, at 1675; Aronson, *supra* note 2, at 250; Rochelle C. Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 770 (2003).

uniformity of patent issues among lower circuit courts, inconsistency in patent cases was common among different circuits. Many plaintiffs took advantage of the inconsistency to file a case in a specific court favorable to him or her. To promote uniformity and prevent forum shopping, the United States established a sole appellate circuit court, the Court of Appeals for the Federal Circuit (CAFC), to review all appellate patent cases.¹⁰ Following the United States, Korea established the Korea Patent Court in 1998¹¹ and Japan established the IP High Court in 2005.¹² Because highly professional knowledge is specially required in the area of patent, almost all specialized courts in IP focus on patent cases.

Since court specialization removes specific subject matter cases from many judges in a regular court to few judges in a separate specialized court, it may pose a risk to judicial independence if the main purpose of specialization is to cope with judges' decision making.¹³ Like President Franklin Delano Roosevelt's 1937 court packing plan that asserted to reform the inefficiency of the U.S. Supreme Court but tried to change the Court's decision making,¹⁴ the court specialization with the same intention may conversely lower the fairness that regular courts

¹⁰ For a general introduction to the CAFC, see Marion T. Bennett, *The United States Court of Appeals for the Federal Circuit – Origins*, in THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY 1982-1990 3-5, 11 (Kristin L. Yohannan ed., 1991); WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 11-13, 24-25 (2004).

¹¹ For a general introduction to the Korean Patent Court, see Kong-Woong Choe, *supra* note 1.

¹² For a general introduction of the IP High court, see Takenaka, *supra* note 1, at 287.

¹³ Some commentators argue that the isolation may result in capture of specialized judges by special interests, judicial identification with limited professional classes and factions, loss of broad-sighted judicial experience, and lack of independence with regard to the appointing authorities. Aronson, *supra* note 2, at 250-251.

¹⁴ President Franklin Delano Roosevelt's court packing reform contained four primary elements: first, that when a federal judge had served ten years and had reached age seventy, the President could name another judge to that position; second, with these new appointments, the Supreme Court could not be increased by more than six new members, and no other court could have more than two new members, and the entire judiciary could not be increased by more than fifty new members; third, that lower court judges could be reassigned to other busier districts and courts of appeals if additional judicial resources were needed; and fourth, that the lower courts would be supervised by the Supreme Court through a Proctor. Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence so Bad?*, 30 MCGEORGE L. REV. 863, 909-910 (1998). For the history of President Franklin Delano Roosevelt's 1937 court packing plan, see BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY (2009).

with diverse judges usually have.¹⁵ In regular courts, cases are assigned among diverse judges, so litigants and the general public usually feel more confident because they can blame others' manipulation but cannot blame destiny.¹⁶ On the contrary, handing a case among few judges in a separate court to change the judiciary's decision making may arouse the suspicion for judicial integrity.¹⁷ Therefore, court specialization aiming to change judges' decision making may be another form of judicial interference.

5.1.2. Establishment of IPC's Jurisdiction over Criminal IP Cases

The idea to establish Taiwan's specialized IP court originated from the Judicial Yuan's policy.¹⁸ Prior to the IPC, there were criminal IP divisions scattered in individual courts. Judges sitting in criminal IP divisions had to deal with other criminal cases. Except for the Kaohsiung Juvenile Court, there was no court specialized in a specific subject matter.¹⁹ In June 2004, the Judicial Yuan announced its determination to establish a specialized court in IP and linked it to Taiwan's economic competitiveness:

The Judicial Yuan's idea to establish a specialized IP court comes from the domestic and foreign demands to enhance IP protection. Besides, ongoing technological innovation has been critical to economic development. Especially now when politics and society in every country are deeply influenced by

¹⁵ For a more detailed discussion on random case assignment, see Jonathan L. Entin, *The Sign of "The Four": Judicial Assignment and the Rule of Law*, 68 MISS. L.J. 369 (1998); Petra Butler, *The Assignment of Cases to Judges*, 1 N.Z. J. PUB. & INT'L L. 83 (2003).

¹⁶ "A system of neutral assignment merely ensures that they were not deliberately placed on the panel to influence the outcome of the case." J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1066 (2000).

¹⁷ A specialized court may lack of independence with regard to the appointing authorities. Aronson, *supra* note 2, at 250-251.

¹⁸ According to the Deputy Director General of the Intellectual Property Office in 2006, Lu Wenxiang (盧文祥), the proposal was initially posted inside the Judicial Yuan and strongly supported by the President Wong Yuesheng (翁岳生). See Lu Wenxiang (盧文祥), *Woguo Zhihuicaichan Fayuan zhi Lixiang yu Shixian* (我國智慧財產法院之理想與實現) [*Materializing the Goals of the Taiwan IP Court*], 4 ZHENGDA ZHIHUICAICHAN PINGLUN (政大智慧財產評論) [NCCU INTELL. PROP. REV.], no.1, 2006, at 1.

¹⁹ In Taiwan, juvenile cases are adjudicated by juvenile divisions scattering in individual courts. The only exception is the Kaohsiung Juvenile Court. This experimental court, established in 1999, is the only court specializing in juvenile cases. A general introduction to the court, see *Introduction of Kaohsiung Juvenile Court*, KAOHSIUNG JUVENILE COURT, <http://ksy.judicial.gov.tw/chinese/CP.aspx?s=348&n=10337> (last visited Jun. 28, 2013).

international economy and trade, the emphasis on IP protection will decide a nation's competitiveness. Those advanced countries are the best examples. There is no one that does not take IP protection seriously. All ground their national competitiveness on IP protection.²⁰

According to the initial announcement, the planned IP court would review civil and administrative cases in relation to the Trademark Act, Patent Act, Copyright Act, Optical Disc Act, Integrated Circuit Layout Protection Act, Trade Secret Act, and Plant Variety and Plant Seed Act.²¹

Whether or not the IP court should review criminal cases was discussed among the Judicial Yuan and other government agencies. The Ministry of Economic Affairs (MOEA) insisted that only by including criminal IP cases in the new court's jurisdiction could sentencing be unified, piracy be deterred, and the quality of legal reasoning be improved.²² The Deputy Director General of the Intellectual Property Office at that time, Lu Wenxiang, also indicated that each year Taiwan had about 5,000 to 6,000 criminal IP cases, 100 to 200 civil IP cases, and 1,000 administrative IP cases (appeals for decisions of Taiwan's Patent and Trademark Office).^{23,24} Since the caseload of criminal IP cases was much larger than the caseload of civil IP cases, excluding criminal IP cases from a specialized IP court would make any specialized IP court small and relatively unhelpful.²⁵

²⁰ Sifayuan (司法院) [Judicial Yuan], *Geji Fayuan Shouzhang Sifa Yewu Zuotanhui Dacheng Gongshi, Shezhi Gaodengfayuan Cengji Zhihuicaichanquan Zhuanye Fayuan, Guanxia Quanguo Zhihuicaichan yu Keji Susong Anjian, De Shezhi Xunhui Fayuan* (各級法院首長司法業務座談會達成共識，設置高等法院層級智慧財產權專業法院，管轄全國智慧財產與科技訴訟案件) [Conference of Court Presidents Reach the Consensus to Establish a High Court Level Specialized Court in IP with Jurisdiction over IP and Technological Ligation Cases], SIFA ZHOUKAN (司法周刊) [JUDICIAL WEEKLY], Jun. 17, 2004, at 1.

²¹ *Id.*

²² See Lu Wenxiang (盧文祥), *supra* note 18, at 17.

²³ *Id.*

²⁴ From April 1, 2007 to March 31, 2008, 4,286 civil copyright cases and 3,524 civil trademark cases were terminated by U.S. federal district court while 1,045 forgery and counterfeiting defendants were disposed by U.S. federal district court. See *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (last visited Jun. 28, 2013).

²⁵ Lu Wenxiang (盧文祥), *supra* note 18, at 17-18.

Later, when publicizing the draft Intellectual Property Court Organization Act (IPC Organization Act) and Intellectual Property Case Adjudication Act (IP Case Adjudication Act), the Judicial Yuan announced that the IP court would handle criminal cases.²⁶ Following the Judicial Yuan's decision, the USTR urged Taiwan to carry out its promise as soon as possible in its 2005, 2006, and 2007 Special 301 Report.²⁷ Later, both bills were endorsed by the Executive Yuan and sent to the Legislative Yuan for further legislation in May 2006. The Legislative Yuan passed the IP Case Adjudication Act in January 2007²⁸ and the IPC Organization Act in March 2007²⁹ but left the effective date for both laws to the Judicial Yuan's discretion.³⁰ The Judicial Yuan soon issued two administrative orders on May 6, 2008 to implement both laws beginning on July 1, 2008.³¹

²⁶ Sifayuan (司法院) [Judicial Yuan], *Zhicai Anjian Shenlifa Zhicai Fayuan Zuzhifa Caoan Wancheng* (智財案件審理法智財法院組織法草案完成) [*Draft IP Case Adjudication Act and IP Court Organization Act Finished*], SIFA ZHOUKAN (司法周刊) [JUDICIAL WEEKLY], Feb. 16, 2006, at 1.

²⁷ "However, Taiwan will remain on the Watch List in 2005 as we continue to monitor Taiwan's efforts to combat Internet piracy, enact judicial reforms... With respect to the judicial process, Taiwan authorities continue to conduct regular training seminars for judges and prosecutors on IPR matters and plan to establish a specialized IPR court." Office of the USTR, *2005 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2005.pdf (last visited Jun. 28, 2013); "The United States looks to Taiwan to sustain the current level of commitment to making progress on IPR issues, and will continue to monitor further improvements, including Taiwan's efforts to... establish a specialized IP court..." Office of the USTR, *2006 Special 301 Report*, KNOWLEDGE ECOLOGY INTERNATIONAL, http://www.keionline.org/sites/default/files/ustr_special301_2006.pdf (last visited Jun. 28, 2013); "Taiwan will remain on the Watch List in 2007. The United States notes Taiwan's strong efforts and significant strides in improving its IPR regime this past year, including the passage of legislation to create a specialized IPR court..." *2007 Special 301 Report*, OFFICE OF THE USTR, http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf (last visited Jun. 28, 2013).

²⁸ *Zhihuicaichan Anjian Shenli Fa* (智慧財產案件審理法) [Intellectual Property Case Adjudication Act, hereinafter IP Case Adjudication Act], Mar. 28, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6737, 2007, at 2. This Act was passed on Jan. 9, 2007 by the Legislative Yuan. See the third reading legislative materials, 96 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.10, Jan. 9, 2007, at 533.

²⁹ *Zhihuicaichan Fayuan Zuzhifa* (智慧財產法院組織法), [Intellectual Property Court Organization Act, hereinafter IPC Organization Act], Mar. 28, 2007, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6737, 2007, at 14. This Act was passed on Mar. 5, 2007. See the third reading legislative materials, 96 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.20, Mar. 5, 2007, at 141.

³⁰ Art. 45(a) of the IPC Organization Act; Art. 39 of the IP Case Adjudication Act.

³¹ For the IPC Organization Act, *Zhonghua Minguo 97 Nian 5 Yue 6 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 0970010117 Hao Ling* (中華民國 97 年 5 月 6 日司法院院台廳司一字第 0970010117 號令) [Judicial Yuan, May 6, 2008, (Yuan Tai Ting Si Yi) No. 0970010117 Order], 50 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN

Although the inclusion of criminal IP cases was controversial, the Judicial Yuan in its explanatory notes to the bills only gave a very general statement that the inclusion of administrative, civil and criminal IP cases would facilitate judicial efficiency and raise the nation's competitiveness.³² Also, during the 10-month legislation for the IPC Organization Act and IP Case Adjudication Act, this criminal IP case jurisdiction issue drew almost no attention. Though the KMT legislator Li Yongping and DPP legislator Lin Zhuoshui questioned the necessity for the inclusion of criminal cases during committee consideration, no further discussion or response occurred.³³ Nevertheless, when invited to address his professional perspective on the jurisdiction of the specialized court, Chen Shijie, a practicing attorney and the Chair of IP Committee of the American Chamber of Commerce, during committee consideration admitted that the jurisdiction over criminal IP cases had been included in part in response to the U.S. demand for more stringent punishments for IP piracy:

Due to the lack of unified application of law, prompt adjudication and deterrent punishment, the enforcement of IP legal protection was not enough at all... Without criminal protection, IP law is just like a tiger without teeth... The establishment of an IP court will improve Taiwan's international reputation and express Taiwan's determination to protect IP.³⁴

GAZ.], no.6, 2008, at 38; for the IP Case Adjudication Act, *Zhonghua Minguo 97 Nian 5 Yue 6 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 0970009972 Hao Ling* (中華民國 97 年 5 月 6 日司法院院台廳司一字第 0970009972 號令) [Judicial Yuan, May 6, 2008, (Yuan Tai Ting Si Yi) No. 0970009972 Order], 50 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.6, 2008, at 38.

³² The explanatory notes of the IPC Organization Act, 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.25, 2006, at 167.

³³ Li Yongping (李永萍), Legislator, the Legislative Yuan of Taiwan, Address Before the Judiciary and Organic Laws and Statutes Committee of the Legislative Yuan (May 22, 2006), *in* 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.33, 2006, at 82; Lin Zhuoshui (林濁水), Legislator, the Legislative Yuan of Taiwan, Address Before the Judiciary and Organic Laws and Statutes Committee of the Legislative Yuan (May 29, 2006), *in* 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.34, 2006, 357.

³⁴ Chen Shijie (陳世杰), Attorney at Law, Zhongda International Law Firm, Address Before the Judiciary and Organic Laws and Statutes Committee of the Legislative Yuan (May 29, 2006), *in* 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.34, 2006, at 350-352.

In 2009, in an academic symposium held by the Academia Sinica³⁵ highlighting Taiwan's judicial reform in specialized court divisions and judges, a famous attorney Huang Hongxia disclosed that the President of IPC once told her the establishment of the IPC was the product of U.S. pressure.³⁶ The hearsay, together with the U.S. ongoing concern about the specialized court and its quick response to the establishment of the specialized court,³⁷ suggests that ROC trade negotiators had promised the United States that the IPC would have jurisdiction over criminal cases in U.S.-Taiwan negotiations under the Special 301 framework.

On the surface, the official justification for the IPC's jurisdiction over criminal IP cases was to enhance the nation's competitiveness, but below the surface, seems to have been driven by a desire to accommodate U.S. pressure to crack down hard on IP piracy with more stringent criminal sanctions. The strategy for cracking down on IP piracy seems to have been to transfer more cases to the IPC, harmonize the enforcement of criminal IP provisions, and increase the severity of criminal punishments for IP infringers. In other words, the purpose of the court seems to have been to carry out Taiwan's promise to the United States to enhance IP protection for U.S. IP owners.

5.1.3. IPC's Jurisdiction over Civil and Criminal IP Cases

According to the IPC Organization Act, only one IP court shall be established and its location

³⁵ Academia Sinica (Zhongyang Yanjiu Yuan 中央研究院) is the most preeminent academic institution in Taiwan. For a general introduction, see *History and Mission*, ACADEMIA SINICA, http://home.sinica.edu.tw/en/about/history_and_mission.html (last visited Jun. 28, 2013).

³⁶ Huang Hongxia (黃虹霞), Address at the Academia Sinica Symposium for Taiwan's Judicial Reform (Jul. 4, 2009), in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU 484 (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] (Tang Dezong & Huang Guochang (湯德宗與黃國昌) eds., 2010).

³⁷ After Taiwan's establishment of the IPC in July 2008, the U.S. soon removed its Special 301 oversight from Taiwan in January 2009. See *USTR Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan*, OFFICE OF THE USTR, <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re> (last visited Jun. 28, 2013).

shall be decided by the Judicial Yuan.³⁸ The jurisdiction of the new IPC covers four categories: (1) the first and second instance of civil IP litigation; (2) the first instance of administrative IP litigation;³⁹ (3) the second instance of criminal IP litigation tried under regular procedures but excluding juvenile criminal cases; and (4) other cases prescribed by law or appointed by the Judicial Yuan.⁴⁰ Unlike IPC's civil jurisdiction that monopolizes all civil IP cases, IPC's criminal jurisdiction does not cover all criminal IP cases. Though IPC's jurisdiction covered both criminal and civil IP cases, its criminal jurisdiction is much important than its civil jurisdiction because: (1) Taiwan's IP enforcement emphasized criminal litigation; and (2) most civil IP cases first were filed in criminal court.

5.1.3.1. IPC's Exclusive Jurisdiction over Civil IP Cases

As mentioned in the last chapter, criminal court has been the main battlefield of IP protection in Taiwan because most IP cases are brought in criminal court, not in civil court. Criminal IP law, especially criminal copyright law, defined criminal infringement broadly and

³⁸ Art. 4(a) of the IPC Organization Act. The IPC is now located in Banqiao (板橋), Xinbei City (新北市). See *Introduction of the IPC*, IPC, <http://ipc.judicial.gov.tw/en/> (last visited Jun. 28, 2013).

³⁹ In Taiwan, administrative measures are subject to judicial review. Like most civil law countries, Taiwan has an administrative court system responsible for the task of judicial review. In general, the administrative court of Taiwan hears cases filed by citizens against government agencies and decides whether or not a governmental measure at issue accords with administrative law. In addition, Taiwan's IP rights are enforced by the judicial system, not government agencies. That is, an IP right owner has to file a civil action or a criminal complaint to civil or criminal court for the enforcement of his or her IP right. It is the judiciary, not government agencies, who has the authority to punish IP infringers and stop infringement. Thus, Taiwan's administrative court may deal with IP issues, but these issues relate to IP administration such as IP registration, examination, opposition, invalidation, or revocation, not enforcement issues arising from IP infringement. Because of Taiwan's one track IP enforcement system, IP enforcement does not fall within the jurisdiction of administrative court. The establishment of the IPC and related procedures did not change the one track enforcement system either. According to the IPC Organization Act, an administrative action or a compulsory enforcement action is under IPC's jurisdiction if it concerns intellectual property rights arising under the Patent Act, Trademark Act, Copyright Act, Optical Disc Act, Integrated Circuit Layout Protection Act, Plant Variety and Plant Seed Act, or Fair Trade Act. The most common administrative IP cases are actions challenging decisions made by Taiwan's Intellectual Property Office for patent and trademark examination, opposition, invalidation, or revocation. Prior to the debut of the IPC, these actions were heard together with other actions challenging governmental orders by the Taipei High Administrative Court. Now, an administrative IP case is first tried before a three-judge panel of the IPC. An appeal for the penal decision goes to the Supreme Administrative Court.

⁴⁰ Art. 3 of the IPC Organization Act.

imposed harsh punishments. Using the threat of criminal prosecution in order to obtain civil compensation for infringement was not prohibited, and an affiliated civil action could be filed in criminal court free of charge, so most civil IP cases were filed in criminal court. The only exception was patent litigation because all patent offenses were decriminalized in 2003. After 2003, all patent infringement cases were filed in civil court. The IPC has jurisdiction over both civil and criminal IP cases, so most of its civil cases are patent cases while most of its criminal cases are copyright and trademark cases.

Before the abolition of all criminal provisions in the Patent Act in 2003, there were few “pure” civil IP cases. Most civil IP actions were filed in criminal court and subordinate to criminal IP cases. After 2003, no criminal patent offenses were left, so patent infringement cases became the main source of civil IP cases. However, in other areas of IP litigation, affiliated civil IP cases were still filed in criminal court and treated as criminal IP cases. More importantly, the 2008 reform did not change the *status quo* at all. Pursuant to Article 27 of the IP Case Adjudication Act, affiliated civil IP cases shall be decided by criminal court.⁴¹ Thus, though all civil IP cases must be tried by the IPC, the IPC’s civil jurisdiction in fact covers all patent infringement cases and a small portion of civil copyright and trademark cases.⁴²

According to the IPC Organization Act, a civil case is under IPC’s jurisdiction if it is a civil action for the protection of intellectual property rights arising under the Patent Act, the Trademark Act, Copyright Act, Optical Disc Act, Trade Secret Act, Integrated Circuit Layout

⁴¹ All affiliated civil IP cases shall be decided by criminal court. *See* Art. 27 of the IP Case Adjudication Act.

⁴² The IPC was also the first instance court for administrative patent litigation, so the IPC was very crucial to patent litigation. Before, Taiwan’s patent litigation was notorious for its time-consuming court proceedings as well as unprofessional court decisions, the purpose of the monopolization was to facilitate court proceedings and improve the quality of court decisions with respect to patent law. *See* Zhang Daozhou (張道周), *Jianli Zhihuicaichan Zhuanye Fayuan Yingyou zhi Gonggong Zhengce Bianlun* (建立智慧財產權專業法院應有之公共政策辯論) [*Public Policy over the Establishment of an Intellectual Property Specialized Court*], TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.], no.78, 2006, at 16, 25.

Protection Act, Plant Variety and Plant Seed Act, or Fair Trade Act.⁴³⁴⁴ Before 2008, the first instance of civil IP litigation was district court and the second instance was the High Court and its branches.⁴⁵ Now a civil IP case has to be first filed at the IPC and tried before one judge of the IPC,⁴⁶ while an appeal for a one-judge court decision of the IPC has to be reviewed by a three-judge panel of the IPC.⁴⁷ Despite the introduction of the IPC and related procedures, the last resort has been the Supreme Court.⁴⁸ Because only the IPC can try civil IP cases, it monopolizes all civil IP litigation in theory. Here is the diagram describing the proceedings for civil IP litigation before and after the establishment of the IPC:

⁴³ Art. 3(a)(1) of the IPC Organization Act.

⁴⁴ Though the IPC enjoys the priority to try civil IP cases, precisely speaking, its jurisdiction is not exclusive. *See* Art. 9 of the Intellectual Property Case Adjudication Rules. Zhihui Caichan Anjian Shenli Xize (智慧財產案件審理細則) [Intellectual Property Case Adjudication Rules], Apr. 24, 2008, *Zhonghua Minguo* 97 Nian 4 Yue 24 Ri Sifayuan Yuan Tai Ting Xing Yi Zi Di 0970009012 Hao Ling (中華民國 97 年 4 月 24 日司法院院台廳行一字第 0970009012 號令) [Judicial Yuan, Apr. 24, 2008, (Yuan Tai Ting Xing Yi) No. 0970009012 Order]. *See also* Hsiao-Ling Fan, *A New Era in the Adjudication of IP Cases in Taiwan*, 3 J. INTELL. PROP. L. & PRAC., no.6, 2008, at 364, 365. A civil action can be filed and heard in regular courts if there is a valid agreement between parties to exclude the jurisdiction of the IPC or the defendant does not contest the jurisdiction of regular courts. *See* Minshi Susong Fa (民事訴訟法) [Code of Civil Procedure, hereinafter], Feb. 1, 1968, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.1928, 1968, at 1, art. 24(a); Art. 25 of the Code of Civil Procedure.

⁴⁵ Art. 32(a)(2) of the Court Organization Act. The Taiwan High Court has four branches, the Taizhong (Taichung 臺中), Tainan (臺南), Gaoxiang (Kaohsiung 高雄), and Hualian (Hualien 花蓮) branches. The Kinmen (金門) and Mazu (馬祖) islands next to the China mainland are under the Fujian High Court (Fuchien 福建高等法院). The organization of Taiwan's court system, *see* *Directory of the Judicial Branch*, JUDICIAL YUAN, <http://www.judicial.gov.tw/en/> (last visited Jun. 28, 2013).

⁴⁶ Art. 6(a) of the IPC Organization Act.

⁴⁷ Art. 6(a) of the IPC Organization Act.

⁴⁸ Art. 48(a)(2) of the Court Organization Act.

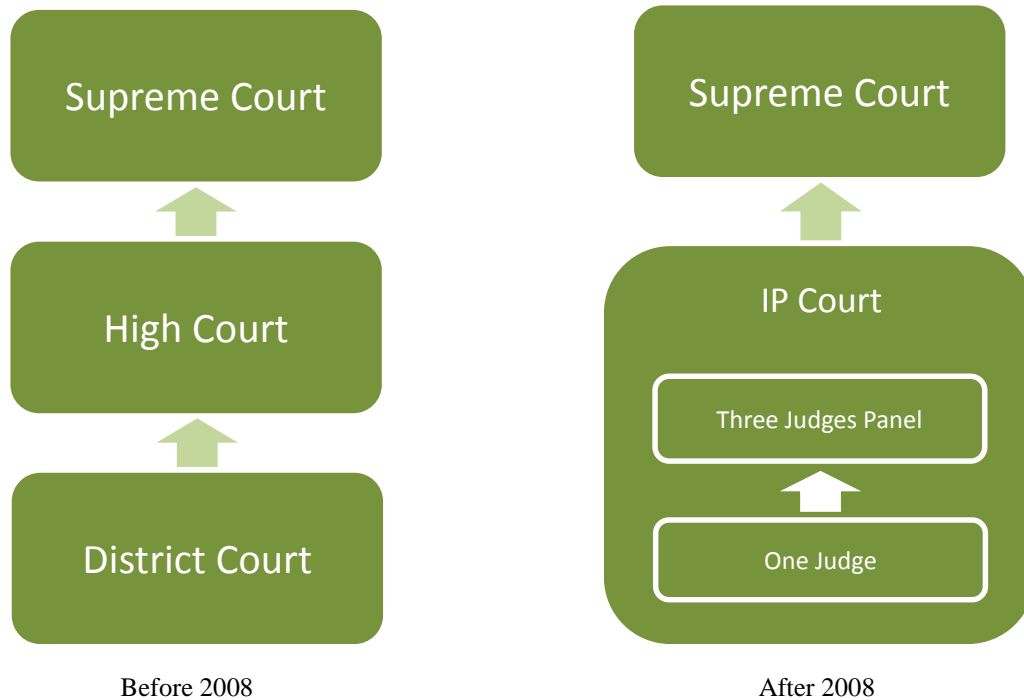


Figure 5-1 Court Proceedings for Civil IP Litigation before and after 2008

5.1.3.2. IPC's Jurisdiction over Criminal IP Cases

The influence of the IPC on Taiwan's criminal IP enforcement depends on its jurisdiction over criminal IP litigation. A large jurisdiction gives the IPC more control over criminal IP enforcement because as an appellate court it gets more opportunities to review and correct lower courts' application of law and sentencing. Though the IPC has exclusive civil jurisdiction over all civil IP cases, its criminal jurisdiction is as large as the old system's and limited to part of appellate criminal IP cases.

According to the IPC Organization Act, the IPC is the second instance for criminal IP cases adjudicated at district court under regular procedures.⁴⁹ A criminal IP case under IPC's

⁴⁹ Art. 3(a)(2) of the IPC Organization Act. The regular procedures here include simplified procedures (簡式審判程序) and negotiation procedures (協商程序). In simplified procedures, a formal trial is required but some measures are authorized to expedite the proceedings. For example, no hearsay rule applies and only one judge tries the case, not a three-judge panel. See Art. 273bis(a), 273ter, and 284bis of the Code of Criminal Procedure. On the other

jurisdiction concerns: (1) an offense in Articles 253, 254, 255, 317, or 318 of the Criminal Code;⁵⁰ (2) an offense in the Trademark Act or Copyright Act; (3) an offense in Article 35(a) of the Fair Trade Act for the violation of Article 20(a); or (4) an offense in Article 36 of the Fair Trade Act for the violation of Article 19(a)(5).⁵¹⁵²

As described in Chapter 4, in Taiwan, all criminal cases including criminal IP cases are adjudicated under regular procedures or summary procedures prescribed by the Code of Criminal Procedure. A summary judgment must find the defendant guilty and must not sentence the

hand, in negotiation procedures, the court convicts and sentences the defendant based on a plea bargaining between both parties. Both parties are not allowed appeal a court decision under negotiation procedures except few extreme situations. Though no formal trial is required, a court decision under negotiation procedures is deemed one under regular procedures because both parties have to come before a judge to confirm their plea bargaining. *See* Art 455ter(a) and 455undecies of the code of Criminal Procedure. For a general introduction to these two procedures, *see* Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reform*, 49 VA. J. INT'L L. 651, 671, 672 (2009).

⁵⁰ Before 1972, trademark infringement was punished pursuant to the Criminal Code of Republic of China. Art. 253 of the Criminal Code prohibits anyone from counterfeiting or imitating a registered trademark. Art. 254 outlaws any traffic in a product bearing a counterfeiting or imitating mark. Art. 255 bans a false mark or indication for country of origin or quality of a product. On the other hand, Art. 317 and 318 are criminal provisions for the protection of trade secret. Art. 317 punishes a person who has legal obligation to maintain a commercial or industrial secret but intentionally discloses it. Art. 318 punishes a public officer who intentionally discloses a commercial or industrial secret known to him or her through his or her duty. In practice, there are few cases involved with these criminal provisions.

⁵¹ In addition to the Trademark Act and the Criminal Code, the Fair Trade Act (公平交易法) is another important source for Taiwan's criminal trademark law. *Zhonghua Minguo 80 Nian Gongping Jiaoyi Fa (中華民國 80 年公平交易法)* [Fair Trade Act of 1991], Feb. 4, 1991, ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.5364, 1991, at 1. There are three trademark offenses provided in the Fair Trade Act, but to establish either one of these offenses, there must be violation of an administrative order issued by the central government agency. Article 20(a)(1) outlaws the use of a person, business or corporate's name, a trademark of another, a trade dress of another, or any similar symbol that represents the source of a product and is commonly known to relevant enterprises or consumers. Article 20(a)(2) outlaws the use of a person, business or corporate's name, a service mark of another, or any similar symbol that represents the source of a business or service and is commonly known to relevant enterprises or consumers. Article 20(a)(3) outlaws the use of a mark identical with or similar to an unregistered foreign well-known mark in connection with goods identical with or similar to the goods for which the foreign well-known mark is being used. According to Art. 35(a) of the Fair Trade Act of 1999, a violator who does not cease or rectify his or her violation pursuant to the administrative order issued by the central government agency shall be sentenced to imprisonment for not more than three years or criminal detention; in lieu thereof, or in addition thereto, a fine of not more than 100 million New Taiwan dollar may be imposed. Prior to 1999, the violation was directly subject to criminal punishment. The legislature, in consideration of the rigidity, revised Article 35(a) in 1999 to punish a violator only when he or she did not observe the administrative order issued by the central government agency on the violation. The legislative history, *see* 88 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.6, Jan 15, 1999, at 901.

⁵² Art. 3(a)(2) of the IPC Organization Act.

defendant to a real jail term. In contrast to a formal trial in regular procedures, no court hearing is required in summary procedures. A judge is allowed to deliver a summary judgment on the basis of the file provided by the prosecution. A party can appeal a summary procedure judgment to a three-judge panel in the same district court. The panel must follow regular procedures to try the case completely. If the panel overrules the appeal, the case is final; if the panel finds the defendant not guilty or sentences the defendant to a real jail term, the panel decision will be deemed to be a district court judgment made under regular procedures. Under such circumstances, a losing party can appeal the case to the High Court.

Because the IPC is the second instance for criminal IP cases adjudicated at district court under “regular” procedures, an appeal for a district court decision under “summary” procedures is not subject to the jurisdiction of the IPC for it is not a district court decision under “regular” procedures. In addition, an appellate court decision of a three-judge panel of district court is not subject to the jurisdiction of the IPC either because the panel here is already the second instance and the last resort.⁵³

Therefore, unlike IPC’s civil jurisdiction that monopolizes all civil IP cases, IPC’s criminal jurisdiction does not cover all criminal IP cases. Two reasons were given during the legislation. “If the sole IP court monopolizes all trials, it may be very cumbersome for local prosecutors and

⁵³ One exception occurs when the panel’s decision acquits the defendant or sentences the defendant to a real jail term because on this occasion this decision is deemed a court decision of a first instance court under regular procedures. Under the circumstances, both parties can appeal the panel decision to the IPC for a second trial. The consideration here is the due process of law. Under summary procedures, because a summary decision is grounded on documentation only, a case can only be tried on appeal. On the other side, a case decided under regular procedures can be tried at district court and high court. Given only one chance to argue the case, summary procedures are disadvantageous to both parties, especially when the result of the case may affect both parties very much. See Wang Zhaopeng (王兆鵬), *Shangsu Ershen de Honggou—Lilun yu Shizheng Yanjiu* (上訴二審的鴻溝—理論與實證研究) [A Gap for Appeals to Second Instance Courts—Research on Theory and Practice], 9 ZHONGSHAN DAXUE FALÜ PINGLUN (中山大學法律評論) [SUN YAT-SEN U. L. REV.], no.2, 2011, at 330, 333, 361 (noting that the defendant has the right to two complete trials under the present criminal procedure law).

police to petition for a search warrant.”⁵⁴ Local prosecutors and police worried that they had to drive a long distance to get a search warrant once the IPC replaced the position of district courts. In addition, “[t]o require defendants all over Taiwan to come to the sole IP court at one specific location, not a nearby district court, may result in inconvenience.”⁵⁵ The other worry was about litigants’ backlash. To unify sentencing and raise punishment but not to cause troubles, a sole court with few judges at appellate court level seemed to be the most ideal.⁵⁶

Here is the diagram describing the court proceedings for criminal IP litigation after the establishment of the IPC:

⁵⁴ 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.25, May 5, 2006, at 171.

⁵⁵ Lu Wenxiang (盧文祥), *supra* note 18, at 21.

⁵⁶ Besides, due to the incompatibility between criminal IP court system and juvenile court system, all juvenile cases in relation to IP were exclude from the jurisdiction of the IPC, too. 95 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.25, May 5, 2006, at 172.

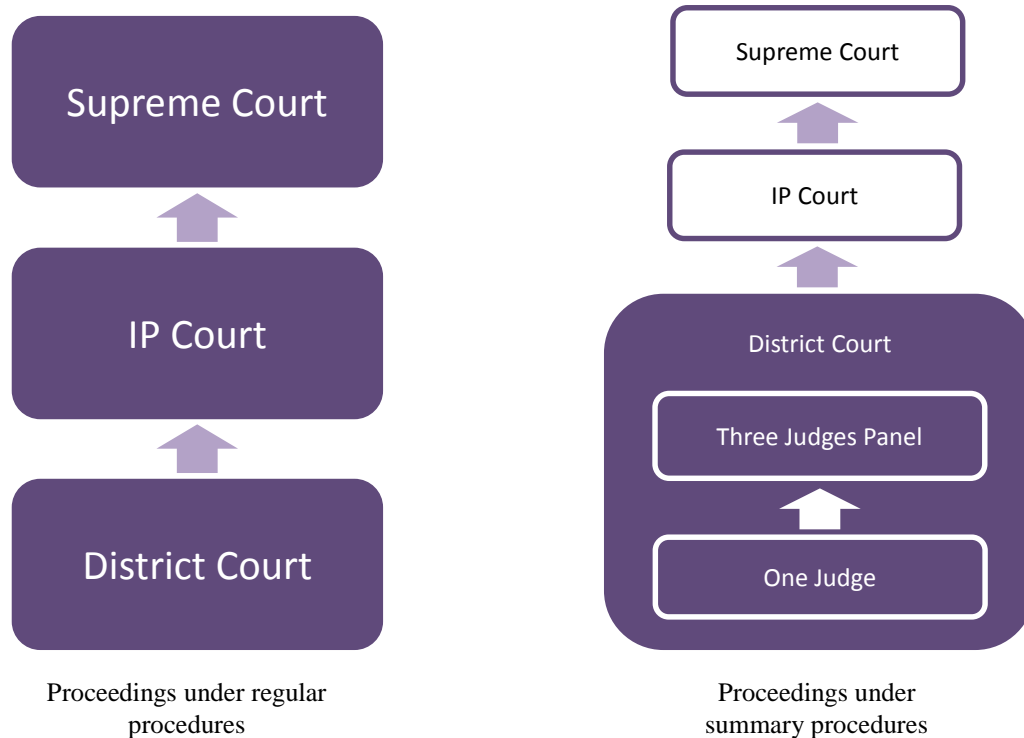


Figure 5-2 Court Proceedings for Criminal IP Litigation after 2008

Compared with the diagram describing the court proceedings before 2008, the only difference is that the IPC replaces the position of the High Court and its branches. In regular procedures, the highest court, the Supreme Court, and the lowest court, district courts, are still the same. In summary procedures, everything is the same unless a three-judge panel in district court acquits the defendant or sentences the defendant to a real jail term. Criminal IP cases final in district court including cases under regular procedures but not appealed by parties and all cases under summary procedures should stay outside the oversight of the IPC. Because the criminal jurisdiction of the IPC is identical to that of the High Court, its influence may not exceed the old system unless other reforms can enhance its leading power.

5.1.4. Justification and Design for IPC's Criminal Jurisdiction

The justification for IPC's criminal jurisdiction over appellate criminal IP cases is to

increase the severity of criminal punishments for IP piracy and provide a separate court with enough cases. In fact, due to broad criminalization of criminal copyright and trademark law, most criminal IP cases might not involve highly professional knowledge and most defendants might plead guilty. Neither delayed adjudication nor erroneous fact finding might be the concern.⁵⁷ The court specialization for IPC's criminal jurisdiction seems to have nothing to do with judicial inefficiency, uniformity, and expertise.

Handing specific criminal cases to a specialized court for the main purpose of raising punishment may lower litigants' confidence with judicial integrity. Since few judges are appointed to circumvent judges' established sentencing patterns, the specialization may be deemed as another form of interference with the judiciary.⁵⁸ Because democratization began in Taiwan more than two decades ago, a culture of judicial independence has increasingly taken root, making judges less willing to defer to political pressure in deciding cases. The lack of respect for judicial independence embodied in the design of the IPC may decrease judges' willingness to cooperate. Thus, with little justification, IPC's criminal jurisdiction might not easily change judges' sentencing patterns.

Nor does the IPC have exclusive jurisdiction over all appellate criminal IP cases. As a compromise with reality, IPC's criminal jurisdiction is as large as the old system's. It does not cover many criminal IP cases which are finalized in district courts. With the same appellate position and criminal jurisdiction as the old appellate courts, the IPC, like the old appellate

⁵⁷ See Zhang Daozhou (張道周), *supra* note 42, at 25.

⁵⁸ In the history, a specialized court with the sole purpose of increasing punishment usually appeared under authoritarian rule. A specialized court reinforced by authoritarian rule usually emphasized reduction in the rights of defendants and a stronger position for the prosecution. The most famous example is the People's Court (Volksgerechtshof) in Germany from 1934 to 1945. In order to circumvent some judges' disobedience to the authoritarian government and suppress political dissenters, the specialized People's Court was established by the third Reich to impose harsh punishment for specific offenses. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 138, 153 (Deborah Lucas Schneider trans, Harvard University Press 1991).

courts, is faced with the same challenges. Thus, given the failure of the old system, unless other measures could effectively enhance IPC's influence, IPC's criminal jurisdiction alone might not change the system.

5.2. Judicial Selection for Criminal IP Divisions in District Courts

In addition to creating the IPC, the 2008 reform tried to separate criminal IP divisions within district courts more clearly from other specialized divisions. Prior to 2008, in spite of specialization of criminal IP divisions, judges in fact periodically rotated for criminal IP divisions and other specialized divisions. Specialization existed in name only. To attract judges interested in IP to be able to sit in criminal and civil IP divisions for more specialization, the Judicial Yuan devised certification for specialized judges in IP and rewarded certified judges' right of priority in rotation. However, because the new design overlooked judges' inclination toward civil court, certified specialized judges in IP did not stay in criminal IP divisions to try criminal IP cases. Despite the 2008 reform, criminal IP cases were still adjudicated by uncertified criminal court judges as before.

The Judicial Yuan devised certification for specialized judges in IP in the name of providing more eligible candidates for the IPC, consolidating specialized IP divisions in district courts, and cultivating judges' expertise in IP.⁵⁹ To encourage judges to pursue certificates, the Judicial Yuan offered an attractive incentive. A certified judge was not only an eligible candidate for an IPC

⁵⁹ Zhihui Caichan Zhuanye Faguan Zhengminshu (智慧財產專業法官證明書) [Certificate for Specialized Judges in IP]. In addition to IP, the Judicial Yuan devised certification for different areas such as juvenile, family, labor, medical, and engineering areas. For a general introduction to the certification system, see Huang Jialie (黃嘉烈), *Youguan Zhuanye Fating zhi Sifa Gaige—Zhuanye Fating yu Zhuanye Faguan* (有關專業法庭之司法改革—專業法庭與專業法官) [*Judicial Reform in Specialized Divisions—Specialized Divisions and Judges*], in SIFA GAIGE SHI ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU 454 (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] (Tang Dezong & Huang Guochang (湯德宗與黃國昌) eds., 2010).

judge⁶⁰ but also enjoyed the priority for a vacant position in criminal or civil IP divisions to other uncertified judges.⁶¹

To be certified by the Judicial Yuan as a specialized judge in IP, a judge had to first show his or her eligibility by satisfying one of these requirements: (1) receiving a master or higher degree in IP over the last five years; (2) making at least 40 court decisions for IP cases over the last three years; (3) joining seminars in relation to IP and visiting government agencies or prestigious institutes in relation to IP in person for at least 120 hours in total over the last three years; (4) lecturing IP courses for at least 30 hours over the last three years; (5) taking at least four credits IP courses at a university, college, or graduate school and having the publication of at least one article in relation to IP with not less than 10 thousand Chinese characters; (6) having served over the last three years as a part-time lecturer, assistant professor, associate professor, or professor at a law department of a university or college, or a graduate school in law, and having lectured an IP course for at least one year; (7) having the publication of at least three articles in IP with Chinese characters not less than 10 thousand or at least two articles in IP with Chinese characters not less than 20 thousand over the past three years; (8) making at least 20 court decisions for IP cases over the past three years and in the meantime having the publication of at least one article

⁶⁰ Art. 3(a)(1)(A) & (2)(C) of the Selection and Training Rules for Candidates for Judges of the IPC.

