

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

VIETNAM

Special 301 Recommendation: Vietnam should remain on the Watch List.

EXECUTIVE SUMMARY

Vietnam became the 150th member of the World Trade Organization on January 11, 2007. With its new membership come important responsibilities in the area of protection of copyright, since Vietnam still may hold the dubious distinction of having the highest piracy rates in the world for many sectors. Exacerbating the piracy situation, market access barriers as to foreign content remain some of the most restrictive in the world. Necessary laws for change are being put into place, with a Circular expected soon that will confirm criminalization for all copyright piracy on a commercial scale. Nonetheless, an organized campaign, including stiff deterrent criminal remedies against large-scale producers and distributors of pirate product in Vietnam, has not been forthcoming. Finally, the Vietnamese government must take steps to gradually open the market which will pave the way for Vietnamese as well as foreign copyright industries to flourish in Vietnam into the future.

PRIORITY ACTIONS FOR 2007

- **Commence Piracy Crackdown:** Now that Vietnam has joined the WTO, it should make good on its promise to provide a “deterrent” against infringement by commencing a crackdown against organized piracy activities in the country, including targeting sources of pirate production, like the optical disc plants in operation in Vietnam, pirate distribution warehouses, and pirate retail shops selling CDs, DVDs, books or engaging in hard-disk loading of computers. Remedies should include not only tough administrative fines, license revocations, and shop closures, but criminal penalties through targeted prosecutions. In addition, steps should be taken to ensure that TV signals in Vietnam are being shown and received legally, and if not, government action against illegal distributors of Pay TV should commence.
- **Confirm Criminal Remedies for Copyright Piracy (TRIPS Requirement) and Lower Thresholds:** A new Circular that the Vietnamese government has promised to issue should confirm that infringements of copyright on a commercial scale and other violations of the IP law shall be subject to criminal remedies in Vietnam. Assuming this delinks copyright infringement from the very high criminal thresholds in the current Circular, this would be an extremely positive step.
- **Broader Market Access Should be Afforded:** Various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies’ setting up subsidiaries to produce or distribute “cultural products.” Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry. Market access restrictions in Vietnam must be lifted to let

foreign right holders participate in the Vietnamese market in order to provide a legitimate alternative to pirate product.

- **Pass Optical Disc License Regulation:** Vietnam now has between five and seven optical disc plants with capacity that far outstrips any rational legitimate domestic demand. As such, the Vietnamese Government should swiftly adopt a comprehensive regulation on the licensing of optical disc manufacture, including the mandatory use of source identification (SID) Code (including on blank discs), imposition of inspections by the Government on optical disc production facilities, revocations and suspensions for violating plants, and the like.

For more details on Vietnam’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

VIETNAM										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2002-2006¹										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	40.0	88%	21.0	90%	30.0	92%	24.0	92%	29.1	95%
Books	18.0	NA	16.0	NA	16.0	NA	12.0	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	10.0	NA	7.0	100%	7.0	100%
Records & Music	NA	95%	NA	95%	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	58.0		37.0		56.0		43.0		36.1	

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Piracy levels in Vietnam rank among the highest in the world; the music/sound recording industries and the business software industry report piracy rates near or well over 90%.

Optical Disc Plants in Vietnam: The Vietnamese Government has indicated in 2005 that there are between five and seven optical disc plants in the country. The plants included at least 12 production lines, capable of producing at least 42 million discs per year. This production capacity is far greater than any rational legitimate domestic demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products have been found in several

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Vietnam under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Vietnam, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

Asian countries (including China, where a recent smuggling ring was uncovered in Guangxi Province, which borders Vietnam),³ Canada, the Czech Republic, and Poland.

Book Piracy: Despite modest efforts from some local publishers and government officials, book publishers continue to suffer from overwhelming book piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copyshops all sell illegal copies of bestselling trade books, travel books and academic textbooks. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers' licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are still being misused, resulting in distribution of unauthorized books through the mainstream state bookshops. Copies of such books also flow to Cambodia. Government publishing houses could help reduce piracy in the English language teaching sector by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy.

