

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List.¹

Executive Summary: IIPA had hoped that the 2005 passage of the IP Code in Vietnam, revisions to the Criminal Code in 2009, an administrative enforcement Decree (No. 47) also in 2009, and a nationwide judicial reform process would lead to steady improvements in copyright protection, allowing a legitimate creative marketplace to emerge in Vietnam. Unfortunately, online and mobile piracy has gotten significantly worse in Vietnam, and end-user piracy of business software remains largely unchecked, among other piracy problems. Increased Internet and mobile penetration and more widely available broadband capacity have led to a severe increase in the trade of illegal copyright files online. Technological advances in Vietnam have outpaced the government's response to copyright issues, notwithstanding that the Vietnamese have long recognized that piracy in the country is increasingly "sophisticated" and involves violations of "[m]ost of the objects of the rights."² The Vietnamese Government has taken very few enforcement actions over the years, and no criminal case has ever been brought to address copyright piracy. The current Criminal Code remains in violation of Vietnam's commitments under the Bilateral Trade Agreement (2001) (BTA), and a new Decree (issued without any public consultation period or other form of transparency with the U.S. Government or industry, to our knowledge) casts further doubts on whether the IP Code is in full compliance with Vietnam's obligations under the BTA with the United States and the TRIPS Agreement. The Vietnamese Government refuses to engage with right holders, and apparently with the U.S. Government, regarding onerous market access restrictions. Vietnam, which has benefitted enormously from bilateral trade with the United States and continues to grow economically, must now hold up its part of the bargain to address copyright piracy and related concerns.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Devote greater resources and Ministry of Culture, Sports and Tourism (MCST) Inspectorate and Economic Police manpower to running raids and bringing cases under the Criminal Code through targeted criminal actions, e.g., against online piracy, end-user piracy of business software, retail and source piracy, CD-R burning labs, reprinting/photocopying facilities, etc.
- Take effective enforcement measures against notorious infringing sites whose business models are based on providing access to infringing content, including in particular those sites identified in this report (e.g., *Bamboo.com*; *Socbay.com*; *Tamtay.cn*; *Zing.vn*, etc.).
- Enforce Ordinance No. 4 and Decree No. 47 on administrative remedies for copyright infringement, imposing maximum penalties.
- Reduce pirated imports from China.
- Reduce signal theft by removing illegal content from local cable operators and stopping retransmission of signals from neighboring countries without license.

Legislation and Market Access

- Issue implementing guidance for the revised Criminal Code so that prosecutions can commence, in line with Vietnam's BTA obligation, including by i) confirming that the Code applies to online distributions, and ii) providing detailed interpretations of "commercial scale" infringements that include those undertaken without a profit motive.

¹For more details on Vietnam's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.



- Make necessary changes to IP Code and implementing decrees to ensure Vietnam is in full compliance with its BTA and other international obligations, and otherwise facilitate the free exercise of rights by copyright owners.
- Expedite the drafting process for, and provide public consultation as to, amendments to the Internet Decree (or circular) on ISP liability that clarifies the secondary liability of ISPs for copyright infringement, avoids blanket immunities for intermediaries, and requires ISPs to take responsibility and cooperate with right holders to combat online infringements both in the hosted and the non-hosted environment.
- Afford U.S. right holders greater access to the Vietnamese market, by eliminating foreign investment restrictions and other entry barriers with respect to production, importation and distribution of copyright materials whether in the physical or online/mobile marketplaces.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Extend the term of protection for sound recordings to the BTA-compatible term (75 years or more) and otherwise extend copyright term in line with the international trend (life of the author plus 70 years).
- Pass optical disc licensing regulation.

PIRACY AND ENFORCEMENT CHALLENGES AND UPDATES IN VIETNAM

Internet and Mobile Piracy Causing Severe Damage to Copyright Owners: Internet penetration continued on an upward path, with 30.5 million Internet users (35% of the population) as of November 2011.³ The vast majority of websites dealing in copyright content remain unlicensed, although there are now a few operators of online services providing licensed music. The rest are streaming, deeplinking, cyberlocker, forum, video, and social network sites all being employed to deliver unlicensed copyright content, including music, movies, entertainment and business software, and published materials. Some are Vietnam-based/hosted sites, and since both international and other Asian repertoire such as Chinese, Japanese and Korean music can be found on these sites, it appears the online music piracy problem in Vietnam is now impacting overseas markets. There is clearly a strong demand in Vietnam for copyright content with little regard to its legality, as recent survey results show.⁴ Vietnam ranks seventh in Asia in the total number of Internet users, well ahead of Thailand and Malaysia, just behind the Philippines, and catching up quickly with the relatively well-developed Internet market in Korea.⁵ Broadband usage expanded rapidly in 2010, up to 4 million broadband subscribers or roughly 5% of the total population.

Meanwhile, mobile penetration continued to skyrocket in Vietnam in 2011, with an estimated 157.8 million mobile subscriptions as of April 2011,⁶ almost doubling the 100% mobile penetration rate which was surpassed in 2009. The most significant statistic related to mobile, however, is the number of 3G network users, which was up to 12.8 million users by the third quarter of 2011, according to the Ministry of Information and Communications.⁷ With rapid increase in mobile phone subscribers in Vietnam, operators of unauthorized online music services have extended their services to mobile applications, and like the illegal online services, the majority of IT and telecommunications companies prefer to maximize their profits and turn a blind eye to the need to license copyright content.