⁶¹ Geji Fayuan Faguan Banli Minxingshi ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事及特殊專業類型案件年度司法事務分配辦法) [Assignment Rules for Civil, Criminal and Specialized Case in Courts of Every Level, hereinafter Assignment Rules of 2010], Apr. 28, 2010, *Zhonghua Minguo* 99 Nian 4 Yue 28 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 0990010131 Hao Ling (中華民國 99 年 4 月 28 日司法院院台廳司一字第 0990010131 號令) [Judicial Yuan, Apr. 28, 2010, No. 0990010131 Order], 52 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.6, 2010, at 141, art. 11(b) (later revised and renamed as Geji Fayuan Faguan Banli Minxingshi yu Xingzheng Susong ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事與行政訴訟及特殊專業類型案件年度司法事務分配辦法) [Assignment Rules for Civil, Criminal, Administrative and Specialized Case in Courts of Every Level, hereinafter Assignment Rules of 2012], May 30, 2012, *Zhonghua Minguo* 101 Nian 5 Yue 30 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 1010015157 Hao Ling (中華民國 101 年 5 月 30 日司法院院台廳司一字第 1010015157 號令) [Judicial Yuan, May 30, 2012, No. 1010015157 Order], 54 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.7, 2012, at 252.

in IP with Chinese characters not less than 10 thousand; (9) joining seminars in relation to IP or visiting government agencies or prestigious institutes in relation to IP in person for at least 40 hours in total over the last three years, and having the publication of at least one article in IP with Chinese characters not less than 10 thousand; or (10) authoring a governmental report in relation to IP over the past three years and the report was selected as an annual report of the Judicial Yuan.⁶²

An eligible judge could then provide the Judicial Yuan with related proofs to apply for a certificate.⁶³ The Judicial Yuan would appoint several examiners among division chief judges of the Supreme Court, senior judges, scholars, or experts to review the application.⁶⁴ If the application was approved by the appointed examiners, the application would be referred to the Judicial Personnel Review Committee of the Judicial Yuan for a final review.⁶⁵ After the Committee approved the application, the Judicial Yuan would issue a certificate to the applicant.⁶⁶ A certificate was valid for three years and could be renewed within three months before it expired by proving holding judge's continuous education or experience in relation to IP.⁶⁷

By rewarding a certified judge some advantages for his or her career, the Judicial Yuan hoped to attract judges interested in IP to apply for certificates and then sit in criminal and civil IP divisions in district courts. As mentioned in Chapter 4, specialized IP divisions in district court did not function well before 2008. At that time, judges in fact rotated among many different specialized divisions. To solve the problem, the Judicial Yuan gave a certified specialized judge

⁶² Art. 18 of the Assignment Rules of 2010.

⁶³ Art. 19 of the Assignment Rules of 2010.

⁶⁴ Art. 21(a) of the Assignment Rules of 2010.

⁶⁵ Art. 21(c) of the Assignment Rules of 2010.

⁶⁶ Art. 21(c) of the Assignment Rules of 2010.

⁶⁷ Art. 21(d) & (e) of the Assignment Rules of 2010.

in IP the priority for a vacant position in a criminal or civil IP division to other uncertified judges. The basic idea was simple: more specialization would produce more compliance with Judicial Yuan's policy on criminal sentencing. The new approach was effective in attracting many judges to be certified as specialized judges in IP; however, because it overlooked the "prefer civil court to criminal court" (*qumin bixing* 趨民避刑) judicial culture, almost all certified judges stayed in civil court, not criminal court. Again, when it is in conflict with the internal judicial culture of the judicial system, a reform might go astray.

The *qumin bixing* judicial culture has in fact existed in the judicial system. For a long time, judges have usually preferred civil court to criminal court.⁶⁸ In its nature, a criminal court judge would sentence someone to death or life imprisonment someday and has to face many unpredictable situations at any time such as a petition for a search warrant, a suspect's detention, or a release order.⁶⁹ A criminal case is usually more sensitive and newsworthy and any fault might give rise to serious results.⁷⁰ By contrast, a civil court judge's decision does not involve a person's life or freedom directly and a civil court judge's routine work is to host court sessions and deliver court opinions. Due to the high pressure in criminal court, judges are usually inclined to stay in civil court.

⁶⁸ Interview with Fan Guangqun (范光群), Lin Heming (林河名), in Taipei, Taiwan (2009), *Chuangban Wanguo* (創辦萬國) [*Establishing Wanguo*], in ZHILI GAIGE ZHI FALU REN: FAN GUANGQUN XIANSHEG (致力改革之法律人：范光群先生) [A JURIST WHO DEVOTES HIMSELF TO REFORM: MR. FAN GUANGQUN] 23 (Chen Chunsheng (陳春生) et al. eds., 2009).

⁶⁹ See Lai Renzhong (賴仁中) & Zhang Qizhen (張琦珍), *Fahuan Diaopai Shiheng, Wong Yuesheng: Duibuqi Renmin* (法官調派失衡，翁岳生：對不起人民) [*For Dysfunctional Judge Rotation, Wong Yuesheng: Apology to People*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Sep. 18, 2002, at Zonghe Xinwen (綜合新聞) [Roundup News], available at <http://www.libertytimes.com.tw/2002/new/sep/18/today-c10.htm>.

⁷⁰ For example, a Taiwanese judge had to see a psychologist because he was always blamed by the public for his bail decision for two gangsters who recommitted several serious crimes. See Hong Dinghong (洪定宏) & Zhang Xunteng (張勳騰), *Xue Qiu yu Chen Yihua, Zhuayige Shang 500 Wan Yuan* (薛球與陳益華，抓一個賞 500 萬元) [*500 Million Dollars for Either Wanted Xue Qiu or Chen Yihua*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Mar. 14, 2003, at Zonghe Xinwen (綜合新聞) [Roundup News], available at <http://www.libertytimes.com.tw/2003/new/mar/14/today-c2.htm>.

The *qumin bixing* judicial culture became a serious problem after the Judicial Yuan implemented another judicial reform in the mid-2000s. Prior to the mid-2000s, Taiwan's judicial system was notorious for its delayed adjudication and unprofessional court opinions.⁷¹⁷² One of the explanations for these problems was the frequent rotation among judges. At that time, a judge could freely rotate between civil court and criminal court if the year-end judicial conference of his or her court approved it.⁷³ Although each judge was subject to Judicial Yuan's oversight for delayed adjudication and unprofessional court opinions, some judges took advantage of rotation to avoid difficult and serious cases that might result in discipline.⁷⁴ For instance, if a judge rotated from criminal court to civil court, his unfinished criminal cases would be assigned to another judge who would take over the position. After one year, if he rotated back to the criminal court and closed as many easy cases as possible before he left civil court, he might be blameless on the surface because his unfinished civil cases were not many. Even though he left difficult and serious cases, it was also acceptable because he had too little time to close them. However, when

⁷¹ The Judicial Yuan tried to solve the problem by issuing at least two administrative orders in 2000. Di Yi, Er Shen Fayuan Qingli Minxingshi Chiyan Anjian Zhuyi Yaodian (第一、二審法院清理民刑事遲延案件注意要點) [Attention Guidelines for Solving Delayed Civil and Criminal Cases, hereinafter Attention Guidelines of 2000], Sep. 8, 2000, *Zhonghua Minguo* 89 Nian 9 Yue 8 Ri (89) Yuan Tai Ting Xing Yi Zi Di 21854 Hao Han (中華民國 89 年 9 月 8 日司法院(89)院台廳刑一字第 21854 號函) [Judicial Yuan, Sep. 8, 2000, No. 21854 Order]; Difang Fayuan Qingli Xingshi Chiyan Anjian Fangan (地方法院清理刑事遲延案件實施方案) [Implementation Rules for Solving Delayed Criminal Cases], May 1, 2000, *Zhonghua Minguo* 89 Nian 5 Yue 1 Ri Sifayuan (89) Yuan Tai Ting Xing Yi Zi Di 10451 Hao Ling (中華民國 89 年 5 月 1 日司法院(89)院台廳刑一字第 10451 號令) [Judicial Yuan, May 1, 2000, No. 10451 Order] (abolished in 2006).

⁷² The Judicial Yuan in 2003 disciplined eight judges for their delayed adjudication. See Zhang Qizhen (張琦珍), *Sifayuan Chengchu Ba Jian Faguan* (司法院懲處八積案法官) [*The Judicial Yuan Disciplined Eight Judges*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Jan. 21, 2003, at *Zhongdian Xinwen* (重點新聞) [Focus News], available at <http://www.libertytimes.com.tw/2003/new/jan/21/today-t1.htm>.

⁷³ "If a judge was disciplined for delayed adjudication over the past two years, his or her application for transfer or rotation should not be allowed." Art. 11 of the Attention Guidelines of 2000.

⁷⁴ After a Banqiao District Court (板橋地方法院) judge was suspected in 2012 that her rotation from criminal court to civil court was to avoid a serious and complicated criminal case, the President of the Judicial Yuan, Lai Haomin (賴浩敏), announced that a judge's rotation would not be allowed if his or her delayed adjudication was too serious. Lin Weixin (林偉信) & Ye Dezheng (葉德正), *Lai Haomin: Faguan Jian Weijie Buzhun Diaodong* (賴浩敏：法官積案未結不准調動) [*Lai Haomin: No Rotation for Delay Adjudication*], ZHONGGUO SHIBAO (中國時報) [CHINA TIMES], Oct. 12, 2012, at *Shehui Xinwen* (社會新聞) [Social News].

more and more judges did this, difficult and serious cases stayed in the judicial system longer. To prevent judges from frequent rotation, the Judicial Yuan in 2004 devised and implemented the “severance between civil and criminal court” (*minxing fenliu* 民刑分流) policy to close the door between civil and criminal court.⁷⁵

Required by the new rule, a judge had to choose between civil and criminal court as his or her specialty.⁷⁶ Once decided, he or she should stay in the same position for a long time.⁷⁷ By doing so, a judge could gradually accumulate expertise on the one hand and would be accountable for all cases that he or she received on the other hand. Though this measure was likely to hold judges accountable, the question about the priority to enter into or stay in civil or criminal court when the measure was implemented was raised as well. The result was that the Judicial Yuan let the system’s core value, seniority, decide the priority for a vacant position in civil or criminal court.⁷⁸ Unexpectedly, this solution aggravated judges’ inclination to civil court over the next decade.⁷⁹

Under the *qumin bixing* judicial culture, most senior judges chose to sit in civil court when the Judicial Yuan implemented the new policy. Junior judges and those judges who just

⁷⁵ Geji Fayuan Faguan Banli Minxingshi ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事及特殊專業類型案件年度司法事務分配辦法) [Assignment Rules for Civil, Criminal and Specialized Case in Courts of Every Level, hereinafter Assignment Rules of 2004], Dec. 23, 2004, *Zhonghua Minguo* 93 Nian 12 Yue 23 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 0930031032 Hao Ling (中華民國 93 年 12 月 23 日司法院院台廳司一字第 0930031032 號令) [Judicial Yuan, Dec. 23, 2004, No. 0930031032 Order].

⁷⁶ Art. 3(a) of the Assignment Rules of 2004.

⁷⁷ A judge could apply for rotation between criminal court and civil court after he or she stayed in either one for at least three years and the application was subject to the approval of the president and the judges meeting of the court. Art. 6(a) & 7(b) of the Assignment Rules of 2004.

⁷⁸ Art. 4(a) of the Assignment Rules of 2004.

⁷⁹ In the news release in 2006, the Judicial Yuan decided to solve the problem caused by the *minxing fenliu* policy and set rules to improve the *qumin bixing* phenomenon. Sifayuan (司法院) [Judicial Yuan], *Daozheng Minxing Zhidu Queshi, Gaishan Qumin Bixing Xianxiang* (導正民刑制度缺失，改善趨民避刑現象) [Redress the Problem in Civil and Criminal Court and Improve Qumin Bixing Phenomenon], SIFA ZHOUKAN (司法周刊) [JUDICIAL WEEKLY], Jul. 20, 2006, at 1.

graduated from the JPTI had no choice but to stay in criminal court.⁸⁰ These inexperienced judges in criminal court in turn contributed to delayed adjudication or controversial decisions.⁸¹ As the situation in criminal court became worse, fewer judges wished to stay in criminal court, including the specialized divisions.

To solve the problem caused by the *minxing fenliu* policy and to let specialized judges sit in specialized divisions, the Judicial Yuan implemented another policy, “specialized judges have priority to stay” (*zhuan ye jiuren* 專業久任), to give a certified judge the priority to other uncertified judges to enter into or stay in a specialized division.⁸² Thus, a junior judge with a certificate could precede a senior judge without a certificate to acquire a position in a specialized division. This sweet fruit successfully increased judges’ willingness to pursue a certificate for a specialized division position. However, this new reform did not require a certified specialized judge in IP to sit in a criminal IP division; instead, it let a certified judge choose to stay in civil or criminal court.

Due to the *qumin bixing* inclination, most certified specialized judges in IP embraced civil court, not criminal court. According to a forthcoming Judicial Yuan report, the Judicial Yuan issued 274 certificates in total from 2003 to 2012.⁸³ Of the 274 certificates, 121 were for civil

⁸⁰ Lai Renzhong (賴仁中) & Zhang Qizhen (張琦珍), *supra* note 69.

⁸¹ The President of the Judicial Yuan Wong Yuesheng (翁岳生) openly apologized for the *minxing fenliu* (民刑分流) policy in 2002. *See id.*

⁸² In fact, the policy was devised together with the policy of *minxing fenliu*. The Judicial Yuan did not take it seriously in the beginning but later believed that it could be a solution to the problem caused by the *minxing fenliu* policy later. *See* Zhonghua Minguo 99 Nian 3 Yue 19 Ri Sifayuan Yuan Tai Ting Si Yi Zi Di 0990001644 Hao Gonggao (中華民國 99 年 3 月 19 日司法院院台廳司一字第 0990001644 號公告) [Judicial Yuan No. 0990001644 Order, Mar. 19, 2010], 52 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.3, 2010, at 115-116.

⁸³ ZHANG DAOZHOU (張道周), SHAONIAN WEIFAN ZHIHUICAICHAN FEIXING JI QI SHENLI ZHI YANJIU—ZHUANYEHUA FANGXIANG DE ZAI PINGGU (少年違反智慧財產非行及其審理之研究—專業化方向的再評估) [RESEARCH ON JUVENILE IP DELINQUENCY AND ITS ADJUDICATION—REEVALUATION OF THE SPECIALIZATION] 65 (forthcoming in 2013).

court and 146 for juvenile court, while only seven for criminal court.⁸⁴ It is pretty clear that judges preferred civil court and juvenile court to criminal court. Of the 121 certificates for civil court, 40 were for IP litigation. Of seven certificates for criminal court, five were for IP litigation and two were for medical malpractice litigation. While the court system had 40 specialized judges in civil IP litigation, only five in “criminal” IP litigation.

Table 5-1 Certificates Issued by the Judicial Yuan from 2003 to 2012

Civil Court					Juvenile Court	Criminal Court		Total
Family	IP	Labor	Medical	Engineering	Juvenile	IP	Medical	
61	40	14	5	1	146	5	2	274
121					146	7		

Source: ZHANG DAOZHOU (張道周), SHAONIAN WEIFAN ZHIHUICAICHAN FEIXING JI QI SHENLI ZHI YANJIU—ZHUANYEHUA FANGXIANG DE ZAI PINGGU (少年違反智慧財產非行及其審理之研究—專業化方向的再評估) [RESEARCH ON JUVENILE IP DELINQUENCY AND ITS ADJUDICATION—REEVALUATION OF THE SPECIALIZATION] 65 (forthcoming in 2013).

The Judicial Yuan’s certification did attract many certified specialized judges in IP to sit in civil IP divisions; however, there are few civil IP cases filed in civil IP divisions. As mentioned in Chapter 4, due to the emphasis on criminal IP litigation, most civil IP cases in district court were filed in criminal court and were subordinate to criminal IP cases. Owing to broad criminalization, harsh statutory criminal punishment, and convenient affiliated civil actions, criminal court has been the battlefield for IP litigation. Before 2008, civil IP divisions in district court could deal with “pure” civil IP cases and “affiliated” civil IP cases referred by criminal court.⁸⁵ The 2008 IPC Organization Act and IP Case Adjudication Act required that all “pure” civil IP cases be first filed in the IPC and all affiliated civil IP cases be adjudicated by criminal IP divisions. Because the new 2008 law prohibited criminal courts from referring affiliated civil IP cases to civil court for further adjudication, after 2008 only criminal IP divisions in criminal

⁸⁴ *Id.*

⁸⁵ *Id.* at 69.

court could deal with IP cases, civil or criminal. The only exception was a civil action filed in light of an agreement explicitly excluding the jurisdiction of the IPC.⁸⁶ Thus, after the establishment of the IPC and related procedures, criminal IP divisions dealt with almost all IP cases and civil IP divisions dealt with very few IP cases. To adjudicate IP cases, those specialized judges in IP were supposed to stay in criminal IP divisions, not civil IP divisions. However, most specialized judges in IP hold certificates for civil IP litigation, not criminal IP litigation. The “civil” title let them gain priority to stay in civil court thanks to the Judicial Yuan’s “specialized judges have priority” (*zhuan ye jiuren*) policy. For those specialized judges in IP, their certificates were tickets to civil court or the IPC, not criminal court. Due to the priority, most specialized judges in IP did not sit in criminal IP divisions. Since someone had to sit in a criminal IP division, criminal court judges without a certificate could not help but rotate for criminal IP divisions. As a consequence, although the Judicial Yuan tried to reform and strengthen criminal IP divisions, no significant change could be made because the reform overlooked the contexts in which the reform was implemented.⁸⁷

5.3. Sentencing Guidelines to Unify and Raise Punishment

Another Judicial Yuan’s reform in 2008 aiming to unify and raise punishment against IP infringers is sentencing guidelines. The Judicial Yuan tried to provide judges with specific direction to sentence IP infringers by promulgating its sentencing guidelines. Because the sentencing guidelines involve a judge’s discretion in sentencing and a defendant’s right to justice, and the Judicial Yuan did not have delegation of legislative power, the administrative legislation of the sentencing guidelines in fact violated the judicial independence and delegation doctrines prescribed by Article 80 and 23 of the ROC Constitution. With their questionable legal status, the

⁸⁶ *Id.* at 69-70.

⁸⁷ *Id.* at 74, 77.

sentencing guidelines could not justify themselves and then change judges' sentencing pattern.

The Judicial Yuan's 2008 reform also tried to respond to the ineffectiveness of its administrative directives. Before 2008, the Judicial Yuan in its administrative directives suggested judges to raise punishment against IP infringers under certain circumstances. Yet the measure involving judicial decision making could not bind judges under the judicial independence doctrine prescribed by Article 80 the ROC Constitution. Nevertheless, to show its determination to unify and raise punishment and provide clearer sentencing rules, when the Judicial Yuan established the IPC in 2008, it also promulgated the Reference Sentencing Guidelines for Intellectual Property Cases (Reference Sentencing Guidelines).⁸⁸ The Reference Sentencing Guidelines was a pioneering work because there had been no specified sentencing guideline in Taiwan. In the news release for the Reference Sentencing Guidelines, the Judicial Yuan praised the Guidelines as the "first step to pursue the transparency and appropriateness of sentencing"⁸⁹ and expressed its anticipation:

After the issuance of the Reference Sentencing Guidelines, there will be clear standards that can prevent obvious discrepancies among judges in: (1) sentencing, (2) increase or decrease of punishment, and (3) combining multiple sentences in criminal IP cases. It will be significant especially for the establishment of judicial transparency and just public image.⁹⁰

Unlike the Judicial Yuan's former sentencing suggestions in administrative directives that were very general, the Reference Sentencing Guidelines specified how to increase or decrease

⁸⁸ Zhihui Caichan Anjian Liangxing Cankao Yaodian (智慧財產案件量刑參考要點) [Reference Sentencing Guidelines for Intellectual Property Cases, hereinafter Reference Sentencing Guidelines], Jun. 25, 2008, Zhonghua Minguo 97 Nian 6 Yue 25 Ri Sifayuan Yuan Tai Ging Xing Yi Zi Di 0970013816 Hao Han (中華民國 97 年 6 月 25 日司法院院台廳刑一字第 0970013816 號函) [Judicial Yuan, Jun. 25, 2008, No. 0970013816 Order], 50 SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZ.], no.8, 2008, at 59.

⁸⁹ Sifayuan (司法院) [Judicial Yuan], *Sifayuan Dingding Zhihuicaichan Anjian Liangxing Cankao Yaodian* (司法院訂定智慧財產案件量刑參考要點) [*Judicial Yuan Establish Reference Sentencing Guidelines for IP Cases*], SIFA ZHOUKAN (司法周刊) [JUDICIAL WEEKLY], Jun. 28, 2008, at 1.

⁹⁰ *Id.*

punishment. “Judges are suggested to increase or decrease 15 percent punishment whenever there is one legal reason for increase or decrease.”⁹¹ Also, a clearer rule for the combination of multiple sentences was provided, “Whenever a judge has to make a decision for the combination of multiple sentences, he or she should take the longest term as a basis, added the rest of the terms, deduct ten to thirty percent of the aggregate terms, and then decide the final term.”⁹²

The new Reference Sentencing Guidelines look innovative, but they are flawed in several aspects. In addition to the Guidelines’ two simple rules,⁹³ the most serious problem is their lack of delegation of legislation power. Article 80 and 23 of the ROC Constitution prescribe:

Judges shall be above partisanship and make judgments independently in accordance with law and free from any interference.⁹⁴

All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare.⁹⁵

Since only law is binding to judges’ decision making power⁹⁶ and restricting people’s rights must have the delegation of legislative power,⁹⁷ any narrowing of a judge’s discretion with respect to people’s rights to justice must find its ground in legislative power. Because the judicial branch’s promulgation of sentencing guidelines will affect judges’ discretion in sentencing a defendant to a specific punishment, the administrative legislation involves judicial independence

⁹¹ Art. 15 of the Reference Sentencing Guidelines.

⁹² Art. 16 of the Reference Sentencing Guidelines.

⁹³ The U.S. Federal Sentencing Guidelines define 43 offense levels and six criminal history categories, and detail sentencing ranges and sentencing table. United States Sentencing Commission, An Overview of the United States Sentencing Commission, http://www.ussc.gov/About_the_Commission/index.cfm (last visited Jun. 28, 2013). For more detailed introduction, see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 59-77 (1988).

⁹⁴ MINGUO XIANFA art. 80 (1947).

⁹⁵ MINGUO XIANFA art. 23 (1947).

⁹⁶ SA MENGWU (薩孟武), ZHONGGUO XIANFA XINLUN (中國憲法新論) [NEW REPUBLIC OF CHINA CONSTITUTION] 278 (7th ed. 1988).

⁹⁷ 1 LIN JIDONG (林紀東), ZHONGHUA MINGUO XIANFA ZHUTIAO SHIYI (中華民國憲法逐條釋義) [INTERPRETATION OF THE ROC CONSTITUTION BY EACH PROVISION] 351-352 (4th ed. 1988).

and people's rights. Thus, without any delegation of legislative power, sentencing guidelines should be unconstitutional interference.⁹⁸

The U.S. Federal Sentencing Guidelines were challenged on what can be best explained as a lack of delegation of legislative power. By the 1970s, the general public of the United States became concerned about the unpredictable and widely disparate sentences that indeterminate sentencing system produced.⁹⁹ To provide more predictability for judges' sentences, Congress passed the Sentencing Reform Act (SRA) in 1984.¹⁰⁰ The SRA of 1984 created the U.S. Sentencing Commission and provided the statutory foundation for federal sentencing guidelines. The Sentencing Commission was established as an independent commission in the judicial branch and has seven voting members appointed by the President of the United States by and with the advice and consent of the Senate.¹⁰¹ One of its principal purposes is to "establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes."¹⁰²

Though the initial sentencing guidelines went into effect on November 1, 1987, the guidelines did not become fully operational until 1989 because defendants challenged the

⁹⁸ The reasoning here is from the Judicial Yuan Shizi No. 530 Interpretation. For a detailed analysis of the reasoning of the Interpretation, see Li Jianliang (李建良), *Lun Shenpan Duli yu Sifa Xingzheng Mingling Quan zhi Guanxi—Jiexi Sifayuan Dafaguan Shizi Di 530 Hao Jieshi* (論審判獨立與司法行政命令權之關係—解析司法院大法官釋字第 530 號解釋) [*On the Relationship between Judicial Independence and Judicial Administrative Legislation—Analysis on the No. 530 Interpretation of the Council of Grand Justices of the Judicial Yuan*], TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.], no.32, 2002, at 43, 47-50.

⁹⁹ Art. 2 of the Reference Sentencing Guidelines.

⁹⁹ See STITH & CABRANES, *supra* note 93, at 30-31 (providing historical backgrounds about sentencing reform in the 1960s and 1970s).

¹⁰⁰ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998 (1988)).

¹⁰¹ 18 U.S.C. § 991(a).

¹⁰² 18 U.S.C. § 991(b). *An Overview of the United States Sentencing Commission*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/About_the_Commission/index.cfm (last visited Jun. 28, 2013).

constitutionality of the SRA on the basis of improper legislative delegation and violation of the separation of powers doctrine.¹⁰³ The U.S. Supreme Court rejected these challenges on January 18, 1989 in *Mistretta v. United States*,¹⁰⁴ and upheld the constitutionality of the Commission as a judicial branch agency. In *Mistretta*, the defendant raised the question about the constitutionality of Congress' delegation of power. The defendant argued that in delegating the power to promulgating sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress in fact granted the Commission excessive legislative discretion in violation of the nondelegation doctrine.¹⁰⁵ The Supreme Court disagreed and held, "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."¹⁰⁶ For the violation of separation of powers, the defendant argued that Congress, in constituting the Commission as it did, effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity.¹⁰⁷ The Supreme Court responded, "Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling Acts."¹⁰⁸ In sum, in recognizing the SRA's delegation, the Supreme Court confirmed the constitutional status of the Commission's power to issue the Federal Sentencing Guidelines.

Making a comparison between the Sentencing Commission and Judicial Yuan, it is clear

¹⁰³ *An Overview of the United States Sentencing Commission*, *supra* note 102.

¹⁰⁴ *John Mistretta v. United States*, 488 U.S. 361 (1989).

¹⁰⁵ *Id.* at 371.

¹⁰⁶ *Id.* at 374.

¹⁰⁷ *Id.* at 661.

¹⁰⁸ *Id.* at 665.

that the missing puzzle for Judicial Yuan's promulgation of sentencing guidelines is delegation of legislative power. While Congress passed the SRA to delegate the Sentencing Commission to promulgate the Federal Sentencing Guidelines, the Legislative Yuan never delegated the Judicial Yuan to promulgate sentencing guidelines. Also, when Taiwan's constitutional court, the Council of Grand Justices of the Judicial Yuan, was asked whether the Judicial Yuan enjoyed the judicial power on administrative legislation, though the constitutional court recognized Judicial Yuan's power, it clarified in its Interpretation No. 530 that Judicial Yuan's power should not violate judicial independence and delegation of legislation was mandatory when administrative legislation placed a burden on people's right:

The Judicial Yuan has the power to promulgate rules to regulate judicial administration affairs, but it shall not violate judicial independence... The contents of Judicial Yuan's rules shall not conflict with law. Unless having clear delegation of legislative power, Judicial Yuan's rules shall not increase any burden on people's right.¹⁰⁹

Therefore, the constitutional status for Judicial Yuan's sentencing guidelines is unwarranted because they not only involve judicial independence but they also lack delegation of legislative power. The Judicial Yuan knew this fundamental flaw very well, so the wording in the sentencing guidelines was deliberately selected. Article 2 of the Reference Sentencing Guidelines clarified, "This Reference Guidelines do not affect judicial independence."¹¹⁰ In other words, a judge can have his or her discretion to cooperate or not. Given their controversial legal status, the Reference Sentencing Guidelines, just like Judicial Yuan's administrative directives, might not bring any significant change to judges' sentencing pattern.

¹⁰⁹ Sifayuan (司法院) [Judicial Yuan], Oct. 5, 2001, (Shi) No. 530 Interpretation (司法院釋字第 530 號解釋), 14 SIFAYUAN DAFAGUAN JIESHI (司法院大法官解釋) [INTERPRETATIONS OF JUDICIAL YUAN GRAND JUSTICES] 265 (Judicial Yuan ed., 2010), available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

¹¹⁰ Art. 2 of the Reference Sentencing Guidelines.

5.4. Conclusion

In response to widespread judicial practice of handing down lenient sentences in IP piracy cases, and to relieve U.S. pressure in trade negotiations, Taiwan launched several reforms in 2008: it established IPC's jurisdiction over appellate criminal IP cases; it strengthened judicial selection for criminal IP divisions in district courts; and it developed sentencing guidelines for criminal IP cases. On the surface, these measures successfully created an image of unifying and raising criminal punishment against IP infringers. In substance, they conflicted with the growing culture of judicial independence and other aspects of Taiwan's judicial culture such as the preference for civil over criminal appointments. The justifications for granting the IPC jurisdiction over criminal cases and for issuing sentencing guidelines were not very strong, undermining judicial commitment to implementing them. Furthermore, because the Judicial Yuan overlooked judicial culture, certified specialized judges in IP chose civil IP divisions where few civil IP cases were filed. As a result, the practical impact of the reforms on the actual behavior of judges' handing down lenient sentences in criminal IP cases was not very large. The next chapter will make use of empirical data to reveal how little impact the reforms had on sentencing in criminal IP cases after the Judicial Yuan's 2008 reforms.

Chapter 6 Data and Analysis

This chapter will compare Republic of China (ROC) judges' sentencing patterns before and after the establishment of the Intellectual Property Court (IPC) and related procedures in 2008. One of the primary goals of these reforms was to reduce judicial discretion in sentencing and increase the severity of punishments for criminal intellectual property (IP) infringement cases as a strategy to reduce IP piracy. The analysis in this chapter will focus on district court and intermediate appellate court cases. Significant changes in sentencing patterns after the reforms would be consistent with a hypothesis that the broad changes ushered in by the IPC and related procedures achieved their objectives, while little or no change in sentencing patterns would suggest otherwise.

The analysis of statistical data for criminal sentences in this chapter provides no evidence that the 2008 reforms produced significant increases in the severity of judges' sentences. To test whether the 2008 reforms led to significant changes in judges' sentencing patterns, an independent samples t-test comparing the 2002-2007 statistical data to the 2009-2011 statistical data was conducted. Based on the t-test results for court disposition, the hypothesis of "no change" cannot be rejected; that is, the results are consistent with the hypothesis that judges did not become harsher after 2008. Though not directly tested here, one explanation for the reforms' failure to lead to more severe sentencing is that judicial independence and judicial culture proved more resistant than policy change. Perhaps the reforms were inadequate to prevent judges in Taiwan from imposing sentences in criminal IP cases that were consistent with the broader social norms of Taiwanese society.

The analysis of reported criminal copyright and trademark cases provides no evidence of any significant change in sentencing patterns after the establishment of the IPC and related

procedures in 2008. Consistent with the pre-reform sentencing patterns, a lenient sentence, including a sentence convertible into a fine and a sentence of probation, was common in both copyright and trademark regimes. Most defendants received a sentence convertible into a fine. When defendants settled their civil cases with their piracy victims, they were usually placed on probation (about 80 percent defendants who settled their civil cases were placed on probation) regardless of whether they were sentenced to a convertible or unconvertible term. Sentencing defendants to a real jail term (i.e., a sentence to a jail term that could not be converted into a fine and without probation) was exceptional. In the copyright regime, only when a defendant was found (1) involved in commercial scale infringement and caused extensive harm (unless the court placed the defendant on probation because of a paid compensation), or (2) a real jail term was mandatory (i.e., when an aggravating factor made conversion and probation impossible), would the court send the defendant to prison. In the trademark regime, a real jail term was more exceptional. A defendant was sent to prison only when he or she was found involved in commercial scale infringement that adversely affected public safety or infringed well-known trademarks and did not settle his or her civil cases.

The analysis of reported cases cannot rule out defendants involved in commercial scale piracy might be able to avoid criminal punishment by paying civil compensation in exchange for being placed on probation. In Taiwan, the court usually places defendants who settled their civil cases on probation, so those defendants who can settle their civil cases are usually spared from criminal punishment. While this practice can give victims more incentives to initiate criminal complaints, it may be able to decrease the severity of criminal punishment since criminal punishment might be suspended and never be executed.

The following decision tree shows the general sentencing patterns in the copyright regime:

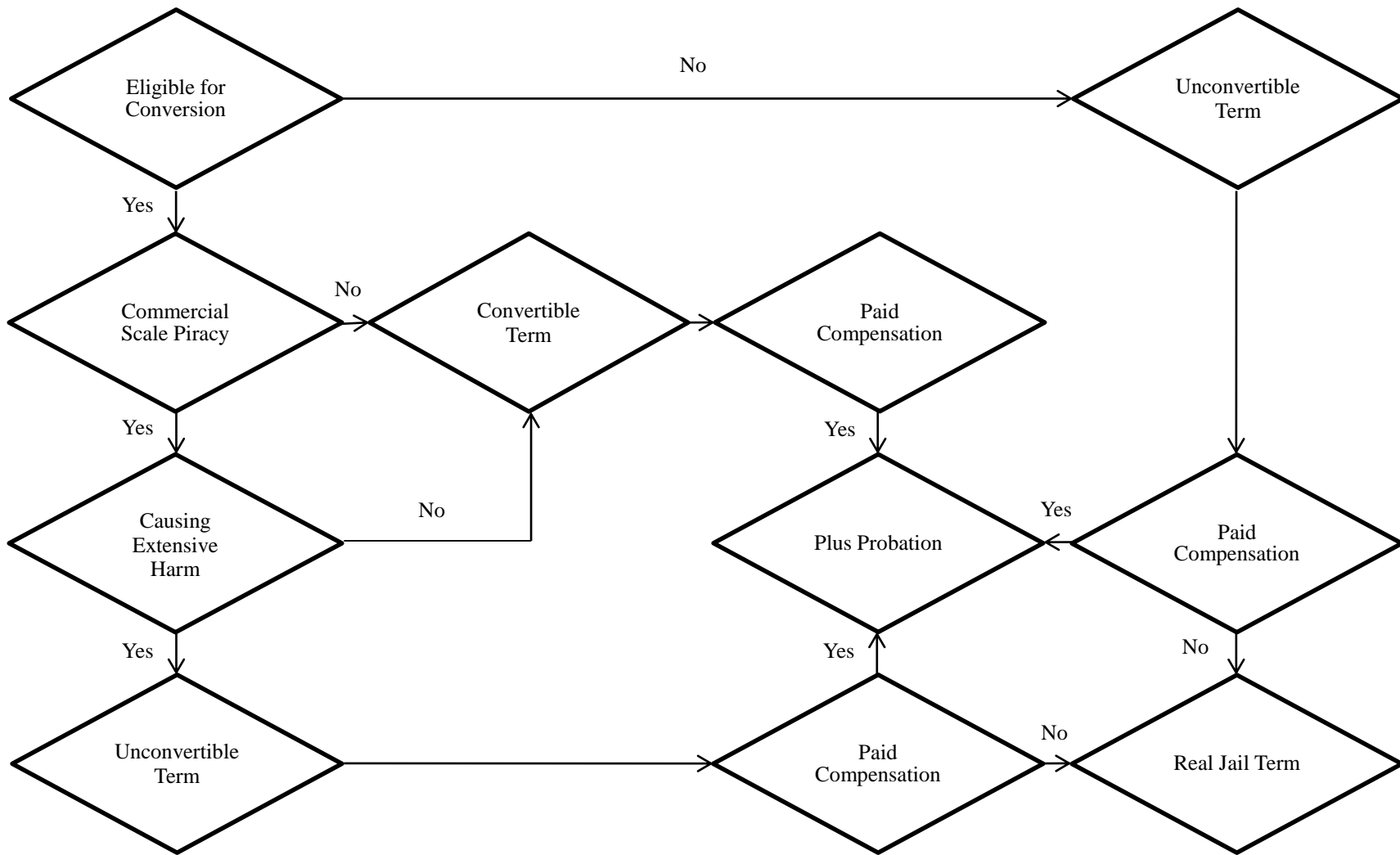


Figure 6-1 Decision Tree for Judges' Sentencing Patterns in the Copyright Regime

The pre-reform and post-reform comparison offers no evidence that the severity of sentences in the district court and intermediate appellate court increased after the introduction of the 2008 reforms. Although it was not uncommon that the appellate court disagreed with the district court's sentences, the appellate court reduced the district court's sentences more often than increased them.¹ While the establishment of the IPC was expected to reduce the practice of giving lenient sentences in lower courts and increase the severity of criminal punishment imposed on IP infringers, this is not what happened. Even after the IPC was formed, the appellate court was still giving lenient sentences much as lower courts were doing.

No evidence shows judges' sentencing patterns were changed by the 2008 reforms spurred by the U.S. Special 301 framework. It remains uncertain, therefore, whether the judicial reforms intended to change judicial culture and reduce judicial independence have had any effect. I contend, though cannot empirically test that, in the context of Taiwan's transition to democracy since the mid-1980s, a culture of judicial independence had already been established. In addition, Taiwan had a long-standing judicial culture that maintained the consistency of judges' decision making. The practice of judicial independence might weaken the impact of the judicial reforms while judicial culture might reinforce the stability of established sentencing patterns.

6.1. Empirical Data

This chapter analyzes two sets of publicly available data. The first set is the aggregate data regarding criminal IP cases completed from 2002 to 2011. The data are collected from the Judicial Statistics Yearbook of the Judicial Yuan which contains the statistics for defendants and sentencing. The first set of data will show the patterns of judicial sentencing in general. For example, this data shows whether the overall rate at which real jail terms were imposed

¹ See, e.g., appellate cases in Appendix B.

decreased or increased over the past ten years. The second set of data is derived from individual criminal IP cases taken from three different jurisdictions: the capital Taipei, the Hsinchu (Xinzhu) high-tech center, and the more rural Tainan.² By studying individual criminal IP district court and intermediate appellate court cases before and after the establishment of the IPC and related procedures, the data will reveal judges' considerations in their sentencing of individual cases in the two different stages, 2007 and 2011. For example, the data will show what factors were considered by a judge when deciding whether or not to send a defendant to prison. The analysis of both sets of data together will permit the real impact of the 2008 reforms to be assessed.

The following considerations are taken into account in analyzing the data:

First, Taiwan established its sole intermediate appellate court specializing in IP in 2008 and the United States lifted its Special 301 oversight from Taiwan in 2009. Since the 2008 reforms are the most important under the Special 301 framework, the data and analysis will pay attention to any significant difference before and after the transitional 2008 period.

Second, data and analysis are divided into two levels: the district court level and the appellate court level. Because the 2008 reforms tried to make use of IPC's jurisdiction over appellate criminal IP cases to modify the patterns of judicial sentencing in lower courts, this analysis will consider whether there is any evidence that the IPC was able to exercise such an influence.

Third, data are divided into criminal copyright and trademark cases because the punishment regimes for the two categories of IP rights differ (as explained in Chapter 4).

Fourth, the analysis in this chapter focuses on copyright and trademark cases. Other

² Case list, *see* Table C-1 and Table C-2 in Appendix C.

criminal IP cases such as criminal trade secret cases are excluded even though they are within the definition of criminal IP cases contained in the IPC Organization Act and IP Case Adjudication Act. The focus of the analysis is narrower than the statutory definition because the statistics of the Judicial Yuan usually excluded other types of criminal IP cases, the United States focused its attention on criminal copyright and trademark cases, and the total number of other kinds of criminal IP cases has been very small.³

Also, the definitions of the following legal terms in the data and analysis are given here for clarification:

Because the main focus of this chapter is ROC judiciary's tendency to give "lenient sentences" versus "real jail terms," those terms are defined here. In this discussion, a lenient sentence refers to: (1) a sentence to a jail term convertible into a fine or (2) a sentence of probation. In general, a sentence to a jail term *not more than six months* is convertible into a fine.⁴ When the court imposes a sentence of primary punishment such as imprisonment, it can suspend execution of this sentence and place the offender on probation.⁵ If a revocation occurs, the original sentence will be executed.⁶ A real jail term refers to an unconvertible jail term

³ The criminal IP cases defined by the IPC Organization Act and IP Case Adjudication Act can be categorized as: (1) copyright offenses, (2) trademark offenses, (3) trademark offenses in the Criminal Code, (4) trade secret offenses in the Criminal Code, and (5) trademark and trade secret offenses in the Fair Trade Act. Taking the 2011 criminal IP cases as an example, Taiwan had 1,770 criminal copyright and trademark cases but 14 other criminal IP cases.

⁴ According to Art. 41(a) of the Criminal Code, a sentence to a jail term not more than six months can be automatically converted into a fine if the maximum punishment of the offense provided for in a statute is not more than five years imprisonment. Thus, if the maximum punishment of an offense provided for in a statute exceeds five years imprisonment, then a sentence for such offense cannot be converted into a fine even if an individual sentence under that statute is less than six months. After 2009, a sentence to a jail term not more than six months can be converted into a community service if the maximum punishment for the offense exceeds five years imprisonment. Art. 41(c) of the Criminal Code.