Signal Piracy: Piracy of cable and satellite broadcasting signals remains a significant problem and is growing due to the increasing demand for international content.⁴ Most content owners have licensed distributors to onward sell to both hotels and cable systems, but they are being undercut by pirate operators picking up and redistributing (without payment) feeds from outside Vietnam (e.g., Thai UBC). The signal piracy problem in Vietnam is made more egregious by the fact that a state owned company, Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telematics, continues openly pirating content in serving hundreds of thousands of end users throughout the country. After much pressure on the Ministry of Trade, VTC began discussing licensing content with legitimate copyright owners in 2006, but such discussions never progressed because VTC was not ready to negotiate on fair commercial terms. Instead of dropping the content, however, they continue to pirate it without payment. It is unacceptable that such state-sponsored piracy has been allowed to continue, and the U.S. government should take steps to press the Vietnamese to cease doing so. In Vietnam's WTO accession protocol, it committed to adopt laws requiring that only fully licensed content be broadcast. This commitment has not yet been implemented.

Business Software End-User Piracy: Business software piracy remains rampant in Vietnam. The most damaging form of piracy for this sector is corporate end-user piracy. In 2006, the Vietnam authorities, working with the software industry, began running raids against this damaging form of piracy, with some success. Currently in Vietnam, however, no software IPR case has been brought to court. The usual resolution of copyright violation cases has been in the form of administrative penalties which are imposed under a decision issued by the Ministry of Culture and Information (MOCI) Inspectorate.⁵ In terms of enforcement against software

³ *Bootleg DVD Movie Kingpin Jailed for Life*, The Standard Online, November 25, 2006, at http://www.thestandard.com.hk/news_detail.asp?we_cat=3&art_id=32633&sid=11044738&con_type=1&d_str=20061125 (a court in southern Guangxi convicted Lin Yuehua and 11 gang members of buying five production units to make DVDs and VCDs, setting them up in "a foreign country" - Guangxi borders Vietnam - and smuggling more than 30 million bootleg discs into China from 2002 to 2005; Lin's pirate smuggling business was the "largest one which has been so far uncovered in China," according to Xinhua, being worth about 188 million yuan). The case was reported in the Vietnamese press at <http://www.toquoc.gov.vn/vietnam/showPrint.asp?newsId=9385>. See also *China Locks Away Pirate Movie Moghul*, Reuters News, November 23, 2006 (reporting that Lin was sentenced to life in prison and the accomplices received jail sentences of two to 15 years).

⁴ The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates the cost of piracy in Vietnam to the legitimate industry in 2006 at US\$37 million; the true cost is likely to be substantially higher.

⁵ Although the relevant laws and regulations provide that an administrative action can be brought to the court, in practice this has never happened.

piracy, most of the actions have been initiated and supported by the software companies and not by the authorities acting on their own. Vietnamese authorities conducted the first two administrative raids in Vietnam against end-user software piracy in 2006. On October 5, 2006, the MOCI and the Economic Police⁶ successfully raided a joint venture company in Hanoi. Forty-two computers were examined during the raid. The total value of pirated software used by the infringing company was estimated at about VND1 billion (approximately US\$62,500). In early December 2006, officers from the same enforcement bodies raided a ceramics company in Ho Chi Minh City and confiscated 30 computers containing unauthorized software applications. The estimated total value of the illegal software found amounted to 1.5 billion VND (approximately US\$93,800).

TRAINING AND PUBLIC AWARENESS

The copyright industries remained available in 2006, as they will in 2007, to conduct training of enforcement officials in Vietnam. The Business Software Alliance (BSA) conducted two seminars on software asset management in March 2006, one each in Hanoi and Ho Chi Minh City. The attendees, totaling 460 people, were IT experts and specialists from various domestic and international businesses and organizations. In September 2006, BSA provided training to 25 officers from the IT Crime Unit of the Department of Economic Police and the MOCI on identifying illegal software and the collection of evidence in end-user software piracy cases. The training was followed by the first ever end user raid in October 2006. The Motion Picture Association participated in the November 2006 ASEAN-PTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.