³*Notice of Internet Data Development Vietnam Report on Internet Statistics of Vietnam*, November 2011, at <http://www.thongkeinternet.vn/isp/trangchu/index.jsp> (in Vietnamese).

⁴According to the author of a 2011 Internet usage survey conducted by Cimigo, "Vietnamese people especially like to listen to music and watch movies online. We measured a constant increase in such entertainment activities over the past few years. At the same time, there is an increasing number of websites offering such services." According to the study, about 80% of internet users listen to music online, and two-thirds download music from the internet. Half of internet users watch movies online. *2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam, April 2011*, available at <http://www.cimigo.vn/en-US/WhatsNew/2010-01/cimigo-releases-report-about-internet-usage-in-vietnam-netcitizens-report-2011.aspx>.

⁵See *Asia Internet Usage and Population*, Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>.

⁶*Vietnam Subscriber Base Touches 174.3m as at the End of April*, VnEconomy, Vietnam Business News, accessed January 28, 2012, at <http://vietnambusiness.asia/vietnam-subscriber-base-touches-174-3m-as-at-the-end-of-april/>.

⁷*VNPT Claims 50 Million Mobile Subscribers*, Viet Nam News, January 21, 2012, at <http://vietnamnews.vnagency.com.vn/Economy/219976/vnpt-claims-50-million-mobile-subscribers.html>.

The list of notorious Internet piracy services is vast and growing;⁸ this problem must be dealt with by the Vietnamese Government with urgency. Notorious websites include *Baamboo.com*, *Tamtay.cn*, *Socbay.com*, and *xalo.vn* (piracy-oriented search indexes);⁹ forum sites like *kenh14.vn*, *yeuamnhac.com*, *hiihehe.com*, *1280.com*, *loitraitim.com*;¹⁰ streaming sites (offering unauthorized video and audio content) like *musik.soha.vn*, *nghenhac.info*, *VietGiaiTri.Com.Vn*, *Nhac.vui.vn*, *Yeucahat.com*, and *Music.dinhcao.vn*; peer-to-peer (P2P) services specializing in pirate copyright content like *up.4share.vn*; cyberlockers used for piracy like *azsharing.com*. University networks are increasingly being used for dissemination of infringing content

Zing.vn is one notorious website which was identified by IIPA in its annual notorious markets filing with the U.S. Trade Representative, and USTR placed *Zing.vn* on its “Notorious Markets” list.¹¹ *Zing.vn* is an online portal service operated by VNG Corporation (previously called VinaGame) in Vietnam. *Zing.vn* provides various services including an online music portal, social networking, a search engine, instant messaging, movies, karaoke, video and photos. The user traffic of *Zing.vn* has increased significantly. According to Alexa, *Zing.vn* is ranked fourth in Vietnam in popularity. Globally, *Zing.vn* is ranked number 444 in terms of internet traffic. The *Zing MP3* music service was launched on August 1, 2007. It provides an unlicensed music service similar to Sohu/Sogou’s (China) MP3 music deeplinking service. *Zing MP3* actively encourages and induces users to listen to infringing music online (streaming) and download infringing music files hosted on a fixed server (although it is unclear whether the file server belongs to *Zing MP3*). The service also embeds the music player into forums or blog sites for Vietnamese, Chinese and international repertoire for streaming and/or download of infringing music files. Users are encouraged to stream and download infringing music files via the music search function or the music charts (e.g., “Hot Vietnamese Music,” “Hot European and American Music,” “Hot Korean Music,” “Hot Japanese Music,” “Love Songs,” “Movie Clips,” “Zing Collection,” etc.), which are designed by *Zing MP3 (mp3.zing.vn)* to facilitate mass-scale copyright infringement. In addition, the *Zing MP3* service is currently available on multiple platforms, including music portal sites, WAP (mobile phones), and other mobile phone applications. *ZingMP3* iPad application was listed in the top two mobile music applications in Vietnam as of February 2012.¹² Since January 2008, cease and desist notices have been sent to *Zing.vn* but the right holders’ notices have been largely ignored and the take down rate has been less than 1%. Administrative complaints against *Zing.vn* were filed with MCST and the Copyright Office of Vietnam in March 2010 and again in October 2011. No enforcement actions have been taken against the unauthorized operator and a large quantity of music files infringing U.S. (and foreign) record producers’ rights are still available on the multiple platforms operated by *Zing.vn*. The Vietnamese Government has not come forward with any explanation as to why no enforcement action has been taken.

Like *Zing.vn*’s parent company, VNG Corporation, virtually all of the companies operating websites or services predicated on infringement do it for one reason only – to maximize profits. The chief forms of revenue for search-based websites or deeplinking sites may be advertising (and many well-known brand names still advertise on many of the sites listed), but more often in recent years, the business models of many Vietnamese sites mirror those from other countries in which massive revenues can be generated from membership schemes or reward schemes. The cyberlocker services noted above are examples of this kind of business model, and one of the most notorious, *MegaUpload* (with headquarters located in New Zealand) was just subject to a criminal indictment in the United States for facilitating massive amounts of infringement.¹³

⁸The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. Piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

⁹Industry indicates that both *bamboo.com* and *xalo.vn* have diversified their services to include video and an mp3 search engine.

¹⁰Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content.

¹¹See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF; United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215.

¹²*App Annie*, *Top Charts-iPad-Music-Vietnam*, February 4, 2012, at <http://www.appannie.com/top/ipad/vietnam/music/>.