⁵ Art. 74 of the Criminal Code. In the United States, probation is generally given in lieu of a prison sentence. If the conditions of probation are breached, the offender can be sentenced to prison following a judicial revocation proceeding. 1 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 1:1 (1999). "[T]he court delay imposing sentence and place the offender on probation. While this disposition itself is a kind of sentence in that the offender may be placed on probation for a certain number of years, the probation term, technically, does not constitute a sentence." 2 *id.* § 27:16.

⁶ Art. 75 of the Criminal Code.

without probation. In general, an unconvertible jail term is a jail term of more than six months imprisonment.⁷ A defendant who is sentenced to a real jail term must serve time in prison.

The term “appellate court” in this discussion means the IPC and its predecessor prior to mid-2008, the High Court (Taiwan High Court and its branch courts). Although a three-judge panel at district court is authorized to review an appeal for a one-judge summary judgment under ROC criminal procedure law, this category is excluded from this study because such three-judge panels do not share the general appellate jurisdiction of the High Court or IPC.

Unlike the intermediate appellate court in the United States which is generally responsible for application of law only,⁸ the intermediate appellate court in Taiwan is responsible for both fact finding and application of law. Taiwan follows the general rule in civil law jurisdictions and requires the intermediate appellate court in effect to retry on appeal.⁹ In Taiwan, when the intermediate appellate court finds a defendant guilty, it is authorized to sentence the defendant. Because the intermediate appellate court in Taiwan retries appellate cases and decides sentences independently, its court decisions usually contain complete information on how it decides sentences.¹⁰ By comparing appellate sentencing before and after the 2008 reforms and

⁷ There is one exception to the conversion rule. According to Art. 41(h) of the Criminal Code, a sentence to more than six months imprisonment can still be converted into a fine if the sentence in fact combines two or more convertible sentences. When a defendant is found guilty for multiple counts and therefore sentenced for each count, the court has to combine the multiple sentences and then sentence the defendant between the longest term and the aggregate term.

⁸ “[I]n the United States... the concept that the target of an appeal is the alleged error(s) of the trial judge, not whether a fresh view of facts and legal issues would command a different result.” FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 84 (1994). For the differences between the U.S. and civil law appellate systems, *see id.* at 34-36.

⁹ “[A]ppellate courts in civil law jurisdictions will review issues of fact with little deference to trial court findings and will even receive new evidence.” *Id.* at 84. Taiwan follows the civil law tradition. *See* Wu Xunlong (吳巡龍), *Cong Meiguo Shangsu Zhidu Jiantao Woguo Xingshi Susong Shangsu Shen Xiuzheng Caoan* (從美國上訴制度檢討我國刑事訴訟上訴審修正草案) [*Review Taiwan’s Draft Bill on Criminal Appellate Procedures from the Perspective of the U.S. Appellate Procedures*], TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.], no.67, Feb. 2005, at 121, 129-130.

¹⁰ In general, in the United States, although appellate court opinions may describe sentences, they do not specify lower courts’ sentencing unless parties dispute it.

comparing that to district court sentencing before and after the reforms, the analysis will consider whether or not there is any evidence that the appellate court contributed to harsher sentencing after the reforms.

6.2. Criminal IP Cases in District Court

6.2.1. Analysis of Statistics

6.2.1.1. Prosecution and Disposition

The overall prosecution and disposition in the copyright regime declined over the past ten years but the trend in the trademark regime was not so clear. Table 6-1 and Table 6-2 show how many copyright and trademark defendants were indicted and disposed (including convicted, acquitted, and dismissed) each year from 2002 to 2011. The “indicted” column means how many defendants were indicted by public prosecutors each year. The “disposed” column means how many defendants were disposed by district courts each year. The “guilty” column means how many defendants were found guilty by district courts each year. The “acquitted” column means how many defendants were acquitted by district courts each year. The “dismissed” column means how many defendants were dismissed by district courts each year. These columns are categorized according to the time sequence of the proceedings of a criminal trial (indicted and disposed) and the different district court disposition (guilty, acquitted, and dismissed).

Table 6-1 District Court Prosecution and Disposition for Copyright Defendants

Special 301 Status	Year	Indicted	Disposed	Guilty	Acquitted	Dismissed
Priority Watch List	2002	2,158	2,041	1,196	203	642
	2003	1,819	2,013	1,207	225	581
	2004	940	1,209	730	151	328
Watch List	2005	1,074	1,051	747	80	224
	2006	1,423	1,289	982	60	247
	2007	1,645	1,572	1,134	74	364
	2008	1,326	1,411	914	99	398
Removed	2009	1,061	1,095	686	68	341
	2010	905	880	577	64	239
	2011	924	854	491	99	264

Source: The “indicted” column, Yearbook of Statistics of Justice;¹¹ the “disposed,” “guilty,” “acquitted,” and “dismissed” columns, Judicial Statistic Yearbook.¹²

Table 6-2 District Court Prosecution and Disposition for Trademark Defendants

Special 301 Status	Year	Indicted	Disposed	Guilty	Acquitted	Dismissed
Priority Watch List	2002	835	696	560	101	35
	2003	1,542	1,331	1,193	108	30
	2004	1,392	1,440	1,334	58	48
Watch List	2005	1,568	1,522	1,435	49	38
	2006	1,386	1,270	1,203	46	21
	2007	1,613	1,487	1,400	73	14
	2008	1,287	1,341	1,284	33	24
Removed	2009	1,099	979	919	43	17
	2010	1,082	1,008	949	40	19
	2011	1,427	1,122	1,053	61	8

Source: The “indicted” column, Yearbook of Statistics of Justice; the “disposed,” “guilty,” “acquitted,” and “dismissed” columns, Judicial Statistic Yearbook.

To see the trend over the past ten years, Table 6-1 and Table 6-2 are transformed into Figure

¹¹ Difangfayuan Jianchashu Zhenzi Anjian Zhongjie Qingxing (地方法院檢察署偵字案件終結情形) [Results of Decisions of Termination by the District Court Prosecutors’ Offices], FAWUBU (法務部) [MINISTRY OF JUSTICE], FAWU TONGJI NIANBAO (法務統計年報) [YEARBOOK OF STATISTICS OF JUSTICE] 116-117 (2011), available at <http://www.moj.gov.tw/site/moj/public/MMO/moj/stat/yearbook/ER0003-013-040.pdf>.

¹² Difangfayuan Xingshi Diyishan Anjian Caipan Jieguo—An Zuimingbie Fen (地方法院刑事第一審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts—by Crime Type], SIFAYUAN (司法院) [JUDICIAL YUAN], SIFA TONGJI NIANBAO (司法統計年報) [JUDICIAL STATISTICS YEARBOOK] § 8 (2003-2008) & § 9 (2009-2012), available at <http://www.judicial.gov.tw/juds/>.

6-2 and Figure 6-3.

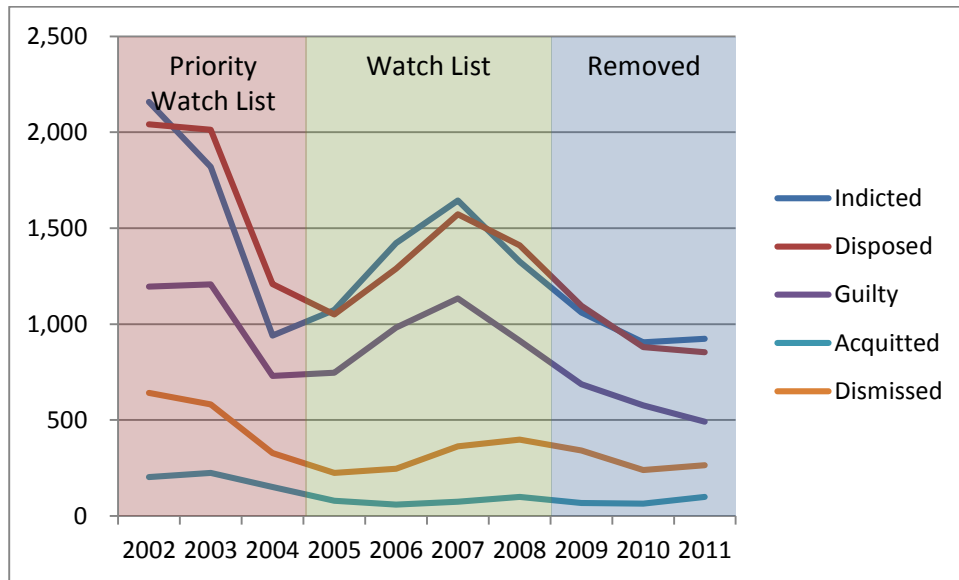


Figure 6-2 District Court Prosecution and Disposition for Copyright Defendants

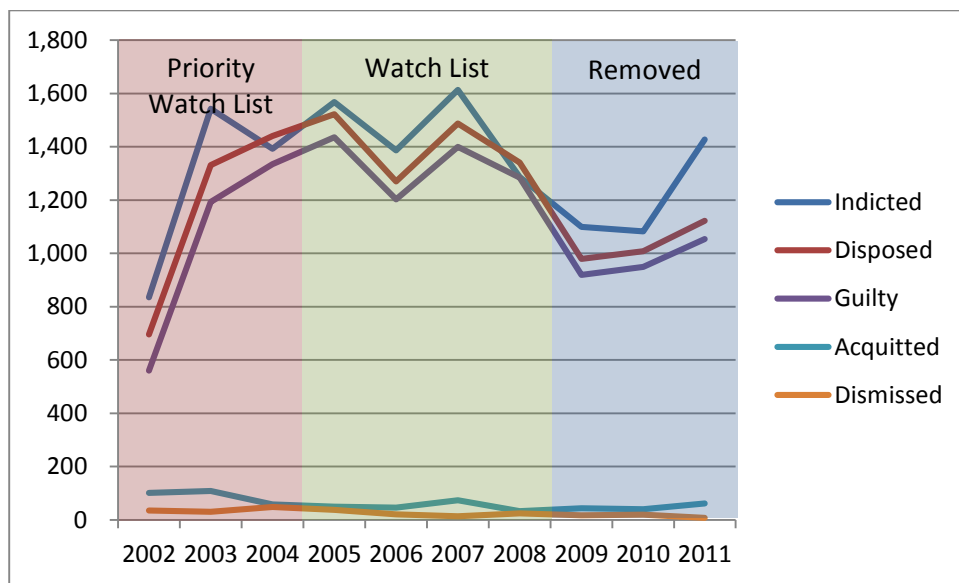


Figure 6-3 District Court Prosecution and Disposition for Trademark Defendants

In order to compare district court prosecution and disposition before and after the 2008 reforms statistically, an independent samples t-test was conducted. The t-test for independent samples, also known as the two-sample t-test, compares the means of two samples.¹³ The

¹³ SARAH BOSLAUGH, STATISTICS IN A NUTSHELL 160-161 (2013).

purpose of this test is to determine whether the means of the populations from which the samples were drawn are the same.¹⁴ The subjects in the two samples are assumed to be unrelated (no one is tested twice, no sibling pairs, etc.) and to have been independently selected from their populations.¹⁵ The independent samples t-test is commonly used in many professional fields and is usually calculated using computer software.¹⁶ A *p*-value in a t-test result is the probability that the null hypothesis¹⁷ is true. A *p*-value less than 0.05 means the probability that the null hypothesis is true is less than 0.05 and is usually considered statistically significant between two populations.¹⁸

Because criminal cases in each year were not related to those in another year, an independent samples t-test is appropriate. Here is the summary of the t-test results for the copyright data (a complete t-test report is in Appendix A.1):

1. Number of indicted defendants: While the pre-reform mean of the number of indicted defendants is 1,509 and the post-reform mean is 963, the t-test result, with 90% confidence, rejects the hypothesis that there is no difference in the average number of indictments between the pre-reform and post-reform policy change. Some possible explanations will be given and discussed later.

2. Disposition rate: While the pre-reform mean of the disposition rate (disposed defendants/indicted defendants) is 1.03 and the post-reform mean is 0.97, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ “Because it is almost impossible to test hypotheses under the many and various possible conditions, researchers attempt to find support for the research hypothesis by rejecting the negation of it, which is called the null hypothesis. If the null hypothesis is rejected, that is, there are sufficiently large statistical differences to reject the idea of the research results occurring by chance, the research hypothesis is supported.” NATALIE L. SPROULL, HANDBOOK OF RESEARCH METHODS: A GUIDE FOR PRACTITIONERS AND STUDENTS IN THE SOCIAL SCIENCES 53 (2nd ed. 1995).

¹⁸ KEN BLACK, BUSINESS STATISTICS: FOR CONTEMPORARY DECISION MAKING 308-309 (7th ed. 2011).

disposition rate.

3. Guilty rate: While the pre-reform mean of the guilty rate (guilty defendants/disposed defendant) is 0.66 and the post-reform mean is 0.62, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

4. Acquittal rate: While the pre-reform mean of the acquittal rate (acquitted defendants/disposed defendants) is 0.09 and the post-reform mean is 0.08, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

5. Dismissal rate: While the pre-reform mean of the dismissal rate (dismissed defendants/disposed defendants) is 0.25 and the post-reform mean is 0.30, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Here are the t-test results for the trademark data:

1. Number of indicted defendants: While the pre-reform mean of the number of indicted defendants is 1,389 and the post-reform mean is 1202, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the number of indicted defendants.

2. Disposition rate: While the pre-reform mean of the disposition rate (disposed defendants/indicted defendants) is 0.92 and the post-reform mean is 0.87, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

3. Guilty rate: While the pre-reform mean of the guilty rate (guilty defendants/disposed defendant) is 0.98 and the post-reform mean is 0.98, the t-test result provides no evidence to

support the idea that the 2008 intervention might have an effect on the guilty rate.

4. Acquittal rate: While the pre-reform mean of the acquittal rate (acquitted defendants/disposed defendants) is 0.91 and the post-reform mean is 0.94, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

5. Dismissal rate: While the pre-reform mean of the dismissal rate (dismissed defendants/disposed defendants) is 0.07 and the post-reform mean is 0.04, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

In sum, in the copyright regime, although a difference in the number of indicted defendants is found, this variance is controlled by the prosecution, not by the judiciary. In addition, no significant change in the overall district court disposition can be found in the pre-reform and post-reform comparison. In the trademark regime, no significant change can be found in either prosecution or disposition. Therefore, none of the findings here contradict the hypothesis that the 2008 reforms did not succeed in changing judges' sentencing patterns in a more severe direction.

Because the t-test result shows in the copyright regime a change in the number of indicted defendants is significant, several possible explanations are discussed here. As Figure 6-2 shows, prosecutions for copyright defendants increased to a high level in 2002 and 2007 but soon declined in 2003 and 2008. These increases and decreases may be attributable to: (1) an overall increase and decrease in prosecutions for all crimes; (2) an overall increase and decrease in government spending on anti-piracy; or (3) a deterrent effect brought by the 2002 and 2007 prosecutions gave rise to the 2003 and 2008 decrease.

In order to see whether or not the increase and decrease is relevant to the overall

prosecution for all crimes, the comparison between the prosecutions for all crimes and copyright crimes is made. The following table shows how many defendants for all crimes and copyright crimes were prosecuted each year. The prosecutions for all crimes decreased from 2003, increased from 2005, and decreased again from 2009.¹⁹ The prosecutions for copyright crimes decreased from 2003, increased from 2005, and decreased again in 2008. The similarity seems to be consistent with the relevance.

Table 6-3 Prosecutions for All Crimes

Year	All	Copyright
2002	125,289	2,158
2003	113,004	1,819
2004	118,851	940
2005	134,624	1,074
2006	158,889	1,423
2007	188,422	1,645
2008	199,374	1,326
2009	187,179	1,061
2010	187,424	905
2011	182,051	924

Source: Yearbook of Statistics of Justice.²⁰

Another possible explanation for the increase and decrease in 2005-2008 copyright prosecutions may be government spending on anti-piracy. This may be measured by observing the Taiwanese government spending plan specifically for anti-piracy in the past. Taiwan established its specialized IP police team, Intellectual Property Rights Police Team (IPPT), in 2003. The budget of the IPPT has been provided by the Taiwan Intellectual Property Office (TIPO) since 2005. Under TIPO's annual spending plan, there was a special section called "anti-

¹⁹ FAWUBU (法務部) [MINISTRY OF JUSTICE], 100 NIAN FANZUI ZHUANGKUANG JI QI FENXI (100 年犯罪狀況及其分析) [2011 CRIME SITUATIONS AND ANALYSIS] 1, 350 (2012), available at <https://www.moj.gov.tw/public/Attachment/312116242221.pdf>.

²⁰ Difangfayuan Jianchashu Zhenzi Anjian Zhongjie Qingxing (地方法院檢察署偵字案件終結情形) [Results of Decisions of Termination by the District Court Prosecutors' Offices], FAWUBU (法務部) [MINISTRY OF JUSTICE], *supra* note 11.

piracy.” This section covered two major programs: (1) the coordination among all government agencies on anti-piracy; and (2) IPPT’s annual spending plan. Under the coordination spending plan, a special bonus budget was provided to reward law enforcement for successful apprehension. The following table shows the amount of TIPO’s anti- piracy spending plan, IPPT’s annual spending plan, and TIPO’s bonus plan each year from 2005 to 2011. Notably, half amount of IPPT’s 2005 spending plan was to purchase offices for the newly established IPPT.

Table 6-4 Government Spending for Anti-Piracy

Year	TIPO Anti-Piracy	IPPT Total	Bonus
2005	101,900*	45,676*	24,336
2006	46,882	22,125	15,000
2007	48,904	29,368	13,500
2008	45,099	24,592	13,500
2009	43,964	23,996	13,000
2010	41,316	24,328	9,880
2011	37,381	27,068	5,000

Source: TIPO Budget Books from 2005 to 2011.²¹

Note: * half amount was spent on purchasing new offices.

As the table shows, TIPO maintained the anti-piracy budget from 2005 to 2007 and reduced it in 2008, while IPPT increased its total budget from 2005 to 2007 and reduced it in 2008. At the same time, the bonus plan kept shrinking, too. The increase and decrease in the government spending on anti-piracy seems to be consistent with the 2005-2008 increase and decrease in the number of indicted copyright defendants.

The last possible explanation for the increase and decrease in copyright prosecutions is a deterrent effect. A deterrent effect means that prosecutions account for a later decline in crime activities. Although in social science it is quite difficult to detect crime activities effectively and

²¹ *Budget Books*, TAIWAN INTELLECTUAL PROPERTY OFFICE, <http://www.tipo.gov.tw/np.asp?ctNode=6865&mp=1> (last visited Jun. 28, 2013).

establishing a clear causality between prosecutions and crime activities is always controversial,²² some signs may be consistent with a deterrent effect. For example, while the Taiwanese government launched a one-year anti-piracy campaign targeting night markets and stores selling pirate optical discs in 2002,²³ criminal IP prosecutions immediately rose to a high level. Soon in 2003 criminal IP prosecutions started to drop and two major IP protection organizations, IFPI (International Federation of the Phonographic Industry) and FVWP (Foundation for Film and Video Works Protection), reported that a sharp drop in such IP crime activities occurred in 2003.²⁴ Similarly, while the Taiwanese government started another three-year anti-piracy campaign from 2006 to 2008,²⁵ criminal IP prosecutions climbed from 2005 to 2007 and declined from 2008. The USTR announced in its 2008 Special 301 report that the United States was considering to remove Taiwan from the Special 301 Watch List thanks to Taiwan's progress in eliminating IP piracy.²⁶

While Taiwan's criminal IP prosecutions started to decline in 2008, Taiwan introduced new

²² Because of a certain dark number in crime investigation, crime activities cannot be effectively detected in reality. Sometimes people use prosecutions and convictions to show a decline in crime activities. For example, the Taiwanese government asserted that the decrease in IP crime prosecutions and convictions could suggest a decline in IP crime activities. This theory may be circular because a decline in crime activities may also be the reason for less prosecutions and convictions. Many IP owners always used an estimated economic loss in their product sales to show whether or not IP infringement was serious. An increase in their product sales means a decline in crime activities. For example, according to the report from the International Intellectual Property Alliance (IIPA), Taiwan's piracy decreased from 2001 to 2003 because IP owners' loss decreased. However, IP piracy may be relevant to a decrease in IP product sales but many other factors other than piracy such as economic depression or less competitive products cannot be excluded. Some scholars surveyed the general public to measure seriousness of piracy. However, they admitted that the results might be inaccurate because participants were usually reluctant to disclose their involvement or experiences in crime activities.

²³ *Jin (2002) Nian Wei Tuidong Baohu Zhihui Caichanquan Xingdong Nian* (今(2002)年為推動保護智慧財產權行動年) [*Year 2002: Action Year for IPR Protection*], TAIWAN IPR NEWS, Jan. 31, 2002, at 1.

²⁴ *Wo 2003 Niandu Chaqi Chengxiao Feiran Yuzhu 301 Chuming* (我 2003 年度查緝成效斐然有助 301 除名) [*2003 Campaign against IP Piracy Will Help Taiwan's Removal from Special 301*], TAIWAN IPR NEWS, Jan. 16, 2004, at 2. It was reported by the IP protection organizations that one half night market piracy decreased and only 50 of the 300 piracy stores remained.

²⁵ *Guanche Baohu Zhihui Caichanquan Xingdong Jihua 2006-2008* (貫徹保護智慧財產權行動計畫 95-97 年) [*Action Plan for Implementing IPR Protection 2006-2008*], TAIWAN INTELLECTUAL PROPERTY OFFICE, <http://www.tipo.gov.tw/ip.asp?CtNode=6806&CtUnit=3306&BaseDSD=7&mp=1> (last visited Jun. 28, 2013).

²⁶ *2008 Special 301 Report*, OFFICE OF THE USTR, http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (last visited Jun. 28, 2013).

judicial reforms with the goal of increasing the severity of judges' sentences. Unless the decline in prosecutions affected the proportion of serious cases subject to heavy sentences to petty cases subject to light sentences, the decline would have no or little influence on the severity of sentences.

6.2.1.2. Sentencing

This section considers sentencing trends over the past ten years, especially whether or not any evidence can be found to support the idea that punishments increased in severity after the establishment of the IPC and the reform of related procedures in district courts in 2008. The statistics show in the copyright regime there were more convertible sentences after 2008, which suggests that sentences actually became more lenient rather than more severe after the reforms. In the trademark regime, sentencing was very lenient both before and after the reforms, so there is no evidence of any increase in severity in this area, either.

Table 6-5 and Table 6-6 present the statistics for district court sentences each year from 2002 to 2011 in the copyright and trademark regimes. Defendants are categorized according to five different primary penalties: (1) a fine; (2) criminal detention (imprisonment less than 60 days, convertible jail term); (3) two- to six-month imprisonment (convertible jail term); (4) seven-month to one-year imprisonment (unconvertible jail term); and (5) more than one year imprisonment (unconvertible jail term). Categories (1)-(3) are considered lenient sentences in this analysis, and Categories (4)-(5) are considered severe.

Based on the statistics in Table 6-5, Figure 6-4 describes the proportion of five different penalties each year from 2002 to 2011. As mentioned above, a sentence of criminal detention or not more than six months imprisonment can be automatically converted into a fine. A sentence of more than six months imprisonment and without probation will guarantee a real jail term. Under

the Special 301 framework, the United States frequently complained that Taiwan's IP infringers seldom received real jail terms and convertible sentences could not deter piracy.²⁷ In response, Taiwan revised its criminal copyright law to narrow judges' discretion in giving sentences convertible into a fine and issued administrative directives to encourage judges to give more severe sentences.

In Figure 6-4, the proportion of convertible sentences to all sentences from 2009 to 2011 is actually higher than it was from 2002 to 2007. Prior to 2008, each year the proportion of convertible sentences had never exceeded 70%. After 2008, the percentage of convertible sentences has been more than 75% and even exceeded 80% in 2009 and 2010. Taiwan was on the Priority Watch List from 2001 to 2004 and on the Watch List from 2005 to 2008. In response to judges' ongoing lenient sentences, Taiwan established the IPC and related procedures in mid-2008 to raise the severity of punishments. If the 2008 reforms had been effective, the percentage of convertible sentences after 2008 should have decreased, not increased.²⁸

²⁷ When Minister of Justice Ma Ying-jeou (馬英九, the current ROC president) reported the Legislative Yuan the stand of the Ministry of Justice in U.S.-Taiwan IP negotiation in 1993, he addressed, "Meifang reng renwei zhunyu yike fajin wufa ezu qinhai zhihui caichan quan qingxing zhi zengjia." (美方仍認為准予易科罰金無法遏阻侵害智慧財產權情形之增加。) [Americans still believed that sentences convertible into a fine could not deter the increase of IP piracy.] See the committee consideration legislative materials, 82 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no.39, Jun. 3, 1993, at 437.

²⁸ A rival situation that fewer serious infringements might result in fewer harsh sentences will be analyzed later.

Table 6-5 District Court Sentences for Copyright Defendants

Year	Guilty Defendants	Fine	Criminal Detention	2 to 6-month	7-month to 1-year	More Than 1-year
2002	1,196	26	5	684	132	349
2003	1,207	35	32	617	167	356
2004	730	36	92	380	56	166
2005	747	25	43	302	229	148
2006	982	24	56	373	411	118
2007	1,134	43	102	741	191	57
2008	914	21	145	629	114	5
2009	686	11	117	466	82	10
2010	577	20	76	399	72	10
2011	491	14	44	328	89	16

Source: Judicial Statistics Yearbook.²⁹

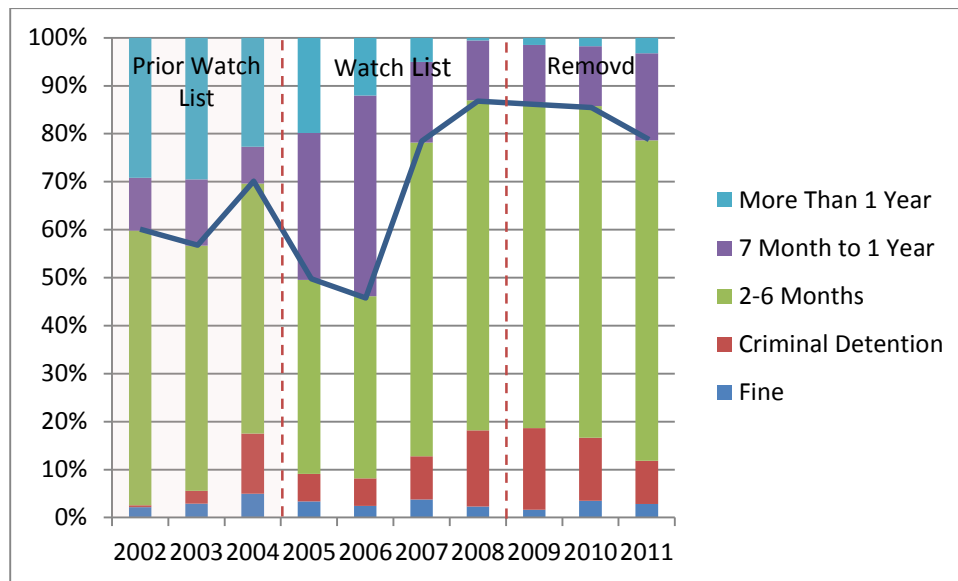


Figure 6-4 District Court Sentences for Copyright Defendants

Table 6-6 and Figure 6-5 present judges' sentences for criminal trademark defendants every year from 2002 to 2011. Compared with the sentences for copyright defendants, the sentences for trademark defendants feature a higher percentage of convertible sentences. Since 2002, each year

²⁹ Difangfayuan Xingshi Diyishan Anjian Caipan Jieguo—An Zuimingbie Fen (地方法院刑事第一審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts—by Crime Type], SIFAYUAN (司法院) [JUDICIAL YUAN], *supra* note 12.

the percentage of convertible sentences has been at least 95%.³⁰ The great majority of trademark defendants received a sentence of a fine, criminal detention, or imprisonment not more than six months; in other words, an unconvertible sentence was more exceptional in the trademark regime. In addition, as time went by, the proportion of convertible sentences to all sentences became larger. The findings here are consistent with the hypothesis that neither the Special 301 oversight nor the establishment of the IPC resulted in harsher punishment in the trademark regime.

Table 6-6 District Court Sentences for Trademark Defendants

Year	Guilty Defendants	Fine	Criminal Detention	2-6 Months	7 Month to 1 Year	More Than 1 Year
2002	560	32	178	328	21	1
2003	1,193	45	521	592	29	6
2004	1,334	58	664	592	18	2
2005	1,435	60	744	610	20	1
2006	1,203	71	622	498	11	1
2007	1,400	66	762	562	10	0
2008	1,284	44	740	493	7	0
2009	919	41	572	301	5	0
2010	949	17	530	397	4	1
2011	1,053	29	561	456	7	0

Source: Judicial Statistics Yearbook.³¹

³⁰ As mentioned in Chapter 4, the United States did not press hard on Taiwan's trademark law probably because U.S. interests in trademarks might be relatively small.

³¹ Difangfayuan Xingshi Diyishan Anjian Caipan Jieguo—An Zuimingbie Fen (地方法院刑事第一審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts—by Crime Type], SIFAYUAN (司法院) [JUDICIAL YUAN], *supra* note 12.

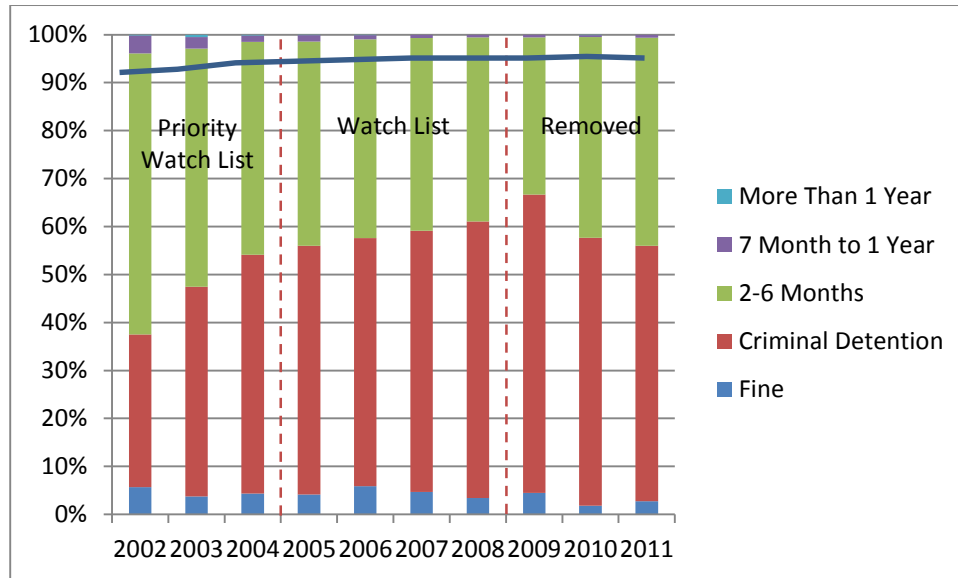


Figure 6-5 District Court Sentences for Trademark Defendants

In order to compare sentences before and after the 2008 reforms statistically, an independent samples t-test was conducted. Here are the t-test results for district court sentences convertible into a fine (a complete t-test report is in Appendix A.2):

1. Conversion rate in the copyright regime: While the pre-reform mean of the conversion rate (convertible defendants/guilty defendants) is 0.60 and the post-reform mean is 0.84, the t-test result shows a significant difference between them. Specifically, the conversion rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

2. Conversion rate in the trademark regime: While the pre-reform mean of the conversion rate (convertible defendants/guilty defendants) is 0.98 and the post-reform mean is 0.99, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the conversion rate.

In sum, the pre-reform and post-reform comparison finds no evidence that district court sentences became harsher after 2008. Although a significant change in the conversion rate is

found in the copyright regime, the conversion rate became higher after 2008, not lower. The findings are consistent with the hypothesis that the 2008 reforms were not successful in changing judges' sentencing patterns in a more severe direction.

6.2.1.3. Probation

The statistics show that the proportion of probation sentences did not become smaller in both regimes after 2008. Since probation can prevent a defendant from being jailed, a sentence of probation (in Taiwan, when the court imposes a sentence of primary punishment, it can suspend execution of that sentence and place the offender on probation) is always taken as a lenient sentence.³²

Table 6-7 shows the statistics about sentences of probation for criminal copyright and trademark defendants each year from 2002 to 2011. Figure 6-6 describes the proportion of copyright defendants who were placed on probation. After 2008, at least 40% of copyright defendants were placed on probation and the percentage stayed almost unchanged. No significant decrease in the frequency with which district court judges sentenced defendants to probation can be seen. Figure 6-7 describes the proportion of trademark defendants placed on probation each year from 2002 to 2011. The percentage of trademark defendants placed on probation kept increasing from 2006 to 2011. In 2011, the percentage reached close to 50%, the highest one over the ten year period. The increase seems to be inconsistent with a harsher trademark regime.

³² In addition, the revocation rate for probation is about 6% to 8%. FAWUBU (法務部) [MINISTRY OF JUSTICE], *supra* note 19, at 119. That is, 94% to 92% defendants placed on probation were not punished in the end.

Table 6-7 District Court Copyright and Trademark Defendants Placed on Probation

Year	Copyright Defendants			Trademark Defendants		
	Probation	No Probation	Guilty	Probation	No Probation	Guilty
2002	501	695	1,196	185	375	560
2003	471	736	1,207	319	874	1,193
2004	256	474	730	331	1,003	1,334
2005	388	359	747	319	1,116	1,435
2006	585	397	982	227	976	1,203
2007	594	540	1,134	332	1,068	1,400
2008	406	508	914	320	964	1,284
2009	321	365	686	270	649	919
2010	250	327	577	326	623	949
2011	213	278	491	505	548	1053

Source: Judicial Statistics Yearbook.³³

³³ Difangfayuan Xingshi Diyishan Anjian Caipan Jieguo—An Zuimingbie Fen (地方法院刑事第一審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts—by Crime Type], SIFAYUAN (司法院) [JUDICIAL YUAN], *supra* note 12.

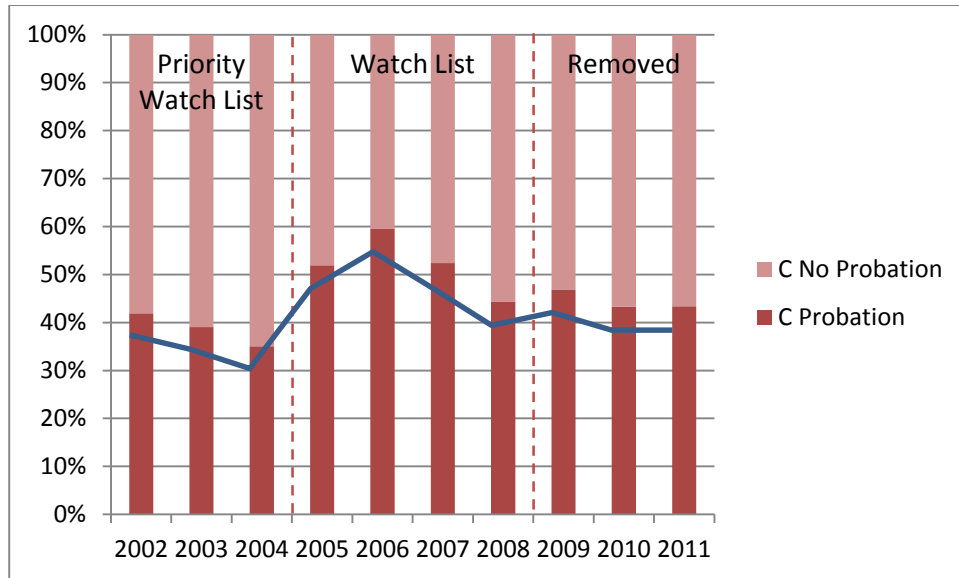


Figure 6-6 District Court Probation for Copyright Defendants

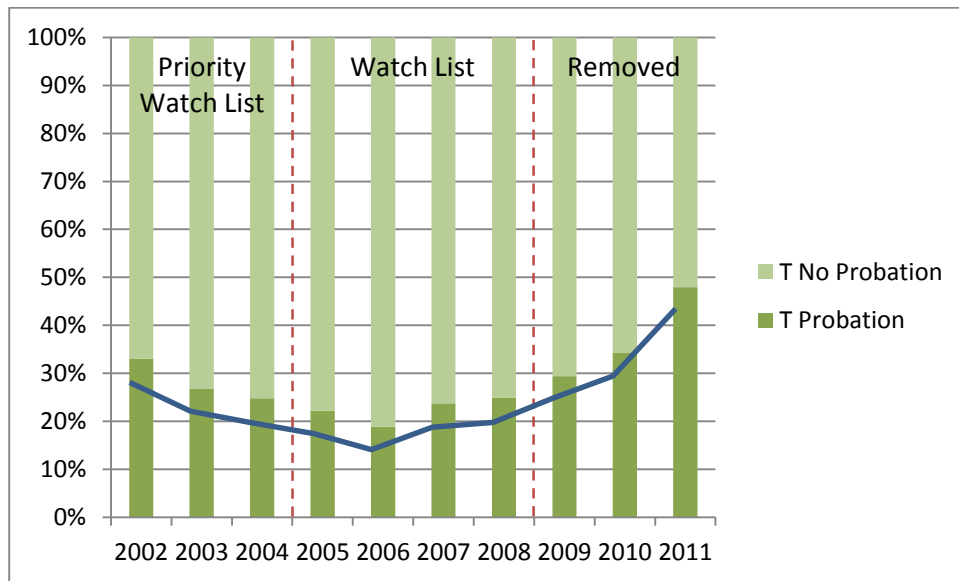


Figure 6-7 District Court Probation for Trademark Defendants

In order to compare probation before and after the 2008 reforms statistically, an independent samples t-test was conducted. Here are the t-test results for district court probation (a complete t-test report is in Appendix A.2):

1. Probation in the copyright regime: While the pre-reform mean of the probation rate (probation defendants/guilty defendants) is 0.47 and the post-reform mean is 0.44, the t-test

result provides no evidence to support the idea that the 2008 intervention might have an effect on the probation rate.

2. Probation in the trademark regime: While the pre-reform mean of the probation rate (probation defendants/guilty defendants) is 0.25 and the post-reform mean is 0.37, the t-test result shows a significant difference between them. Specifically, the probation rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

In sum, the pre-reform and post-reform comparison finds no evidence that the probation rate decreased after 2008. Although a significant change in the probation rate is found in the trademark regime, the probation rate became higher after 2008, not lower. Thus, the findings are still consistent with the hypothesis that the 2008 reforms did not succeed in changing judges' sentencing patterns in a more severe direction.

6.2.2. Analysis of Cases

In order to examine the contemporary events of the ROC judiciary's sentencing for criminal copyright and trademark defendants and deliver in-depth insights into the ROC judiciary's sentencing, three jurisdictions in Taiwan have been chosen as case studies for criminal copyright and trademark cases decided by the ROC judiciary in 2007 and 2011. In the following discussion, only cases in which defendants found guilty are considered. That is, acquittal and dismissal decisions are excluded. It is assumed that judges would not intentionally hand down such decisions to avoid harsh punishment.³⁴

³⁴ Although this avoidance is not impossible in theory, it should be very rare in Taiwan because it may cause tension between public prosecutions and judges and is always strictly overseen by public prosecutors. As mentioned in Chapter 3, public prosecutors and judges are trained together under the supervision of the Ministry of Justice and have a close relationship in Taiwan. See Wang Taisheng (王泰升), *Faguan yu Jianchaguan zhi Qucai yu Xunlian* (法官與檢察官之取才與訓練) [Selection and Training for Judges and Public Prosecutors], in SIFA GAIGE SHI

According to Table 6-1, there were 2,534 criminal copyright and trademark defendants found guilty in 2007 and 1,544 in 2011. There are 21 district courts in the territory of the ROC,³⁵ and this analysis will focus on criminal copyright and trademark sentences decided in 2007 and 2011 by three representative district courts: Taipei District Court, Hsinchu District Court, and Tainan District Court. The selection for the three representative district courts is based on their: (1) importance—Taipei is the capital city and the most prosperous area in Taiwan; (2) diversity of cases—Hsinchu covers the most important high tech area in Taiwan while Tainan covers both urban and rural areas; and (3) different location—Taipei and Hsinchu are located in northern Taiwan and Tainan is located in southern Taiwan.