The U.S. government has also been active in training in Vietnam in 2006. For example, in November 2006, the Star program had a chance to bring Mr. Luu Hoang VAN, Director of VTC, Southern Branch, to Bangkok to attend the ASEAN-USPTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.⁷

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Goes Into Force and Implementing Regulations to IP Code Issued: On November 29, 2005, the Vietnamese National Assembly passed the “Intellectual Property Law,”⁸ which by its terms went into effect on July 1, 2006. The law resulted in a number of advances in Vietnam’s copyright system. For example, it provided protection for temporary reproductions (Article 4(10)), and provided, for the first time in Vietnam, protection against circumvention of technological protection measures used by right holders to protect their works/subject matter in the digital environment (Articles 28(12) and 35(7)), as well as prohibitions against trafficking in circumvention devices (Articles 28(14) and 35(9)).⁹

⁶ The Business Software Alliance has developed good relationships with the two most notable and important enforcement authorities in Vietnam in the field of copyright protection, the IT Crime Unit of the Department of Economic Police of Vietnam, and the Inspectorate under the MOCI. IIPA recognizes these groups for the work carried out to date, and calls upon a more general strategy to combat piracy in all its forms.

⁷ As a follow-up to this training, it is hoped VTC may survey all the television stations in Vietnam as a starting point to legalize broadcasting, as a suspicion is that many stations simply do not know the rules.

⁸ Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated 25 December, 2001.

⁹ The term “technical methods” is undefined (the term used throughout is a technical measure “applied by a copyright owner to protect copyrights of his or her work”). The draft implementing regulations we have reviewed do not include a definition of “technical methods.” Article 30 of the draft implementing regulations we have reviewed seems to say,

The new Law still contains some deficiencies when evaluated on the basis of full TRIPS compliance and on the basis of the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).¹⁰ The drive toward WTO accession no doubt has infused energy into the copyright drafting and legislative process, and in Vietnam's overall willingness to try to align itself with the international community on issues related to the protection of copyright.¹¹ The Vietnamese government should work to correct as many deficiencies as possible in the coming months. The following lists in a non-exhaustive manner several key remaining concerns.

Substantive Issues

- **Restrictions on IP Rights:** Article 7(2) gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact creates inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties. The second half of Article 7(3) violates Vietnam's current and future obligations by permitting the State to restrict the ability of a right holder to exercise lawful rights, and could even result in an open-ended compulsory licensing to use copyright materials seemingly without limitation or reason. The provision should be deleted. The first clause of Article 8 also runs afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. That clause should be deleted.¹² Article 4 of the draft implementing regulations we have reviewed does not do anything to allay the concern raised.
- **Civil Code Supremacy:** Article 5 retains a clause making the Civil Code supreme to the IP Code where inconsistent. Supremacy of the Civil Code, and the legal uncertainties and inconsistencies resulting from such parallel and inconsistent legislation, seriously endangers Vietnam's ability to fulfill its present (Berne, BTA) and future (TRIPS, WCT/WPPT) obligations. Again, the draft implementing regulations do not address this issue, and by referring to the dual provisions of the Civil Code and the IP Code, only reinforce the potential legal uncertainties.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the

importantly, that violations such as circumvention or trafficking in circumvention devices is a separate violation, but as to remedies is to be treated similarly to other infringements.

¹⁰ Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA). The BTA required Vietnam to bring its copyright regime, including enforcement provisions, into compliance with the TRIPS Agreement by December 2003.