¹³*MegaUpload* allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The indicted owners amassed huge profits from this activity, all predicated on users massively infringing copyright.

There has also been an increase in “mobile” piracy over the year. Right holders now face two major challenges in the mobile space: 1) the loading by mobile device vendors of illegal copyright content onto devices at the point of sale; and 2) illegal music channels or “apps” set up to be accessed on mobile platforms, without any intervention from the authorities to cease such activities. As an example of this phenomenon, sites like *Socbay.com* offer illegal downloads of ringtones to mobile phones, but *Socbay* has now developed a mobile “app” called *Socbay iMedia* which provides a variety of unauthorized entertainment content, including, *inter alia*, music files. This second phenomenon will, if allowed unchecked, threaten the entire online/mobile market for music and other copyright materials into the future and must be addressed.

Despite notifying the Vietnamese Government of sites involved in piracy of music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products),¹⁴ the government has been mainly inactive and disinterested. On top of the lack of Vietnamese Government intervention (or perhaps because of it), cooperation from ISPs and content providers found to be involved in copyright infringement is extremely poor, with takedown rates reportedly being less than 9%. Both *zing.vn* and the second most popular site for infringing music, *nhaccuatui.com*, have been brought to the attention of administrative authorities in Vietnam, but there has been no response. The problem is further compounded by existing administrative enforcement remedies being rendered ineffective by: 1) the lack of an effective procedure to deal with online piracy administrative complaints; 2) a heavy burden on right holders for production of evidence and proof of actual damages (as opposed to regarding advertising revenues and other commercial advantage as sufficient proof of damage); 3) continued rudimentary issues related to MCST knowledge of and ability to identify and effectively deal with online infringement cases; and 4) lack of compliance with administrative orders, since some infringing websites do not comply with Orders issued by MCST, and some websites merely remove infringing “URLs” without ceasing the infringing operation.

End-User Piracy of Business Software Harms the Software Industry and Stunts the Growth of the IT Sector: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the software industry, thereby stunting the growth of the IT sector. Retail piracy and hard disc loading continue to cause losses as well. Apart from a handful of *ex officio* actions undertaken by provincial enforcement authorities (e.g., Son La Provincial Market Management Bureau) against distributors of pirated software, most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots. While efforts by the Copyright Office of Vietnam to partner with the private sector on IP education and training are laudable, the enterprise end-user software piracy rate in Vietnam remains high.¹⁵ A 2010 study done by the International Data Corporation (IDC) with the Business Software Alliance (BSA) concluded that decreasing Vietnam’s software piracy rate by ten percent over a four year period would add US\$1.17 billion to Vietnam’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$60 million in tax revenue.

In 2011, the business software industry continued to experience good cooperative efforts with the Vietnamese Government to legalize enterprise software use. In all, at least 15 raids against end-users were conducted on behalf of BSA member companies, and two more are in the process of investigation for possible raiding. The Economic Police and Customs both carried out *ex officio* raids. While the Economic Police worked well in teams with the MCST Inspectorate during the enforcement actions, no criminal cases were brought based on these (or any prior) raids, although a civil case is still being considered. This leaves only the administrative system to

¹⁴In addition to the sites listed in this filing, MCST and COV have been informed of the following websites: *1280.com*, *7Sac.com*, *bbs.orzko.com*, *clip.vn*, *galaxy.net*, *Gate.vn*, *giaitri24.vn*, *giaitriamnhac.info*, *hihihehe.com*, *karaoke.com.vn*, *kenh14.vn*, *livevn.com*, *loitraitim.com*, *nhac.vui.vn*, *nhaccuatui.com*, *noi.vn*, *onlinemtv.net*, *rap.vn*, *timnhanh.com*, *Top1.vn*, *truongton.net*, *vast.net.vn*, *VietGiaiTri.Com.Vn*, *Yeah1.com*, *Yeumnhac.com*, and *yeucahat.com*.

¹⁵BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Vietnam was 83% (one of the highest in the world), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$247 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

deter piracy, and unfortunately, while quicker, cheaper and more effective to carry out, the result is non-deterrent fines, in amounts below the cost of having purchased legal software. It is reported that low fines result from reluctance to consider the legitimate value of the products infringed rather than the “pirate value.” The authorities seem to consider legalization the key issue, not compensation for the damage suffered by right holders or the TRIPS principle of deterring further infringements. A 2008 Memorandum of Agreement has been effective in fostering good working relations between industry and government enforcement authorities through the Partnership in Protection of Software Copyright program.¹⁶ Still, while enforcement officers show a strong interest in learning about copyright, improving their inspection skills, and applying what they have learned in practice, this interest has not translated into increased deterrence through greater numbers of actions, criminal prosecutions, or deterrent administrative enforcement.

Physical Piracy Remains Rampant, Including Pirate Imports, Pirate Burned Content, and Factory Production: Evidence of physical piracy can still be found everywhere in Vietnam, especially in urban areas, including major piracy hubs like Hanoi, Ho Chi Minh City, Đà Nẵng, Hải Phòng, and Vietnamese-Chinese border cities Lang Son and Mong Cai. It remains very easy to buy almost any kind of software at shops on the so-called “PC streets” or other “CD-DVD” shops.¹⁷ Piracy storefronts are more than happy to supply any content on recordable discs, complete with hacking or cracking instructions for those products embedded with technological protection measures (access controls or copy controls). Vietnamese law outlaws the circumvention of such TPMs as well as the trafficking in circumvention tools, and thus it is critical that the laws be implemented to halt these practices. Vietnamese-sourced pirate products flood the domestic markets and have been found in other markets in recent years in Asia, North America, and even Eastern Europe. For the music industry, with piracy levels still extremely high, financial returns for recorded music sales have dropped so deeply that the companies involved are unable to invest in new albums and artists, choosing to recoup investment through ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing.

