

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# VIETNAM

### EXECUTIVE SUMMARY<sup>1</sup>

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The signing of a trade agreement between the U.S. and Vietnam in 2000 was a watershed event in bilateral relations, but by itself will have little real impact either copyright on protection or on enforcement for U.S. works. Protection already exists under the Bilateral Copyright Agreement that came into force in 1998, but enforcement remains largely a theoretical proposition. Vietnam's market for every kind of copyrighted material is almost entirely pirate. While there are indications that Vietnam's government is no longer itself as closely linked to pirate activity as in the past, it remains unable to mount any consistent or effective enforcement effort against piracy. Vietnam needs to streamline and strengthen its enforcement capability, and to continue to forestall any expansion of pirate optical media production into its territory. The real significance of the bilateral trade agreement could be the lowering of some of the impenetrable market access barriers that currently keep most legitimate foreign product out of Vietnam. As its markets gradually open to trade in copyrighted materials, Vietnam needs to be prepared to enforce the laws it has already enacted. IIPA recommends that Vietnam remain on the Special 301 Watch List while the U.S. government monitors and seeks to encourage Vietnam to accelerate its progress toward these goals.

#### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	7.0	100%	5.0	100%	5.0	100%	5.0	100%	5.0	100%	5.0	100%
Sound Recordings / Musical Compositions	NA	100%	NA	100%	6.0	99%	6.0	99%	10.0	99%	NA	NA
Business Software Applications <sup>2</sup>	13.5	98%	10.5	98%	8.3	97%	8.1	98%	11.4	98%	25.8	99%
Entertainment Software <sup>3</sup>	NA	NA	20.1	96%	22.5	98%	21.9	97%	18.0	97%	15.0	99%
Books	8.0	NA	8.0	NA	7.0	NA	7.0	NA	7.0	NA	7.0	NA
<b>TOTALS</b>	<b>28.5</b>		<b>43.6</b>		<b>48.8</b>		<b>48.0</b>		<b>51.4</b>		<b>52.8</b>	

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<sup>1</sup> For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to filing.

<sup>2</sup> BSA loss numbers for 2000 are preliminary.

<sup>3</sup> IDSA estimates for 2000 are preliminary.

# PIRACY AND ENFORCEMENT

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## Optical Media

IIPA remains very concerned about the threat of optical media piracy throughout Southeast Asia, including in Vietnam. We believe there are now three optical media production lines operating in Vietnam. So far, there is no evidence that these plants have been used for piracy. Even so, the known production capacity clearly exceeds Vietnam's current low consumption levels for CDs, video CDs, and/or CD-ROMs.

Despite the advent of legal protection under copyright for U.S. works, resulting from the Bilateral Copyright Agreement (discussed below), Vietnam is, almost without exception, a pirate market. Finding a legitimate copy of a U.S. copyrighted work is a rare occurrence. This is true for works in both digital and nondigital formats.

Pirate music CDs are readily available throughout the country, at numerous retail outlets and street markets, and especially in areas like the Yen Bai flea market in Hanoi, and District 1 of Ho Chi Minh City. Prevailing prices are about U.S.\$0.85. These CDs are believed to be imported from neighboring countries, although there is an increasing trend of CD-Recordable (CD-R) discs being burned locally using professional-level equipment.

VCDs are also starting to penetrate a market still dominated by videocassettes. This is especially the case in the major cities. Legal video importation remains a monopoly of a government agency, FAFILM Vietnam, which claims to have licensed 62 VCD titles for import.<sup>4</sup> Still, the market is almost entirely pirate. The pirate VCDs in the Vietnamese market are believed to be produced mostly in China and Cambodia.