Because all ROC judicial decisions are published on the official website of the Judicial Yuan, the criminal copyright and trademark sentences decided by the three district courts in 2007 and 2011 are collected by way of searching the on-line database of the Judicial Yuan.³⁶ The search terms are: (1) name of district court (*fayuan mingcheng* 法院名稱); (2) criminal copyright case (*xingshi weifan zhuzuoquan fa anjian* 刑事違反著作權法案件) and criminal

ZHOUNIAN DE HUIGU YU ZHANWANG HUIYI SHILU (司法改革十週年的回顧與展望會議實錄) [SYMPOSIUM RECORDS FOR RETROSPECT AND PROSPECT ON THE TENTH ANNIVERSARY OF NATIONAL CONFERENCE ON JUDICIAL REFORM] 551 (Tang Dezong & Huang Guochang (湯德宗&黃國昌) eds., 2010). Whenever a defendant is acquitted or dismissed, the public prosecutor in charge will gain fewer points for his or her work records. See Gaodeng Fayuan Yixia Geji Fayuan ji Qi Fenyuan Jianchashu Jianchaguan Banan Chengji Kaocha Shishi Yaodian (高等法院以下各級法院及其分院檢察署檢察官辦案成績考查實施要點) [Implementation Rules for Evaluating the Grade of Public Prosecutors Under Taiwan High Court Prosecutors' Office and Its Affiliated Prosecutors' Offices], Jun. 18, 2008, *Zhonghua Minguo* 97 Nian 6 Yue 18 Ri Fawubu Fajian Zi Di 0970802146 Hao Han (中華民國 97 年 6 月 18 日法務部法檢字第 0970802146 號函) [Ministry of Justice, Jun. 18, 2008, No. 0970802146 Order], art. 10. Because this will affect the public prosecutor's year-end grade, public prosecutors always challenge this category of cases very much. On the contrary, whenever a defendant is convicted, the public prosecutor can gain points regardless of the severity of imposed punishment. Given the relationship and oversight, it is reasonable to infer that judges rarely take this avoidance. In addition, no significant change was found in the acquittal and dismissal rates, either.

³⁵ *Directory of the Judicial Branch*, JUDICIAL YUAN, <http://www.judicial.gov.tw/en/> (last visited Jun. 28, 2013).

³⁶ *On-line Database of Court Decisions*, JUDICIAL YUAN, <http://jirs.judicial.gov.tw/FJUD/> (last visited Jun. 28, 2013).

trademark case (*xingshi weifan shangbiao fa anjian* 刑事違反商標法案件); and (3) date of decision (*caipan riqi* 裁判日期). After all court decisions that contain the search terms are searched out, they are carefully reviewed to filter those that do not contain sentences such as: (1) court decisions that dismissed defendants because indicted offenses were not a public crime and required complaints were withdrawn by direct victims;³⁷ (2) court decisions that ordered switching changes of procedures;³⁸ (3) court decisions that appointed a new court session;³⁹ (4) court decisions that acquitted the defendants;⁴⁰ and (5) court decisions for affiliated civil actions.⁴¹ All district court cases were collected from January 1, 2013 to February 6, 2013. Table B-1 in Appendix B shows the total number of decisions that were found, the number of eligible decisions, and the number of defendants who were found guilty and sentenced in these eligible decisions. Table C-1 in Appendix C lists all district court case names.

The analysis of these individual cases will consider the following components that relate to judges' sentences: (1) real jail terms; (2) convertible sentences; (3) probation sentences; (4) multiple sentences; (5) seized counterfeits; and (6) U.S. interests.

6.2.2.1. Real Jail Term

The analysis of individual cases shows that although the sentencing patterns for copyright cases are different from those for trademark cases, the sentencing patterns in 2007 are similar to those in 2011. In general, in the copyright regime, defendants were sentenced to a real jail term when they were found that: (1) they engaged in commercial scale piracy, caused extensive harm, such as operating a factory manufacturing pirate copies or operating a store selling plenty of

³⁷ Art. 303(a)(3) of the Code of Criminal Procedure.

³⁸ Art. 271*bis*(a) & 449(b) of the Code of the Criminal Procedure.

³⁹ Art. 291 of the Code of the Criminal Procedure.

⁴⁰ Art. 301(a) of the Code of the Criminal Procedure.

⁴¹ Art. 501 of the Code of the Criminal Procedure; Art. 27 of the IP Case Adjudication Act.

pirate copies, and did not settle their civil cases; or (2) a real jail term was mandatory because an aggravating factor such as a legal recidivist made both conversion and probation impossible. In the trademark regime, a real jail term was even rarer. The district court sent trademark offenders to prison only when they were found their engagement in commercial scale piracy that adversely affected public safety or infringed well-known trademarks.

In the individual cases analyzed, in 2007, 15 copyright defendants were sentenced to a real jail term (summarized in Table B-2 in Appendix B). The most serious sentences were four-year imprisonment with a fine of 400 thousand NT dollars and three-year imprisonment with a fine of 350 thousand NT dollars.⁴² In 2011, 15 copyright defendants were sentenced to a real jail term (summarized in Table B-3 in Appendix B). The most serious sentence was two-year imprisonment with a fine of 700 thousand NT dollars. These real jail term cases show that a real jail term was sentenced only when: (1) a defendant engaged in commercial scale piracy, caused extensive harm, and did not settle his or her civil case; or (2) a real jail term was mandatory.

Real jail terms were rarer in the trademark regime than in the copyright regime. Only when a defendant engaged in commercial scale piracy that adversely affected public safety or infringed well-known trademarks, would a sentence of a real jail term be imposed. In 2007, only three defendants were sentenced to a real jail term (summarized in Table B-4 in Appendix B). In 2011, only one was sentenced to a real jail term (summarized in Table B-5 in Appendix B).

6.2.2.2. Convertible Term

The collected individual cases in the three district courts show that judges usually sentenced defendants to a convertible term. In the copyright regime, courts often sentenced a defendant

⁴² In the fiscal year of 2007, there were 250 criminal IP defendants found guilty by U.S. federal district courts. Of the 250 defendants, 15 were sentenced to more than 60 months imprisonment. *FY 2010 Performance and Accountability Report E6 (2010)*, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/ag/annualreports/pr2010/p253-284.pdf> (last visited Jun. 28, 2013).

involved in an offense with the minimum statutory punishment of six months imprisonment to exactly six months for conversion (six months imprisonment is convertible into a fine, but seven months imprisonment is unconvertible). In the trademark regime, judges sentenced defendants to a fine, criminal detention, or convertible imprisonment in light of seriousness of their offenses. A serious trademark offender such as someone who engaged in commercial scale infringement was usually sentenced to imprisonment not more than six months.

As noted in Chapter 4, to narrow a judges' discretion in sentencing a defendant to a convertible term, the minimum punishments for several copyright offenses such as the copyright offenses involving optical media piracy were raised to six months imprisonment. This measure in fact raised the starting point of sentencing from criminal detention or two-month imprisonment to six-month imprisonment. The higher starting point could narrow judges' discretion because the only option for conversion into a fine was exactly the imprisonment of six months. To avoid a real jail term, what a judge could do was to sentence the defendant to exactly the imprisonment of six months for conversion or place the defendant on probation if he or she compensated the victim. The analysis of the collected cases finds that in the copyright regime judges tended to sentence defendants to exactly six months imprisonment for conversion when the minimum statutory punishment was six-month imprisonment. By contrast, the minimum statutory punishment in trademark law was not raised to narrow judges' discretion in sentencing. The starting point of sentencing in the trademark regime was still criminal detention or two-month imprisonment, so judges were able to sentence a defendant to a convertible term without restriction.

In 2007, out of all 190 copyright defendants found guilty, 147 to a convertible term

(77.4%)⁴³ and 43 to an unconvertible term. From another angle, out of all 190 defendants, 117 were involved in optical media piracy. Out of those 117 defendants, 84 were sentenced to a convertible term (71.8%). As mentioned, the minimum punishment for the copyright offenses involving optical media piracy was six months imprisonment and a sentence to more than six months imprisonment could not be converted into a fine. The only two options that judges could avoid a real jail term were to sentence defendants to exactly six months imprisonment for conversion or place them on probation. The finding that the majority of the defendants involved in optical media piracy were sentenced to a convertible term is consistent with the avoidance of imposing long sentences.

In 2011, out of all 106 copyright defendants found guilty, 75 defendants were sentenced to a convertible term (70.8%) and 31 to an unconvertible term. From another angle, out of all 106 defendants, 74 were involved in optical media piracy. Out of those 74 defendants, 46 were sentenced to a convertible term (62.2%). This similarly confirms judges' avoidance of imposing long sentences again.

In the trademark regime, judges almost always gave defendants sentences convertible into a fine. In 2007, out of all 280 trademark defendants found guilty, 275 were sentenced to a convertible term (98.2%)⁴⁴ and five to an unconvertible term. In 2011, out of all 202 trademark defendants found guilty, 200 were sentenced to a convertible term (99%)⁴⁵ and two to an unconvertible term. The sentencing pattern that almost all defendants are sentenced to a convertible term was unchanged.

⁴³ Including one defendant sentenced to a fine.

⁴⁴ Out of the 275 defendants, 19 were sentenced to a fine, 124 to criminal detention, and 132 to not more than six months imprisonment.

⁴⁵ Out of the 200 defendants, two were sentenced to a fine, 79 to criminal detention, and 119 to not more than six months imprisonment.

6.2.2.3. Probation

The analysis of the collected cases shows in both regimes a settlement for civil compensation was usually relevant to placing a defendant on probation. As mentioned in Chapter 3 and 4, placing a defendant on probation is usually hinged on civil compensation in Taiwan. Whether or not a victim is compensated is taken by the court as the most important consideration for placing a defendant on probation. Although the court has no control over whether or not a civil settlement can be reached between a defendant and a victim, it has the discretion in placing the defendant on probation whenever a civil settlement is reached. The ROC judges' practice of this discretion did not change significantly in spite of the 2008 reforms.

In the copyright regime, defendants who settled their civil cases were usually placed on probation. In 2007, out of all 190 copyright defendants, 70 settled their civil cases (36.8%) while 120 did not. Out of the 70 who settled their civil cases, 64 were placed on probation (91.4%). Out of those 64, 11 were sentenced to an unconvertible term (17.1%). Of those 11, eight were involved in commercial scale piracy and caused extensive harm.⁴⁶ In 2011, out of all 106 copyright defendants, 40 settled their civil cases (37.7%) while 66 did not. Out of the 40 who settled their civil cases, 31 were placed on probation (77.5%). Out of those 31, 11 were sentenced to an unconvertible term (35.5%). Of those 11, four were involved in commercial scale piracy and caused extensive harm.⁴⁷

In the trademark regime, defendants who settled their civil cases were placed on probation

⁴⁶ In each of the eight cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 58,964. Taiwan Hsinchu Difang Fayuan (臺灣新竹地方法院) [Hsinchu Dist. Ct.], Dec. 4, 2007, Minguo 95 (Su) No. 903 Criminal Judgment (中華民國 96 年 12 月 4 日 95 年度訴字第 903 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴⁷ In each of the four cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 38,341. Taiwan Taipei Difang Fayuan (臺灣臺北地方法院) [Taipei Dist. Ct.], Feb. 16, 2011, Minguo 99 (Zhisu) No. 16 Criminal Judgment (中華民國 100 年 2 月 16 日 99 年度智訴字第 16 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

frequently. In 2007, out of all 280 trademark defendants, 71 settled their civil cases (25.4%) while 209 did not. Out of the 71 who settled their civil cases, 59 were placed on probation (83%). Out of those 59, 15 were involved in commercial scale piracy and caused extensive harm.⁴⁸ In 2011, out of all 202 trademark defendants, 64 settled their civil cases (31.7%) while 138 did not. Out of the 64 who settled their civil cases, 54 were placed on probation (84.3%). Out of those 54, 19 were involved in commercial scale piracy and caused extensive harm.⁴⁹

6.2.2.4. Multiple Sentences

The analysis of cases finds that the majority of defendants received only one sentence and few defendants received multiple sentences. In 2007 and 2011, judges usually treated persisting infringements as one offense in both regimes.

As described in Chapter 3, Taiwan abolished the so-call “consecutive offense” in the criminal law in 2006 for more punishment. Prior to 2006, when a defendant committed several identical or similar offenses consecutively, these offenses would be treated as only one “consecutive offense” but the statutory punishment for the offense would be aggravated. For example, if one committed three thefts in one week, his three thefts would be treated as one “consecutive” theft. In theory, after the 2006 abolition, multiple offenses should not be treated as one offense.

However, after 2006, judges developed the so-call “collective offense” or analogous terms to treat multiple offenses as one offense. This interpretation usually applied to criminal cases in

⁴⁸ In each of the 15 cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 1,740. Taiwan Taipei Difang Fayuan (臺灣臺北地方法院) [Taipei Dist. Ct.], Jun. 29, 2007, Minguo 96 (Yi) No. 971 Criminal Judgment (中華民國 96 年 6 月 29 日 96 年度易字第 971 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁴⁹ In each of the 19 cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 4,490. Taiwan Hsinchu Difang Fayuan (臺灣新竹地方法院) [Hsinchu Dist. Ct.], Jul. 21, 2011, Minguo 100 (Shenzhijian) No. 11 Criminal Judgment (中華民國 100 年 7 月 21 日 100 年度審智簡訴字第 11 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

which one sold or distributed contraband goods several times during a specific period of time. Because many copyright and trademark offenses involved selling or distributing pirated goods, judges might apply the interpretation to these copyright and trademark cases. Thus, multiple sentences might be uncommon in the copyright and trademark regimes in spite of the 2006 abolition.⁵⁰ Here the analysis of the collected cases confirms the inference.

In the copyright regime, in 2007, out of all 190 copyright defendants, 181 received only one sentence (95.3%) while nine received two sentences (4.7%). Judges explicitly recognized the “collective offense” in 57 defendants’ cases and disagreement with the “collective offense” was not found. In 2011, out of all 106 copyright defendants, 100 received only one sentence (94.3%) while five received two sentences (4.7%) and one receive three sentences (0.9%). Judges explicitly recognized the “collective offense” in 44 cases and disagreement with the “collective offense” was not found.

In the trademark regime, in 2007, out of all 280 trademark defendants, 276 received only one sentence (98.6%) while four received two sentences (1.4%). Judges explicitly recognized the “collective offense” in 124 defendants’ cases and disagreement with the “collective offense” was not found. In 2011, out of all 202 trademark defendants, 200 received only one sentence (99%) while two received two sentences (1%). Judges explicitly recognized the “collective offense” in 106 cases and disagreement with the “collective offense” was not found.

6.2.2.5. Seized Counterfeits

The analysis of the collected cases finds a defendant involved in a case with more seized

⁵⁰ For a general introduction to the collective offense, see Cai Huifang (蔡蕙芳), *Xingfa Xiuzheng Hou Jihefan yu Zhuzuoquan Anjian Zhong zhi Shiyong Wenti—Zhuzuoquan Fa Shang Jihefan Panjue zhi Zonghe Xing Pingxi* (刑法修正後集合犯於著作權侵權案件中之適用問題—著作權法上集合犯判決之綜合性評析) [*Application of Collective Offenses to Copyright Infringement Cases After the Revisions of the Criminal Code—Comments and Analysis on Copyright Decisions Recognizing Collective Offenses*], YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.], no.175, 2009, at 219.

counterfeits is usually punished more seriously. Thus, a case with more seized counterfeits may be taken as a more serious case. If the number of seized counterfeits in a case is taken as an indicator to show whether the case is a serious one or not, the proportion of serious cases to all cases may be obtained. Comparing the proportion in 2007 with 2011 allows for analysis of whether or not the proportion of serious cases changed after the 2008 reforms thereby influencing judges' sentences.

The following analysis does not find that in the copyright regime the proportion of serious cases became smaller from 2008 to 2011. Thus, in the copyright regime, a rival situation that a smaller proportion of serious cases resulted in a larger proportion of lenient sentences in 2011 may be excluded. In the trademark regime, because almost all defendants received lenient sentences, the proportion of serious cases had no effect on the proportion of lenient sentences. Thus, the rival situation may be excluded in the trademark regime as well.

In the following table, the collected copyright and trademark cases with seized counterfeits are categorized into three groups by the number of seized counterfeits described in court opinions: (1) 1 to 10; (2) 11 to 100; and (3) more than 100. In each group, cases are classified by two different penalties sentenced to defendants: (1) a convertible term and (2) an unconvertible term.

Table 6-8 Number of Seized Counterfeits and Convertible Terms in District Court

Category	Number of Seized Counterfeits	Convertible Term	Unconvertible Term
2007 Copyright	1~10	61	5
	11~100	25	12
	101~	7	17
2011 Copyright	1~10	25	3
	11~100	9	5
	101~	12	19
2007 Trademark	1~10	72	0
	11~100	71	2
	101~	91	1
2011 Trademark	1~10	86	0
	11~100	26	2
	101~	61	0

Source: Compiled by the author.

The following two figures show the relationship between the numbers of seized counterfeits and convertible terms sentenced to defendants in the copyright regime in 2007 and 2011. In Figure 6-8, when the number of seized counterfeits was 1 to 10, the percentage of convertible terms was around 90%. When the number was 11 to 100, the percentage decreased to 65% to 70%. When the number was more than 100, the percentage decreased to 30% to 40%.

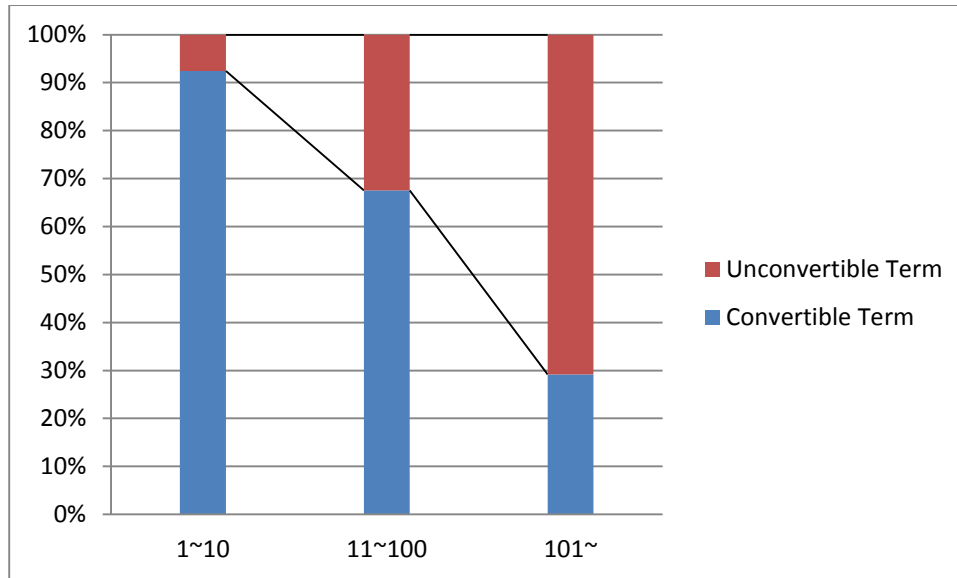


Figure 6-8 District Court 2007 Seized Counterfeits and Convertible Terms

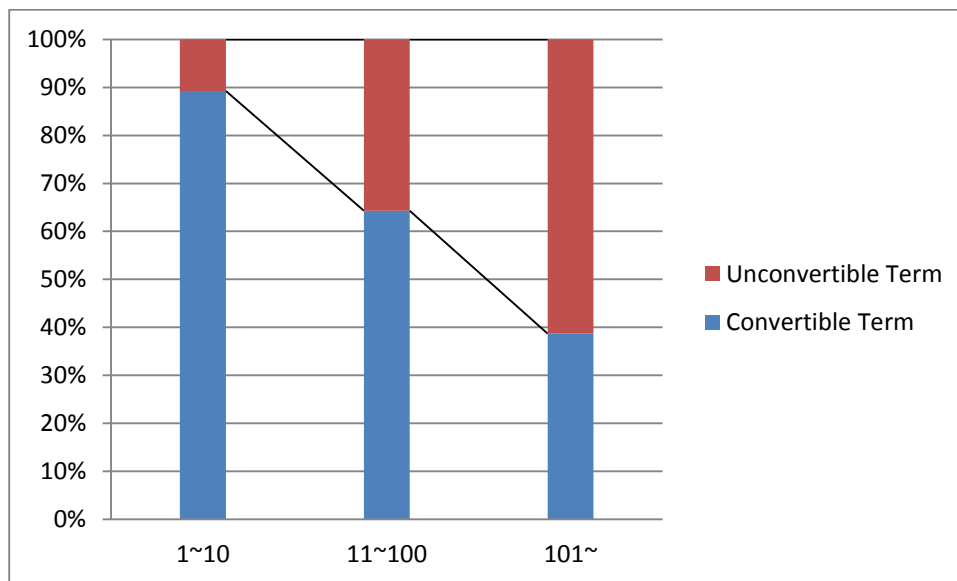


Figure 6-9 District Court 2011 Seized Counterfeits and Convertible Terms

In the trademark regime, as Table 6-8 shows, while the number of seized counterfeits varied, the infrequency of unconvertible terms kept the same. No evidence shows the number of seized counterfeits in the trademark cases posted significant influence on judges' sentences.

In theory, an increase in the severity of sentences might be due to either a change in judicial attitudes or to evidence of more serious piracy activity. Only when it has been shown that the

evidence of the seriousness of the piracy activity is consistent, does it make sense to turn to considering whether judicial attitudes might be the explanation for stricter sentencing.

In general, a defendant involved in a case with more seized counterfeits is often considered a more serious offender and sentenced to more serious punishment. Since the number of seized counterfeits can roughly represent the seriousness of copyright or trademark infringements, the number of seized counterfeits is taken as the indicator to show the proportion of serious cases in both regimes in 2007 and 2011.

In the following table, all collected cases are categorized by the number of seized counterfeits into three groups: (1) 1 to 10 seized counterfeits; (2) 11 to 100 seized counterfeits; and (3) more than 100 seized counterfeits. The first and second groups represent the petty and intermediate cases, while the third represents the serious cases. To see the change of the proportion of the serious cases from 2007 to 2011, Table 6-9 is transformed into Figure 6-10 and Figure 6-11. Figure 6-10 shows the proportion in the copyright regime in 2007 and 2011, while Figure 6-11 shows the proportion in the trademark regime in 2007 and 2011.

Table 6-9 District Court Cases Categorized by the number of Seized Counterfeits

Category	Not Specified	1~10	11~100	101~	Sum
2007 Copyright	63	66	37	24	190
2011 Copyright	33	28	14	31	106
2007 Trademark	33	82	73	92	280
2011 Trademark	27	86	28	61	202

Source: Categorized and calculated by the author.

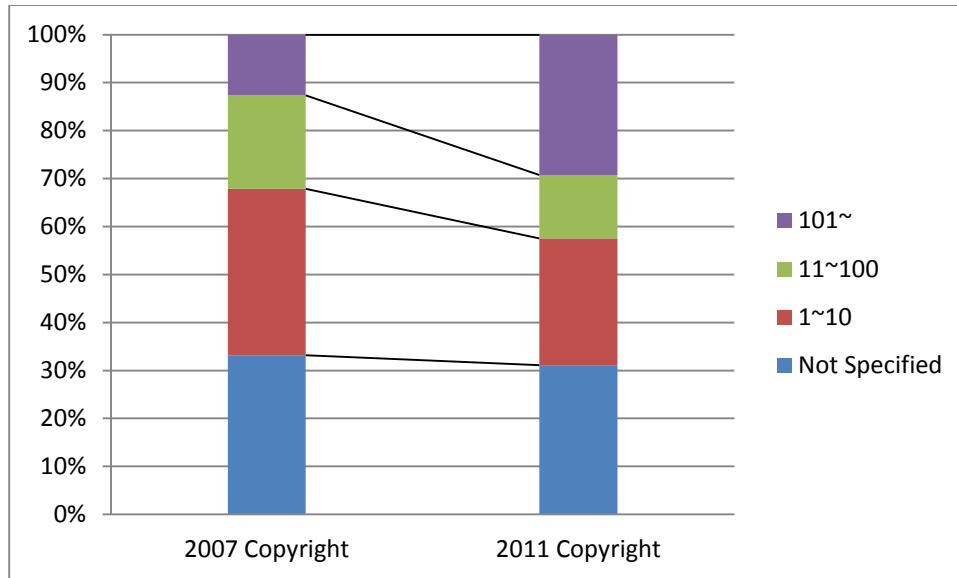


Figure 6-10 District Court Proportion of Serious Copyright Cases

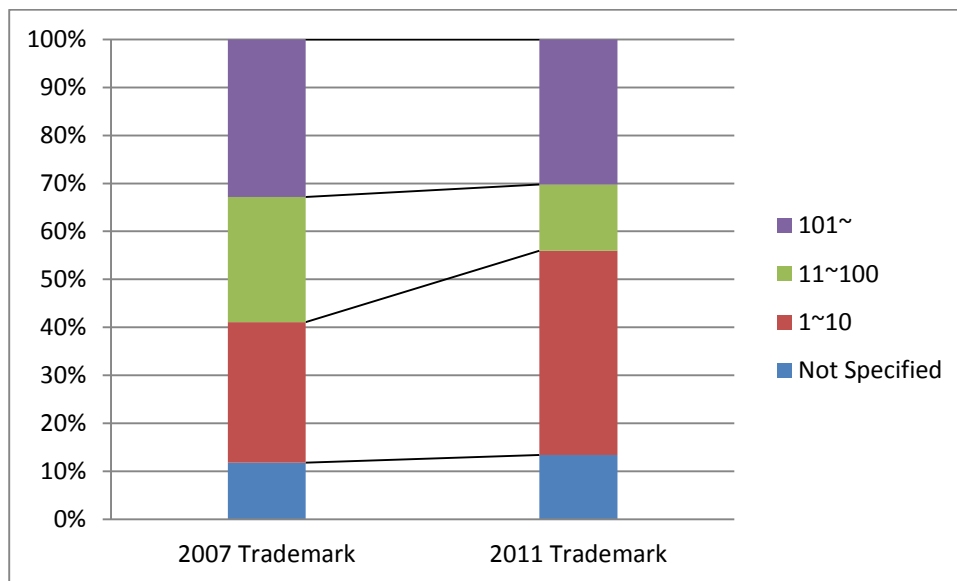


Figure 6-11 District Court Proportion of Serious Trademark Cases

In Figure 6-10, the proportion of serious cases (cases with more than 100 seized counterfeits) became larger from 2007 to 2011 (from 12% to 29%) but the proportion of the intermediate and petty cases (cases with 1 to 100 seized counterfeits) became smaller (from 55% to 40%). In Figure 6-11, the proportion of serious cases did not change from 2007 to 2011 (about 30%), nor did the proportion of the intermediate and petty infringements (about 55%). Since in

both regimes the proportion of serious cases did not decrease, the rival situation that fewer serious cases resulted in more lenient sentences may be excluded.

6.2.2.6. U.S. Interests

The analysis of the collected cases finds the United States had more interests in copyrights than in trademarks while the European Union had much more interests in trademarks than in copyrights.

After identifying the infringed copyrights and trademarks in the collected cases, those infringed copyrights and trademarks are categorized in light of the origin countries of right holders. For example, Levi's is the trademark of an American blue jean manufacturer. If this trademark is infringed, it will be categorized as an infringed U.S. trademark.

In the copyright regime, in 2007, out of all 191 copyright defendants, the country of origin of the infringed copyrights in 162 cases can be identified. Out of the 162 defendants 52 infringed U.S. copyrights (32.1%); 49 infringed ROC copyrights (30.2%); 42 infringed Japan copyrights (25.9%); and two infringed European Union copyrights (1.2%).⁵¹ In 2011, out of all 106 copyright defendants, the country of origin of the infringed copyrights in 95 cases can be identified. Out of the 95 defendants 39 infringed U.S. copyrights (41.1%); 36 infringed ROC copyrights (37.9%); 51 infringed Japan copyrights (53.7); and four infringed European Union copyrights (4.2%).⁵² The following figure shows the different economic interest between the United States and European Union in copyrights:

⁵¹ Moreover, 29 infringed Korea copyrights (17.9%), nine infringed Hong Kong copyrights (5.6%), and four infringed PRC copyrights (2.4%).

⁵² Moreover, six infringed Korea copyrights (6.3%), one infringed Hong Kong copyrights (1%), and two infringed PRC copyrights (2.1%).



Figure 6-12 U.S. Interest in Copyrights

In the trademark regime, in 2007, out of all 280 trademark defendants, the country of origin of the infringed trademarks in 214 cases can be identified. Out of the 214 defendants 69 infringed U.S. trademarks (32.2%); 124 infringed European Union trademarks (57.9%); 23 infringed Japan trademarks (10.7%); and 22 infringed ROC trademarks (10.3%). In 2011, out of all 202 trademark defendants, the country of origin of the infringed trademarks in 168 cases can be identified. Out of the 168 defendants 70 infringed U.S. trademarks (41.7%); 106 infringed European Union trademarks (63.1%); 50 infringed Japan trademarks (28.8%); and three infringed ROC trademarks (1.8%). The following figure shows the different economic interest between the United States and European Union in trademarks:

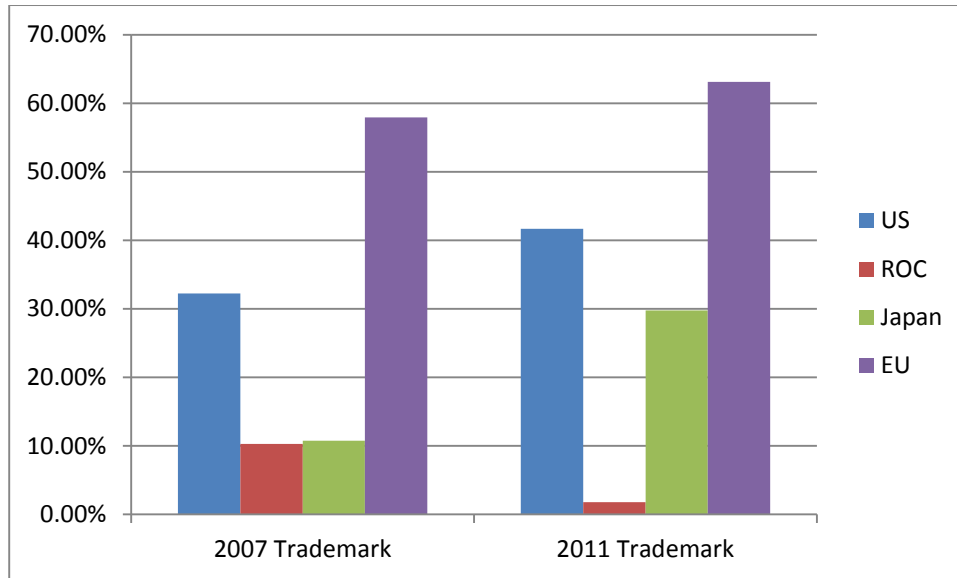


Figure 6-13 U.S. Interest in Trademarks

Out of the infringed U.S. copyrights, copyright works for computer software (Microsoft), motion pictures, and video games (Microsoft Xbox) were the most common. Out of the infringed U.S. trademarks, trademarks for apparel (Disney, Nike, Levi's, and Ralph Lauren), footwear (Nike), and luxury leather goods (Coach) were the most common. By contrast, almost all infringed European Union trademarks were used for luxury goods (LV, Prada, Chanel, Gucci, Burberry, and brands for Swiss made wristwatches) and apparel (Adidas and Puma). It appears that the United States has more economic interest in copyrights and less economic interest in trademarks. The difference may explain why the United States placed more emphasis on Taiwan's criminal copyright law and enforcement but did not press Taiwan's criminal trademark law and enforcement so hard.

6.3. Criminal IP Cases in Appellate Court

6.3.1. Analysis of Statistics

Taiwan's IPC started to operate on July 1, 2008. The 2002-2007 statistics are based on appellate cases decided by the High Court while the 2009-2011 statistics are based on appellate

cases decided by the IPC. The 2008 statistics contain cases decided by both High Court and IPC.

6.3.1.1. Disposition

Table 6-10 and Table 6-11 show how many copyright and trademark defendants were disposed in the intermediate appellate court each year from 2002 to 2011. These two tables also show different disposition including conviction, acquittal, and dismissal. To see the trend from 2002 to 2011, Table 6-10 and Table 6-11 are transformed into Figure 6-14 and Figure 6-15. Notably, in both regimes, a huge jump occurred in 2003. The 2003 increase in appellate court disposition in fact coincided with the 2002-2003 increase in district court disposition. Both were the highest over the ten years. Because the proportion of appellate court disposition to district court disposition did not change significantly as discussed below, the huge jump should be the result of the increase in district court disposition. Thus, the possible explanations for the 2002-2003 increase in district court disposition might explain this huge jump as well.

Table 6-10 Appellate Court Disposition for Copyright Defendants

Special 301 Status	Year	Disposed	Guilty	Acquitted	Dismissed
Priority Watch List	2002	501	251	139	111
	2003	770	418	189	163
	2004	488	236	147	105
Watch List	2005	352	183	117	52
	2006	358	196	109	53
	2007	351	233	59	59
	2008	309	176	79	54
Removed	2009	220	88	75	57
	2010	219	99	63	57
	2011	211	112	69	30

Source: Judicial Statistic Yearbook.⁵³

⁵³ (1) 2002-2007: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the High Courts and Their Branches—by Crime Type]; (2) 2008: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second

Table 6-11 Appellate Court Disposition for Trademark Defendants

Special 301 Status	Year	Disposed	Guilty	Acquitted	Dismissed
Priority Watch List	2002	163	80	67	16
	2003	190	87	95	8
	2004	138	62	62	14
Watch List	2005	95	65	25	5
	2006	109	56	43	10
	2007	131	77	38	16
	2008	99	48	42	9
Removed	2009	74	32	31	11
	2010	74	40	22	12
	2011	98	39	53	6

Source: Judicial Statistic Yearbook.⁵⁴

Instance Rendered by the High Courts and Their Branches—by Crime Type] and Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]; (3) 2009-2011: Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]. SIFAYUAN (司法院) [JUDICIAL YUAN], SIFA TONGJI NIANBAO (司法統計年報) [JUDICIAL STATISTICS YEARBOOK] § 6 (2003-2009) & § 8 (2009-2012), available at <http://www.judicial.gov.tw/juds/>.

⁵⁴ *Id.*

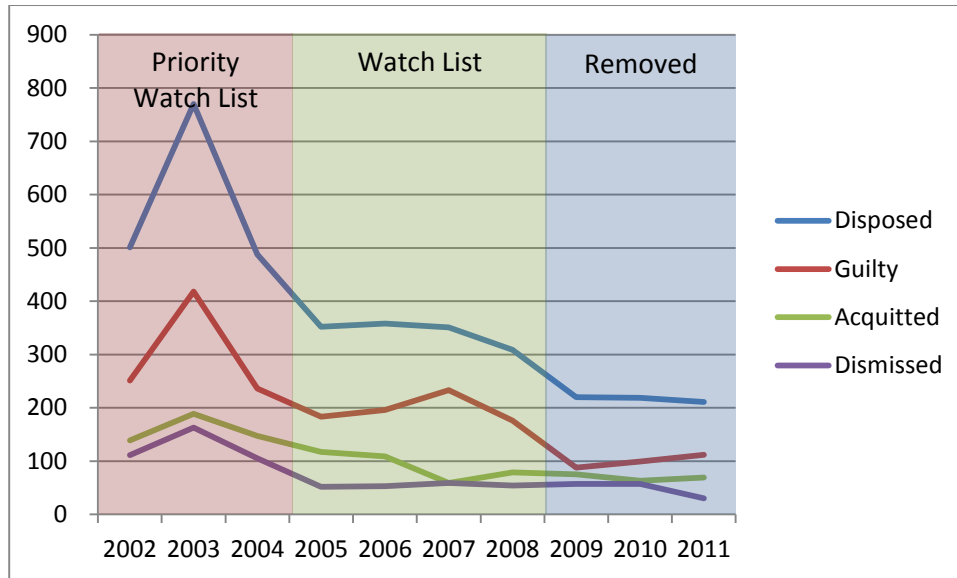


Figure 6-14 Copyright Defendants Disposed in Appellate Court

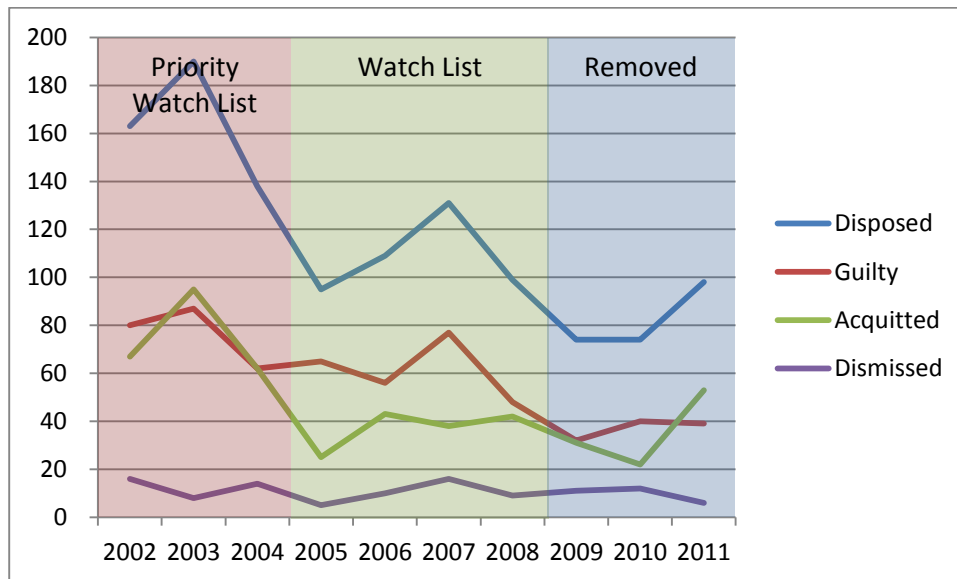


Figure 6-15 Trademark Defendants Disposed in Appellate Court

In order to compare appellate court disposition before and after the 2008 reforms statistically, an independent samples t-test was conducted. Here is the summary of the t-test results for the copyright data (a complete t-test report is in Appendix A.3):

1. Disposition rate: While the pre-reform mean of the disposition rate (defendants disposed in the appellate court/defendants disposed in the district court) is 0.31 and the post-reform mean

is 0.23, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

2. Guilty rate: While the pre-reform mean of the guilty rate (guilty defendants/disposed defendants) is 0.54 and the post-reform mean is 0.46, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

3. Acquittal rate: While the pre-reform mean of the acquittal rate (acquitted defendants/disposed defendants) is 0.27 and the post-reform mean is 0.32, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

4. Dismissal rate: While the pre-reform mean of the dismissal rate (dismissed defendants/disposed defendants) is 0.19 and the post-reform mean is 0.22, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Here are the t-test results for the trademark data:

1. Disposition rate: While the pre-reform mean of the disposition rate (defendants disposed in the appellate court/defendants disposed in the district court) is 0.12 and the post-reform mean is 0.08, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

2. Guilty rate: While the pre-reform mean of the guilty rate (guilty defendants/disposed defendants) is 0.58 and the post-reform mean is 0.53, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

3. Acquittal rate: While the pre-reform mean of the acquittal rate (acquitted defendants/disposed defendants) is 0.38 and the post-reform mean is 0.42, the t-test result

provides no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

4. Dismissal rate: While the pre-reform mean of the dismissal rate (dismissed defendants/disposed defendants) is 0.08 and the post-reform mean is 0.12, the t-test result provides no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

In sum, in both regimes, the pre-reform and post-reform comparison does not find any statistically significant changes in appellate court disposition. The findings here do not conflict with the hypothesis that the 2008 reforms might not be able to change judges' sentencing patterns in a more severe direction.

6.3.1.2. Sentencing

The statistics about the appellate court's sentences from 2002 to 2011 show that in both copyright and trademark regimes more convertible jail terms were given after 2008. Also, the proportion of convertible sentences to all sentences became larger after 2008. There seems to be no evidence to support the idea that the appellate court's sentences become harsher after the establishment of the IPC. Table 6-12 and Table 6-13 show the appellate court's sentences for copyright defendants and trademark defendants each year from 2002 to 2011. In order to have a look at the 2002-2011 trend for the proportion of convertible and unconvertible jail terms, all values with regard to sentences are transformed into Figure 6-16 and Figure 6-17.

Table 6-12 Appellate Court Sentences for Copyright Defendants

Year	Guilty Defendants	Fine	Criminal Detention	2-6 Months	7 Month to 1 Year	More Than 1 Year
2002	251	13	0	102	40	96
2003	418	19	2	135	67	195
2004	236	16	7	59	36	118
2005	183	12	11	49	25	86
2006	196	15	2	41	61	77
2007	233	21	4	79	86	43
2008	176	9	8	89	64	6
2009	88	10	4	36	34	4
2010	99	7	2	47	33	10
2011	112	9	3	65	32	3

Source: Judicial Statistics Yearbook.⁵⁵

Table 6-13 Appellate Court Sentences for Trademark Defendants

Year	Guilty Defendants	Fine	Criminal Detention	2-6 Months	7 Month to 1 Year	More Than 1 Year
2002	80	1	13	57	8	1
2003	87	3	11	57	13	3
2004	62	0	15	34	11	2
2005	65	0	8	43	14	0
2006	56	0	5	44	6	1
2007	77	0	7	61	7	2
2008	48	0	7	39	2	0
2009	32	0	8	23	1	0
2010	40	0	11	25	3	1
2011	39	1	10	27	1	0

Source: Judicial Statistics Yearbook.⁵⁶

⁵⁵ (1) 2002-2007: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the High Courts and Their Branches—by Crime Type]; (2) 2008: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the High Courts and Their Branches—by Crime Type] and Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]; (3) 2009-2011: Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]. SIFAYUAN (司法院) [JUDICIAL YUAN], *supra* note 53.

⁵⁶ *Id.*

Figure 6-16 shows the appellate court's sentences for copyright defendants. The ten years from 2002 to 2011 can be divided into two different stages according to the proportion of convertible sentences to all sentences. During the 2002-2007 stage, the proportion of convertible sentences ranged from 30% to 46%. By contrast, during the 2009-2011 stage, the proportion ranged from 57% to 69%. The similar division can be seen in the district court's sentences in Figure 6-4.⁵⁷ The larger proportion of convertible sentences after 2008 is consistent with the hypothesis that the reforms did not succeed in making appellate court judges' sentencing practices harsher after 2008.