Though MCST has been supportive in recognizing the problem, they have devoted very few resources to deal with physical piracy across Vietnam. With the development of the Internet, some physical piracy has begun to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed.¹⁸ Only a ‘zero tolerance’ campaign, including *ex officio* actions against open and blatant piracy activities of all kinds, with deterrent administrative fines meted out to their maximums, license revocations, shop closures, seizures of pirate imports and pirated product destined for export by Customs, and criminal penalties can result in a significant reduction in piracy in Vietnam.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers continue to suffer from rampant piracy in Vietnam, in the form of illegal reprints and unauthorized photocopies. Bookshops, roadside vendors and copy shops all sell unauthorized copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers. Unauthorized translations are another problem, often being produced by university lecturers or professors, who append their name to the translated textbook with no acknowledgment that the work is not of their own authorship.¹⁹ The English language teaching market continues to be hard hit, with much of the market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. In 2009, law

¹⁶In August 2008, a Memorandum of Agreement was signed establishing the “Partnership in Protection of Software Copyright” between BSA, the Vietnam Software Association, the Inspectorate of the Ministry of Culture, Sports & Tourism (MCST), and the Copyright Office of Vietnam.

¹⁷Pirate optical discs in the market come in three varieties: imports, mainly from China; locally produced “burning” onto recordable discs; and factory-produced discs. The majority of pirate VCDs and DVDs of movies are now imported from China. Authorities in Vietnam have previously reported eight optical disc plants operating in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand.

¹⁸A reported seizure in Ho Chi Minh City on January 6, 2010 of “300,000 discs of all kinds that could be considered pirated” from a plant supposed to be producing blank discs highlights the continued struggle in Vietnam against piracy. *Vietnam Police Say Pirated Discs Seized*, Agence France Presse, January 7, 2010, at <http://www.france24.com/en/20100107-vietnam-police-say-pirateddiscs-seized>.

¹⁹*Uni Faculty Members Accused of Plagiarism*, <http://english.vietnamnet.vn/education/201005/Uni-faculty-members-accused-of-plagiarism-910815/>

enforcement authorities raided the premises of a printer/bookstore owner engaged in unauthorized reprinting of ELT materials. Though a fine was imposed, it apparently remains uncollected.²⁰

Signal Piracy/Pay TV Piracy: Vietnam's Pay-TV sector is one of the fastest developing markets in the Asia Pacific, and is set to rank fourth in the region in growth over the next four years.²¹ With 4.2 million overall connections as of May 2010, and digital systems taking hold (including through Vietnamese Government infusion of capital), signal piracy in Vietnam still holds back the legitimate Pay-TV market,²² and causes major damages to right holders.²³ Urban cable systems are prone to “line tapping” and signal theft by individual consumers, including the unauthorized reception and redistribution of foreign satellite channels using illegal decoders. Cable companies continue engaging in “under-declaration” by which they fail to pay for the full number of customers to whom they provide programming, and also use unlicensed content (including unauthorized broadcasts of DVDs directly over their channels). “Overspill” is also a problem in Vietnam as cable operators capture signals from neighboring countries’ satellite systems. These are endemic problems which the government should address. A relatively new and dangerous problem in Vietnam involves the operation of websites which steal Pay-TV signals and stream them onto the Internet. Several sites have been identified as streaming premium content channels without authorization, mainly focusing on motion pictures or sports content. On top of this increase in lost revenues, there are lost opportunities due to restrictions placed by the Vietnamese Government on the number of international channels. Even with the current hundreds of TV channels of all kinds in Vietnam, foreign right holders are being denied access to the Vietnamese market.

Court Reform Efforts Lacking: The inactivity of the courts in dealing with copyright infringement issues is a major disappointment. To IIPA’s knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be great reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. There have to date been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors as they play a very important role in bringing a criminal offense case to the courts.

COPYRIGHT LAW AND RELATED ISSUES

Criminal Code Violates Vietnam’s BTA Obligations; Implementing Circular Should Ensure Full Compatibility with BTA: Vietnam’s revisions to the Criminal Code in 2009 included a new Article 170a criminalizing “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” Article 170a improved Vietnam’s statutory framework in two respects: 1) the phrase “and for commercial purposes” was removed from the Criminal Code, so the standard for criminal liability is now “on a commercial scale”; and 2) fines are increased to a range from US\$3,000 minimum to US\$30,000 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$22,000 minimum to US\$57,000 maximum.

²⁰There were two raids run against these premises, in December 2009 and March 2010, resulting in seizures of 38,764 pirated books. A fine of VND 500 million (US\$25,700) was imposed but has yet to be collected.

²¹Louise Duffy, *Vietnam Pay-TV Market Set to Take Off*, Rapid TV News, December 23, 2011 (indicating Vietnam will be the fourth fastest-growing market for Pay TV services through 2016, according to industry market research).