Computer programs and many other kinds of copyrighted materials in pirate digital formats may be purchased at a store located right next to the Ministry of Trade building in Hanoi. There, pirated copies of Windows 2000 Professional® cost US\$2.85, barely one percent of the retail price in the U.S.<sup>5</sup>

Vietnam must prevent its excess optical media production capacity from being diverted to pirate purposes, and should forestall the establishment of pirate optical media production facilities that are now starting to penetrate the territory of its Indochinese neighbors. Vietnam should ensure that its regulations on the import, export, and operation of optical media replication and mastering equipment, and on optical grade polycarbonate, are sufficient, and sufficiently well enforced, to prevent this threat from occurring.

## High Levels of Piracy Remain, and Enforcement is Almost Nonexistent

Antipiracy enforcement in Vietnam has been slow, uneven, and almost totally lacking in transparency. Agencies charged with enforcement generally have little understanding of the new

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<sup>4</sup> "Vietnam Takes Steps to Implement Copyright Law," *Asia Pulse*, May 4, 2000.

<sup>5</sup> McDonald, "Landmark U.S.-Viet Pact Calls for Open Markets, Copyright Protection," *San Jose Mercury News*, July 14, 2000.

legal framework they are supposed to implement. Even the Ministry of Culture and Information (MOCI), charged with enforcing Vietnam's copyright law, admits that the audiovisual and music markets are dominated by piracy which is "destroying domestic production" of legitimate product.<sup>6</sup> State companies producing products for the domestic market share the assessment that piracy has driven them "to the edge of bankruptcy."<sup>7</sup>

MOCI has promulgated regulations on import, export, and distribution of audio and video products, and claims to have carried out thousands of inspections, confiscated more than 2.5 million pirate CDs and videocassettes, and imposed administrative fines totaling 7.4 billion dong (US\$509,000).<sup>8</sup> But none of this activity has had much impact on actual market conditions, which can be summarized as follows.

For the audiovisual industry, Vietnam is, for almost all intents and purposes, a pirate market. The government has issued a decree giving up its monopoly over film importation, and there have been a few licensed exhibitions of U.S. movies in Vietnamese cinemas. But most theatrical exhibition remains unlicensed, as are the numerous minitheaters that use pirated videos for public performances. The video market for Motion Picture Association (MPA) member company product remains 100% pirate. FAFILM, which maintains its monopoly over video importation, no longer blatantly imports, copies and distributes pirate video product throughout the country, emblazoned with its official censorship stickers, as was the case as recently as 1997. Indeed, FAFILM now maintains that controlling piracy is one of its top priorities. It has issued directives to its distributors (which include provincial and municipal bureaus of the Culture Ministry) to stop selling, renting, or otherwise exploiting all previously distributed U.S. audiovisual materials in all formats, and to recall and return pirate film prints. Nevertheless, pirate videos are readily available throughout the country. Large video rental outlets in Hanoi offer pirate versions of current Hollywood hits for VND2000 (US\$0.15) per day. In 1999, the government estimated that unauthorized public performances of U.S. music and television programming dominated the broadcast spectrum, accounting for 80% of airtime.<sup>9</sup> It now asserts that U.S. films amount to only 10% of films shown on the central television network and that all are licensed.<sup>10</sup> Annual losses to the U.S. motion picture industry due to audiovisual piracy in Vietnam are estimated at \$7 million for 2000.

While Vietnam has great potential as a market for U.S. publishers, especially for English language training and college textbooks, widespread piracy of these products and of technical and scientific titles has prevented much progress toward realizing this potential. In 1999, the Ministry of Culture and Information estimated that U.S. titles (including novels as well as textbooks and instructional materials) formed 20 percent of all books published in Vietnam; nearly all these were unauthorized translations and/or pirate editions, and many of these are published by houses controlled by the Ministry itself.<sup>11</sup> As of May 2000 the Ministry counted only 21 licensed or public

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<sup>6</sup> Hung, "CD pirates face new crackdown," *Vietnam Investment Review*, 31 May 1999, at 3.

<sup>7</sup> Hung, "Black CD agencies must face the music," *Vietnam Investment Review*, July 19, 1999.