¹¹ Vietnam acceded to the Geneva Convention (the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms) on July 6, 2005 and the Brussels Convention in late 2005. Vietnam was also planning to accede to the Rome Convention at the end of 2005. There are no plans to accede to WCT and WPPT although Vietnam acknowledges that its law will comply with these and that Vietnam will eventually accede.

¹² We note that a new Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

performer or producer is also required, and vice versa. Article 35 of the draft implementing regulations reinforces the supremacy of copyright over related rights.¹³

- **Importation Right Not Provided (BTA Requirement):** Articles 20 and 30 fail to provide an “importation” right as required by BTA Articles 4.2(a) and 4.6(b).
- **Exceptions Overly Broad:** Certain exceptions, including Article 25(a) (personal use copy exception), (d)*bis* (library archive copies “for the purpose of research”), (g) (“[d]irectly recording and reporting performances for public information and educational purposes”), and (j) do not accord with the Berne Convention, TRIPS, and the BTA. For example, Article 25(j) regarding personal use imports needs to be specifically narrowed in order to comply with TRIPS Article 60. Article 25(e) is Berne and TRIPS-inconsistent, as it provides that it is permissible to put on stage “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” as long as there is no admission charge; however, the provision that performers may not be paid was struck in the bill that was passed into law. It was already believed that “cultural gatherings” and especially “promotional campaigns” could be read in an overly broad way, but with payments being made, this provision runs afoul of the Berne three part test.¹⁴ The draft implementing regulations worsen the situation, in that, under draft Article 28(2) of the implementing regulations, it appears the IP Code would allow the copying of a computer program “for archives in libraries for the purposes of research.” If this is what is intended by the implementing regulation, it would create a TRIPS-incompatible exception which must be remedied.
- **Impermissible Compulsory Licenses:** Article 26 enacts into law in Vietnam a broad broadcasters’ compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).¹⁵ Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license

¹³ Draft Article 35 provides,

Protection of related rights without prejudice to copyright provided in paragraph 4 of Article 17 of the Intellectual Property Law means that organizations or individuals using works subject to copyright protection for performances, phonograms or broadcasting must guarantee personal rights and property rights as specified in Articles 19 and 20 of the Intellectual Property Law.

¹⁴ By contrast, Title 17, Section 110(4) of the U.S. Copyright Act permits “performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers” if there is “no direct or indirect admission charge” or if “proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.” Section 110(4) also provides right holders with an opportunity to object to such performances. The Vietnamese provision is much broader in the subject matter (“dramatic works and other forms of performing arts”), the setting (“cultural gatherings or in promotional campaigns”) and the payment scheme (payments not prohibited).

¹⁵ The Article reads as follows:

Use of published works without obtaining permission but paying royalties, remuneration

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations,

2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.

3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this legislation) for use of sound recordings and video recording for commercial “broadcasting” is in violation of international standards; 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne three part test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.

- **Duration Provisions Are BTA-Incompatible:** Articles 27(2)(a) (with respect to cinematographic works) and 34(2) (with respect to phonograms) violate BTA Article 4.4 since they do not provide the term promised under that Agreement.¹⁶

Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and could impose a Berne-prohibited formality by requiring a registration certificate in order to enforce copyright. Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, *enforce* and exercise rights or benefits in respect of copyright and related rights.” Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures), since they apply the same standard of proof, also violate international standards.
- **Criminal Penalties: IP Code/Criminal Code TRIPS-Incompatible on Their Face, But Circular Should Hopefully Resolve Deficiency:** Article 212 dealing with criminal penalties did nothing to resolve doubts about whether Vietnam’s criminal remedy is TRIPS-compatible.¹⁷ TRIPS (and the BTA) require that Vietnam provide criminal penalties at least in cases involving copyright piracy on a commercial scale, and that remedies be sufficiently severe to provide a *de facto* deterrent to further infringement. Article 14 of the BTA requires Vietnam to “provide criminal procedures and penalties to be applied at least in cases of ... infringement of copyrights or neighboring rights on a commercial scale,” and to provide that “penalties *available* include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity” (restating the TRIPS Article 61 test). Article 14.2 of the BTA also requires Vietnam to

¹⁶ BTA Article 4.4. provides,

Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.