²²Cable and Satellite Broadcasters Association of Asia (CASBAA), *CASBAA Release - Vietnam Pay-TV in Bloom*, May 7, 2011, at <http://www.casbaa.com/media-and-resources/news-center/casbaa-news/casbaa-news-archive/55-casbaa-release-vietnam-pay-tv-in-bloom>. It has been reported in recent years that signal piracy extends as far as Vietnam Television Corporation (VTC), operated by the Ministry of Posts and Telematics, which has broadcasted foreign content without a license to do so.

²³According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), the cost of pay-TV piracy in Vietnam increased 20% to almost US\$18 million in 2010, attributable to more than 1.1 million illegal connections at the time (307,000 illegal individual connections or overspill, and 825,000 under-declarations or illegal distributions).

Unfortunately, overall, Article 170a is weaker than the provision in force up until its adoption, the February 2008 Criminal Circular. That 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of technological protection measures (TPMs), decryption of encrypted satellite signals, and other acts. Implementing legislation should once again confirm coverage of acts of infringement or other violations enumerated in the IP Code, which would confirm that Vietnam does not violate its commitments under the BTA with the United States.²⁴ In the BTA, Vietnam agreed, in Chapter II, Article 14, to criminalize all “infringement of copyright or neighboring rights on a commercial scale.” The BTA also expressly calls for criminalization of the trafficking in a device or system used for “the unauthorized decoding of an encrypted program-carrying satellite signal” or “the willful receipt or further distribution of an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal,” so it must also be confirmed in implementing regulations that the revised Criminal Code covers this act as well, or the Government of Vietnam must separately demonstrate that such acts are criminalized elsewhere in the Code (otherwise this lack of coverage would place Vietnam in violation of Chapter II, Article 5 of the BTA). The U.S. should commence immediate consultations in conjunction with Chapter VII, Article 5 of the BTA, to resolve these express violations of the terms of the BTA, recognizing that resolution is also connected to Vietnam’s successful participation in the TPP.²⁵

An Inter-Ministerial Circular to implement the revised Criminal Code is to be issued. IIPA understands the drafting team is headed by the Inspectorate of the Ministry of Science & Technology. In such a Circular, the Vietnamese Government should clarify the types of acts subject to criminal liability under the amended Criminal Code to include online distributions and offers to distribute online (making available).²⁶ It would also be important for the Vietnamese Government to provide detailed interpretations of “commercial scale” infringements that include acts which harm the market regardless of the motive of the infringer to make profits. Guidance should be provided to set out that “commercial scale” includes infringements that are undertaken without a commercial purpose but which nevertheless have a clear commercial impact (such as the unauthorized making available on the Internet of copies of protected works, knowingly providing access to such infringing materials, or other acts such as the unauthorized use of software in a business). Such guidance will give administrative authorities in Vietnam the confidence to recommend cases for criminal action when harmful Internet piracy activities are taking place.

Administrative Remedies Decree Must Be Implemented in Practice: Several ordinances and decrees built on one another govern administrative enforcement of copyright in Vietnam over the past several years. The administrative enforcement system is intended to deal with “intentional or unintentional actions of individuals or organizations violating the law on copyright and related rights but not serious enough to hold criminal liability,” which appears to cover any violation of the IP Code including violations as to works in Article 28 of the Code and as to related rights in Article 35 of the Code.²⁷ The current Ordinance No. 04/2008/UBTVQH12, issued on April 2, 2008,

²⁴See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

²⁵Chapter VII, Article 5(3) of the BTA provides in relevant part,

The Parties agree to establish a Joint Committee (“Committee”) on Development of Economic and Trade Relations between Vietnam and the United States of America. The Committee’s responsibilities shall include the following:

A. monitoring and securing the implementation of this Agreement and making recommendations to achieve the objectives of this Agreement;

...

C. serving as the appropriate channel through which the Parties shall consult at the request of either Party to discuss and resolve matters arising from interpretation or implementation of this Agreement...

²⁶Specifically, to ensure proper coverage of commercial scale Internet-based copyright infringements, which cause enormous commercial damage to copyright owners, those drafting interpretations should ensure that Internet transmissions are included within the term “distributing,” so that communicating works to the public by wire or wireless means, through electronic information network or by any other technical means, and such acts as making available works through interactive networks, are covered.

²⁷For such violations, Section 2 of the Administrative Decree provides, “for each administrative violation, the individual or organization shall be subjected to one of two forms of primary penalty: warning and fine,” with the maximum fine being VND500 million (US\$25,700). Remedies also include seizure of all infringing goods and materials (transport, equipment, raw materials, and imported materials) used in the infringement, suspension of the business or service for three to six months, and possible destruction of all infringing goods and materials used to effect the infringement. Importantly, the law expressly refers to removal from the Internet of copies “that were transferred illegally by digital networks,” and removal of all illegal copies “under form of electronic storage.” While there is overlap, the Administrative Decree also sets forth separate penalties, with a different fine structure, for illegally making derivative works, displaying (or performing) works

raised the maximum fine up to VND 500 millions (about US\$25,000).²⁸ Decree No. 47/2009/NĐ-CP, on “Handling Administrative Infringement in Copyright and Related Rights” implemented Ordinance No. 04. Unfortunately, administrative remedies in Vietnam as implemented have been mostly non-deterrent. On December 2, 2011, the Prime Minister approved Decree No 109/2011/ND-CP on amending and supplementing some articles of Decree 47.²⁹ Decree No. 109 deals in large part with valuation of infringed commodities in order to determine the fine structure. For the most part, the Decree will not help lead to more deterrent enforcement. For example, the Decree adds to the administrative liability structure to provide penalties of a fine between 10 million VND (US\$475) and 90 million VND (US\$4,200) if the value of infringed commodities cannot be determined. While this newly added provision is welcome to address the difficulties faced by the right holders and/or law enforcement agencies in estimating the value of infringed commodities, it appears that the level of administrative fine remains wholly inadequate to create real deterrence.