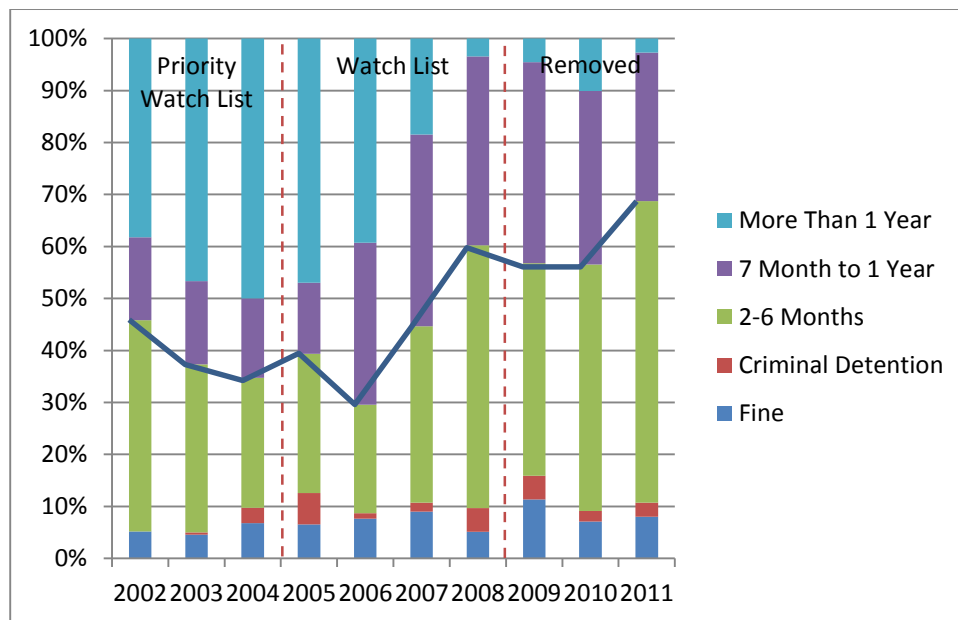


Figure 6-16 Appellate Court Sentences for Copyright Defendants

Figure 6-17 shows the appellate court's sentences for trademark defendants. Similar to the district court's sentences, the appellate court's sentences also features a high percentage of convertible sentences. From 2002 to 2011, at least 78% of trademark defendants were granted convertible sentences by the appellate court. In addition, more convertible sentences were given

⁵⁷ During the 2002-2007 period, the proportion of convertible terms ranged from 45% to 78%; during the 2008-2011 period, the proportion ranged from 79% to 86%.

to trademark defendants after 2008. From 2002 to 2007, the proportion of convertible sentences to all sentences ranged from 78% to 89%; from 2009 to 2011, the proportion ranged from 90% to 97%. The analysis here does not support the idea that appellate court judges become harsher after 2008.

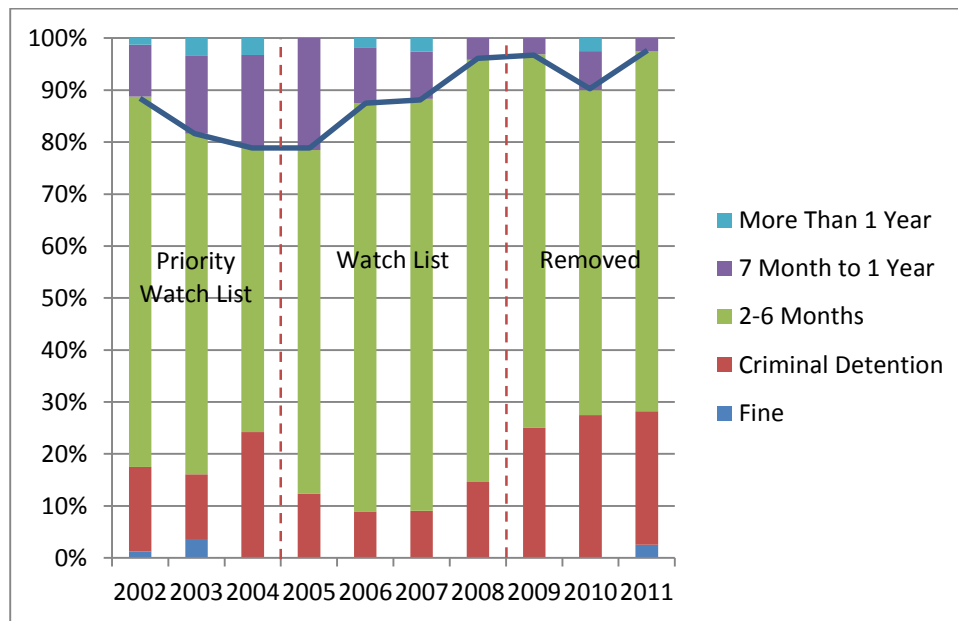


Figure 6-17 Appellate Court Sentences for Trademark Defendants

In order to compare sentences before and after the 2008 reforms statistically, an independent samples t-test was conducted. Here are the t-test results for appellate court sentences convertible into a fine (a complete t-test report is in Appendix A.4):

1. Conversion rate in the copyright regime: The pre-reform mean of the conversion rate (convertible defendants/guilty defendants) is 0.39 and the post-reform mean is 0.61. The t-test result shows a significant difference between them. Specifically, the conversion rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

2. Conversion rate in the trademark rate: The pre-reform mean of the conversion rate (convertible defendants/guilty defendants) is 0.84 and the post-reform mean is 0.95. The t-test

result shows a significant difference between them. Specifically, the conversion rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

In sum, the pre-reform and post-reform comparison finds no evidence that appellate court sentences became more severe after 2008. Although a significant change in the conversion rate is found in both regimes, the conversion rate became higher after 2008, not lower. This finding is consistent with the hypothesis that the 2008 reforms did not succeed in changing judges' sentencing patterns in a more severe direction.

6.3.1.3. Probation

The statistics show that the appellate court's practice of placing defendants on probation in the copyright regime did not decrease after 2008. The overall probation rate (defendants placed on probation/all defendants found guilty) from 2009 to 2011 was higher than that from 2002 to 2007. In the trademark regime, the appellate court's use of probation kept increasing after 2008 and reached the highest peak over the past ten years in 2011.

In the copyright regime, the proportion of defendants placed on probation to all defendants found guilty ranged from 18% to 27% during the 2002-2007 period and ranged from 29% to 37% during the 2009-2011 period. In the trademark regime, although the proportion in 2008 was relatively small, the proportion kept increasing after 2008. The proportion in 2011 was the largest over the past ten years. Thus, no evidence can support that the establishment of IPC gave rise to a decrease in placing defendants on probation in both regimes.

Table 6-14 Appellate Court Copyright and Trademark Defendants Placed on Probation

Year	Copyright Defendants			Trademark Defendants		
	Probation	No Probation	Guilty	Probation	No Probation	Guilty
2002	57	194	251	18	62	80
2003	104	314	418	23	64	87
2004	51	185	236	21	41	62
2005	33	150	183	8	57	65
2006	53	143	196	9	47	56
2007	49	184	233	10	67	77
2008	43	133	176	6	42	48
2009	29	59	88	8	24	32
2010	37	62	99	13	27	40
2011	32	80	112	17	22	39
Total	488	1,504	1,992	133	453	586

Source: Judicial Statistics Yearbook.⁵⁸

⁵⁸ (1) 2002-2007: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the High Courts and Their Branches—by Crime Type]; (2) 2008: Gaodengfayuan ji Fenyuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Zuimingbie Fen (高等法院暨分院受理刑事第二審案件裁判結果—按罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the High Courts and Their Branches—by Crime Type] and Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]; (3) 2009-2011: Zhihuicaichanfayuan Shouli Xingshi Diershan Anjian Caipan Jieguo—An Nianbie ji Zuimingbie Fen (智慧財產法院受理刑事第二審案件裁判結果—按年別及罪名別分) [Results of Judgments and Rulings of Criminal Cases of the Second Instance Rendered by the Intellectual Property Court—by Crime Type]. SIFAYUAN (司法院) [JUDICIAL YUAN], *supra* note 53.

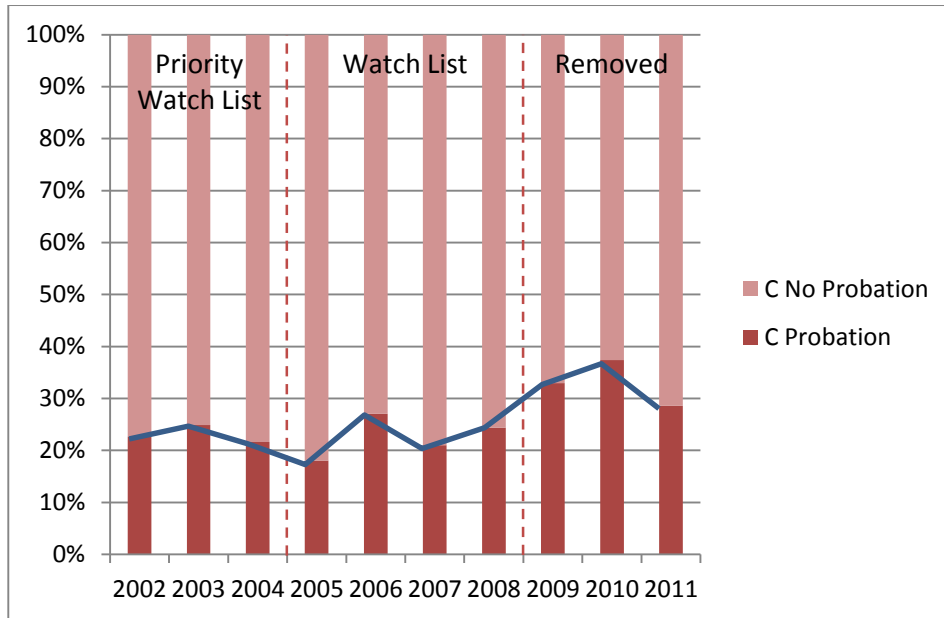


Figure 6-18 Appellate Court Probation for Copyright Defendants

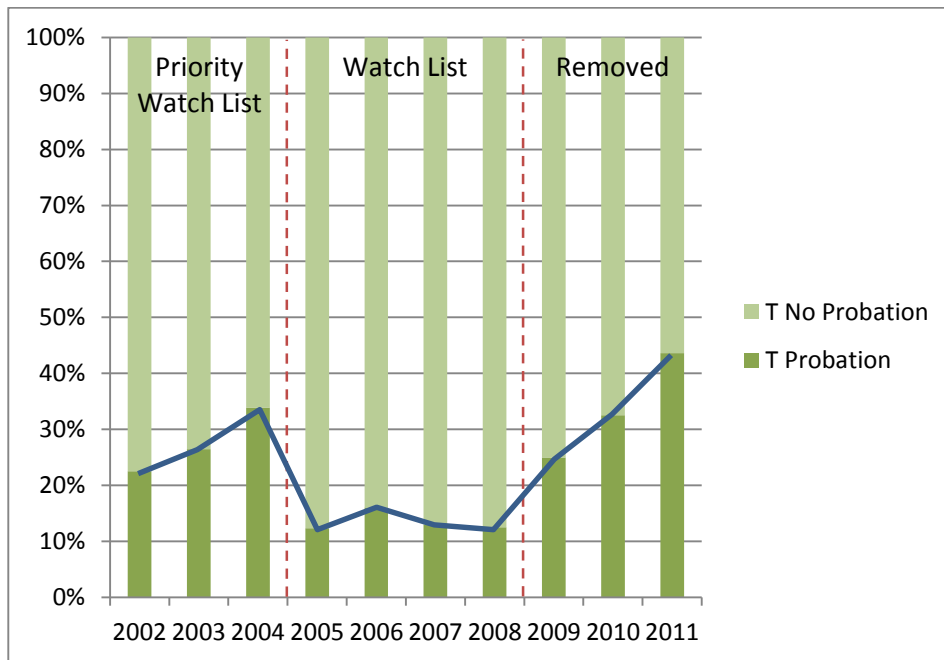


Figure 6-19 Appellate Court Probation for Trademark Defendants

In order to compare probation before and after the 2008 reforms statistically, an independent samples t-test was conducted. Here are the t-test results for appellate court probation (a complete t-test report is in Appendix A.4):

1. Probation in the copyright regime: The pre-reform mean of the probation rate (probation defendants/guilty defendants) is 0.23 and the post-reform mean is 0.33. The t-test result shows a significant difference between them. Specifically, the probation rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

2. Probation in the trademark regime: The pre-reform mean of the probation rate (probation defendants/guilty defendants) is 0.21 and the post-reform mean is 0.34. The t-test result shows a difference between them. Specifically, the probation rate became higher after 2008, which would be the opposite of the result the United States intended when it asked for the reforms.

In sum, the pre-reform and post-reform comparison finds no evidence that the appellate court decreased probation sentences after 2008. Although a significant change in the probation rate is found in both regimes, the probation rate became higher after 2008, not lower. This finding is consistent with the hypothesis that the 2008 reforms might not be able to change judges' sentencing patterns in a more severe direction.

6.3.2. Analysis of Cases

In the previous analysis of cases, the collected criminal copyright and trademark cases were decided by Taipei District Court, Hsinchu District Court, and Tainan District Court in 2007 and 2011. Likewise, in the following analysis of cases, the collected cases were appellate criminal copyright and trademark cases decided by the High Court in 2007 and by the IPC in 2011 for appeals from the same three district courts. After all appellate cases were downloaded from the on-line database of the Judicial Yuan, they were carefully reviewed to filter those cases that did not contain sentences such as: (1) court decisions that remanded lower courts' decisions and

ordered new trials in lower courts;⁵⁹ (2) court decisions that ordered parties to submit specific appellate reasons;⁶⁰ (3) court decisions that appointed new court sessions;⁶¹ (4) court decisions that acquitted defendants;⁶² and (5) court decisions for affiliated civil actions.⁶³ All appellate court cases were collected from February 7, 2013 to February 8, 2013. Table B-6 in Appendix B shows the total number of decisions that were found, the number of eligible decisions, and the number of defendants who were found guilty and sentenced in the eligible decisions. Table C-2 in Appendix C lists all appellate court case names.

The analysis of these individual cases will consider the components that relate to judges' sentencing: (1) real jail terms; (2) convertible sentences; (3) probation sentences; (4) multiple sentences; and (5) seized counterfeits.

6.3.2.1. Real Jail Term

The analysis of the collected cases shows that the sentencing patterns of the IPC for real jail terms are similar to its predecessor, the High Court. In general, only when: (1) a defendant was involved in commercial scale copyright piracy, caused extensive harm, such as operating a factory manufacturing pirate copies or operating a store selling plenty of pirate copies, and did not settle with his or her piracy victims; or (2) a real jail term was mandatory, would the appellate court impose a real jail term.⁶⁴ Although the appellate court often reversed lower court

⁵⁹ *Proviso* of Art. 369(a) of the Code of Criminal Procedure.

⁶⁰ *Proviso* of Art. 367(a) of the Code of Criminal Procedure.

⁶¹ Art. 291 of the Code of the Criminal Procedure.

⁶² Art. 301(a) of the Code of the Criminal Procedure. As mentioned, it is assumed that the ROC judges would not avoid harsh punishment by acquitting defendants. Therefore, those cases in which defendants were acquitted are not included in this discussion.

⁶³ Art. 501 of the Code of the Criminal Procedure; Art. 27 of the IP Case Adjudication Act.

⁶⁴ Two cases were the exception. One was decided by the High Court. Taiwan Gaodeng Fayuan Taiwan Fenyuan (臺灣高等法院臺南分院) [Taiwan High Ct. Tainan Branch Ct.], Aug. 29, 2007, Minguo 96 (Shangsu) No. 494 Criminal Judgment (中華民國 96 年 8 月 29 日 96 年度上訴字第 494 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/> (No. 16 in Table B-7). In this case, although the defendant settled the civil case and a real jail term was not mandatory, the appellate court still sentenced the defendant to a real jail term. The other was decided by the IPC. Zhahui Caichan Fayuan (智慧財產法院) [IPC], Jul. 6, 2011, Minguo 100 (Xingzhishangsu) No.

decisions (at least half cases were reversed),⁶⁵ they always based their sentences on the lower courts' and did not increase the severity of criminal punishments.

In 2007, out of 49 copyright defendants found guilty by the High Court, 16 were sentenced to a real jail term (summarized in Table B-7 in Appendix B). All 16 were involved in commercial scale copyright piracy and caused extensive harm. 15 defendants did not settle their civil cases. All lower court decisions were reversed by the High Court because of their erroneous fact finding or application of law, but not their discretion in sentencing. Out of the 16 defendants, ten defendants' sentences were reduced on appeal, five's sentences were affirmed, and one's acquittal was reversed and a guilty verdict was imposed.

The IPC's sentencing patterns are almost the same as its predecessor. In 2011, out of 25 copyright defendants found guilty by the IPC, five were sentenced to a real jail term (summarized in Table B-8 in Appendix B). All five defendants were involved in commercial scale copyright piracy and caused extensive harm. Four defendants did not settle their civil cases. The IPC upheld one lower court decision and reversed the other four.⁶⁶ The IPC reversed those four decisions because of erroneous fact finding and application of law, but not inappropriate discretion in sentencing. Out of these four, the sentences for three were reduced on appeal and one was reiterated.

The analysis of the collected cases shows that the High Court and IPC sentenced a trademark defendant to a real jail term only when the defendant: (1) was involved in commercial

40 Criminal Judgment (中華民國 100 年 7 月 6 日 100 年度刑智上訴字第 40 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/> (No. 1 in Table B-8).

⁶⁵ In 2007, out of 49 collected appellate copyright cases, 40 were reversed (40/49=81.6%); out of 29 collected appellate trademark cases, 20 were reversed (20/29=69.0%). In 2011, out of 25 collected appellate copyright cases, 14 were reversed (14/25=56.0%); out of 8 collected appellate trademark cases, 5 were reversed (5/8=62.5%)

⁶⁶ This empirical study found the reverse rate was over 50%. Taiwan's appellate court has been criticized of a high reverse rate. When Taiwan's appellate court reverses a case because it finds an erroneous fact finding or application of law, it does not consider whether the error is harmful or harmless. *See* Wu Xunlong (吳巡龍), *supra* note 9, at 130, 137 (commenting on Taiwan's new proposal to adopt the harmless-error analysis principle in U.S. law).

scale trademark piracy which adversely affected public safety or infringed a world well-known trademarks with plenty of counterfeits; and (2) did not settle his or her civil cases. When sentencing a defendant to a real jail term, the High Court did not increase punishment. Although the IPC in one case did indicate the lower court sentence was too lenient, the overall sentencing patterns of the IPC show that this case should be an exception.

In 2007, out of 29 trademark defendants found guilty by the High Court, two defendants were sentenced to a real jail term (summarized in Table B-9 in Appendix B). Both defendants were involved in commercial scale trademark piracy which adversely affected public safety or infringed a world well-known trademark with plenty of counterfeits, and did not settle their civil cases. The High Court reversed one lower court decision and upheld the other. For the case that was reversed, the appellate court reduced the lower court's sentence but did not specify the reason.

In 2011, out of eight trademark defendants found guilty by the IPC, one was sentenced to a real jail term (Summarized in Table B-10 in Appendix B). The defendant was involved in commercial scale trademark piracy which infringed a world well-known trademark with plenty of counterfeits, and did not settle his or her civil case. The lower court sentenced the defendant to four months imprisonment, a convertible term, but the IPC reversed the lower court sentence and sentenced the defendant to seven months imprisonment, an unconvertible term. The IPC in this case specified that the lower court sentence was too lenient because it did not fully consider the defendant's malice and the harm caused. Nevertheless, this case should be an exception because, as indicated later, the IPC generally upheld lower court sentences.

6.3.2.2. Convertible Term

In 2007, out of all 49 copyright defendants found guilty, 27 were for a convertible jail term

(55.1%), and 22 were for an unconvertible jail term (44.9%). In 2011, out of all 25 copyright defendants found guilty, 16 were sentenced to a convertible jail term (64%), and nine to an unconvertible jail term (36%). The proportion of convertible jail terms became larger after 2008.

In 2007, out of all 29 trademark defendants found guilty, 25 were sentenced to a convertible jail term (86.2%) and four to an unconvertible jail term (13.8%). Like the lower courts, the sentences of the High Court also featured a high percentage of convertible jail terms.

In 2011, out of eight trademark defendants found guilty, seven were sentenced to a convertible jail term (87.5%, summarized in Table B-11 in Appendix B) and one sentenced to an unconvertible jail term (12.5%). Out of the seven defendants, the IPC overruled the appeals for three defendants' sentences, reversed two defendants' sentences, and reversed two defendants' acquittals. For the reversed sentences, the IPC's sentences were the same as the lower court sentences. Because a lower court acquittal decision does not contain a sentence, when the IPC reversed the lower court acquittals, there was no lower court sentence for the IPC to consider. As a result, for the seven defendants who were sentenced to a convertible jail term, the IPC did not increase punishment in reality. Since the IPC did not raise punishment here at all and the statistics also show the IPC gave more convertible sentences, the previous case in which the IPC raised punishment should be considered an exception.

6.3.2.3. Probation

The analysis of the collected cases shows that defendants who settled their civil cases were usually placed on probation. Even a defendant who was involved in commercial scale piracy and caused extensive harm would be placed on probation if he or she paid compensation. This practice did not change significantly in spite of the 2008 reforms.

In the copyright regime, in 2007, out of all 49 copyright defendants found guilty on appeal,

seven settled their civil cases. Out of the seven, six were placed on probation (85.7%). Out of the six, two were involved in commercial scale piracy and caused extensive harm.⁶⁷ In 2011, out of all 25 copyright defendants found guilty on appeal, eight settled their civil cases. Out of the eight, six were placed on probation (75%). Out of the six, two were involved in commercial scale piracy and caused extensive harm.⁶⁸

In the trademark regime, in 2007, out of all 29 trademark defendants found guilty on appeal, seven settled their civil cases. Out of the seven, two were placed on probation (28.6%) but the other five were not. Nevertheless, the five were sentenced to a convertible term. In 2011, out of all eight trademark defendants found guilty on appeal, four settled their civil cases. Out the four, all were placed on probation (100%).

6.3.2.4. Multiple Sentences

The analysis of the collected cases shows that in 2007 almost every defendant in both regimes received only one sentence. In 2011, while a few copyright defendants received multiple sentences, almost every trademark defendant received only one sentence.

In the copyright regime, in 2007, out of all 49 copyright defendants found guilty on appeal, each received one sentence (100%). The High Court explicitly recognized the “collective offense” in two defendants’ cases but explicitly disagreed with the “collective offense” in one case. In this case, although the High Court disagreed with the “collective offense,” it used the alternative term, the “continuous offense,” to treat the defendant’s consecutive infringements as

⁶⁷ In both cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 6,388. Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Ct.], Mar. 22, 2007, Minguo 96 (Shangyi) No. 72 Criminal Judgment (中華民國 96 年 3 月 22 日 96 年度上易字第 72 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

⁶⁸ In both cases, the number of seized counterfeits exceeded 100. In one case, the number of seized counterfeits was 147,763. Zhihui Caichan Fayuan (智慧財產法院) [IPC], Sep. 5, 2011, Minguo 100 (Xingzhishanggeng(1)) No. 2 Criminal Judgment (中華民國 100 年 9 月 5 日 100 年度刑智上更(一)字第 2 號刑事判決), <http://jirs.judicial.gov.tw/FJUD/>.

one “continuous offense.” In 2011, out of all 25 copyright defendants found guilty on appeal, 20 defendants received one sentence (80%), two received two sentences, one received three sentences, one received six sentences, and one received seven sentences. The IPC explicitly recognized the “collective offense” in eight defendants’ cases but explicitly disagreed with it in four’s cases. Nonetheless, in the four cases, the IPC also used the alternative term, the “continuous offense,” to treat each defendant’s consecutive infringements as one offense.

In the trademark regime, in 2007, out of all 29 trademark defendants found guilty on appeal, each defendant received one sentence (100%). The High Court explicitly recognized the “collective offense” in five defendants’ cases and disagreement with the “collective offense” was not found. In 2011, out of all eight trademark defendants found guilty on appeal, seven received one sentence (87.5%) and one receive two sentences. The IPC explicitly recognized the “collective offense” in one defendant’s case but explicitly disagreed with it in another’s. Nonetheless, in this case, the IPC also used the alternative term, the “continuous offense,” to treat the defendant’s consecutive infringements as one offense.

6.3.2.5. Seized Counterfeits

The number of seized counterfeits is used to measure whether or not the proportion of serious cases to all cases is different between 2007 and 2011. The following table shows the categorization of the number of seized counterfeits in the collected cases. Figure 6-20 shows the proportion in the copyright regime in 2007 and 2011, while Figure 6-21 shows the proportion in the trademark regime in 2007 and 2011. In the copyright regime, the proportion of serious cases (the number of seized counterfeits more than 100) became larger from 2007 to 2011. Although in the trademark regime the proportion of serious cases became smaller from 2007 to 2011, this should have no significant influence on sentences since most trademark defendants received

lenient sentences. Therefore, the findings here are inconsistent with the rival situation that less serious cases might result in more lenient sentences.

Table 6-15 Appellate Court Cases Categorized by the Number of Seized Counterfeits

Category	Not Specified	1~10	11~100	101~	Sum
2007 Copyright	19	7	3	20	49
2011 Copyright	10	1	3	11	25
2007 Trademark	8	5	5	11	29
2011 Trademark	3	3	0	2	8

Source: Compiled by the author.

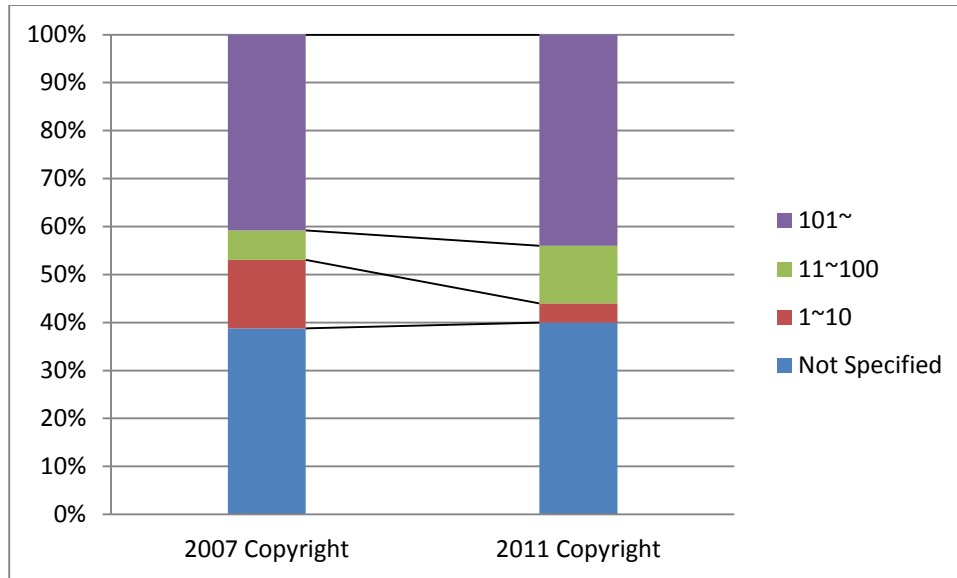


Figure 6-20 Appellate Court Proportion of Serious Infringements in Copyright Cases

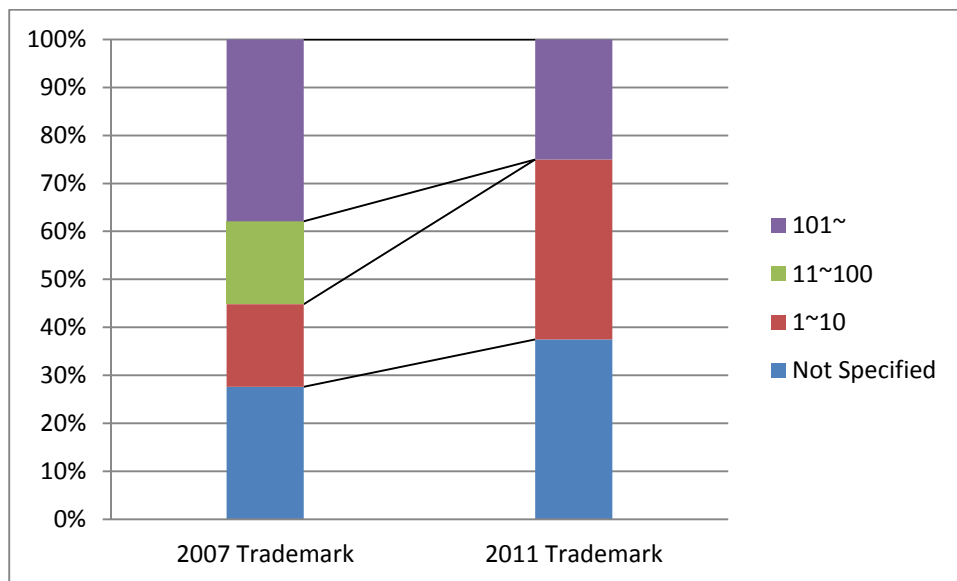


Figure 6-21 Appellate Court Proportion of Serious Infringements in Trademark Cases

6.4. Conclusion

The pre-reform and post-reform comparison empirical study in this chapter finds no evidence to support the idea that the establishment of the IPC and related procedures caused judges' sentences in either copyright or trademark regimes to become more severe.

In both regimes, there is no evidence of a reduction in the proportion of lenient sentences in

the district court and intermediate appellate court. The proportion of convertible sentences even became larger after the 2008 reforms.

In the copyright regimes, a real jail term was an exception. In general, unless a defendant: (1) engaged in commercial scale piracy, caused extensive harm, and did not pay compensation; or (2) a real jail term was mandatory, he or she was sentenced to a lenient sentence, including a convertible sentence or a probation sentence. By contrast, in the trademark regime, almost all defendants were sentenced to a lenient sentence and a real jail term was even more exceptional. Only when a defendant was involved in commercial scale trademark piracy that adversely affected public safety or infringed well-known trademarks and did not pay compensation, would the court send the defendant to prison.

There is no evidence that judges' sentencing patterns became harsher. The analysis finds that the IPC itself followed the established sentencing patterns among judges. Like its predecessor, the High Court, the IPC based its sentences on the lower courts' sentences and rarely raised punishment on appeal.

In sum, in spite of the judicial reforms under the Special 301 framework such as the raised statutory punishment in the Copyright Act, the enhanced criminal IP divisions, and the establishment of the IPC, there is no evidence to support the idea that the ROC judiciary changed its sentencing patterns in a more severe direction.

Chapter 7 Conclusion

This research explores the Republic of China (ROC) judiciary's resistance to the judicial reforms promoting a harsher punishment regime for intellectual property (IP) infringement spurred by the U.S. Special 301 framework. Faced with the judicial reforms trying to increase criminal punishments imposed on IP infringers, the ROC judiciary maintained its existing sentencing patterns. Shielded by judicial independence, judges usually followed their existing sentencing patterns embodied in the long-term judicial culture, and continued to hand down lenient sentences. This research finds no evidence that the judicial reforms succeeded in changing judges' sentencing patterns in the more severe direction that was demanded by the United States.

The literature review presents the distinctive case of Taiwan in which the pressure of the U.S. Special 301 framework spurred the judicial reforms toward a punishment regime for IP protection; but the judicial independence and judicial culture weakened these judicial reforms and reinforced the existing sentencing patterns. Given the economic and political ties between Taiwan and the United States as well as Taiwan's high dependence on the United States, the United States from the late 1980s employed unilateral trade retaliation mechanisms established under its domestic law to pressure Taiwan to make criminal punishments a main vehicle to protect IP rights. Under the Special 301 framework, Taiwan criminalized almost all IP infringements and launched intensive and extensive prosecutions and convictions for IP piracy.

In the meantime, Taiwan was being transformed from an authoritarian state into a democratic one. Following the progress toward democratization, judicial independence was enhanced to protect the judiciary from political interference. At the same time, a local judicial culture emphasizing discipline and obedience was maintained inside the judiciary. Because of the

bad reputation in the past of the judicial system for being subordinated to the ruling party, interference with the judiciary became extremely sensitive and judges fiercely defended their autonomy in their decision making. Inside the judiciary, judges adhered to their existing sentencing patterns reinforced by the long-term judicial culture regarding the sentencing of defendants. To avoid what might be perceived as unjust results caused by the unduly harsh criminal IP law, judges tended to hand down lenient sentences. The external judicial independence and internal judicial culture jointly facilitated the judiciary's resistance to a punishment regime for IP protection.

To relieve U.S. pressure and overcome judges' resistance, Taiwan used legislation to narrow judges' discretion in sentencing, issued administrative directives to guide judges' sentences, and established criminal IP divisions in individual courts. However, perhaps because they perceived the criminal punishment as disproportionate, local judges still adhered to their sentencing patterns and rarely imposed harsher punishments. Also, judicial independence made the Judicial Yuan directives merely advisory.

Nor was specialization increased as much as expected. Finally, in an effort to unify and enhance judges' sentences, Taiwan in 2008 established a single intermediate appellate court specializing in IP, the Intellectual Property Court (IPC); issued sentencing guidelines on criminal IP cases; and introduced specialized judges in IP to criminal IP divisions in individual district courts. By shifting the jurisdiction for appellate criminal IP cases to the IPC, Taiwan expected the IPC to make use of its appellate position to improve lenient sentences. Taking the criminal jurisdiction of the IPC as a breakthrough, the United States lifted its 20-year Special 301 oversight from Taiwan in 2009. Taiwan's efforts were then promoted by the United States a successful model of law reform that strengthened IP protection. However, judicial independence

and judicial culture limited the reforms. Further, the sentencing guidelines were issued without any authorization of law, and as such were merely advisory, not mandatory. Also, due to the poor work environment in criminal courts generally, most judges specializing in IP have chosen to stay in civil IP divisions, not criminal IP divisions. Under these circumstances, the 2008 reforms had little impact on the pattern of judicial sentencing for IP crimes.

This empirical study of the statistical data and individual cases finds no evidence that the severity of criminal IP punishment at district court level or intermediate court level changed after the introduction of the 2008 judicial reforms. The statistical pre-reform and post-reform comparison does not find any significant change in judges' sentencing patterns in a more severe direction. On the contrary, there is actually evidence that sentencing became more lenient after the reforms. The analysis of individual cases finds many similarities in judges' sentencing patterns before and after the 2008 reforms that are consistent with the statistical analysis. In the copyright regime, lenient sentences including a jail term convertible into a fine and a sentence of probation were widely imposed. Only when a copyright defendant was found to have: (1) engaged in commercial scale piracy, caused extensive harm, and did not settle his or her civil case; or (2) a real jail term was mandatory, would a judge consider sending the defendant to prison. A real jail term was even more exceptional in the trademark regime. Only when a trademark defendant was found involved in commercial scale piracy that adversely affected public safety or infringed well-known trademarks, and did not settle his or her civil case, would judges consider a real jail term. In either copyright or trademark regime, defendants could avoid criminal punishment by settling civil cases in exchange for being placed on probation. As a consequence, the findings are consistent with the hypothesis that due to growing judicial independence and a persistent local judicial culture, the judiciary adhered to its existing

sentencing patterns and did not increase the severity of criminal IP punishment in spite of the 2008 judicial reforms.

Because of the findings of this research, it now seems clear that Taiwan's experiences under the Special 301 framework are a surprising case. Some IP policy makers have asserted that Taiwan's judicial reforms for criminal IP protection is a successful model that can be applied or transplanted to other countries with massive piracy. Taking criminal punishment as a main vehicle by raising criminal punishment and establishing a specialized court might result in strong IP protection. But, the case of Taiwan presented in this research shows that it was harder than expected to influence Taiwan's culture of criminal IP enforcement. The ROC judiciary's resistance to the judicial reforms toward a harsher punishment regime for IP infringement originated in the local culture of judicial independence and a stable local judicial culture that emerged following Taiwan's peaceful democratization. Despite the introduction of the most important judicial reforms in 2008, no evidence can be found to support the idea that judges' sentencing patterns changed, or that the severity of punishment increased. This research suggests that the U.S. Special 301 framework produced merely symbolic reforms, and suggests that Taiwan is not an example of successful judicial reforms but a unique case of conflicts between foreign pressure and domestic resistance.

This research is a systematic study of the relationship among the Special 301 framework, the judicial reforms toward a punishment regime for IP protection, and the judiciary's response in the contexts of local judicial independence and persistent judicial culture. It connects the previous research in different areas including trade law, criminal IP law, judicial independence, and judicial culture. This research provides a holistic view of the application of the Special 301 framework to countries that are U.S. trading partners. Also, with the analysis of the empirical

data, this research has not only revealed the reality of the judicial reforms under the Special 301 framework but also provides an opportunity to move beyond the polarized perspectives on the Special 301 framework.

Although this research sheds light on judges' sentencing patterns under the Special 301 framework, it has a few limitations. First, it does not cover all the players. In addition to the judiciary, the police and public prosecutors also played an important role under the Special 301 framework. How these players apprehended and disposed criminal IP suspects and interacted with the judiciary are also critical to the enforcement of criminal IP law. Especially as institutions within the executive branch of the government, their performance is quite separate from the behavior of the judiciary.

Second, this research does not deal with the overall effectiveness of the Special 301 framework. This research does not address whether or not the Special 301 framework effectively deterred IP piracy in Taiwan more generally. Because IP piracy is a social phenomenon far broader than criminal cases decided by the judiciary, this research focuses only on a small proportion of the larger social phenomenon of IP piracy. Besides, many factors other than criminal punishment may influence the seriousness of piracy as well. For example, the progress of technology may make piracy more serious or undetectable while the transformation of Taiwan from an IP importer to an IP exporter may change social norms hostile to IP rights into social norms hostile to IP piracy.

Third, this research relies on publicly available statistical data and court decisions and does not contain first-hand information regarding the social phenomenon at issue. Individual judges' perspectives on sentencing patterns and judicial reforms have not been addressed.

Fourth, Taiwan just launched a new judicial reform in 2012 targeting the long-term judicial

culture that had made judges' sentencing patterns resistant to change. Because the 2012 reform may influence judges' sentencing patterns, the findings of this research cannot be extended past 2012.

Fifth, this research focuses only on the case of Taiwan and does not consider similar or different circumstances in other countries.¹

To provide a more complete image on Taiwan's response to the Special 301 framework, the following directions of future research are suggested. How did the executive branch of the government respond to the Special 301 framework, dispose of criminal IP suspects, and interact with the judiciary? What is the driving force for Taiwan's improvement in IP piracy? Has the Special 301 framework more generally been a force deterring Taiwan's IP piracy? If yes, what parts of the Special 301 framework have been successful? Could a judiciary in other countries with similar political and economic ties with the United States and a similar political and judicial transformation such as the judiciary in Korea also resist the judicial reforms driven by the Special 301 framework like Taiwan's judiciary did?² What are individual judges' perspectives on their sentencing patterns and the judicial reforms with respect to criminal IP law?

In sum, the ROC judges' resistance to reforms in criminal sentencing norms provides a good example for the limitations of criminal punishment for IP protection. The U.S. Special 301 framework may trigger judicial reforms toward an enhanced punishment regime for IP protection in a foreign country. However, when taking criminal punishment as a main vehicle, the judiciary's resistance may offset this strategy. In a newly democratized country like Taiwan

¹ For a general discussion for Asian countries' attitude toward the Special 301 framework, see Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT'L J.L. & INFO. TECH. 378 (2005).

² As a country with close political and economic ties with the U.S., Korea's development in IP law and enforcement was heavily influenced by the Special 301 framework, see Amy Choe, Note and Comment, *Korea's Road Toward Respecting Intellectual Property Rights*, 25 RUTGERS COMPUTER & TECH. L.J. 341 (1999).

where interference with the judiciary is extremely sensitive and judges' lenient sentences are supported by the long-term local judicial culture, the intervention of the judicial reforms driven by the Special 301 framework may not be able change judges' existing sentencing patterns. In the end, the introduction of the judicial reforms toward a punishment regime for IP protection may be merely symbolic. On the surface, there seems to be strong criminal IP law and specialized judicial institutions in IP in place, but in substance, lenient sentences persist in most cases.

Appendix A T-Test Report

1. District Court Prosecution and Disposition

Here are the steps of the t-test for district court prosecution and disposition: (1) data in Table 6-1 and Table 6-2 are transformed according to five variances, number of indicted defendants, disposition rate, guilty rate, acquittal rate, and dismissal rate (Table A-2 and Table A-3 in Appendix A), (2) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group,¹ and (3) SPSS statistical computer software is used to calculate the mean and *p*-value under each variance (Table A-4 and Table A-5).

Table A-1 shows the t-test results. In all t-test results in this research, a *p*-value less than 0.01 is considered statistically extremely significant while a *p*-value less than 0.05 is considered statistically very significant and a *p*-value less than 0.10 is considered statistically significant.²

Table A-1 T-Test Results for District Court Prosecution and Disposition

	Copyright	Trademark
Indicted Defendants	<i>p</i> =0.089*	<i>p</i> =0.351
Disposition Rate	<i>p</i> =0.517	<i>p</i> =0.346
Guilty Rate	<i>p</i> =0.323	<i>p</i> =0.404
Acquittal Rate	<i>p</i> =0.941	<i>p</i> =0.449
Dismissal Rate	<i>p</i> =0.159	<i>p</i> =0.361

Source: Table A-5.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for copyright data:

1. Indicted defendants: An independent-samples t-test was conducted to compare the mean number of indicted defendants in the group of 2002-2007 and the group of 2009-2011. In the

¹ The 2008 data is skipped because the 2008 reforms were introduced in mid-2008.