¹⁷ A proposed change in a previous draft would have come closer to compliance. Specifically Article 249(2) of the 4th Draft of the IP Code provided that the following would be subject to criminal penalties:

- “Any of the acts of infringement provided for in Article 218 conducted after the infringer has been handled by administrative procedures, or after the infringer has been sentenced for this crime and the criminal records have not yet been deleted.”
- Any act of intellectual property right infringement resulting in serious consequences to the society.”

“provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.” The current draft IP Code does not expressly provide for BTA or TRIPS-compatible criminal penalties. The Criminal Code (Article 131) on its face is not helpful in resolving the ambiguities and potential weaknesses in the criminal statutes, regulations and interpretations. The good news is that a new Circular is set to be issued to clarify 1) that all infringements/violations listed in Articles 28 and 35 of the IP Code would be subject to criminal penalties under the Vietnamese Criminal Code (Article 131), and 2) that the threshold for criminal liability is whether such infringements/violations are carried out “on a commercial scale.” Resolution of these issues is crucial to Vietnam meeting its TRIPS and BTA commitments, and to establishing a healthy copyright enforcement system.

- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”**: Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed (if permissible constitutionally). Article 202(5) of Vietnam’s IP Law provides that one application of civil remedies could include “Compelling distribution or use for non-commercial purpose of goods, materials and equipment used for the production and business of IPR infringing goods.” This provision falls short of what the BTA (and TRIPS) would allow, notwithstanding that the drafters added “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” There remains no possibility of seizure or destruction of the infringing goods, materials or equipment used in the infringing activity. With regard to administrative remedies, Article 214(3)(a) is similarly too broad, providing for the possibility of “distribution and use of the [goods/implements] for non-commercial purpose provided that such distribution and use does not affect the IPR owner’s capacity to exploit his/her IPRs.” The draft implementing regulations do nothing to resolve this issue.
- **Secondary Liability and Limitations of Liability for Internet Service Providers**: Article 442(2) of the 3rd Draft IP Code provided that “[t]he person who does not directly conduct the act of infringement of intellectual property right but assigns, hires or orders other person to conduct that act shall be considered as the infringer of intellectual property rights.” Unfortunately, this was struck from subsequent revisions, including the final IP Code that passed. Establishing secondary liability for copyright infringement in the IP Law would have provided the context for what the Government is now contemplating: treatment of “service providers” when infringing materials or activities occur on their services. IIPA understands that a draft E-Transactions Bill which would have given ISPs blanket immunity for copyright infringement occurring over their services was scrapped, in favor of the approach taken in the IT Bill.¹⁸ IIPA’s view is that the draft IT Bill should not be considered seriously for passage until it is reworked to do more to foster incentives for “suppliers” (as defined therein) to cooperate with right holders in combating online piracy,¹⁹ and to adopt a robust “notice and takedown” mechanism.²⁰

¹⁸Bill entitled “Information Technology Law, Based on the Constitution of the Socialist Republic of Vietnam dated 1992, amended and supplemented in accordance with Resolution No. 51/2001/QH10 dated 25/12/2001 of Legislature X, Session 10.”

¹⁹ In general, Articles 20-23 seem intended to describe instances in which a “supplier” is not liable (with notions roughly parallel to those adopted in the United States and the EU). Unfortunately, the current formulation creates blanket immunities from liability rather than remedial limitations, i.e., it does not preserve incentives for service providers to cooperate with right holders to fight infringements online.