The Decree also does not address Internet infringements head on, although Articles 7 (amending Article 35 of Decree 47) and 8 (amending Article 37 of Decree 47) of the new Decree impose fines against acts of “distributing” phonograms without a right holder or CMO’s permission, which could be interpreted to include Internet infringements. It is critically important that online transmissions of works and sound recordings be covered under civil, administrative and criminal remedies.³⁰ While the Ordinance and new Decree in general should not be viewed as a substitute for a workable and deterrent criminal remedy in Vietnam, IIPA members believe that swift implementation in practice of the remedies in the Ordinance and Decree can, if implemented with maximum fines in most circumstances, and if applied to the online environment, begin to deter piracy and send a strong signal that violations of the IP Code will not be tolerated. The one software case noted above is an example of the problems that can occur when implementing Decree 47 in practice, since in that case, the maximum administrative fine was administered, but never paid, and the perpetrator remains in operation to this day under a different business name.

New Decree No. 85, Amending Decree No. 100 (Implementing Regulations for the IP Code and the Vestigial Civil Code) Potentially Creates New Problems in the Law: IIPA has commented in detail in previous submissions³¹ regarding the Intellectual Property Code (2005)³² and the 2009 amendments to that Code.³³ The law, and the Civil Code which remains as a vestigial parallel law, are subject to implementing Decree No. 100.³⁴ Decree No. 100 was amended in late 2011 by Decree No. 85, effective November 10, 2011.³⁵ This Decree was issued without any public consultation period or other form of transparency with the U.S. Government or industry, to our knowledge, which is unfortunate, since both likely would have had comments. Decree No. 85 contains some helpful

to the public, reproducing works, distributing or importing works, communicating works to the public by wireless or wired means, electronic information networks or other technical means, and rental of cinematographic works or computer programs.

²⁸The first Ordinance on handling administrative violations was issued on July 6, 1995. This ordinance was replaced by the revised Ordinance No 44/2002/PL-UBTVQH10 issued on July 2, 2002, which in turn was replaced by the current Ordinance (2008).

²⁹An English copy from the Copyright Office of Vietnam’s website is available at http://www.cov.gov.vn/cbgen/index.php?option=com_content&view=article&id=797:decree-1092011-nd-cp&catid=42:vn-law-document&Itemid=67.

³⁰According to Article 30 of Vietnam IP Law (2005), it is the right of producers of phonograms to “distribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public.”

³¹See, e.g., International Intellectual Property Alliance, *Vietnam*, in 2009 Special 301 Submission, at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

³²Law 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 December 25, 2005. The law, while not entirely in compliance with Vietnam’s international or bilateral obligations, represented at the time a major modernization, including partial implementation of the WCT and WPPT; Vietnam should now be encouraged as an immediate next step to join those treaties. In addition to the remaining issues discussed in the text below, members have indicated it would be helpful if the government considered introduction of a provision making pre-established (statutory) damages available, upon the election of the right holder. Statutory damages can be very important in civil cases in circumstances in which the amount of reproduction or distribution having occurred is difficult to calculate. Such damages systems have been adopted in many countries, including China and Malaysia.

³³National Assembly of Law No. 36/2009/QH12, “Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law,” which went into effect January 1, 2010.

³⁴Decree No. 100 on Detailed Regulations and Guidelines to the Implementation of Number of Provisions of the Civil Code and the Intellectual Property Law on Copyright and Related Rights, Decree No. 100/2006/ND-CP, September 21, 2006, at <http://www.cov.gov.vn/english/viewNew.asp?newId=79>.

³⁵Decree No. 85/2011/ND-CP Dated September 20, 2011 of the Government Amending and Supplementing a Number of Articles of the Government’s Decree No. 100/ 2006/ND-CP of September 21, 2006, Detailing and Guiding a Number of Articles of the Civil Code and the Intellectual Property Law Regarding Copyright and Related Rights (effective November 10, 2011) (English translation on file with author, courtesy of Baker McKenzie Vietnam).

clarifications,³⁶ but potentially raises new questions with respect to Vietnam's compliance with its international obligations. The following are some initial observations regarding the Decree:

- **Coverage of Temporary Reproductions:** Article 5 of Decree No. 85 alters Article 23(2) of Decree No. 100 to provide that the right of reproduction “provided at Point c, Clause 1, Article 20 of the Intellectual Property Law means one of exclusive economic rights under copyright which are performed by copyright holders or their authorized persons to make copies of works by any means or in any form, including electronic ones.” Article 20(1)(c) of the IP Code provides a more detailed definition of reproduction, including “permanent or provisional backup of the work in electronic form.” Since that provision is not altered, we read Decree No. 85 as consistent with, if less detailed than, the IP Code provision. To the extent the intent of the drafters is to alter the IP Code to remove “provisional backup” (i.e., temporary storage) from the law, it would appear to us necessary to make an amendment to the IP Code itself. Such an amendment would be inadvisable, however, since 1) over 100 countries recognize temporary reproductions as part of the reproduction right in their national legislation, or through interpretation, and 2) it would be hoped that through the TPP process protection of temporary copies will be included, as confirming the understanding of Article 9 of the Berne Convention, and carried forward into the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- **Collective Management:** Article 11 of Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 which governs collective management. Some of these changes are useful clarifications, e.g., it requires that collective management organizations have “signed authorizations” (Article 41(1)(b) as amended), and takes away discretionary power for MCST to “guide the division of royalties, remunerations and other material benefit” when right holders have “not yet authorized any organizations to act as collective representatives of copyright or related rights.” Unfortunately, some other changes to Article 41(3) and especially the changes to Article 41(4) are onerous and conflict with the ability for collective management organizations to operate freely, and are especially onerous with regard to right holders’ ability to freely determine on what terms their rights will be administered. As the most egregious example, Article 41(4) of Decree No. 100 as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