<sup>8</sup> Asia Pulse fn. 3 *supra*.

<sup>9</sup> Hung, *supra*.

<sup>10</sup> Asia Pulse fn. 3 *supra*.

<sup>11</sup> Hung, *supra*; Birchall, "US tries to close last Asia refuge of CD pirates," *Financial Times*, January 6, 1999.

domain editions of U.S. works from government publishing houses.<sup>12</sup> Illegally photocopied books of all kinds are openly sold in the alleyways of Hanoi; English language training books are particularly popular targets of offset piracy. Major research institutes, such as the National Centre for Science and Technology in Hanoi, use pirated software (including software published by members of AAP, the Association of American Publishers), and circulate research articles electronically without having paid subscriptions to the journals. Local publishers continue to translate and reprint U.S. copyrighted books without seeking permission. Enforcement efforts are tentative at best; officials are consistently reluctant to carry out raids or take other action against piracy. Administrative authorities have issued some warnings or nominal fines (US\$50 to \$100) to commercial pirates, and there have even been some damage awards from the civil courts in some localities, but not at a level sufficient to deter. AAP estimates losses to U.S. publishers for 2000 at \$8 million, unchanged from the previous year.

Piracy of U.S. music and audio products remains pervasive in Vietnam. As noted above, cheap imported pirate CDs dominate the domestic market, and blank recordable CDs are also imported and loaded in Vietnam with unauthorized copies of Western sound recordings.<sup>13</sup> The Vietnamese authorities have never made any serious, sustained attempt to clear pirate materials from the market, although there have been sporadic police actions against smugglers and against pirates of Vietnamese repertoire. Most major recording companies are not operating in Vietnam, as U.S. repertoire lacked any legal protection until December 1998. Virtually 100% of the Vietnamese market for American recorded music is pirate.

The market for software in Vietnam, both entertainment and business applications, is virtually entirely pirate; a 98% piracy level for business applications is estimated by the Business Software Alliance (BSA). A Vietnamese copyright official has publicly stated that software piracy is "out of control" in Vietnam.<sup>14</sup> Rampant software piracy not only harms U.S. firms, but has been identified as one of the leading factors stunting the growth of Vietnam's fledgling software industry. BSA estimates losses to U.S. business software producers at \$13.5 million for 2000, a \$3 million increase from 1999.

Clearly Vietnam's enforcement efforts have not been effective to date. At least recently, this has not been due to a lack of laws or regulations. Indeed, the government has continued to promulgate edicts to govern the enforcement process, including a March 1999 decree covering administrative enforcement. But as new laws are laid on top of old, confusion about the enforcement system mounts. At least five state authorities have reportedly been assigned enforcement responsibility, but no one agency has been put in charge. The enforcement apparatus also steers copyright owners away from bringing their cases into court; they are foreclosed from doing so if they pursue the matter in the administrative system to the ministerial level. The Vietnamese National Assembly recently increased maximum penalties for copyright violations, both for administrative fines and for criminal punishment<sup>15</sup>, but there is no indication that deterrent penalties have actually been imposed on violators.

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<sup>12</sup> Asia Pulse, fn. 3 *supra*.

<sup>13</sup> Watkin, "Pirates send CD industry spinning," *South China Morning Post*, August 17, 1999, at 6.

<sup>14</sup> "Vietnam urged to take action against software pirates," *Asia Pulse*, October 29, 1999.

<sup>15</sup> *Asia Pulse*, fn. 3 *supra*.