²⁰ The IT Bill creates no notice and takedown mechanism whereby right holders can make “suppliers” aware of infringing

Criminal Code of Vietnam

Prior to consideration of the new Circular, there were several problems with Article 131 of the Criminal Code noted by IIPA:

- It was unclear what the thresholds were (e.g., terms like “serious consequences,” “very serious consequences,” and “particularly serious consequences” are defined in only vague ways in court interpretations).
- It was unclear whether “appropriating” in Article 131 covers all commercial scale piracy (e.g., potentially all acts of infringement, end-user piracy of software, etc.).
- The penalties for “serious consequences” may be too low to deter further infringements, i.e., they may result only in “non-custodial reform” (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).²¹
- Neither the IP Code nor the Criminal Code provide that “judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense” as required by the BTA and TRIPS.
- A more serious problem was that the police in Vietnam had indicated great reluctance to investigate or enforce copyright infringement cases because Article 131 violations fall under the category of “human rights” violations rather than economic crimes. If the police remain uncommitted to act against criminal piracy once the Circular is in effect, this would be a serious problem that must be addressed for Vietnam to achieve TRIPS compatibility.

The Need for Optical Disc Regulations: The Copyright Office in Vietnam estimates that there are 5 to 7 optical disc plants in Vietnam, and they plan to issue a decree on optical disc production. If this is true, it is welcome news. Effective prevention of optical disc piracy can only be achieved through targeted legislation and by the establishment of specific enforcement mechanisms. APEC Member Economies’ Ministers endorsed a paper, “Effective Practices for Regulation of Optical Disc Production” in 2003, which contained many key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary. In addition, commercial CD-R/DVD-R “burning” (i.e., for the purpose of sale,

activity, upon which the supplier is obliged to expeditiously take down or block access to the infringing material or the user engaging in the infringement.

²¹ The penalty for the crime committed with “serious consequences” is \$1,263 to \$12,630 or “non-custodial reform” of up to two years; thus, a crime of copyright piracy may result merely in a “non-custodial reform” which might be non-deterrent (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).

distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.

- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

MARKET ACCESS

Various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves right holders no choice but to license Vietnamese companies (which often refuse to license due to the prevalence of piracy). Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market in Vietnam, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry as our right holders invariably do. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of this developing market.

Quantitative Restriction on Foreign Film and Other Restrictions Relating to Audiovisual Content: Under current regulations, there are no explicit screen quotas or restrictions on the number of imported films. However, under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced, which is a major restriction on the number of imported films allowed. Also, the number of foreign films projected by each cinema would only be allowed to reach two-thirds of the total projected films in any given year. Since the domestic films industry is underdeveloped and the number of domestic films produced has generally ranged between 10 and 15 films or

less per year, these proposed restrictions would pose a significant barrier to the import and distribution of foreign films in Vietnam.

In the television sector, foreign content is reportedly limited to 50% of broadcast time, although it is unclear whether this is enforced. In addition, foreign programming is not allowed during prime time viewing hours of 7:00 p.m. to 9:30 p.m.

Foreign investors are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. Only cinema exhibitors are allowed to import foreign films into Vietnam, but under the Cinema Law (Article 13(2)), foreign organizations and individuals and Vietnamese residing overseas may establish and manage “film distribution enterprises” and “film projection enterprises” in Vietnam, apparently with no ownership restrictions.²²

Sound Recordings and Musical Compositions: Under present rules in Vietnam, foreign sound recording companies cannot set up subsidiaries to produce or distribute “cultural products”; they must license a Vietnamese company. In the first instance, this has prevented U.S. sound recording companies from establishing businesses in Vietnam. Making matters worse, Vietnamese companies are not interested in licensing legitimate product from American companies given that pirated versions of these products are already available in the Vietnamese market. Thus, right holders in sound recordings (and musical compositions) are totally excluded from the market. It is critically important that all U.S. right holders obtain the right, if Vietnam joins the World Trade Organization, to establish wholly owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. U.S. right holders do not challenge the authority of the state to review cultural materials (e.g., through censorship) provided that they do so in a transparent and timely manner that does not operate as a disguised barrier to entry.

²² This is in contrast to “film production” in which the Director or Director General must be Vietnamese.