“amendments or supplementations to the operation charters or regulations; changes in the leadership; participation in international organizations; other external activities; rates and modes of payment of royalty, remuneration and material benefits; long-term and annual programs and plans; operations, conclusion of authorization contracts and use licensing contracts; collection, levels, modes and methods of dividing royalty, remuneration and material benefits; and other related activities”

Such onerous provisions should be stricken from the law in order to allow right holders to freely exercise their rights in Vietnam.³⁷ In the absence of immediate changes, it should be clarified that these new provisions do not apply to administration of foreign rights.

³⁶For example:

- Article 6 of Decree No. 85 confirms a BTA-compatible term for cinematographic works.
- Article 8 of Decree No. 85 helpfully clarifies that broadcasters’ rights as defined in Article 31 of the IP Code shall include the ability to control the “relay, re-broadcast or transmission] via telecommunications or electronic communication networks or in any technical media broadcasts of other broadcasting organizations,” as well as “[a]ny modification, mutilation or supplementation of broadcasts of other broadcasting organizations for rebroadcasting or transmission via telecommunications or electric communication networks or in any technical media.” It would be helpful if the law also specified these rights in the authors of cinematographic and other audiovisual works, but since they are already granted broad “communication to the public” right as well as remedy against any form of “dissemination” we see these enumerated rights as covering most, if not all, the acts enumerated in Section 8 of Decree No. 85.

³⁷To ensure that CMOs can operate in the most efficient way, it is important for the Vietnamese Government to establish a flexible legal framework that allows them to operate without unnecessary or burdensome requirements. An efficient licensing market based on minimum state interference allows different players to adjust to the best solutions of the domestic marketplace, for the benefit of all stakeholders involved.

- **Remuneration “Principles and Methods”:** Article 12 of Decree No. 85 adds Article 45a to Decree No. 100, setting out some “Principles and methods of payment of royalty, remuneration and material benefits.” The first principle of the provisions noted in the IP Code are that the rights enumerated therein are exclusive rights, and thus, the method and manner in which exploitation of those rights will occur is the primary domain of the author, co-authors, or right holders, as the case may be. IIPA is worried that the obligatory nature of the “principals and methods” set forth in Article 45a as amended (“Royalty and remuneration ... *shall be determined* as follows”) suggests they are compulsory. However, in reading the “principals and methods” they do not seem to be inconsistent with the ability for right holders to freely contract and freely determine the terms under which their exclusive rights may be exercised. This should be confirmed, however, by the Vietnamese Government. To the extent the Vietnamese Government is considering compulsory remuneration, it should be reminded, for example, that the BTA prohibits Vietnam from availing itself of the very narrow and restrictive provisions of the Berne Convention Appendix.³⁸

Copyright Law and Implementing Regulations to IP Code Remain Incompatible with the BTA and Potentially Vietnam’s Other International Obligations: The following summarizes issues raised by IIPA in previous submissions regarding the IP Code’s compliance with Vietnam’s BTA obligations and other international obligations/standards.

- **Term of Protection (BTA):** The 2009 amendments did not meet the BTA obligation to increase the term of protection for sound recordings to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). Article 34(2) of the IP Code therefore still violates BTA Article 4.4. When the government does go forward and amend the law to fix this BTA deficiency, it should follow the international trend to extend the term of protection for works as well to life of the author plus 70 years.
- **Internet Rules to Clarify Service Provider Responsibility and Promote Service Provider Cooperation:** Laws in Vietnam dealing with Internet issues and service provider responsibility include the Information Technology Law (2007),³⁹ and Decree No. 55 on the Management, Provision and Use of Internet Services (2001) (Internet Decree).⁴⁰ The Information Technology Law apparently provides a broad exemption for information transmitted over or stored on their network.⁴¹ The Internet Decree, by contrast, contains helpful language on service provider issues. Article 6(1) provides, “[i]nformation stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State’s Secrets and other law provisions on intellectual property and Internet information management.” Article 6(2) provides, “[o]rganizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.” To create meaningful copyright protection online in Vietnam, the laws must be tailored to foster service provider responsibility. This can be done initially by creating mechanisms including statutory notice and takedown to deal with infringement in the hosted environment. With increasing broadband penetration and mobile piracy, fostering responsibility (especially when the service provider knows or has red-flag knowledge of infringing activity) in the non-hosted environment is critical. The government must engage ISPs, most of which have ties to Vietnamese Government agencies, and adopt policies so that they can easily stop online infringements and repeat infringers from engaging in such illegal activities. IIPA understands Vietnam is working on changes to the Internet Decree

³⁸See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), Article 5, which provides,

Neither Party may grant translation or reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party’s territory for copies or translations of the work could be met by the right holder’s voluntary actions but for obstacles created by the Party’s measures.