While the U.S. should continue to press the government of Vietnam to put in place effective enforcement mechanisms against copyright piracy, two other steps seem indispensable. First, the government must completely cease its sponsorship of video, broadcast, public performance and book piracy, and its agencies must legalize their use of computer software. Second, experience teaches that enforcement is unlikely to be effective so long as there is no legitimate source of supply for copyrighted materials. Vietnam must open up its market to legitimate producers if it is to be successful in stamping out piracy.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **The 1998 Bilateral Copyright Agreement and the 2000 Bilateral Trade Agreement**

#### **Bilateral Copyright Agreement**

On December 23, 1998, after many months of uncertainty and mixed signals, the United States - Vietnam Bilateral Copyright Agreement (BCA) went into effect. When it signed the BCA with the U.S. in June 1997, Vietnam undertook to do two things: provide U.S. works the same level of legal protection, on a national treatment basis, as its law accords to domestic works; and raise its levels of legal protection and enforcement, at least as to U.S. works, to fulfill the substantive requirements of the agreement. These substantive obligations are quite extensive, and include:

- coverage for all copyrightable works and sound recordings;
- protection for pre-existing works and sound recordings (retroactivity);
- protection without formalities (registration is not required);
- exclusive rights modeled on U.S. copyright law, including reproduction, distribution, and public performance and display, subject to exceptions that conform to the criteria of Article 9(2) of the Berne Convention;
- civil, criminal and border enforcement obligations modeled on TRIPS, including deterrent penalties;
- specific implementation of all these obligations in national law and regulations.

Vietnam moved fairly quickly to put national treatment in place, although some questions remained.

#### **The Circular**

The second commitment — substantive law and enforcement obligations — proved more problematic. It was not until September 1998, when Vietnam's Minister of Culture and Information promulgated a circular for the implementation of the BCA, that it was sufficiently fulfilled to allow the BCA to go into force.

The circular specifies that U.S. works are protected in Vietnam "in accordance with the [BCA]." The protection specifically includes all the minimum rights spelled out in the BCA. Furthermore, Section 4.5 of the circular provides that disputes and claims of infringement of U.S. works in Vietnam are to be handled "*in accordance with the Agreement and the laws of Vietnam*"

(emphasis added), thus incorporating the TRIPS-level enforcement obligations of the BCA into the enforcement regime in Vietnam, at least as to U.S. works.

The circular, and the other directives issued by the Vietnamese government to implement the BCA, thus go far enough to establish that, as of December 23, 1998, U.S. copyright owners enjoy a comprehensive and high level of protection for their works in Vietnam — on paper. The practice, is of course, far different. Vietnam's commitment, not only to accord U.S. works legal protection but also to enforce that protection, remains untested.

Vietnam's Civil Code provides the foundation upon which a modern copyright law and enforcement system — one compliant with the BCA — can be built. So far, though, very little has been built on that foundation, especially with regard to enforcement. USTR should encourage Vietnam to adopt sound and comprehensive enforcement regulations, which resolve ambiguities in the Civil Code provisions, which explicitly designate a lead agency for copyright enforcement matters, and which set out a clear framework by which U.S. copyright owners can enforce their rights. The U.S. should also provide expert advice and assistance in the enforcement of copyright law against piracy, to which certain IIPA members are prepared to contribute time and expertise.

## **Bilateral Trade Agreement**

U.S. and Vietnam signed a landmark Bilateral Trade Agreement in July 2000. The copyright provisions of the BTA are not substantially different from the applicable requirements of the BCA, although to the extent they are inconsistent, the later agreement controls. Of course, the BCA remains in full effect until the BTA is ratified by both countries, which should take place in 2001.

The more significant impact of the BTA for the U.S. copyright industries flows from its market access provisions. While these are quite limited in some aspects — for example, there are no commitments for market access of "video tapes," and a blanket provision allows Vietnam to deny national treatment with regard to "production, publication and distribution of cultural products" — in others they may allow improved market access for U.S. copyrighted materials. As noted above, this is likely to be a functional prerequisite to any significant improvement in Vietnam's currently astronomical piracy rates. The recent decree allowing entities other than FAFILM to import films for theatrical exhibition is a step in the right direction, but just a first step toward the open and competitive marketplace that the U.S. copyright industries seek in Vietnam.