² When $p\text{-value} > 0.10$, the result cannot reject the null hypothesis for commonly accepted values of α ; when $0.05 < p\text{-value} \leq 0.10$, the result rejects the null hypothesis for $\alpha = 0.10$; when $0.01 < p\text{-value} \leq 0.05$, the result rejects the null hypothesis for $\alpha = 0.05$; when $0.001 < p\text{-value} \leq 0.01$, the result rejects the null hypothesis for $\alpha = 0.01$; when $0.0001 < p\text{-value} \leq 0.001$, the result rejects the null hypothesis for $\alpha = 0.001$. KEN BLACK, BUSINESS STATISTICS: FOR CONTEMPORARY DECISION MAKING 309 (7th ed. 2011).

copyright regime, difference at the 10% significance level could be found in the scores for 2002-2007 ($M=1509.83$, $SD=459.60$)³ and 2009-2011 ($M=963.33$, $SD=85.11$); $t(7)=1.976$, $p= 0.089$. With 90% confidence, these results reject the hypothesis that there is no difference in the average number of indictments between the pre-reform and post-reform policy change. In other words, the possibility that the 2008 intervention might have an effect on the number of indicted defendants cannot be excluded. Specifically, the results show that the number of indicted defendants decreased after 2008.

2. Disposition rate: An independent-samples t-test was conducted to compare the disposition rate (disposed defendants/indicted defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=1.03$, $SD=0.14$) and 2009-2011 ($M=0.97$, $SD=0.06$); $t(7)=0.682$, $p= 0.517$. These results suggest that no evidence supports the idea that the 2008 intervention may have an effect on the disposition rate.

3. Guilty rate: An independent-samples t-test was conducted to compare the guilty rate (guilty defendants/dispensed defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.66$, $SD=0.08$) and 2009-2011 ($M=0.62$, $SD=0.05$); $t(6.373)=1.071$, $p= 0.323$ (the Sig. value in the Levene's Test for Equality of Variances column is less than or equal to 0.05, read from the bottom row). These results provide no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

4. Acquittal rate: An independent-samples t-test was conducted to compare the acquittal rate (acquitted defendants/dispensed defendants) in the group of 2002-2007 and the group of 2009-

³ M: mean; SD: standard deviation; t: Student's distribution.

2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.09$, $SD=0.03$) and 2009-2011 ($M=0.08$, $SD=0.03$); $t(7)=0.077$, $p=0.941$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

5. Dismissal rate: An independent-samples t-test was conducted to compare the dismissal rate (dismissed defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.25$, $SD=0.05$) and 2009-2011 ($M=0.30$, $SD=0.02$); $t(7)=-1.577$, $p=0.159$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Here is the analysis of the t-test results for trademark data:

1. Indicted defendants: An independent-samples t-test was conducted to compare the number of indicted defendants in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=1389.33$, $SD=287.25$) and 2009-2011 ($M=1202.67$, $SD=194.46$); $t(7)=1.000$, $p=0.351$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the number of indicted defendants.

2. Disposition rate: An independent-samples t-test was conducted to compare the disposition rate (disposed defendants/indicted defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.92$, $SD=0.07$) and 2009-2011 ($M=0.87$, $SD=0.07$); $t(7)=1.009$, $p=0.346$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

3. Guilty rate: An independent-samples t-test was conducted to compare the guilty rate (guilty defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.91$, $SD=0.06$) and 2009-2011 ($M=0.94$, $SD=0.00$); $t(7)=-0.887$, $p=0.404$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

4. Acquittal rate: An independent-samples t-test was conducted to compare the acquittal rate (acquitted defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.07$, $SD=0.05$) and 2009-2011 ($M=0.04$, $SD=0.01$); $t(7)=0.802$, $p=0.449$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

5. Dismissal rate: An independent-samples t-test was conducted to compare the dismissal rate (dismissed defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.03$, $SD=0.01$) and 2009-2011 ($M=0.02$, $SD=0.01$); $t(7)=0.978$, $p=0.361$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Table A-2 District Court Copyright Prosecution and Disposition Data for T-Test

Year	Indicted	Disposition Rate	Guilty Rate	Acquittal Rate	Dismissal Rate
2002	2,158	0.95	0.59	0.10	0.31
2003	1,819	1.11	0.60	0.11	0.29
2004	940	1.29	0.60	0.12	0.27
2005	1,074	0.98	0.71	0.08	0.21
2006	1,423	0.91	0.76	0.05	0.19
2007	1,645	0.96	0.72	0.05	0.23
2008	1,326	1.06	0.65	0.07	0.28
2009	1,061	1.03	0.63	0.06	0.31
2010	905	0.97	0.66	0.07	0.27
2011	924	0.92	0.57	0.12	0.31

Source: Table 6-1.

Table A-3 District Court Trademark Prosecution and Disposition Data for T-Test

Year	Indicted	Disposition Rate	Guilty Rate	Acquittal Rate	Dismissal Rate
2002	835	0.83	0.80	0.15	0.05
2003	1,542	0.86	0.90	0.08	0.02
2004	1,392	1.03	0.93	0.04	0.03
2005	1,568	0.97	0.94	0.03	0.02
2006	1,386	0.92	0.95	0.04	0.02
2007	1,613	0.92	0.94	0.05	0.01
2008	1,287	1.04	0.96	0.02	0.02
2009	1,099	0.89	0.94	0.04	0.02
2010	1,082	0.93	0.94	0.04	0.02
2011	1,427	0.79	0.94	0.05	0.01

Source: Table 6-2.

Table A-4 District Court Prosecution and Disposition Group Statistics

Group Statistics					
	Group	N	Mean	Std. Deviation	Std. Error Mean
Cindicted	1.00	6	1509.8333	459.60305	187.63216
	2.00	3	963.3333	85.11365	49.14039
CdispositionR	1.00	6	1.0333	.14292	.05835
	2.00	3	.9733	.05508	.03180
CguiltyR	1.00	6	.6633	.07501	.03062
	2.00	3	.6200	.04583	.02646
CacquittalR	1.00	6	.0850	.03017	.01232
	2.00	3	.0833	.03215	.01856
CdismissalR	1.00	6	.2500	.04733	.01932
	2.00	3	.2967	.02309	.01333
Tindicted	1.00	6	1389.3333	287.24879	117.26883
	2.00	3	1202.6667	194.46422	112.27397
TdispositionR	1.00	6	.9217	.07250	.02960
	2.00	3	.8700	.07211	.04163
TguiltyR	1.00	6	.9100	.05657	.02309
	2.00	3	.9400	.00000	.00000
TacquittalR	1.00	6	.0650	.04506	.01839
	2.00	3	.0433	.00577	.00333
TdismissalR	1.00	6	.0250	.01378	.00563
	2.00	3	.0167	.00577	.00333

Table A-5 District Court Prosecution and Disposition Independent Samples Test

		Independent Samples Test									
		Levene's Test for Equality of Variances		t-test for Equality of Means							
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference		
										Lower	Upper
Cindicted	Equal variances assumed	4.775	.065	1.976	7	.089	546.50000	276.54288	-107.42000	1200.42000	
	Equal variances not assumed			2.818	5.643	.033	546.50000	193.96032	64.52327	1028.47673	
CdispositionR	Equal variances assumed	2.523	.156	.682	7	.517	.06000	.08791	-.14788	.26788	
	Equal variances not assumed			.903	6.891	.397	.06000	.06645	-.09763	.21763	
CguiltyR	Equal variances assumed	6.667	.036	.902	7	.397	.04333	.04806	-.07030	.15697	
	Equal variances not assumed			1.071	6.373	.323	.04333	.04047	-.05430	.14097	
CacquittalR	Equal variances assumed	.004	.951	.077	7	.941	.00167	.02174	-.04974	.05307	
	Equal variances not assumed			.075	3.850	.944	.00167	.02227	-.06113	.06447	
CdismissalR	Equal variances assumed	4.023	.085	-1.577	7	.159	-.04667	.02960	-.11666	.02333	
	Equal variances not assumed			-1.988	6.954	.087	-.04667	.02348	-.10225	.00892	
Tindicted	Equal variances assumed	.086	.777	1.000	7	.351	186.66667	186.73740	-254.89712	628.23046	
	Equal variances not assumed			1.150	5.924	.295	186.66667	162.34969	-211.82818	585.16151	
TdispositionR	Equal variances assumed	.001	.971	1.009	7	.346	.05167	.05119	-.06937	.17271	
	Equal variances not assumed			1.011	4.112	.368	.05167	.05108	-.08864	.19198	
TguiltyR	Equal variances assumed	3.500	.104	-.887	7	.404	-.03000	.03381	-.10994	.04994	
	Equal variances not assumed			-1.299	5.000	.251	-.03000	.02309	-.08937	.02937	
TacquittalR	Equal variances assumed	3.347	.110	.802	7	.449	.02167	.02701	-.04221	.08554	
	Equal variances not assumed			1.159	5.319	.296	.02167	.01869	-.02553	.06886	
TdismissalR	Equal variances assumed	1.209	.308	.978	7	.361	.00833	.00852	-.01182	.02848	
	Equal variances not assumed			1.274	6.977	.243	.00833	.00654	-.00714	.02381	

2. District Court Sentencing and Probation

Here are the steps of the t-test for district court sentencing: (1) data in Table 6-5 and Table 6-6 are categorized by convertibility into a fine (Table A-7), (2) the categorized data are transformed according to one variance, conversion rate (Table A-8), (3) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group, and (4) SPSS statistical computer software is used to calculate the mean and p -value under this variance (Table A-11 and Table A-12). The following table shows the t-test results.

Table A-6 T-Test Results for District Court Sentences

	Copyright	Trademark
Conversion Rate	$p=0.015^{**}$	$p=0.185$

Source: Table A-12.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for district court convertible sentences:

1. Conversion rate in the copyright regime: An independent-samples t-test was conducted to compare the conversion rate (defendants sentenced to a convertible sentence/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, there was a significant difference at the 5% level in the scores for 2002-2007 ($M=0.60$, $SD=0.12$) and 2009-2011 ($M=0.84$, $SD=0.04$); $t(7)=-3.220$, $p=0.015$. These results suggest that the 2008 intervention might have an effect on the conversion rate. Specifically, the results show that the conversion rate became higher after 2008.

2. Conversion rate in the trademark regime: An independent-samples t-test was conducted to compare the conversion rate (defendants sentenced to a convertible sentence/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, there was no significant difference in the scores for 2002-2007 ($M=0.98$, $SD=0.01$) and 2009-2011 ($M=0.99$, $SD=0.00$); $t(5.000)=-1.536$, $p=0.185$ (the Sig. value in the Levene's Test for

Equality of Variances column is less than or equal to 0.05, read from the bottom row). These results show that no evidence support the idea that the 2008 intervention might have an effect on the conversion rate.

Table A-7 District Court Sentences Categorized by Convertibility

Year	Copyright			Trademark		
	Guilty	≤6 IM	>6 IM	Guilty	≤6 IM	>6 IM
2002	1,196	715	481	560	538	22
2003	1,207	684	523	1,193	1,158	35
2004	730	508	222	1,334	1,314	20
2005	747	370	377	1,435	1,414	21
2006	982	453	529	1,203	1,191	12
2007	1,134	886	248	1,400	1,390	10
2008	914	795	119	1,284	1,277	7
2009	686	594	92	919	914	5
2010	577	495	82	949	944	5
2011	491	386	105	1053	1046	7

Source: Table 6-5 and Table 6-6.

Note: IM: imprisonment; ≤6 IM: fine+(criminal detention)+(2 to 6 months imprisonment); >6 IM: more than 6 months imprisonment.

Table A-8 District Court Conversion Rate Data for T-Test

Year	Copyright Conversion Rate	Trademark Conversion Rate
2002	0.60	0.96
2003	0.57	0.97
2004	0.70	0.99
2005	0.50	0.99
2006	0.46	0.99
2007	0.78	0.99
2008	0.87	0.99
2009	0.87	0.99
2010	0.86	0.99
2011	0.79	0.99

Source: Table A-7.

Here are the steps of the t-test for district court probation: (1) data in Table 6-7 are transformed according to one variance, probation rate (Table A-10), (2) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group, and (3) SPSS statistical computer software is used to calculate the mean and p -value under this variance (Table A-11 and Table A-12). The following table shows the t-test results.

Table A-9 T-Test Results for District Court Probation

	Copyright	Trademark
Probation Rate	$p=0.590$	$p=0.038^{**}$

Source: Table A-12.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for district court probation:

1. Probation in the copyright regime: An independent-samples t-test was conducted to compare the probation rate (defendants placed on probation/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.47$, $SD=0.10$) and 2009-2011 ($M=0.44$, $SD=0.02$); $t(6.041)=0.569$, $p=0.590$ (the Sig. value in the Levene's Test for Equality of Variances column is less than or equal to 0.05, read from the bottom row). These results show that no evidence support the idea that the 2008 intervention might have an effect on the probation rate.

2. Probation in the trademark regime: An independent-samples t-test was conducted to compare the probation rate (defendants placed on probation/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, there was a significant difference at the 5% level in the scores for 2002-2007 ($M=0.25$, $SD=0.05$) and 2009-2011 ($M=0.37$, $SD=0.10$); $t(7)=-2.558$, $p=0.038$. These results suggest that the 2008 intervention might have an effect on the probation rate. Specifically, the results show that the probation rate became higher after 2008.

Table A-10 District Court Probation Rate Data for T-Test

Year	Copyright			Trademark		
	Guilty	Probation	Probation Rate	Guilty	Probation	Probation Rate
2002	1,196	501	0.42	560	185	0.33
2003	1,207	471	0.39	1,193	319	0.27
2004	730	256	0.35	1,334	331	0.25
2005	747	388	0.52	1,435	319	0.22
2006	982	585	0.60	1,203	227	0.19
2007	1,134	594	0.52	1,400	332	0.24
2008	914	406	0.44	1,284	320	0.25
2009	686	321	0.47	919	270	0.29
2010	577	250	0.43	949	326	0.34
2011	491	213	0.43	1,053	505	0.48

Source: Table 6-7.

Table A-11 District Sentencing and Probation Group Statistics

Group Statistics					
	Group	N	Mean	Std. Deviation	Std. Error Mean
CconversionR	1.00	6	.6017	.12073	.04929
	2.00	3	.8400	.04359	.02517
CprobationR	1.00	6	.4667	.09501	.03879
	2.00	3	.4433	.02309	.01333
TconversionR	1.00	6	.9817	.01329	.00543
	2.00	3	.9900	.00000	.00000
TprobationR	1.00	6	.2500	.04775	.01949
	2.00	3	.3700	.09849	.05686

Table A-12 District Sentencing and Probation Independent Samples Test

Independent Samples Test										
		Levene's Test for Equality of Variances		t-test for Equality of Means						
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
									Lower	Upper
CconversionR	Equal variances assumed	2.175	.184	-3.220	7	.015	-.23833	.07401	-.41334	-.06333
	Equal variances not assumed			-4.307	6.793	.004	-.23833	.05534	-.37001	-.10666
CprobationR	Equal variances assumed	7.911	.026	.406	7	.697	.02333	.05745	-.11250	.15917
	Equal variances not assumed			.569	6.041	.590	.02333	.04101	-.07686	.12353
TconversionR	Equal variances assumed	12.121	.010	-1.049	7	.329	-.00833	.00794	-.02712	.01045
	Equal variances not assumed			-1.536	5.000	.185	-.00833	.00543	-.02228	.00562
TprobationR	Equal variances assumed	2.800	.138	-2.558	7	.038	-.12000	.04690	-.23091	-.00909
	Equal variances not assumed			-1.996	2.484	.159	-.12000	.06011	-.33587	.09587

3. Appellate Court Disposition

Here are the steps of the t-test for appellate court disposition: (1) data in Table 6-10 and Table 6-11 are transformed according to four variances, disposition rate, guilty rate, acquittal rate, and dismissal rate (Table A-14 and Table A-15), (2) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group, and (3) SPSS statistical computer software is used to calculate the mean and p -value under each variance (Table A-16 and Table A-17). The following table shows the t-test results.

Table A-13 T-Test Results for Appellate Court Disposition

	Copyright	Trademark
Disposition Rate	$p= 0.128$	$p= 0.326$
Guilty Rate	$p= 0.114$	$p= 0.483$
Acquittal Rate	$p= 0.211$	$p= 0.624$
Dismissal Rate	$p= 0.347$	$p= 0.197$

Source: Table A-17.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for copyright data:

1. Disposition rate: An independent-samples t-test was conducted to compare the disposition rate (defendants disposed in the appellate court/defendants disposed in the district court) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.31$, $SD=0.07$) and 2009-2011 ($M=0.23$, $SD=0.03$); $t(7)=1.725$, $p= 0.128$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

2. Guilty rate: An independent-samples t-test was conducted to compare the guilty rate (guilty defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.54$, $SD=0.06$) and 2009-2011 ($M=0.46$, $SD=0.07$); $t(7)=1.804$, $p= 0.114$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the

guilty rate.

3. Acquittal rate: An independent-samples t-test was conducted to compare the acquittal rate (acquitted defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.27$, $SD=0.06$) and 2009-2011 ($M=0.32$, $SD=0.03$); $t(7)=-1.376$, $p=0.211$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

4. Dismissal rate: An independent-samples t-test was conducted to compare the dismissal rate (dismissed defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, no significant difference could be found in the scores for 2002-2007 ($M=0.19$, $SD=0.03$) and 2009-2011 ($M=0.22$, $SD=0.07$); $t(7)=-1.007$, $p=0.347$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Here is the analysis of the t-test results for trademark data:

1. Disposition rate: An independent-samples t-test was conducted to compare the disposition rate (defendants disposed in the appellate court/defendants disposed in the district court) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.12$, $SD=0.06$) and 2009-2011 ($M=0.08$, $SD=0.01$); $t(7)=1.055$, $p=0.326$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the disposition rate.

2. Guilty rate: An independent-samples t-test was conducted to compare the guilty rate (guilty defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007

($M=0.58$, $SD=0.10$) and 2009-2011 ($M=0.53$, $SD=0.12$); $t(7)=0.740$, $p=0.483$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the guilty rate.

3. Acquittal rate: An independent-samples t-test was conducted to compare the acquittal rate (acquitted defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.38$, $SD=0.09$) and 2009-2011 ($M=0.42$, $SD=0.12$); $t(7)=-0.513$, $p=0.624$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the acquittal rate.

4. Dismissal rate: An independent-samples t-test was conducted to compare the dismissal rate (dismissed defendants/disposed defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, no significant difference could be found in the scores for 2002-2007 ($M=0.08$, $SD=0.03$) and 2009-2011 ($M=0.12$, $SD=0.06$); $t(7)=-1.427$, $p=0.197$. These results provide no evidence to support the idea that the 2008 intervention might have an effect on the dismissal rate.

Table A-14 Appellate Court Copyright Disposition Data for T-Test

Year	Disposition Rate	Guilty Rate	Acquittal Rate	Dismissal Rate
2002	0.25	0.50	0.28	0.22
2003	0.38	0.54	0.25	0.21
2004	0.40	0.48	0.30	0.22
2005	0.33	0.52	0.33	0.15
2006	0.28	0.55	0.30	0.15
2007	0.22	0.66	0.17	0.17
2008	0.22	0.57	0.26	0.17
2009	0.20	0.40	0.34	0.26
2010	0.25	0.45	0.29	0.26
2011	0.25	0.53	0.33	0.14

Source: Table 6-10.

Table A-15 Appellate Court Trademark Disposition Data for T-Test

Year	Disposition Rate	Guilty Rate	Acquittal Rate	Dismissal Rate
2002	0.23	0.54	0.41	0.10
2003	0.14	0.48	0.50	0.04
2004	0.10	0.50	0.45	0.10
2005	0.06	0.72	0.26	0.05
2006	0.09	0.57	0.39	0.09
2007	0.09	0.67	0.29	0.12
2008	0.07	0.53	0.42	0.09
2009	0.08	0.51	0.42	0.15
2010	0.07	0.65	0.30	0.16
2011	0.09	0.42	0.54	0.06

Source: Table 6-11.

Table A-16 Appellate Court Disposition Group Statistics

Group Statistics					
	Group	N	Mean	Std. Deviation	Std. Error Mean
CdispositionR	1.00	6	.3100	.07211	.02944
	2.00	3	.2333	.02887	.01667
CguiltyR	1.00	6	.5417	.06338	.02587
	2.00	3	.4600	.06557	.03786
CacquittalR	1.00	6	.2717	.05636	.02301
	2.00	3	.3200	.02646	.01528
CdismissalR	1.00	6	.1867	.03386	.01382
	2.00	3	.2200	.06928	.04000
TdispositionR	1.00	6	.1183	.06047	.02469
	2.00	3	.0800	.01000	.00577
TguiltyR	1.00	6	.5800	.09571	.03907
	2.00	3	.5267	.11590	.06692
TacquittalR	1.00	6	.3833	.09245	.03774
	2.00	3	.4200	.12000	.06928
TdismissalR	1.00	6	.0833	.03141	.01282
	2.00	3	.1233	.05508	.03180

Table A-17 Appellate Court Disposition Independent Samples Test

		Independent Samples Test								
		Levene's Test for Equality of Variances		t-test for Equality of Means						
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
								Lower	Upper	
CappealR	Equal variances assumed	4.358	.075	1.725	7	.128	.07667	.04445	-.02845	.18178
	Equal variances not assumed			2.266	6.937	.058	.07667	.03383	-.00347	.15681
CguiltyR	Equal variances assumed	.024	.881	1.804	7	.114	.08167	.04526	-.02537	.18870
	Equal variances not assumed			1.781	3.959	.150	.08167	.04586	-.04617	.20950
CacquittalR	Equal variances assumed	1.050	.340	-1.376	7	.211	-.04833	.03514	-.13142	.03475
	Equal variances not assumed			-1.750	6.986	.124	-.04833	.02762	-.11367	.01700
CdismissalR	Equal variances assumed	5.444	.052	-1.007	7	.347	-.03333	.03309	-.11159	.04492
	Equal variances not assumed			-.788	2.492	.499	-.03333	.04232	-.18496	.11830
TappealR	Equal variances assumed	3.075	.123	1.055	7	.326	.03833	.03634	-.04759	.12425
	Equal variances not assumed			1.512	5.521	.186	.03833	.02535	-.02503	.10170
TguiltyR	Equal variances assumed	.025	.878	.740	7	.483	.05333	.07204	-.11703	.22369
	Equal variances not assumed			.688	3.436	.535	.05333	.07749	-.17646	.28313
TacquittalR	Equal variances assumed	.040	.847	-.513	7	.624	-.03667	.07148	-.20569	.13236
	Equal variances not assumed			-.465	3.249	.672	-.03667	.07890	-.27721	.20388
TdismissalR	Equal variances assumed	2.244	.178	-1.427	7	.197	-.04000	.02803	-.10628	.02628
	Equal variances not assumed			-1.167	2.675	.337	-.04000	.03429	-.15701	.07701

4. Appellate Court Sentencing and Probation

Here are the steps of the t-test for appellate court sentencing: (1) data in Table 6-12 and Table 6-13 are categorized by convertibility into a fine (Table A-19), (2) the categorized data are transformed according to one variance, conversion rate (Table A-20), (3) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group, and (4) SPSS statistical computer software is used to calculate the mean and p -value under this variance (Table A-23 and Table A-24). The following table shows the t-test results:

Table A-18 T-Test Results for Appellate Court Sentences

	Copyright	Trademark
Conversion Rate	$p = 0.002^{***}$	$p = 0.015^{**}$

Source: Table A-24.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for appellate court conversion rate:

1. Conversion rate in the copyright regime: An independent-samples t-test was conducted to compare the conversion rate (defendants sentenced to a convertible sentence/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, there was a significant difference at the 1% level in the scores for 2002-2007 ($M=0.39$, $SD=0.06$) and 2009-2011 ($M=0.61$, $SD=0.07$); $t(7)=-4.982$, $p = 0.002$. These results suggest that the 2008 intervention might have an effect on the conversion rate. Specifically, the results show that the conversion rate became higher after 2008.

2. Conversion rate in the trademark regime: An independent-samples t-test was conducted to compare the conversion rate (defendants sentenced to a convertible sentence/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, there was a significant difference at the 5% level in the scores for 2002-2007 ($M=0.84$, $SD=0.05$) and 2009-2011 ($M=0.95$, $SD=0.04$); $t(7)=-3.209$, $p = 0.015$. These results suggest that the 2008

intervention might have an effect on the conversion rate. Specifically, the results show that the conversion rate became higher after 2008.

Table A-19 Appellate Court Sentences Categorized by Convertibility

Year	Copyright			Trademark		
	Guilty	≤6 IM	>6 IM	Guilty	≤6 IM	>6 IM
2002	251	115	136	80	71	9
2003	418	156	262	87	71	16
2004	236	82	154	62	49	13
2005	183	72	111	65	51	14
2006	196	58	138	56	49	7
2007	233	104	129	77	68	9
2008	176	106	70	48	46	2
2009	88	50	38	32	31	1
2010	99	56	43	40	36	4
2011	112	77	35	39	38	1

Source: Table 6-12 and Table 6-13.

Note: IM: imprisonment; ≤6 IM: fine+(criminal detention)+(2 to 6 months imprisonment); >6 IM: more than 6 months imprisonment.

Table A-20 Appellate Court Conversion Rate Data for T-Test

Year	Copyright Conversion Rate	Trademark Conversion Rate
2002	0.46	0.89
2003	0.37	0.82
2004	0.35	0.79
2005	0.39	0.78
2006	0.30	0.88
2007	0.45	0.88
2008	0.60	0.96
2009	0.57	0.97
2010	0.57	0.90
2011	0.69	0.97

Source: Table A-19.

Here are the steps of the t-test for appellate court probation: (1) data in Table 6-14 are transformed according to one variance, probation rate (Table A-22), (2) all data are divided into two groups, the 2002-2007 group and the 2009-2011 group, and (3) SPSS statistical computer software is used to calculate the mean and p -value under this variance (Table A-23 and Table A-24). The following table shows the t-test results.

Table A-21 T-Test Results for Appellate Court Probation

	Copyright	Trademark
Probation Rate	$p= 0.004^{***}$	$p= 0.071^*$

Source: Table A-24.

Note: * $0.05 < p\text{-value} \leq 0.10$; ** $0.01 < p\text{-value} \leq 0.05$; *** $p\text{-value} \leq 0.01$.

Here is the analysis of the t-test results for appellate court probation:

1. Probation in the copyright regime: An independent-samples t-test was conducted to compare the probation rate (defendants placed on probation/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the copyright regime, there was a significant difference at the 1% level in the scores for 2002-2007 ($M=0.23$, $SD=0.03$) and 2009-2011 ($M=0.33$, $SD=0.04$); $t(7)=-4.287$, $p= 0.004$. These results suggest that the 2008 intervention might have an effect on the probation rate. Specifically, the results show that the probation rate became higher after 2008.

2. Probation in the trademark regime: An independent-samples t-test was conducted to compare the probation rate (defendants placed on probation/guilty defendants) in the group of 2002-2007 and the group of 2009-2011. In the trademark regime, difference at the 10% significance level could be found in the scores for 2002-2007 ($M=0.21$, $SD=0.09$) and 2009-2011 ($M=0.34$, $SD=0.10$); $t(7)=-2.129$, $p= 0.071$. With 90% confidence, these results reject the hypothesis that there is no difference in the probation rate between the pre-reform and post-reform policy change. In other words, the probability that the 2008 intervention might have an

effect on the probation rate could not be excluded. Specifically, the results show that the probation rate became higher after 2008.

Table A-22 Appellate Court Probation Rate Data for T-Test

Year	Copyright			Trademark		
	Guilty	Probation	Probation Rate	Guilty	Probation	Probation Rate
2002	251	57	0.23	80	18	0.23
2003	418	104	0.25	87	23	0.26
2004	236	51	0.22	62	21	0.34
2005	183	33	0.18	65	8	0.12
2006	196	53	0.27	56	9	0.16
2007	233	49	0.21	77	10	0.13
2008	176	43	0.24	48	6	0.13
2009	88	29	0.33	32	8	0.25
2010	99	37	0.37	40	13	0.33
2011	112	32	0.29	39	17	0.44

Source: Table 6-14.

Table A-23 Appellate Court Sentencing and Probation Group Statistics

Group Statistics					
	Group	N	Mean	Std. Deviation	Std. Error Mean
CconversionR	1.00	6	.3867	.06088	.02486
	2.00	3	.6100	.06928	.04000
CprobationR	1.00	6	.2267	.03141	.01282
	2.00	3	.3300	.04000	.02309
TconversionR	1.00	6	.8400	.04940	.02017
	2.00	3	.9467	.04041	.02333
TprobationR	1.00	6	.2067	.08571	.03499
	2.00	3	.3400	.09539	.05508

Table A-24 Appellate Court Sentencing and Probation Independent Samples Test

Independent Samples Test										
		Levene's Test for Equality of Variances		t-test for Equality of Means						
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
									Lower	Upper
CconversionR	Equal variances assumed	.095	.767	-4.982	7	.002	-.22333	.04483	-.32933	-.11733
	Equal variances not assumed			-4.742	3.626	.011	-.22333	.04709	-.35957	-.08709
CprobationR	Equal variances assumed	.057	.818	-4.287	7	.004	-.10333	.02410	-.16033	-.04634
	Equal variances not assumed			-3.912	3.298	.025	-.10333	.02642	-.18326	-.02341
TconversionR	Equal variances assumed	1.613	.245	-3.209	7	.015	-.10667	.03324	-.18526	-.02807
	Equal variances not assumed			-3.459	4.990	.018	-.10667	.03084	-.18599	-.02734
TprobationR	Equal variances assumed	.013	.913	-2.129	7	.071	-.13333	.06264	-.28145	.01479
	Equal variances not assumed			-2.043	3.699	.116	-.13333	.06525	-.32046	.05379

Appendix B Case Summary

1. District Court Cases

Table B-1 District Court Cases Collected for Analysis

Category		Copyright				Trademark			
		Taipei	Hsinchu	Tainan	Sum	Taipei	Hsinchu	Tainan	Sum
2007	Found Decisions	232	30	64	326	231	27	55	313
	Eligible Decisions	109	21	48	178	174	25	54	253
	Sentenced Defendants	117	25	48	190	185	32	63	280
2011	Found Decisions	104	29	40	173	134	34	64	232
	Eligible Decisions	43	17	23	83	94	34	58	186
	Sentenced Defendants	61	20	25	106	109	35	58	202

Source: On-line Database of the Judicial Yuan.

Note: Taipei: Taipei District Court; Hsinchu: Hsinchu District Court; Tainan: Tainan District Court.

Table B-2 District Court 2007 Copyright Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	Taipei 01/26/2007 95 Yi 1273	8-month	<ol style="list-style-type: none"> 1. Because the defendant was a legal recidivist and his offense related to optical media piracy, the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. 2. The defendant sold pirated VCDs and DVDs on streets for profit. 3. The police seized 21 pirated discs. 4. The defendant had a prior conviction in connection with IP piracy. 5. A real jail term was mandatory.
2	Taipei 01/31/2007	1. 48-month 2. 400K NT	<ol style="list-style-type: none"> 1. The defendants operated an optical disc factory manufacturing and exporting pirated American computer software. The factory was found manufacturing 461,000 pirated computer software discs. 2. The defendants were found to be career offenders. The minimum punishment for the offense was one-year imprisonment. 3. The defendants had no prior conviction but did not settle the case. 4. Real jail terms were sentenced because of the harm caused.
3	91 Su 1401	1. 36-month 2. 350K NT	
4	Taipei 04/09/2007 95 Su 729	14-month	<ol style="list-style-type: none"> 1. The defendant reprinted 13 books authored by a famous Korean go game master without authorization and sold pirated books for profit. 2. The defendant was found to be a career offender. The minimum punishment for the offense was one-year imprisonment. 3. The defendant had no prior conviction but did not settle the case. 4. A real jail term was sentenced because of the harm caused.
5	Taipei	8-month	<ol style="list-style-type: none"> 1. The defendant ordered an unknown manufacturer in Hong Kong to

	05/29/2007 96 Su 203		<p>pirated artistic works on case covers for NINTENDO video games, and then sold and exported pirated case covers to Paraguay for profit.</p> <ol style="list-style-type: none"> The defendant had no prior conviction but did not settle the case. When the package of pirate goods was transferred from the U.S. to Paraguay, the U.S. custom seized the 3.7 kg package. A real jail term was sentenced because of the harm caused.
6	Taipei 06/04/2007 95 Su 1715	14-month	<ol style="list-style-type: none"> The defendant pirated 196 Korean artistic works for nail decoration. He manufactured and sold pirated products for profit. The defendant was found to be a career offender. The minimum punishment for the offense was one-year imprisonment. The defendant had no prior conviction but did not settle the case. A real jail term was sentenced because of the harm caused.
7	Taipei	16-month	<ol style="list-style-type: none"> The defendants published Japanese comic books without authorization and sold pirated books for profit. The defendants were found to be career offenders. The minimum punishment for the offense was one-year imprisonment. The police seized about 50,000 pirated comic books. The defendants had no prior conviction but did not settle the case. Real jail terms were sentenced because of the harm caused.
8	06/29/2007 94 Su 1422	14-month	
9	Taipei 09/17/2007 96 Yi 1768	7-month	<ol style="list-style-type: none"> Because the defendant was a legal recidivist and his offense related to optical media piracy, the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. The defendant sold pirated Japanese drama VCDs and DVDs in his store. The police seized 8 pirated discs. A real jail term was mandatory.
10	Hsinchu 06/27/2007 96 Yi 243	8-month	<ol style="list-style-type: none"> Because the defendant was a legal recidivist and his offense related to optical discs, the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. The defendant used his fishing boat to import pirated SONY video game discs to Taiwan. The police seized 7,622 pirated discs. The harm was serious and a real jail term was mandatory.
11	Hsinchu 12/04/2007 95 Su 903	10-month	<ol style="list-style-type: none"> When the defendant sold the business of his video game store to the co-defendant, he assisted the co-defendant in pirating video games by providing equipment and skills. The police seized 58,964 pirated video game discs in the store. The defendant had a prior conviction in connection with copyright infringement and did not settle the case. The defendant was sentenced to 20 months but reduced to 10 months because of the 2007 prison overcrowding commutation. A real jail term was sentenced because of the harm caused.
12		12-month	<ol style="list-style-type: none"> The defendant pirated video games and sold them in his video game store for profit. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The police seized 58,964 pirated video game discs in the store. The defendant was arrested for copyright infringement before and did not settle the case. The defendant was sentenced to 24 months but reduced to 12 months because of the 2007 prison overcrowding commutation.

			6. A real jail term was sentenced because of the harm caused.
13	Tainan 03/01/2007 95 Su 272	22-month	1. The defendants manufactured and sold karaoke machines in which some unauthorized songs were added. 2. The defendants were found to be career offenders. The minimum punishment was one-year imprisonment.
14	Tainan 04/17/2007 95 Su 676	18-month	3. The defendants had no prior conviction but did not settle the case. 4. Real jail terms were sentenced because of the harm caused.
15	Tainan 04/10/2007 95 Su 1047	10-month	1. The defendant pirated Taiwanese puppet drama VCDs and DVDs in his store and sold around 300 pirated copies on the Internet. 2. The defendant had no prior conviction but did not settle the case. 3. A real jail term was sentenced because of the harm caused.

Source: On-line database of the Judicial Yuan.

Note: Taiwan implemented commutation in July 2007 to relieve overcrowded prisons. Zhonghua Minguo 96 Nian Zuifan Jianxing Tiaoli (中華民國 96 年罪犯減刑條例) [2007 Criminals Commutation Act], ZONGTONGFU GONGBAO (總統府公報) [PRESIDENTIAL OFF. GAZ.], no.6751, Jul. 4, 2007, at 11. According to Art. 2 of the 2007 Criminals Commutation Act, if a defendant committed an offense prior to June 24, 2007 and was sentenced by the court after July 16, 2007, the court, after it sentenced the defendant, had to reduce the sentence to one half. Also, Art. 9 provided that if a sentence was reduced to not more than six months imprisonment, the reduced sentence was convertible. Since the commutation was implemented in 2007, some unconvertible sentences should become convertible sentences in 2007. In theory, there should be more lenient sentences in 2007. It would be much easier to find the subsequent increase in severity, if other things being equal.

Table B-3 District Court 2011 Copyright Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	Taipei	12-month	1. The defendants jointly operated a factory manufacturing and selling pirated Japanese drama VCDs and DVDs. 2. The police seized 88,341 pirated discs . 3. The defendants had no prior conviction and settled the case. 4. Real jail terms were sentenced because of the harm caused.
2	02/16/2011 99 Zhisu 16	7-month	
3	Taipei 04/29/2011 100 Zhisuqi 1	1. 24-month 2. 700K NT	1. The defendant reproduced a large number of pirated VCDs and DVDs and sold them for profit. 2. The police seized 16,794 pirated discs . 3. The defendant had no prior conviction but did not settle the case. 4. A real jail term was sentenced because of the harm caused.
4	Taipei	18-month	1. The No. 4 defendant was a legal recidivist. 2. The defendants were engaged in a piracy network manufacturing and selling pirated video game and motion pictures discs all over Taiwan. 3. The police seized 8,064 pirated discs . 4. Except for the No. 4 defendant, the defendants had no prior conviction. 5. The No. 7 defendant settled the case but others did not. 6. Real jail terms were sentenced because of the harm caused.
5	07/19/2011	18-month	
6	98 Su 941	16-month	
7		18-month	
8		18-month	
9		18-month	
10		16-month	
11	Taipei 12/28/2011 100 Zhiyi 32	7-month	1. The defendant was a legal recidivist and the offense was related to optical media piracy, so the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. 2. The defendant participated in the operation of a video game store reproducing and selling pirated video game discs. 3. The police seized 26,423 pirated video game discs . 4. The defendant had a prior conviction in connection with trademark

			infringement and did not settle the case. 5. A real jail term was sentenced because of the harm caused.
12	Tainan 01/28/2011 99 Zhiyi 10	9-month	1. The defendant created and operated a website where a Korean on-line computer game was provided for profit . 2. The defendant had no prior conviction but did not settle the case. 3. A real jail term was sentenced because of the harm caused.
13	Tainan 03/15/2011 99 Zhisu 7	16-month	1. The defendant pirated English learning books published by the Oxford Press for a chain of English language schools that he operated. 2. The police seized 5,818 pirated books . 3. The defendant had no prior conviction but did not settle the case. 4. A real jail term was sentenced because of the harm caused.
14	Tainan 06/30/2011 99 Zhisu 6	8-month	1. The defendant was a legal recidivist and the offense of the case related to unauthorized reproduction of a copyrighted work with the intent to profit, so the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. 2. The defendant operated a company manufactured mops. However, he copied an instruction manual authored by its competitor for his products. 3. A real jail term was mandatory .
15	Tainan 10/06/2011 100 Zhiyi 14	8-month	1. The defendant was a legal recidivist and the offense of the case related to optical media piracy, so the minimum punishment was raised to 7-month imprisonment and placement on probation was impossible. 2. The defendant sold pirated motion pictures discs. 3. The defendant had two prior convictions in connection with copyright infringement and did not settle the case. 4. The police seized 262 pirated discs. 5. A real jail term was mandatory .

Source: On-line database of the Judicial Yuan.

Table B-4 District Court 2007 Trademark Real Jail Term Cases

	Court Docket no.	Punishment	Summary of Cases
1	Taipei 04/03/2007 95 Yi 721	8-month	1. The defendant sold counterfeit Jinmen sorghum wine (Kinmen Gaoliang Jiu), a popular brand in Taiwan, in the store he operated. 2. The police seized 97 bottles of counterfeit wine . 3. The defendant had no prior conviction but did not settle the case. 4. The offense might adversely affect public safety .
2	Taipei 05/31/2007 96 Yi 1110	8-month	1. The defendant was a legal recidivist. 2. The defendant sold counterfeit fashionable fine works at his on-street stall. 3. The offense infringed several foreign well-known trademarks including LV, CELINE, GUCCI, and DIOR . 4. The defendant had three prior convictions with respect to trademark infringement and did not settle the case. 5. The police seized 290 counterfeits .
3	Taipei 08/09/2007 95 Yi 1432	17-month	1. Knowing that his trademark authorization from a U.S. fire extinguisher company had expired, the defendant still used the U.S. company's trademark on his products and sold 143 extinguishers to the government and other companies.

			2. The defendant had no prior conviction but did not settle the case. 3. The offense might adversely affect public safety . A real jail term was sentenced because of the harm caused.
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Source: On-line database of the Judicial Yuan.

Table B-5 District Court 2011 Trademark Real Jail Term Cases

	Court Docket no.	Punishment	Summary of Cases
1	Taipei 07/29/2011 98 Yi 1614	7-month	1. The defendant ran a business specializing in selling foreign fashionable fine works. He intentionally sold counterfeit fashionable fine works through his on-line stores. 2. The offense infringed several foreign well-known trademarks including GUCCI, PRADA, and BURBERRY . 3. The police seized 50 counterfeits. 4. The defendant had no prior conviction but did not settle the case. 5. A real jail term was sentenced because of the harm caused.

Source: On-line database of the Judicial Yuan.

2. Appellate Court Cases

Table B-6 Appellate Court Cases Collected for Analysis

Category		Copyright				Trademark			
		Taipei	Hsinchu	Tainan	Sum	Taipei	Hsinchu	Tainan	Sum
2007 THC	Found Decisions	67	7	17	91	32	2	5	39
	Eligible Decisions	25	4	12	41	18	1	3	22
	Sentenced Defendants	28	5	16	49	24	1	4	29
2011 IPC	Found Decisions	29	3	9	41	16	0	7	23
	Eligible Decisions	13	2	5	20	5	0	2	7
	Sentenced Defendants	18	2	5	25	6	0	2	8

Source: On-line Database of the Judicial Yuan.

Note: THC: Taiwan High Court; IPC: Intellectual Property Court.

Table B-7 Appellate Court 2007 Copyright Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	THC 05/15/2007 92 Shangsü 4503	36-month (reduced)	1. The defendants were involved in a piracy network selling pirated motion pictures and computer software discs all over Taiwan . 2. The police seized 423 pirated discs . The defendant had a prior conviction in connection with copyright infringement and did not settle the case.

			<p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 46 months with a fine of 400 thousand NT dollars. The appellate court reversed the lower court's sentence and sentenced the defendant to 36 months without a fine.</p> <p>4. The lower court erred in application of law. However, the appellate court did not mention why it reduced the lower court's sentence.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
2	THC 05/31/2007 95 Shanggeng(2) 588	10-month (reduced)	<p>1. The defendant operated a company pirating 18 music albums of the victim. After manufacturing pirated CDs, the defendant sold them to retail music shops for profit.</p> <p>2. The police seized 8,136 pirated discs. The defendant had no prior conviction but did not settle the case.</p> <p>3. The lower court sentenced the defendant to 16 months with a fine of 200 thousand NT dollars. The appellate court reversed the lower court's sentence and sentenced the defendant to 10 months without a fine.</p> <p>4. The lower court erred in finding that the defendant pirated "20" music albums of the victim.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
3	THC 08/16/2007 96 Shanggeng(1) 231	1. 9-month 2. 225K NT	<p>1. The defendant was involved in an optical media factory manufacturing and selling pirated video game, motion pictures, and music discs.</p> <p>2. The police seized 2,065 pirated discs. The defendant had no prior conviction but did not settle the case.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 18 months with a fine of 450K NT dollars. The appellate court reversed the lower court's sentence, and sentenced the defendant to 18 months with a fine of 450 NT dollars and reduced the sentence to 9 months with a fine of 225 NT dollars due to the 2007 prison overcrowding commutation.</p> <p>4. The lower court erred in application of law.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
4	THC 09/20/2007 96 Shangsus 2064	6-month (reduced)	<p>1. The defendant reprinted 10 books authored by a famous Korean go game master without authorization and sold pirated books for profit.</p> <p>2. The defendant had no prior conviction but did not settle the case.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 14 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 12 months and reduced the sentence to 6 months due to the 2007 prison overcrowding commutation (Since the maximum imprisonment for the offense was more than 5 years, the 6 months term was therefore unconvertible).</p> <p>4. The lower court erred in finding "13" books were pirated.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
5	THC	6.5-month	<p>1. The defendant pirated 196 Korean artistic works for nail</p>

	09/27/2007 96 Shangsu 2997	(reduced)	<p>decoration. He manufactured and sold pirated products for profit.</p> <p>2. The defendant had no prior conviction but did not settle the case.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 14 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 13 months and reduced the sentence to 6.5 months due to the 2007 prison overcrowding commutation.</p> <p>4. The lower court erred in finding trademark infringement in this case.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
6	THC 12/27/2007 96 Zhongshanggeng(4) 153	6.5-month (reduced)	<p>1. Because the defendant was a legal recidivist and his prior conviction was connected to copyright infringement.</p> <p>2. The defendant sold pirated SONY and NINTENDO video game discs in his video game store.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 18 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 13 months and reduced the sentence to 6.5 months due to the 2007 prison overcrowding commutation.</p> <p>4. The lower court erred in finding all seized discs were pirated discs. In fact, some were not pirated discs. Nor did the lower court consider the settlement that was reached by both sides on appeal.</p> <p>5. The defendant settled the case on appeal.</p> <p>6. A real jail term was mandatory.</p>
7	THC 09/13/2007 95 Shanggeng(1) 720	9-month (reduced)	<p>1. The defendant reproduced and sold pirated SONY and NINTENDO video game discs in his video game store.</p> <p>2. The police seized 428 pirated discs.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 30 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 18 months and reduced the sentence to 9 months due to the 2007 prison overcrowding commutation.</p> <p>4. The lower court's sentence was reversed because of the 2007 prison overcrowding commutation (the appellate court did not mention why the 30 months was mitigated to 18 months).</p> <p>5. The defendant did not settle the case.</p> <p>6. A real jail term was sentenced because of the harm caused.</p>
8	THC 12/28/2007 95 Shanggeng(1) 645	9-month (reduced)	<p>1. The defendant was involved in an optical media factory manufacturing and selling pirated music CDs.</p> <p>2. The police seized 1,005 pirated discs. The defendant had no prior conviction but did not settle the case.</p> <p>3. The lower court sentenced the defendant to 22 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 18 months and reduced the sentence to 9 months due to the 2007 prison overcrowding commutation.</p> <p>4. The lower court erred in finding: (1) the defendant was a career</p>

			<p>offender and (2) 3,000 motion pictures discs seized were pirated discs (in fact, they were not).</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
9	THC Tainan 01/30/2007 95 Shangsu 1344	8-month	<p>1. The defendant reproduced and sold pirated computer software discs on the Internet for profit.</p> <p>2. The police seized 122 pirated discs.</p> <p>3. The defendant had no prior conviction but did not settle the case.</p> <p>4. The lower court sentenced the defendant to 8 months. The appellate court reversed the lower court's sentence and sentenced the defendant also to 8 months.</p> <p>5. The lower court erred in application of law.</p> <p>6. A real jail term was sentenced because of the harm caused.</p>
10	THC Tainan 02/14/2007 95 Shanggeng(2) 447	18-month	<p>1. The defendant was involving in a video game store selling pirated SONY, NINTENDO and MICROSOFT video game discs and cartridges.</p> <p>2. The police seized 16,053 pirated discs and cartridges.</p> <p>3. The defendant did not have prior conviction but did not settle the case.</p> <p>4. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 18 months. The appellate court reversed the lower court's sentence and sentenced the defendant also to 18 months.</p> <p>5. The lower court erred in application of law.</p> <p>6. A real jail term was sentenced because of the harm caused.</p>
11	THC Tainan 06/21/2007 95 Shanggeng(1) 248	1. 36-month 2. 200K NT (reduced)	<p>1. The No. 11 and No. 12 defendants jointly operated a factory manufacturing pirated music CDs, VCDs, DVDs and video game discs. The No. 13 defendant was an employee of the pirating factory. The No. 14 defendant bought pirated discs from the factory and then sold them to retailer stores and stalls all over Taiwan.</p> <p>2. The police seized 31,403 pirated discs.</p> <p>3. The defendant had no prior conviction and did not settle the case.</p> <p>4. All defendants were found to be career offenders. The minimum punishment was one year imprisonment. The lower court sentenced: (1) both No. 11 and 12 defendants to 60 months with a fine of 450K NT dollars, (2) the No. 13 to 24 months, and (3) the No. 14 to 24 months and a fine of 300K NT dollars. The appellate court reversed the lower court's sentences and sentenced: (1) the No. 11 and 12 defendants to 36 months with a fine of 200K NT dollars, (2) the No. 13 also to 24 months, and (3) the No. 14 to 18 months with a fine of 50K NT. The appellate court mitigated the punishments for the No. 11, 12, and 14 defendants.</p> <p>5. The lower court erred in finding part of seized discs were pirated discs (in fact they were not).</p> <p>6. Real jail terms were sentenced because of the harm caused.</p>
12		1. 36-month 2. 200K NT (reduced)	
13		24-month	
14		1. 18-month 2. 50K NT (reduced)	
15	THC Tainan 07/24/2007 96 Shangsu 597	9-month	<p>1. The defendant was involving in a factory manufacturing Karaoke machines in which several copyrighted songs were reproduced without authorization. The defendant sold the machines to retailer stores.</p>

			<ol style="list-style-type: none"> 2. The defendants had no prior conviction but did not settle the case. 3. The defendant was found to be a career offender. The minimum punishment was one-year imprisonment. The lower court sentenced the defendant to 18 months. The appellate court reversed the lower court's sentences, and sentenced the defendant to 18 months and reduced the sentence to 9 months due to the 2007 prison overcrowding commutation. 4. The appellate court reversed the district court decision because of the 2007 prison overcrowding commutation. 5. Real jail terms were sentenced because of the harm caused.
16	THC Tainan 08/29/2007 96 Shangsu 494	7-month (raised)	<ol style="list-style-type: none"> 1. The defendant forged a copyright authorization contract with respect to a series of famous Japanese cartoon, DORAEMON, and used the forged contract to convince a VCD manufacturer to reproduce 26,000 unauthorized copies. Later, he sold the pirated VCDs all over Taiwan. 2. The police seized 3,960 pirated discs. 3. The defendant had no prior conviction and settled the case. 4. The defendant was found to be a career offender. The minimum punishment was one year imprisonment. The lower court sentenced the defendant to 6 months. The appellate court reversed the lower court's sentence, and sentenced the defendant to 14 months but reduced the sentence to 7 months due to the 2007 prison overcrowding commutation. 5. The district court erred in finding the defendant not a career offender. 6. A real jail term was imposed because of the harm caused.

Source: On-line Database of the Judicial Yuan.

Note: THC Tainan: Taiwan High Court Tainan Branch Court.

Table B-8 Appellate Court 2011 Copyright Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	IPC 07/06/2011 100 Xingzhishangsu 40	12-month	<ol style="list-style-type: none"> 1. The defendant operated a company manufacturing and selling pirated Japanese drama DVDs all over Taiwan. 2. The police seized 88,339 pirated discs. The defendant had no prior conviction and settled the case. 3. The lower sentenced the defendant to 12 months. The appellate court overruled the defendant's appeal. 4. A real jail term was sentenced because of the harm caused.
2	IPC 09/05/2011	22-month (reduced)	<ol style="list-style-type: none"> 1. The defendants jointly operated a company manufacturing and selling pirated Microsoft computer software. They sold the pirated software to the United States, Canada, Germany, Netherland, Swiss, Britain, Australia, Singapore, Mainland China, and Hong Kong. 2. The police seized 147,763 pirated discs. The defendant had no prior conviction but did not settle the case. 3. Both defendants were found to be career offenders. The minimum punishment was one year imprisonment. The lower court sentenced the No. 2 and 3 defendants to 48 and 24 months, and reduced the sentences to 24 and 12 months
3	100 Xingzhishanggeng(1) 2	8-month (reduced)	

			<p>because of the 2007 prison overcrowding commutation. The appellate court reversed the lower court's sentences, and sentenced the defendants to 44 and 16 months and reduced the sentences to 22 and 8 months because of the 2007 prison overcrowding commutation.</p> <p>4. The appellate court found the defendants pirated only English, German, and Chinese versions. The lower court erred in finding the defendants pirated other language versions.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
4	IPC 05/26/2011 100 Xingzhishanggeng(1) 1	8-month (reduced)	<p>1. The defendant operated a video game store reproducing and selling pirated SONY, MICROSOFT, SEGA, and KOEI video game discs in the store and on the Internet.</p> <p>2. The police seized 50,311 pirated discs. The defendant had 2 prior convictions in connection with copyright infringement and did not settle the case.</p> <p>3. The defendant was found to be a career offender. The minimum punishment was one year imprisonment. The lower court sentenced the defendant to 24 months and reduced the sentence to 12 months because of the 2007 prison overcrowding commutation. The appellate court reversed the lower court's sentences, and sentenced the defendant to 16 months and reduced the sentence to 8 months because of the 2007 prison overcrowding commutation.</p> <p>4. The lower court erred in finding the defendant's trademark infringement with respect to a specific trademark.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
5	IPC 06/15/2011 100 Xingzhishangyi 27	9-month	<p>1. The defendant created and operated a website where a Korean on-line computer game was provided for profit.</p> <p>2. The defendant had no prior conviction but did not settle the case.</p> <p>3. The lower court sentenced the defendant to 9 months. The appellate court reversed the lower court's sentence and sentenced the defendant also to 9 months.</p> <p>4. The lower court erred in application of law.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>

Source: On-line Database of the Judicial Yuan.

Table B-9 Appellate Court 2007 Trademark Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	THC 01/23/2007 95 Shangyi 662	16-month (reduced)	<p>1. The defendant operated a store selling and displaying a great deal of LV fashionable fine products.</p> <p>2. The defendant had a prior conviction in connection with trademark infringement and did not settle the case.</p> <p>3. The lower court sentenced the defendant to 18 months. The appellate court reversed the sentence, and sentenced the defendant to 16 months. The appellate court did not specify the reason for the reduction.</p> <p>4. The lower court erred in application of law.</p> <p>5. A real jail term was sentenced because of the harm caused.</p>
2	THC	7-month	1. The defendant sold counterfeit Jinmen sorghum wine

	07/11/2007 96 Shangyi 1019		<p>(Kinmen Gaoliang Jiu) in the store he operated.</p> <p>2. The police seized 97 bottles of counterfeit wine.</p> <p>3. The defendant had no prior conviction but did not settle the case.</p> <p>4. The appellate court overruled the defendant's appeal and upheld the lower court's sentence.</p> <p>5. The offense might adversely affect public safety. A real jail term was sentenced because of the harm caused.</p>
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Source: On-line Database of the Judicial Yuan.

Table B-10 Appellate Court 2011 Trademark Real Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	IPC 07/27/2011 100 Xingzhishangyi 30	8-month (raised)	<p>1. The defendant operated a company selling counterfeit SONY ERICSON cell phone earphones and cases to retailer stores.</p> <p>2. The police seized 358 counterfeit earphones and cases.</p> <p>3. The defendant had no prior conviction but did not settle the case.</p> <p>4. The lower court sentenced the defendant to 4 months, a convertible term. The appellate court reversed the lower court's sentence and sentenced the defendant to 7 months, an unconvertible term.</p> <p>5. The appellate court specified that the lower court erred in not carefully considering the seriousness of the offense and the defendant's malice.</p> <p>6. A real jail term was sentenced because of the harm caused.</p>

Source: On-line Database of the Judicial Yuan.

Table B-11 Appellate Court 2011 Trademark Convertible Jail Term Cases

	Court Date Docket no.	Punishment	Summary of Cases
1	IPC 08/01/2011 100 Xingzhishangyi 46	50-day convertible	<p>1. The defendant used a service mark for his language school. However, the trademark was similar to the victim's registered service mark in relation to language schools.</p> <p>2. The defendants had no prior conviction but did not settle the case.</p> <p>3. The lower court acquitted the defendant. The appellate court found the defendant guilty of trademark infringement and reversed the lower court's decision.</p>
2	IPC 09/05/2011 100 Xingzhishangyi 47	5-month convertible probation	<p>1. The defendant operated a store selling and displaying counterfeit CHROME HEARTS silver jewelry.</p> <p>2. The police seized 9 pieces of counterfeit silver jewelry.</p> <p>3. The defendants had a prior deferred prosecution in connection with trademark infringement but settled this case on appeal.</p> <p>4. The lower court sentenced the defendant to 5 months. The appellate court reversed the sentence, and sentenced the defendant also to 5 months and placed him on probation because of the settlement on appeal.</p>

			5. The lower court erred in application of law.
3	IPC 10/05/2011 100 Xingzhishangyi 55	4-month convertible	<ol style="list-style-type: none"> 1. The defendant operated an on-line store selling and displaying counterfeit PANASONIC earphones. 2. The police seized 1 counterfeit. 3. The defendant had no prior conviction but did not settle the case. 4. The lower court sentenced the defendant to 4 months. The appellate court overruled the defendant's appeal.
4	IPC 11/23/2011	55-day convertible	<ol style="list-style-type: none"> 1. The defendants jointly operated a postnatal care center where women who had just given birth could receive special care and rest. However, the defendants used the service mark similar to the victim's registered service mark in relation to postnatal care centers. 2. The defendants had no prior conviction and settled the case on appeal. 3. The lower court sentenced the No. 4 defendant to 55 days and acquitted the No. 5 defendant. The appellate court found both defendants guilty and sentenced them to 55 and 20 days. 4. The appellate court reversed the lower court's decisions because it erred in application of law and finding the No. 5 defendant not guilty.
5	100 Xingzhishangyi 79	20-day convertible	
6	IPC 06/23/2011 100 Xingzhishangyi 28	6-month convertible probation	<ol style="list-style-type: none"> 1. (1) The defendant displayed a counterfeit LV wallet on the Internet with the intent to sell on Jul. 12, 2010. The police bought the counterfeit on the same day. (2) The defendant displayed a counterfeit GUCCI pocket on the Internet with the intent to sell on Aug. 13, 2010. The police bought the counterfeit on Aug. 14, 2010. 2. The police seized 2 counterfeits. 3. The defendants had no prior conviction and reached a settlement with GUCCI on appeal. The defendant did not reach a settlement with LV due to LV's reluctance to settle. 4. The lower court found the defendants' two counts guilty and sentenced the defendant to 4 and 4 months. The lower court combined two sentences and sentenced the defendant to 6 months. The appellate court overruled the defendant's appeal but placed her on probation because of the settlement with GUCCI on appeal.
7	IPC 10/20/2011 100 Xingzhishangyi 72	6-month convertible	<ol style="list-style-type: none"> 1. The defendant was a legal recidivist and his prior conviction related to trademark infringement. 2. The defendant from April 2010 to December 2010 sold and displayed counterfeit LEVI'S, ADDIDAS, PUMA, NIKE, and GUIXI apparel on an auction sites. 3. The police seized 328 counterfeits. 4. The defendant settled the case at trial. 5. The lower court sentenced the defendant to 6 months. The appellate court overruled the public prosecutor's appeal for more punishment.

Source: On-line Database of the Judicial Yuan.

Appendix C Case List

1. District Court Cases

Table C-1 District Court Case List

District Court 2007 Copyright Cases							
Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	Taipei	95	Su	776		01/05/2007	Copyright
2	Taipei	95	Jian	3681		01/09/2007	Copyright
3	Taipei	96	Jian	33		01/19/2007	Copyright
4	Taipei	95	Yi	1273		01/26/2007	Copyright
5	Taipei	95	Jian	2738		01/31/2007	Copyright
6	Taipei	95	Su	2049		01/31/2007	Copyright
7	Taipei	96	Jian	232		01/31/2007	Copyright
8	Taipei	95	Jianshang	336		01/31/2007	Copyright
9	Taipei	96	Jian	158		01/31/2007	Copyright
10	Taipei	91	Su	1401		01/31/2007	Copyright
11	Taipei	91	Su	1401		01/31/2007	Copyright
12	Taipei	95	Jian	4000		02/02/2007	Copyright
13	Taipei	96	Su	24		02/16/2007	Copyright
14	Taipei	95	Yi	1830		02/26/2007	Copyright
15	Taipei	95	Yi	1830		02/26/2007	Copyright
16	Taipei	95	Yi	4168		02/27/2007	Copyright
17	Taipei	96	Yi	148		02/27/2007	Copyright
18	Taipei	96	Jian	509		02/27/2007	Copyright
19	Taipei	95	Yi	1362		03/08/2007	Copyright
20	Taipei	95	Yi	1362		03/08/2007	Copyright
21	Taipei	95	Yi	1242		03/08/2007	Copyright
22	Taipei	95	Yi	1775		03/09/2007	Copyright
23	Taipei	95	Yi	2884		03/14/2007	Copyright
24	Taipei	96	Yi	199		03/19/2007	Copyright
25	Taipei	96	Jian	875		03/23/2007	Copyright
26	Taipei	96	Yi	248		03/29/2007	Copyright
27	Taipei	96	Jian	610		03/30/2007	Copyright
28	Taipei	96	Yi	461		03/30/2007	Copyright
29	Taipei	96	Su	161		04/03/2007	Copyright
30	Taipei	96	Yi	494		04/03/2007	Copyright
31	Taipei	95	Su	729		04/09/2007	Copyright
32	Taipei	96	Jian	1028		04/11/2007	Copyright
33	Taipei	95	Yi	2330		04/23/2007	Copyright
34	Taipei	96	Jian	870		04/26/2007	Copyright
35	Taipei	95	Yi	2746		05/07/2007	Copyright
36	Taipei	96	Yi	516		05/07/2007	Copyright
37	Taipei	96	Yi	741		05/07/2007	Copyright
38	Taipei	96	Jian	1541		05/11/2007	Copyright
39	Taipei	96	Jian	1398		05/14/2007	Copyright
40	Taipei	95	Jianshang	318		05/15/2007	Copyright
41	Taipei	96	Jianshang	66		05/17/2007	Copyright
42	Taipei	95	Yi	2815		05/18/2007	Copyright
43	Taipei	95	Yi	2815		05/18/2007	Copyright
44	Taipei	95	Yi	2815		05/18/2007	Copyright

45	Taipei	96	Su	203	05/29/2007	Copyright
46	Taipei	96	Yi	806	05/30/2007	Copyright
47	Taipei	96	Jian	389	05/31/2007	Copyright
48	Taipei	95	Su	1715	06/04/2007	Copyright
49	Taipei	96	Su	601	06/11/2007	Copyright
50	Taipei	96	Yi	863	06/11/2007	Copyright
51	Taipei	96	Yi	743	06/25/2007	Copyright
52	Taipei	96	Yi	1166	06/28/2007	Copyright
53	Taipei	94	Su	1422	06/29/2007	Copyright
54	Taipei	94	Su	1422	06/29/2007	Copyright
55	Taipei	95	Su	1920	07/12/2007	Copyright
56	Taipei	96	Su	612	07/19/2007	Copyright
57	Taipei	96	Jian	2125	07/20/2007	Copyright
58	Taipei	96	Jian	2304	07/23/2007	Copyright
59	Taipei	96	Jian	2186	07/23/2007	Copyright
60	Taipei	96	Jian	2419	07/25/2007	Copyright
61	Taipei	96	Yi	1467	07/25/2007	Copyright
62	Taipei	96	Su	504	08/02/2007	Copyright
63	Taipei	96	Jian	2516	08/06/2007	Copyright
64	Taipei	96	Jian	2539	08/09/2007	Copyright
65	Taipei	96	Jian	2535	08/14/2007	Copyright
66	Taipei	96	Yi	387	08/16/2007	Copyright
67	Taipei	96	Yi	387	08/16/2007	Copyright
68	Taipei	95	Yi	1170	08/17/2007	Copyright
69	Taipei	95	Yi	1170	08/17/2007	Copyright
70	Taipei	96	Jian	2645	08/20/2007	Copyright
71	Taipei	96	Yi	1552	08/20/2007	Copyright
72	Taipei	96	Zi	21	08/23/2007	Copyright
73	Taipei	96	Yi	1576	08/24/2007	Copyright
74	Taipei	96	Su	544	08/28/2007	Copyright
75	Taipei	95	Yi	124	08/28/2007	Copyright
76	Taipei	96	Jian	2644	08/31/2007	Copyright
77	Taipei	96	Jian	2503	08/31/2007	Copyright
78	Taipei	96	Jian	2588	08/31/2007	Copyright
79	Taipei	96	Yi	1963	08/31/2007	Copyright
80	Taipei	96	Yi	1285	09/03/2007	Copyright
81	Taipei	96	Jian	2577	09/05/2007	Copyright
82	Taipei	96	Jian	2824	09/06/2007	Copyright
83	Taipei	96	Jian	2396	09/07/2007	Copyright
84	Taipei	96	Yi	1768	09/17/2007	Copyright
85	Taipei	96	Jian	2736	09/26/2007	Copyright
86	Taipei	96	Jian	2860	09/26/2007	Copyright
87	Taipei	96	Jianshang	304	09/28/2007	Copyright
88	Taipei	96	Yi	1856	09/29/2007	Copyright
89	Taipei	96	Jian	2609	09/29/2007	Copyright
90	Taipei	96	Yi	2055	10/01/2007	Copyright
91	Taipei	96	Su	891	10/03/2007	Copyright
92	Taipei	96	Yi	1689	10/18/2007	Copyright
93	Taipei	96	Yi	2321	10/26/2007	Copyright
94	Taipei	96	Yi	1802	10/29/2007	Copyright
95	Taipei	96	Jian	2827	10/30/2007	Copyright
96	Taipei	96	Jian	2764	10/30/2007	Copyright
97	Taipei	96	Yi	2423	10/31/2007	Copyright
98	Taipei	96	Jian	3117	10/31/2007	Copyright

99	Taipei	96	Su	1187	10/31/2007	Copyright
100	Taipei	96	Jian	3384	11/01/2007	Copyright
101	Taipei	96	Jianshang	313	11/06/2007	Copyright
102	Taipei	96	Jian	3540	11/12/2007	Copyright
103	Taipei	96	Jianshang	177	11/14/2007	Copyright
104	Taipei	96	Yi	2069	11/26/2007	Copyright
105	Taipei	96	Jian	3838	11/30/2007	Copyright
106	Taipei	96	Jian	2251	11/30/2007	Copyright
107	Taipei	96	Jian	3788	12/04/2007	Copyright
108	Taipei	96	Jian	3973	12/10/2007	Copyright
109	Taipei	96	Yi	2741	12/11/2007	Copyright
110	Taipei	96	Yi	2741	12/11/2007	Copyright
111	Taipei	96	Su	456	12/13/2007	Copyright
112	Taipei	96	Yi	1902	12/24/2007	Copyright
113	Taipei	96	Jian	4278	12/27/2007	Copyright
114	Taipei	96	Jian	3854	12/28/2007	Copyright
115	Taipei	96	Yi	2965	12/28/2007	Copyright
116	Taipei	96	Jian	579	12/31/2007	Copyright
117	Taipei	96	Jian	3032	12/31/2007	Copyright
118	Hsinchu	95	Zhujian	1426	01/05/2007	Copyright
119	Hsinchu	95	Jianshang	188	02/15/2007	Copyright
120	Hsinchu	96	Zhujian	275	03/16/2007	Copyright
121	Hsinchu	96	Zhujian	389	03/30/2007	Copyright
122	Hsinchu	95	Zhujian	1433	04/13/2007	Copyright
123	Hsinchu	96	Su	95	04/20/2007	Copyright
124	Hsinchu	95	Zhujian	937	04/30/2007	Copyright
125	Hsinchu	96	Zhujian	250	04/30/2007	Copyright
126	Hsinchu	96	Zhujian	585	05/31/2007	Copyright
127	Hsinchu	96	Zhujian	848	06/22/2007	Copyright
128	Hsinchu	96	Yi	243	06/27/2007	Copyright
129	Hsinchu	96	Zhujian	834	07/11/2007	Copyright
130	Hsinchu	95	Jianshang	188	08/28/2007	Copyright
131	Hsinchu	96	Zhujian	838	10/18/2007	Copyright
132	Hsinchu	96	Zhujian	1076	10/26/2007	Copyright
133	Hsinchu	96	Zhujian	894	10/31/2007	Copyright
134	Hsinchu	95	Su	903	12/04/2007	Copyright
135	Hsinchu	95	Su	903	12/04/2007	Copyright
136	Hsinchu	95	Su	903	12/04/2007	Copyright
137	Hsinchu	95	Su	903	12/04/2007	Copyright
138	Hsinchu	95	Yi	417	12/17/2007	Copyright
139	Hsinchu	95	Yi	417	12/17/2007	Copyright
140	Hsinchu	96	Zhujian	1418	12/19/2007	Copyright
141	Hsinchu	96	Zhujian	934	12/21/2007	Copyright
142	Hsinchu	96	Zhujian	1333	12/31/2007	Copyright
143	Tainan	95	Jian	3907	01/02/2007	Copyright
144	Tainan	96	Jian	302	02/09/2007	Copyright
145	Tainan	95	Yi	1502	02/27/2007	Copyright
146	Tainan	95	Su	272	03/01/2007	Copyright
147	Tainan	96	Jian	654	03/05/2007	Copyright
148	Tainan	96	Jian	764	03/12/2007	Copyright
149	Tainan	96	Jian	637	03/28/2007	Copyright
150	Tainan	96	Jian	636	03/30/2007	Copyright
151	Tainan	95	Su	1047	04/10/2007	Copyright
152	Tainan	96	Su	334	04/16/2007	Copyright

153	Tainan	95	Jian	3942	04/16/2007	Copyright
154	Tainan	95	Su	676	04/17/2007	Copyright
155	Tainan	96	Jianshang	15	05/15/2007	Copyright
156	Tainan	96	Jian	1016	05/28/2007	Copyright
157	Tainan	96	Jian	1857	05/29/2007	Copyright
158	Tainan	96	Jian	1532	05/30/2007	Copyright
159	Tainan	96	Jian	2001	06/10/2007	Copyright
160	Tainan	96	Jian	2298	06/29/2007	Copyright
161	Tainan	96	Jian	2428	07/13/2007	Copyright
162	Tainan	96	Jian	2007	07/13/2007	Copyright
163	Tainan	95	Su	1634	07/16/2007	Copyright
164	Tainan	95	Su	1634	07/16/2007	Copyright
165	Tainan	95	Su	1542	07/25/2007	Copyright
166	Tainan	96	Jian	2422	07/30/2007	Copyright
167	Tainan	96	Jian	2423	07/31/2007	Copyright
168	Tainan	96	Jian	1145	08/13/2007	Copyright
169	Tainan	96	Jian	2857	08/22/2007	Copyright
170	Tainan	96	Yi	1968	08/31/2007	Copyright
171	Tainan	96	Jian	2826	09/07/2007	Copyright
172	Tainan	96	Su	171	09/17/2007	Copyright
173	Tainan	96	Jianshang	349	09/26/2007	Copyright
174	Tainan	96	Jianshang	282	09/27/2007	Copyright
175	Tainan	96	Jian	2898	09/29/2007	Copyright
176	Tainan	96	Jian	3328	10/04/2007	Copyright
177	Tainan	96	Su	1198	10/15/2007	Copyright
178	Tainan	96	Jianshang	199	10/16/2007	Copyright
179	Tainan	96	Jian	3523	10/16/2007	Copyright
180	Tainan	96	Jian	3574	10/19/2007	Copyright
181	Tainan	96	Jian	3444	10/22/2007	Copyright
182	Tainan	96	Jian	2833	10/30/2007	Copyright
183	Tainan	96	Su	1317	11/06/2007	Copyright
184	Tainan	96	Jian	3827	11/15/2007	Copyright
185	Tainan	96	Jian	3891	11/21/2007	Copyright
186	Tainan	96	Yi	774	12/12/2007	Copyright
187	Tainan	96	Jian	4304	12/24/2007	Copyright
188	Tainan	96	Jian	4266	12/25/2007	Copyright
189	Tainan	96	Jianshang	430	12/28/2007	Copyright
190	Tainan	96	Jian	4076	12/31/2007	Copyright

District Court 2011 Copyright Cases

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	Taipei	99	Zhijian	105		01/20/2011	Copyright
2	Taipei	100	Zhijian	9		01/31/2011	Copyright
3	Taipei	100	Zhijian	9		01/31/2011	Copyright
4	Taipei	99	Zhijian	121		02/14/2011	Copyright
5	Taipei	99	Zhisu	16		02/16/2011	Copyright
6	Taipei	99	Zhisu	16		02/16/2011	Copyright
7	Taipei	99	Zhisu	16		02/16/2011	Copyright
8	Taipei	99	Zhisu	16		02/16/2011	Copyright
9	Taipei	99	Zhisu	16		02/16/2011	Copyright
10	Taipei	100	Zhisu	2		02/24/2011	Copyright
11	Taipei	100	Zhiyi	12		02/25/2011	Copyright
12	Taipei	100	Zhijian	7		02/25/2011	Copyright
13	Taipei	100	Zhijian	4		02/25/2011	Copyright

14	Taipei	99	Zhijianshang	18	03/29/2011	Copyright
15	Taipei	99	Zhijianshang	18	03/29/2011	Copyright
16	Taipei	100	Zhiyi	3	03/31/2011	Copyright
17	Taipei	100	Zhiyi	2	04/15/2011	Copyright
18	Taipei	100	Zhisuqi	1	04/29/2011	Copyright
19	Taipei	100	Zhisu	14	05/04/2011	Copyright
20	Taipei	100	Zhisu	14	05/04/2011	Copyright
21	Taipei	100	Zhisu	14	05/04/2011	Copyright
22	Taipei	100	Zhiyi	22	05/09/2011	Copyright
23	Taipei	100	Zhiyi	23	05/25/2011	Copyright
24	Taipei	100	Zhiyi	28	06/14/2011	Copyright
25	Taipei	100	Zhijian	59	07/08/2011	Copyright
26	Taipei	100	Zhisu	11	07/11/2011	Copyright
27	Taipei	100	Zhijian	40	07/11/2011	Copyright
28	Taipei	100	Zhisu	1	07/18/2011	Copyright
29	Taipei	98	Su	941	07/19/2011	Copyright
30	Taipei	98	Su	941	07/19/2011	Copyright
31	Taipei	98	Su	941	07/19/2011	Copyright
32	Taipei	98	Su	941	07/19/2011	Copyright
33	Taipei	98	Su	941	07/19/2011	Copyright
34	Taipei	98	Su	941	07/19/2011	Copyright
35	Taipei	98	Su	941	07/19/2011	Copyright
36	Taipei	100	Zhiyi	34	07/22/2011	Copyright
37	Taipei	100	Zhijian	44	07/26/2011	Copyright
38	Taipei	100	Zhijian	56	07/29/2011	Copyright
39	Taipei	100	Zhiyi	50	08/31/2011	Copyright
40	Taipei	100	Zhijian	30	08/31/2011	Copyright
41	Taipei	100	Zhijian	69	08/31/2011	Copyright
42	Taipei	100	Zhijian	76	10/05/2011	Copyright
43	Taipei	100	Zhijian	83	10/11/2011	Copyright
44	Taipei	100	Zhisu	12	10/26/2011	Copyright
45	Taipei	100	Zhisu	22	10/31/2011	Copyright
46	Taipei	100	Zhisu	20	10/31/2011	Copyright
47	Taipei	100	Zhijianshang	7	11/23/2011	Copyright
48	Taipei	98	Su	30	11/23/2011	Copyright
49	Taipei	99	Zhiyi	77	12/16/2011	Copyright
50	Taipei	99	Zhiyi	77	12/16/2011	Copyright
51	Taipei	100	Zhiyi	69	12/20/2011	Copyright
52	Taipei	100	Zhiyi	69	12/20/2011	Copyright
53	Taipei	100	Zhijian	94	12/26/2011	Copyright
54	Taipei	100	Zhijian	87	12/26/2011	Copyright
55	Taipei	100	Zhijian	103	12/27/2011	Copyright
56	Taipei	100	Zhijian	103	12/27/2011	Copyright
57	Taipei	100	Zhijian	101	12/27/2011	Copyright
58	Taipei	100	Zhiyi	32	12/28/2011	Copyright
59	Taipei	100	Zhiyi	32	12/28/2011	Copyright
60	Taipei	100	Zhijian	38	12/30/2011	Copyright
61	Taipei	100	Zhijian	110	12/30/2011	Copyright
62	Hsinchu	99	Shenzhisu	2	01/07/2011	Copyright
63	Hsinchu	99	Shenzhijian	13	02/14/2011	Copyright
64	Hsinchu	99	Shenzhiyi	12	03/23/2011	Copyright
65	Hsinchu	100	Shenzhijian	8	07/18/2011	Copyright
66	Hsinchu	100	Shenzhisu	3	08/31/2011	Copyright
67	Hsinchu	100	Zhijian	7	09/14/2011	Copyright

68	Hsinchu	100	Shenzhisu	1	09/15/2011	Copyright
69	Hsinchu	100	Shenzhisu	1	09/15/2011	Copyright
70	Hsinchu	100	Shenzhiyi	9	09/27/2011	Copyright
71	Hsinchu	100	Shenzhiyi	11	10/04/2011	Copyright
72	Hsinchu	100	Zhijian	8	10/06/2011	Copyright
73	Hsinchu	100	Zhijian	18	10/07/2011	Copyright
74	Hsinchu	100	Shenzhiyi	14	10/25/2011	Copyright
75	Hsinchu	100	Zhijian	17	10/27/2011	Copyright
76	Hsinchu	100	Zhijian	17	10/27/2011	Copyright
77	Hsinchu	100	Zhijian	12	11/16/2011	Copyright
78	Hsinchu	100	Shenzhijian	19	11/24/2011	Copyright
79	Hsinchu	100	Shenzhisu	7	12/09/2011	Copyright
80	Hsinchu	100	Shenzhisu	7	12/09/2011	Copyright
81	Hsinchu	100	Zhijian	19	12/20/2011	Copyright
82	Tainan	99	Zhiyi	10	01/28/2011	Copyright
83	Tainan	100	Zhijian	4	02/25/2011	Copyright
84	Tainan	99	Zhisu	7	03/15/2011	Copyright
85	Tainan	99	Zhijianshanggeng(3)	1	03/31/2011	Copyright
86	Tainan	100	Zhijian	18	04/14/2011	Copyright
87	Tainan	100	Zhisu	2	04/28/2011	Copyright
88	Tainan	99	Zhisu	9	05/31/2011	Copyright
89	Tainan	100	Zhijian	32	06/16/2011	Copyright
90	Tainan	100	Zhijian	30	06/30/2011	Copyright
91	Tainan	99	Zhisu	6	06/30/2011	Copyright
92	Tainan	99	Zhisu	3	06/30/2011	Copyright
93	Tainan	100	Zhijian	33	06/30/2011	Copyright
94	Tainan	100	Zhijianshang	2	07/19/2011	Copyright
95	Tainan	100	Zhisu	1	07/20/2011	Copyright
96	Tainan	100	Zhijian	36	09/07/2011	Copyright
97	Tainan	100	Zhijianshang	6	09/13/2011	Copyright
98	Tainan	100	Zhiyi	14	10/06/2011	Copyright
99	Tainan	100	Zhijian	20	10/18/2011	Copyright
100	Tainan	100	Zhisu	6	10/25/2011	Copyright
101	Tainan	100	Zhisu	6	10/25/2011	Copyright
102	Tainan	100	Zhiyi	11	11/29/2011	Copyright
103	Tainan	100	Zhiyi	11	11/29/2011	Copyright
104	Tainan	100	Zhijian	61	12/01/2011	Copyright
105	Tainan	100	Zhisu	8	12/22/2011	Copyright
106	Tainan	100	Zhiyi	16	12/29/2011	Copyright

District Court 2007 Trademark Cases

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	Taipei	95	Jian	3606		01/09/2007	Trademark
2	Taipei	95	Jian	3384		01/09/2007	Trademark
3	Taipei	95	Yi	1139		01/09/2007	Trademark
4	Taipei	96	Jian	40		01/11/2007	Trademark
5	Taipei	95	Yi	2797		01/19/2007	Trademark
6	Taipei	95	Jian	4131		01/19/2007	Trademark
7	Taipei	95	Yi	2611		01/22/2007	Trademark
8	Taipei	96	Jian	159		01/22/2007	Trademark
9	Taipei	96	Jian	159		01/22/2007	Trademark
10	Taipei	96	Jian	178		01/24/2007	Trademark
11	Taipei	94	Yi	1615		01/25/2007	Trademark
12	Taipei	95	Yi	2850		01/26/2007	Trademark

13	Taipei	95	Yi	2850	01/26/2007	Trademark
14	Taipei	95	Yi	2270	01/29/2007	Trademark
15	Taipei	95	Yi	2270	01/29/2007	Trademark
16	Taipei	95	Yi	2908	01/30/2007	Trademark
17	Taipei	96	Jian	180	01/30/2007	Trademark
18	Taipei	96	Jian	212	01/31/2007	Trademark
19	Taipei	96	Jian	212	01/31/2007	Trademark
20	Taipei	96	Jian	262	01/31/2007	Trademark
21	Taipei	95	Yi	2934	01/31/2007	Trademark
22	Taipei	95	Yi	2889	01/31/2007	Trademark
23	Taipei	95	Jian	4170	01/31/2007	Trademark
24	Taipei	96	Jian	238	01/31/2007	Trademark
25	Taipei	96	Jian	277	02/06/2007	Trademark
26	Taipei	96	Jian	435	02/12/2007	Trademark
27	Taipei	95	Yi	2055	02/15/2007	Trademark
28	Taipei	96	Yi	185	02/27/2007	Trademark
29	Taipei	96	Jian	3394	02/27/2007	Trademark
30	Taipei	96	Jian	3394	02/27/2007	Trademark
31	Taipei	96	Jian	588	02/27/2007	Trademark
32	Taipei	96	Jian	584	02/27/2007	Trademark
33	Taipei	96	Jian	659	03/13/2007	Trademark
34	Taipei	96	Jian	607	03/14/2007	Trademark
35	Taipei	96	Yi	312	03/16/2007	Trademark
36	Taipei	96	Yi	222	03/19/2007	Trademark
37	Taipei	96	Yi	222	03/19/2007	Trademark
38	Taipei	96	Yi	300	03/20/2007	Trademark
39	Taipei	96	Jian	864	03/22/2007	Trademark
40	Taipei	95	Yi	2397	03/22/2007	Trademark
41	Taipei	96	Jian	808	03/28/2007	Trademark
42	Taipei	96	Yi	376	03/29/2007	Trademark
43	Taipei	96	Jian	239	03/30/2007	Trademark
44	Taipei	96	Jian	896	03/30/2007	Trademark
45	Taipei	96	Jian	586	04/02/2007	Trademark
46	Taipei	95	Yi	721	04/03/2007	Trademark
47	Taipei	96	Yi	519	04/12/2007	Trademark
48	Taipei	96	Yi	519	04/12/2007	Trademark
49	Taipei	96	Yi	624	04/23/2007	Trademark
50	Taipei	96	Yi	169	04/23/2007	Trademark
51	Taipei	96	Jian	1176	04/24/2007	Trademark
52	Taipei	96	Jian	1176	04/24/2007	Trademark
53	Taipei	96	Jian	1199	04/30/2007	Trademark
54	Taipei	96	Jian	1056	04/30/2007	Trademark
55	Taipei	96	Jian	1038	04/30/2007	Trademark
56	Taipei	96	Yi	684	04/30/2007	Trademark
57	Taipei	96	Jian	1418	05/04/2007	Trademark
58	Taipei	96	Jian	1442	05/07/2007	Trademark
59	Taipei	96	Yi	313	05/07/2007	Trademark
60	Taipei	96	Yiqi	37	05/09/2007	Trademark
61	Taipei	96	Yi	617	05/09/2007	Trademark
62	Taipei	96	Jian	1476	05/10/2007	Trademark
63	Taipei	96	Jian	1533	05/14/2007	Trademark
64	Taipei	95	Yi	2268	05/16/2007	Trademark
65	Taipei	95	Yi	2268	05/16/2007	Trademark
66	Taipei	96	Yi	563	05/21/2007	Trademark

67	Taipei	96	Jian	1731	05/24/2007	Trademark
68	Taipei	96	Jian	1594	05/31/2007	Trademark
69	Taipei	96	Jian	1552	05/31/2007	Trademark
70	Taipei	96	Yi	1110	05/31/2007	Trademark
71	Taipei	96	Jian	1704	05/31/2007	Trademark
72	Taipei	96	Jian	1532	06/05/2007	Trademark
73	Taipei	96	Jian	1532	06/05/2007	Trademark
74	Taipei	96	Jianshang	124	06/06/2007	Trademark
75	Taipei	96	Jian	1977	06/14/2007	Trademark
76	Taipei	96	Yi	495	06/22/2007	Trademark
77	Taipei	96	Yi	971	06/29/2007	Trademark
78	Taipei	96	Yi	971	06/29/2007	Trademark
79	Taipei	96	Jian	2235	07/06/2007	Trademark
80	Taipei	96	Yi	1165	07/12/2007	Trademark
81	Taipei	96	Jian	2305	07/13/2007	Trademark
82	Taipei	96	Yi	1237	07/13/2007	Trademark
83	Taipei	96	Jianshang	178	07/13/2007	Trademark
84	Taipei	96	Jian	2243	07/16/2007	Trademark
85	Taipei	96	Jian	1773	07/20/2007	Trademark
86	Taipei	96	Jian	2420	07/25/2007	Trademark
87	Taipei	96	Yi	395	07/25/2007	Trademark
88	Taipei	96	Yi	1352	07/26/2007	Trademark
89	Taipei	96	Yi	96	07/30/2007	Trademark
90	Taipei	96	Jian	1990	07/30/2007	Trademark
91	Taipei	96	Yi	1319	07/31/2007	Trademark
92	Taipei	96	Jian	2176	07/31/2007	Trademark
93	Taipei	96	Jian	2395	07/31/2007	Trademark
94	Taipei	96	Jian	2441	07/31/2007	Trademark
95	Taipei	96	Yi	404	07/31/2007	Trademark
96	Taipei	96	Yi	1007	08/06/2007	Trademark
97	Taipei	95	Yi	1432	08/09/2007	Trademark
98	Taipei	96	Jian	2629	08/16/2007	Trademark
99	Taipei	96	Jian	2647	08/23/2007	Trademark
100	Taipei	96	Jian	2729	08/27/2007	Trademark
101	Taipei	96	Jian	2738	08/27/2007	Trademark
102	Taipei	96	Jianshang	316	08/28/2007	Trademark
103	Taipei	96	Jianshang	248	08/28/2007	Trademark
104	Taipei	96	Jian	2737	08/28/2007	Trademark
105	Taipei	96	Jianshang	284	08/28/2007	Trademark
106	Taipei	96	Yi	1820	08/30/2007	Trademark
107	Taipei	96	Yi	1859	08/30/2007	Trademark
108	Taipei	96	Jian	2712	08/31/2007	Trademark
109	Taipei	96	Jian	2697	08/31/2007	Trademark
110	Taipei	96	Jian	2247	08/31/2007	Trademark
111	Taipei	96	Jian	2710	08/31/2007	Trademark
112	Taipei	96	Jian	2576	09/10/2007	Trademark
113	Taipei	96	Jian	2894	09/14/2007	Trademark
114	Taipei	96	Yi	1468	09/17/2007	Trademark
115	Taipei	96	Jian	2893	09/19/2007	Trademark
116	Taipei	96	Jian	2242	09/19/2007	Trademark
117	Taipei	96	Jianshang	290	09/19/2007	Trademark
118	Taipei	96	Jianshang	179	09/27/2007	Trademark
119	Taipei	96	Jian	2912	09/29/2007	Trademark
120	Taipei	96	Jian	2699	09/30/2007	Trademark

121	Taipei	96	Jian	2889	09/30/2007	Trademark
122	Taipei	96	Jian	3058	10/02/2007	Trademark
123	Taipei	96	Yi	2191	10/04/2007	Trademark
124	Taipei	96	Yi	1862	10/04/2007	Trademark
125	Taipei	96	Jian	3031	10/05/2007	Trademark
126	Taipei	96	Jian	2891	10/11/2007	Trademark
127	Taipei	96	Jian	3113	10/15/2007	Trademark
128	Taipei	96	Yi	1966	10/15/2007	Trademark
129	Taipei	96	Jian	3173	10/17/2007	Trademark
130	Taipei	96	Jian	3170	10/17/2007	Trademark
131	Taipei	96	Yi	970	10/19/2007	Trademark
132	Taipei	96	Yi	200	10/25/2007	Trademark
133	Taipei	96	Jian	3381	10/26/2007	Trademark
134	Taipei	96	Jian	3064	10/31/2007	Trademark
135	Taipei	96	Jian	2987	10/31/2007	Trademark
136	Taipei	96	Jian	3496	11/12/2007	Trademark
137	Taipei	96	Jian	3611	11/13/2007	Trademark
138	Taipei	96	Jian	3719	11/16/2007	Trademark
139	Taipei	96	Jian	3773	11/22/2007	Trademark
140	Taipei	96	Jian	3676	11/22/2007	Trademark
141	Taipei	96	Jian	3775	11/22/2007	Trademark
142	Taipei	96	Jian	3760	11/22/2007	Trademark
143	Taipei	96	Jian	3774	11/23/2007	Trademark
144	Taipei	96	Jian	3761	11/23/2007	Trademark
145	Taipei	96	Jian	3717	11/23/2007	Trademark
146	Taipei	96	Yi	2592	11/29/2007	Trademark
147	Taipei	96	Jian	3488	11/30/2007	Trademark
148	Taipei	96	Jian	3308	11/30/2007	Trademark
149	Taipei	96	Jian	3112	11/30/2007	Trademark
150	Taipei	96	Jian	2676	11/30/2007	Trademark
151	Taipei	96	Jian	3846	11/30/2007	Trademark
152	Taipei	96	Jian	3675	11/30/2007	Trademark
153	Taipei	96	Jian	3615	11/30/2007	Trademark
154	Taipei	96	Jian	3941	12/05/2007	Trademark
155	Taipei	96	Jian	3996	12/11/2007	Trademark
156	Taipei	96	Jian	4130	12/19/2007	Trademark
157	Taipei	96	Jian	4028	12/20/2007	Trademark
158	Taipei	96	Yi	2659	12/21/2007	Trademark
159	Taipei	96	Yi	2989	12/21/2007	Trademark
160	Taipei	96	Jian	4127	12/24/2007	Trademark
161	Taipei	96	Jianshang	439	12/24/2007	Trademark
162	Taipei	96	Jian	4050	12/28/2007	Trademark
163	Taipei	96	Jian	3776	12/28/2007	Trademark
164	Taipei	96	Jian	3718	12/28/2007	Trademark
165	Taipei	96	Jian	4128	12/28/2007	Trademark
166	Taipei	96	Jian	4319	12/28/2007	Trademark
167	Taipei	96	Yi	2307	12/28/2007	Trademark
168	Taipei	96	Jian	4320	12/31/2007	Trademark
169	Taipei	96	Jian	4239	12/31/2007	Trademark
170	Taipei	96	Jian	4089	12/31/2007	Trademark
171	Taipei	96	Jian	3901	12/31/2007	Trademark
172	Taipei	96	Jian	3809	12/31/2007	Trademark
173	Taipei	96	Jian	3727	12/31/2007	Trademark
174	Taipei	96	Jian	3457	12/31/2007	Trademark

175	Taipei	96	Jian	3379	12/31/2007	Trademark
176	Taipei	96	Jian	3252	12/31/2007	Trademark
177	Taipei	96	Jian	2890	12/31/2007	Trademark
178	Taipei	96	Jianshang	440	12/31/2007	Trademark
179	Taipei	96	Jian	4131	12/31/2007	Trademark
180	Taipei	96	Jian	4129	12/31/2007	Trademark
181	Taipei	96	Jian	3940	12/31/2007	Trademark
182	Taipei	96	Jian	3919	12/31/2007	Trademark
183	Taipei	96	Jian	3804	12/31/2007	Trademark
184	Taipei	96	Yi	2632	12/31/2007	Trademark
185	Taipei	96	Jianshang	437	12/31/2007	Trademark
186	Hsinchu	95	Zhujian	1278	01/08/2007	Trademark
187	Hsinchu	95	Zhujian	1430	01/08/2007	Trademark
188	Hsinchu	96	Zhujian	31	01/12/2007	Trademark
189	Hsinchu	96	Zhujian	56	01/29/2007	Trademark
190	Hsinchu	96	Zhujian	263	03/16/2007	Trademark
191	Hsinchu	96	Zhujian	394	03/21/2007	Trademark
192	Hsinchu	95	Zhujian	945	03/22/2007	Trademark
193	Hsinchu	95	Zhujian	550	03/23/2007	Trademark
194	Hsinchu	95	Zhujian	550	03/23/2007	Trademark
195	Hsinchu	95	Zhujian	550	03/23/2007	Trademark
196	Hsinchu	95	Zhujian	550	03/23/2007	Trademark
197	Hsinchu	96	Zhujian	322	03/30/2007	Trademark
198	Hsinchu	96	Zhujian	123	03/30/2007	Trademark
199	Hsinchu	96	Zhujian	438	03/30/2007	Trademark
200	Hsinchu	96	Zhujian	262	04/30/2007	Trademark
201	Hsinchu	96	Zhujian	108	05/31/2007	Trademark
202	Hsinchu	96	Zhujian	165	05/31/2007	Trademark
203	Hsinchu	96	Zhujian	165	05/31/2007	Trademark
204	Hsinchu	96	Zhujian	165	05/31/2007	Trademark
205	Hsinchu	96	Zhujian	165	05/31/2007	Trademark
206	Hsinchu	96	Zhujian	754	06/26/2007	Trademark
207	Hsinchu	96	Zhujian	754	06/26/2007	Trademark
208	Hsinchu	96	Yi	267	07/18/2007	Trademark
209	Hsinchu	96	Zhujian	863	07/30/2007	Trademark
210	Hsinchu	96	Zhujian	1156	09/27/2007	Trademark
211	Hsinchu	96	Zhujian	951	09/29/2007	Trademark
212	Hsinchu	94	Yi	630	11/14/2007	Trademark
213	Hsinchu	96	Zhujian	1220	11/23/2007	Trademark
214	Hsinchu	96	Zhujian	1027	11/30/2007	Trademark
215	Hsinchu	96	Zhujian	1424	12/07/2007	Trademark
216	Hsinchu	96	Zhujian	1332	12/11/2007	Trademark
217	Hsinchu	96	Zhujian	1455	12/31/2007	Trademark
218	Tainan	95	Jian	3381	01/18/2007	Trademark
219	Tainan	96	Jian	303	01/29/2007	Trademark
220	Tainan	96	Jian	453	02/09/2007	Trademark
221	Tainan	96	Jian	19	02/14/2007	Trademark
222	Tainan	96	Jian	107	02/16/2007	Trademark
223	Tainan	96	Jian	107	02/16/2007	Trademark
224	Tainan	96	Jian	471	02/27/2007	Trademark
225	Tainan	95	Jianshang	321	03/01/2007	Trademark
226	Tainan	96	Jian	706	03/08/2007	Trademark
227	Tainan	95	Jian	2480	03/28/2007	Trademark
228	Tainan	96	Jian	1060	03/29/2007	Trademark

229	Tainan	96	Jian	777	03/30/2007	Trademark
230	Tainan	96	Jian	781	04/14/2007	Trademark
231	Tainan	96	Jian	1249	04/14/2007	Trademark
232	Tainan	96	Jian	1245	04/14/2007	Trademark
233	Tainan	95	Jian	3754	04/16/2007	Trademark
234	Tainan	95	Jian	3754	04/16/2007	Trademark
235	Tainan	95	Jian	3754	04/16/2007	Trademark
236	Tainan	95	Jian	3754	04/16/2007	Trademark
237	Tainan	95	Jian	3754	04/16/2007	Trademark
238	Tainan	95	Jian	2700	04/23/2007	Trademark
239	Tainan	95	Jian	2700	04/23/2007	Trademark
240	Tainan	95	Jian	2700	04/23/2007	Trademark
241	Tainan	96	Jian	1220	04/23/2007	Trademark
242	Tainan	96	Jian	1258	04/23/2007	Trademark
243	Tainan	96	Jian	1539	05/04/2007	Trademark
244	Tainan	96	Yi	478	05/16/2007	Trademark
245	Tainan	96	Jian	1838	05/25/2007	Trademark
246	Tainan	96	Jian	1875	05/30/2007	Trademark
247	Tainan	96	Jian	2157	06/22/2007	Trademark
248	Tainan	96	Jian	2072	06/28/2007	Trademark
249	Tainan	96	Jian	2206	06/29/2007	Trademark
250	Tainan	96	Jian	1844	07/09/2007	Trademark
251	Tainan	96	Jian	2031	07/13/2007	Trademark
252	Tainan	96	Jian	2307	07/30/2007	Trademark
253	Tainan	96	Jian	2683	07/31/2007	Trademark
254	Tainan	96	Yi	645	08/02/2007	Trademark
255	Tainan	95	Yi	1310	08/02/2007	Trademark
256	Tainan	95	Yi	1310	08/02/2007	Trademark
257	Tainan	95	Yi	1310	08/02/2007	Trademark
258	Tainan	96	Jian	2619	08/03/2007	Trademark
259	Tainan	96	Jian	2649	08/27/2007	Trademark
260	Tainan	96	Jian	3075	08/31/2007	Trademark
261	Tainan	96	Jian	2451	08/31/2007	Trademark
262	Tainan	96	Jian	3102	09/04/2007	Trademark
263	Tainan	96	Yi	994	09/14/2007	Trademark
264	Tainan	96	Jian	3107	09/18/2007	Trademark
265	Tainan	96	Jian	2939	09/21/2007	Trademark
266	Tainan	96	Jian	3270	09/27/2007	Trademark
267	Tainan	96	Jian	2994	09/29/2007	Trademark
268	Tainan	96	Jian	3262	09/29/2007	Trademark
269	Tainan	96	Jian	3375	10/29/2007	Trademark
270	Tainan	96	Jian	3656	10/29/2007	Trademark
271	Tainan	96	Yi	1003	10/31/2007	Trademark
272	Tainan	95	Yi	1578	11/08/2007	Trademark
273	Tainan	96	Jian	3848	11/14/2007	Trademark
274	Tainan	96	Jian	3895	11/20/2007	Trademark
275	Tainan	96	Jian	3893	11/30/2007	Trademark
276	Tainan	96	Jian	4019	11/30/2007	Trademark
277	Tainan	96	Jian	4018	12/20/2007	Trademark
278	Tainan	96	Jian	3653	12/20/2007	Trademark
279	Tainan	96	Jian	4369	12/28/2007	Trademark
280	Tainan	96	Jian	4430	12/31/2007	Trademark

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	Taipei	99	Zhiyi	82		01/28/2011	Trademark
2	Taipei	99	Zhiyi	82		01/28/2011	Trademark
3	Taipei	99	Zhijian	129		01/31/2011	Trademark
4	Taipei	100	Zhijian	12		01/31/2011	Trademark
5	Taipei	99	Zhiyi	87		01/31/2011	Trademark
6	Taipei	99	Zhiyi	59		01/31/2011	Trademark
7	Taipei	100	Zhijian	14		02/16/2011	Trademark
8	Taipei	100	Zhijian	8		02/17/2011	Trademark
9	Taipei	100	Zhijian	6		02/21/2011	Trademark
10	Taipei	99	Zhiyi	71		02/24/2011	Trademark
11	Taipei	99	Zhiyi	71		02/24/2011	Trademark
12	Taipei	99	Zhiyi	71		02/24/2011	Trademark
13	Taipei	100	Zhijian	16		02/24/2011	Trademark
14	Taipei	100	Zhijian	13		02/25/2011	Trademark
15	Taipei	100	Zhijian	17		02/25/2011	Trademark
16	Taipei	99	Zhiyi	60		03/11/2011	Trademark
17	Taipei	100	Zhiyi	5		03/21/2011	Trademark
18	Taipei	99	Zhiyi	89		03/25/2011	Trademark
19	Taipei	100	Zhijian	23		03/28/2011	Trademark
20	Taipei	99	Zhijianshang	17		03/29/2011	Trademark
21	Taipei	99	Zhijianshang	17		03/29/2011	Trademark
22	Taipei	100	Zhijian	28		03/30/2011	Trademark
23	Taipei	100	Zhijian	29		03/31/2011	Trademark
24	Taipei	100	Zhijian	20		03/31/2011	Trademark
25	Taipei	100	Zhijian	20		03/31/2011	Trademark
26	Taipei	100	Zhijian	2		03/31/2011	Trademark
27	Taipei	100	Zhiyi	10		03/31/2011	Trademark
28	Taipei	100	Zhijian	10		04/06/2011	Trademark
29	Taipei	99	Zhiyi	76		04/15/2011	Trademark
30	Taipei	100	Zhijian	21		04/19/2011	Trademark
31	Taipei	100	Zhijian	35		04/25/2011	Trademark
32	Taipei	100	Zhijian	34		04/26/2011	Trademark
33	Taipei	100	Zhijian	37		04/27/2011	Trademark
34	Taipei	100	Zhijian	24		04/28/2011	Trademark
35	Taipei	100	Zhijian	32		04/29/2011	Trademark
36	Taipei	100	Zhijian	19		04/29/2011	Trademark
37	Taipei	100	Zhijian	41		04/29/2011	Trademark
38	Taipei	100	Zhijian	36		04/29/2011	Trademark
39	Taipei	100	Zhijian	1		05/02/2011	Trademark
40	Taipei	100	Zhijian	43		05/09/2011	Trademark
41	Taipei	100	Zhiyi	16		05/18/2011	Trademark
42	Taipei	100	Zhijian	25		05/20/2011	Trademark
43	Taipei	100	Zhijian	46		05/24/2011	Trademark
44	Taipei	100	Zhijianshang	3		05/24/2011	Trademark
45	Taipei	100	Zhijian	50		05/31/2011	Trademark
46	Taipei	100	Zhijian	48		05/31/2011	Trademark
47	Taipei	100	Zhiyi	33		05/31/2011	Trademark
48	Taipei	100	Zhijian	42		05/31/2011	Trademark
49	Taipei	100	Zhijian	47		06/08/2011	Trademark
50	Taipei	100	Zhijian	51		06/10/2011	Trademark
51	Taipei	100	Zhiyi	1		06/17/2011	Trademark
52	Taipei	100	Zhijian	54		06/29/2011	Trademark

53	Taipei	100	Zhijian	53	06/30/2011	Trademark
54	Taipei	100	Zhijian	52	06/30/2011	Trademark
55	Taipei	100	Zhijian	57	07/04/2011	Trademark
56	Taipei	100	Zhijianshang	5	07/22/2011	Trademark
57	Taipei	100	Zhijian	65	07/25/2011	Trademark
58	Taipei	100	Zhijian	61	07/25/2011	Trademark
59	Taipei	100	Zhijian	68	07/27/2011	Trademark
60	Taipei	98	Yi	1614	07/29/2011	Trademark
61	Taipei	100	Zhijian	66	07/29/2011	Trademark
62	Taipei	100	Zhijian	71	08/05/2011	Trademark
63	Taipei	100	Zhiyi	42	08/12/2011	Trademark
64	Taipei	100	Zhiyi	42	08/12/2011	Trademark
65	Taipei	100	Zhijianshang	8	08/15/2011	Trademark
66	Taipei	100	Zhijian	73	08/26/2011	Trademark
67	Taipei	100	Zhiyi	49	08/29/2011	Trademark
68	Taipei	100	Zhijian	49	08/29/2011	Trademark
69	Taipei	100	Zhijian	49	08/29/2011	Trademark
70	Taipei	100	Zhijian	49	08/29/2011	Trademark
71	Taipei	100	Zhijian	70	08/31/2011	Trademark
72	Taipei	100	Zhijian	55	08/31/2011	Trademark
73	Taipei	100	Zhijian	74	09/23/2011	Trademark
74	Taipei	100	Zhijian	81	09/30/2011	Trademark
75	Taipei	100	Zhijian	62	09/30/2011	Trademark
76	Taipei	100	Zhijian	60	10/07/2011	Trademark
77	Taipei	100	Zhijian	85	10/12/2011	Trademark
78	Taipei	100	Zhijian	82	10/17/2011	Trademark
79	Taipei	100	Zhiyi	48	10/31/2011	Trademark
80	Taipei	100	Zhiyi	39	11/14/2011	Trademark
81	Taipei	99	Zhiyi	56	11/21/2011	Trademark
82	Taipei	99	Zhiyi	56	11/21/2011	Trademark
83	Taipei	99	Zhiyi	56	11/21/2011	Trademark
84	Taipei	99	Zhiyi	56	11/21/2011	Trademark
85	Taipei	100	Zhijian	91	11/22/2011	Trademark
86	Taipei	100	Zhijian	92	11/23/2011	Trademark
87	Taipei	100	Zhisu	24	11/28/2011	Trademark
88	Taipei	100	Zhijian	95	11/30/2011	Trademark
89	Taipei	100	Zhijian	96	11/30/2011	Trademark
90	Taipei	100	Zhiyi	63	11/30/2011	Trademark
91	Taipei	100	Zhijianshang	10	12/09/2011	Trademark
92	Taipei	100	Zhijian	98	12/19/2011	Trademark
93	Taipei	100	Zhijianshang	14	12/19/2011	Trademark
94	Taipei	100	Zhiyi	53	12/19/2011	Trademark
95	Taipei	100	Zhijian	77	12/20/2011	Trademark
96	Taipei	100	Zhijian	80	12/23/2011	Trademark
97	Taipei	100	Zhijian	80	12/23/2011	Trademark
98	Taipei	100	Zhijian	80	12/23/2011	Trademark
99	Taipei	100	Zhijian	80	12/23/2011	Trademark
100	Taipei	100	Zhijian	80	12/23/2011	Trademark
101	Taipei	100	Zhijian	93	12/26/2011	Trademark
102	Taipei	100	Zhijian	90	12/26/2011	Trademark
103	Taipei	100	Zhijian	105	12/29/2011	Trademark
104	Taipei	100	Zhijian	111	12/30/2011	Trademark
105	Taipei	100	Zhiyi	15	12/30/2011	Trademark
106	Taipei	100	Zhijian	107	12/30/2011	Trademark

107	Taipei	100	Zhijian	109	12/30/2011	Trademark
108	Taipei	100	Zhijian	102	12/30/2011	Trademark
109	Taipei	100	Zhijian	86	12/30/2011	Trademark
110	Hsinchu	99	Shenzhijian	16	01/10/2011	Trademark
111	Hsinchu	99	Shenzhijian	19	01/10/2011	Trademark
112	Hsinchu	99	Jianshang	136	01/20/2011	Trademark
113	Hsinchu	100	Shenzhijian	1	01/28/2011	Trademark
114	Hsinchu	99	Zhujian	712	02/15/2011	Trademark
115	Hsinchu	100	Shenzhijian	3	02/24/2011	Trademark
116	Hsinchu	99	Shenzhijian	18	02/25/2011	Trademark
117	Hsinchu	99	Shenzhijian	15	02/25/2011	Trademark
118	Hsinchu	100	Shenzhijian	10	02/25/2011	Trademark
119	Hsinchu	100	Shenzhijian	9	02/25/2011	Trademark
120	Hsinchu	99	Shenzhijian	14	02/25/2011	Trademark
121	Hsinchu	100	Shenzhijian	7	03/04/2011	Trademark
122	Hsinchu	100	Shenzhijian	6	03/17/2011	Trademark
123	Hsinchu	99	Jianshang	191	03/30/2011	Trademark
124	Hsinchu	99	Shenzhijian	11	03/31/2011	Trademark
125	Hsinchu	99	Shenzhijian	17	04/18/2011	Trademark
126	Hsinchu	100	Zhijian	1	05/19/2011	Trademark
127	Hsinchu	100	Shenzhijian	5	05/23/2011	Trademark
128	Hsinchu	100	Shenzhijian	16	06/24/2011	Trademark
129	Hsinchu	100	Shenzhijian	15	07/04/2011	Trademark
130	Hsinchu	100	Shenzhijian	14	07/12/2011	Trademark
131	Hsinchu	100	Shenzhijian	11	07/21/2011	Trademark
132	Hsinchu	100	Zhijian	5	07/26/2011	Trademark
133	Hsinchu	100	Zhijian	3	07/29/2011	Trademark
134	Hsinchu	100	Zhiyi	5	08/31/2011	Trademark
135	Hsinchu	100	Shenzhijian	3	08/31/2011	Trademark
136	Hsinchu	100	Shenzhijian	3	08/31/2011	Trademark
137	Hsinchu	100	Zhijian	2	09/26/2011	Trademark
138	Hsinchu	100	Shenzhijian	17	10/13/2011	Trademark
139	Hsinchu	100	Zhijian	9	10/31/2011	Trademark
140	Hsinchu	100	Zhiyi	4	11/09/2011	Trademark
141	Hsinchu	100	Shenzhiyi	12	11/24/2011	Trademark
142	Hsinchu	100	Zhijian	16	12/12/2011	Trademark
143	Hsinchu	100	Zhijian	11	12/22/2011	Trademark
144	Hsinchu	100	Shenzhijian	18	12/26/2011	Trademark
145	Tainan	99	Zhijian	50	01/11/2011	Trademark
146	Tainan	100	Zhijian	1	01/14/2011	Trademark
147	Tainan	99	Zhiyi	16	01/25/2011	Trademark
148	Tainan	100	Zhijian	3	01/28/2011	Trademark
149	Tainan	99	Zhijianshang	7	02/14/2011	Trademark
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151	Tainan	100	Zhijian	5	02/24/2011	Trademark
152	Tainan	100	Zhijian	2	02/25/2011	Trademark
153	Tainan	100	Zhijian	6	02/25/2011	Trademark
154	Tainan	100	Zhijian	9	03/04/2011	Trademark
155	Tainan	100	Zhijian	10	03/24/2011	Trademark
156	Tainan	100	Zhijian	14	03/28/2011	Trademark
157	Tainan	100	Zhijian	13	03/31/2011	Trademark
158	Tainan	100	Zhijian	12	03/31/2011	Trademark
159	Tainan	100	Zhijian	16	04/06/2011	Trademark
160	Tainan	100	Zhijian	17	04/15/2011	Trademark

161	Tainan	100	Zhijian	8	04/21/2011	Trademark
162	Tainan	99	Zhijianshang	10	05/05/2011	Trademark
163	Tainan	100	Zhijian	22	05/23/2011	Trademark
164	Tainan	100	Zhijian	15	05/24/2011	Trademark
165	Tainan	100	Zhiyi	6	05/26/2011	Trademark
166	Tainan	100	Zhijian	11	05/31/2011	Trademark
167	Tainan	100	Zhijian	28	06/07/2011	Trademark
168	Tainan	100	Zhijian	31	06/14/2011	Trademark
169	Tainan	100	Zhijian	25	06/16/2011	Trademark
170	Tainan	100	Zhijian	24	06/30/2011	Trademark
171	Tainan	100	Zhijian	29	06/30/2011	Trademark
172	Tainan	100	Zhijian	37	07/11/2011	Trademark
173	Tainan	100	Zhijian	35	07/14/2011	Trademark
174	Tainan	100	Zhijian	40	08/31/2011	Trademark
175	Tainan	100	Zhijian	41	08/31/2011	Trademark
176	Tainan	100	Zhijian	34	09/07/2011	Trademark
177	Tainan	100	Zhijian	42	09/07/2011	Trademark
178	Tainan	100	Zhijian	39	09/07/2011	Trademark
179	Tainan	100	Zhiyi	2	09/21/2011	Trademark
180	Tainan	100	Zhijianshang	5	09/29/2011	Trademark
181	Tainan	100	Zhijianshang	4	09/29/2011	Trademark
182	Tainan	100	Zhijian	47	10/17/2011	Trademark
183	Tainan	100	Zhijian	44	10/17/2011	Trademark
184	Tainan	100	Zhijian	43	10/17/2011	Trademark
185	Tainan	100	Zhijian	49	10/28/2011	Trademark
186	Tainan	100	Zhiyi	15	10/28/2011	Trademark
187	Tainan	100	Zhijian	50	11/03/2011	Trademark
188	Tainan	100	Zhijian	55	11/04/2011	Trademark
189	Tainan	100	Zhijian	53	11/09/2011	Trademark
190	Tainan	100	Zhijian	54	11/10/2011	Trademark
191	Tainan	100	Zhijian	45	11/18/2011	Trademark
192	Tainan	100	Zhijian	58	11/25/2011	Trademark
193	Tainan	100	Zhijian	59	12/07/2011	Trademark
194	Tainan	100	Zhijian	60	12/07/2011	Trademark
195	Tainan	100	Zhijian	46	12/09/2011	Trademark
196	Tainan	100	Zhijian	52	12/12/2011	Trademark
197	Tainan	100	Zhijian	64	12/19/2011	Trademark
198	Tainan	100	Zhijian	63	12/19/2011	Trademark
199	Tainan	100	Zhijian	56	12/23/2011	Trademark
200	Tainan	100	Zhijian	66	12/30/2011	Trademark
201	Tainan	100	Zhiyi	28	12/30/2011	Trademark
202	Tainan	100	Zhiyi	27	12/30/2011	Trademark

Source: On-line database of the Judicial Yuan.

Note: Taipei: Taipei District Court; Hsinchu: Hsinchu District Court; Tainan: Tainan District Court. All district court cases were collected from January 1, 2013 to February 6, 2013.

2. Appellate Court Cases

Table C-2 Appellate Court Case List

Appellate Court 2007 Copyright Cases							
Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	THC	96	Shangyi	72	Taipei	03/22/2007	Copyright
2	THC	95	Shangsu	4233	Taipei	04/13/2007	Copyright
3	THC	92	Shangsu	4503	Taipei	05/15/2007	Copyright
4	THC	95	Shanggeng(2)	588	Taipei	05/31/2007	Copyright
5	THC	95	Shanggeng(2)	588	Taipei	05/31/2007	Copyright
6	THC	96	Shangsu	281	Taipei	06/05/2007	Copyright
7	THC	96	Shangsu	281	Taipei	06/05/2007	Copyright
8	THC	96	Shangyi	951	Taipei	06/22/2007	Copyright
9	THC	96	Shangyi	1345	Taipei	07/31/2007	Copyright
10	THC	96	Shanggeng(1)	231	Taipei	08/16/2007	Copyright
11	THC	96	Shangyi	1489	Taipei	08/16/2007	Copyright
12	THC	96	Shangsu	2855	Taipei	08/15/2007	Copyright
13	THC	96	Shangsu	2971	Taipei	09/06/2007	Copyright
14	THC	96	Shangyi	1759	Taipei	09/19/2007	Copyright
15	THC	96	Shangsu	2064	Taipei	09/20/2007	Copyright
16	THC	96	Shangyi	1165	Taipei	09/20/2007	Copyright
17	THC	96	Shangyi	1651	Taipei	09/21/2007	Copyright
18	THC	96	Shangsu	2997	Taipei	09/27/2007	Copyright
19	THC	96	Shangsu	3464	Taipei	09/28/2007	Copyright
20	THC	96	Shanggeng(1)	582	Taipei	10/16/2007	Copyright
21	THC	96	Shangsu	3840	Taipei	11/07/2007	Copyright
22	THC	96	Shangyi	2332	Taipei	11/30/2007	Copyright
23	THC	96	Shangsu	3839	Taipei	12/04/2007	Copyright
24	THC	96	Shangyi	2495	Taipei	12/06/2007	Copyright
25	THC	96	Shangyi	2495	Taipei	12/06/2007	Copyright
26	THC	96	Shangyi	2368	Taipei	12/21/2007	Copyright
27	THC	96	Zhongshanggeng(4)	153	Taipei	12/27/2007	Copyright
28	THC	96	Shangyi	2841	Taipei	12/28/2007	Copyright
29	THC	95	Zhongshanggeng(3)	71	Hsinchu	03/27/2007	Copyright
30	THC	96	Shangyi	229	Hsinchu	03/30/2007	Copyright
31	THC	95	Shanggeng(1)	720	Hsinchu	09/13/2007	Copyright
32	THC	95	Shanggeng(1)	645	Hsinchu	12/28/2007	Copyright
33	THC	95	Shanggeng(1)	645	Hsinchu	12/28/2007	Copyright
34	THC Tainan	95	Zhongshanggeng(4)	400	Tainan	01/25/2007	Copyright
35	THC Tainan	95	Shangsu	1344	Tainan	01/30/2007	Copyright
36	THC Tainan	95	Shanggeng(2)	447	Tainan	02/14/2007	Copyright
37	THC Tainan	96	Shangyi	77	Tainan	04/30/2007	Copyright
38	THC Tainan	95	Shanggeng(1)	248	Tainan	06/21/2007	Copyright
39	THC Tainan	95	Shanggeng(1)	248	Tainan	06/21/2007	Copyright
40	THC Tainan	95	Shanggeng(1)	248	Tainan	06/21/2007	Copyright
41	THC Tainan	95	Shanggeng(1)	248	Tainan	06/21/2007	Copyright
42	THC Tainan	95	Shanggeng(1)	248	Tainan	06/21/2007	Copyright
43	THC Tainan	95	Shangsu	1319	Tainan	06/26/2007	Copyright
44	THC Tainan	96	Shangsu	597	Tainan	07/24/2007	Copyright
45	THC Tainan	96	Shangsu	494	Tainan	08/29/2007	Copyright
46	THC Tainan	96	Shangsu	983	Tainan	10/04/2007	Copyright
47	THC Tainan	96	Shangsu	973	Tainan	11/13/2007	Copyright

48	THC Tainan	96	Shangsu	468	Tainan	11/28/2007	Copyright
49	THC Tainan	96	Shangsu	729	Tainan	12/25/2007	Copyright

Appellate Court 2011 Copyright Cases

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	IPC	99	Xingzhishangyi	78	Taipei	01/03/2011	Copyright
2	IPC	99	Xingzhishangyi	78	Taipei	01/03/2011	Copyright
3	IPC	99	Xingzhishangyi	78	Taipei	01/03/2011	Copyright
4	IPC	99	Xingzhishangyi	104	Taipei	01/24/2011	Copyright
5	IPC	100	Xingzhishangyi	117	Taipei	03/14/2011	Copyright
6	IPC	100	Xingzhishangyi	36	Taipei	05/09/2011	Copyright
7	IPC	100	Xingzhishangsu	40	Taipei	07/06/2011	Copyright
8	IPC	100	Xingzhishanggeng(5)	5	Taipei	08/29/2011	Copyright
9	IPC	100	Xingzhishangyi	54	Taipei	08/29/2011	Copyright
10	IPC	100	Xingzhishanggeng(1)	2	Taipei	09/05/2011	Copyright
11	IPC	100	Xingzhishanggeng(1)	2	Taipei	09/05/2011	Copyright
12	IPC	100	Xingzhishanggeng(1)	2	Taipei	09/05/2011	Copyright
13	IPC	100	Xingzhishangyi	100	Taipei	10/26/2011	Copyright
14	IPC	100	Xingzhishangsu	45	Taipei	11/10/2011	Copyright
15	IPC	100	Xingzhishangsu	65	Taipei	11/10/2011	Copyright
16	IPC	100	Xingzhishangsu	67	Taipei	12/01/2011	Copyright
17	IPC	99	Xingzhishanggeng(1)	33	Taipei	12/15/2011	Copyright
18	IPC	99	Xingzhishanggeng(1)	33	Taipei	12/15/2011	Copyright
19	IPC	100	Xingzhishanggeng(1)	1	Hsinchu	05/26/2011	Copyright
20	IPC	100	Xingzhishangyi	119	Hsinchu	11/21/2011	Copyright
21	IPC	100	Xingzhishangyi	7	Tainan	03/28/2011	Copyright
22	IPC	99	Xingzhishangyi	118	Tainan	03/28/2011	Copyright
23	IPC	100	Xingzhishangyi	27	Tainan	06/15/2011	Copyright
24	IPC	100	Xingzhishangsu	22	Tainan	06/22/2011	Copyright
25	IPC	100	Xingzhishanggeng(1)	20	Tainan	12/28/2011	Copyright

Appellate Court 2007 Trademark Cases

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	THC	95	Shangyi	2119	Taipei	01/11/2007	Trademark
2	THC	95	Shangyi	662	Taipei	01/23/2007	Trademark
3	THC	95	Shangyi	662	Taipei	01/23/2007	Trademark
4	THC	95	Shangyi	2263	Taipei	01/31/2007	Trademark
5	THC	95	Shangyi	2263	Taipei	01/31/2007	Trademark
6	THC	96	Shangyi	91	Taipei	04/13/2007	Trademark
7	THC	96	Shangyi	91	Taipei	04/13/2007	Trademark
8	THC	96	Shangyi	16	Taipei	05/17/2007	Trademark
9	THC	96	Shangyi	636	Taipei	06/07/2007	Trademark
10	THC	96	Shangyi	636	Taipei	06/07/2007	Trademark
11	THC	96	Shangyi	636	Taipei	06/07/2007	Trademark
12	THC	96	Shangyi	1019	Taipei	07/11/2007	Trademark
13	THC	96	Shangyi	986	Taipei	07/13/2007	Trademark
14	THC	96	Shangyi	1285	Taipei	07/31/2007	Trademark
15	THC	96	Shangyi	1530	Taipei	08/23/2007	Trademark
16	THC	96	Shangyi	1530	Taipei	08/23/2007	Trademark
17	THC	96	Shangyi	1808	Taipei	09/13/2007	Trademark
18	THC	96	Shangyi	1887	Taipei	09/18/2007	Trademark
19	THC	96	Shangyi	1845	Taipei	09/27/2007	Trademark
20	THC	96	Shangyi	2024	Taipei	09/27/2007	Trademark
21	THC	96	Shangyi	2091	Taipei	10/24/2007	Trademark
22	THC	96	Shangyi	1985	Taipei	10/31/2007	Trademark

23	THC	96	Shangyi	2569	Taipei	12/12/2007	Trademark
24	THC	96	Shangyi	2167	Taipei	12/13/2007	Trademark
25	THC	96	Shangyi	1917	Hsinchu	10/26/2007	Trademark
26	THC Tainan	95	Shangyi	125	Tainan	01/30/2007	Trademark
27	THC Tainan	95	Shangyi	125	Tainan	01/30/2007	Trademark
28	THC Tainan	95	Zhongshanggeng(4)	375	Tainan	06/12/2007	Trademark
29	THC Tainan	96	Shangyi	574	Tainan	12/05/2007	Trademark

Appellate Court 2011 Trademark Cases

Defendant	Court	Minguo	Docket	No.	Lower Court	Date	Category
1	IPC	100	Xingzhishangyi	30	Taipei	07/27/2011	Trademark
2	IPC	100	Xingzhishangyi	46	Taipei	08/01/2011	Trademark
3	IPC	100	Xingzhishangyi	47	Taipei	09/05/2011	Trademark
4	IPC	100	Xingzhishangyi	55	Taipei	10/05/2011	Trademark
5	IPC	100	Xingzhishangyi	79	Taipei	11/23/2011	Trademark
6	IPC	100	Xingzhishangyi	79	Taipei	11/23/2011	Trademark
7	IPC	100	Xingzhishangyi	28	Tainan	06/23/2011	Trademark
8	IPC	100	Xingzhishangyi	72	Tainan	10/20/2011	Trademark

Source: On-line database of the Judicial Yuan.

Note: THC: Taiwan High Court; THC Tainan: Taiwan High Court Tainan Branch Court; IPC: Intellectual Property Court. All appellate court cases were collected from February 7, 2013 to February 8, 2013.

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