³⁹Law No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007).

⁴⁰Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services.

⁴¹The IT Law does not expressly cover copyright, so it is believed that the Internet Decree should govern copyright cases. Under the IT Law, ISPs are not responsible for any violations over their networks, unless (i) they themselves initiated the transmission of the information; (ii) they themselves proactively selected recipients of transmitted information; (iii) they proactively selected and modified the content of the transmitted information. Industry indicates that in practice, this means ISPs have to take down infringing content only where they are so requested by competent State authorities.

and providing for a public consultation process is extremely important in regard to this critical legislation. IIPA welcomes the opportunity to comment in that process.

- **Making Available Right:** The Implementing Decree does not expressly confirm that Article 30(1)(b) provides producers of sound recordings with a WPPT-compatible right of “making available” as required by Article 14. Either a clarification should be made to Article 30 of the IP Code to ensure that this right should cover any form of transmissions of sound recordings under the distribution right, including interactive and non-interactive digital transmissions, or Article 23(4) of the Decree should be made applicable, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of the WPPT.
- **Technological Protection Measures (WPPT):** It appears an inadvertent gap was created in enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to works) was not made applicable to related rights. This can be resolved in one of two ways: Article 28(14) can be made applicable, *mutatis mutandis*, to related rights, or a separate provision of Article 35 can be added to provide that trafficking (as in Article 28(14)) is a “related rights infringement.”
- **Restrictions on IP Rights:** IIPA remains concerned about Article 7(2) (which potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances), Article 7(3) (which permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights), and Article 8 (which establishes impermissible content-based restrictions of protection under copyright, similar to a provision in the Copyright Law of the People’s Republic of China which was found by a WTO panel to violate China’s WTO obligations). The scope of Article 23 also remains ambiguous. These articles must be made compatible with Vietnam’s commitments under bilateral and international copyright agreements and treaties.
- **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 performer or producer must not cease to exist because the author has granted authorization of a particular use, and vice versa. Article 35 of the Implementing Regulations establishes the supremacy of copyright over related rights. This should be remedied.
- **Exceptions Overly Broad, and Impermissible Compulsory Licenses:** Certain exceptions in the IP Code may be overly broad. Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes” and Article 25(1)(e) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” remain potentially problematic. IIPA also remains concerned that Article 25(2) of the Implementing Decree appears to allow the copying of a computer program “for archives in libraries for the purposes of research,” which would create a TRIPS-incompatible exception which must be remedied. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works. Notwithstanding the attempt to limit the scope of the compulsory license to the three-step test, the simple addition of the language of the test will not avoid any compulsory arrangement from colliding with it. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which was a last minute addition to this legislation) for use of sound and video recordings for commercial “broadcasting” violates international standards. Article 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 Convention three-step 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.
- **TRIPS/Berne-Compatible Presumption of Ownership Must Be Afforded and No Formality Principle Honored (BTA, Berne, TRIPS):** Article 203 of the IP Code requires right holders to provide “necessary evidence proving basis [for] the establishment of copyrights, related rights, of which [a] Copyright Registration Certificate

and Related Right Registration Certificate are consider[ed] as acceptable evidence.”⁴² The Vietnamese Government has taken the position that nothing in Article 203 requires a registration certificate as a formality and that it affords a presumption of ownership without production of a certificate. Vietnam must adhere to the “no formalities” principle of Berne and TRIPS, and Article 3.2 of the BTA.⁴³

- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Articles 202(5) and 214(3) of the IP Code provide that remedies for copyright infringement may include compelling the distribution or use for non-commercial purpose of the infringing goods, as well as the materials and equipment used in furtherance of the infringement, provided that such distribution does not affect the exploitation of rights by an aggrieved rights holder. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS obligations.⁴⁴
- **Optical Disc Regulations:** IIPA understands that draft optical disc regulations have been under consideration by Vietnam for some time to deal with optical disc production over-capacity in Vietnam. This regulation should be enacted and implemented forthwith. IIPA members have provided the government with model legislation on numerous occasions. Such a regulation on the licensing of optical disc manufacture should include the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs, and a way to monitor imports of machinery and raw materials used to make pirate discs. APEC Member Economies’ Ministers endorsed a paper, “Effective Practices for Regulation of Optical Disc Production” in 2003, which contained key aspects of an effective optical disc regulatory scheme.

MARKET ACCESS BARRIERS IN VIETNAM

Various market access barriers exist in Vietnam today, the most serious of which are limitations and prohibitions on foreign companies’ setting up subsidiaries to produce or distribute “cultural products,” including IIPA members’ products. These restrictions contribute to the lack of a robust and competitive marketplace for content, and limit investment in the creation of new Vietnamese cultural materials. Thus, the vicious cycle of high piracy rates and little to no market access continues. To facilitate commercial development of Vietnam’s cultural sector, Vietnam should look to internationally accepted standards and practices which are premised on the understanding that constraining market access for legitimate products complicates efforts to effectively combat piracy. The Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.⁴⁵ Unfortunately, Vietnam’s restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, undermining this objective.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides a summary and, where applicable, updates.

New Concerning Regulatory Intervention in the Pay TV Sector: Decision No. 20/ 2011/ QD-TTg issued in 2011⁴⁶ requires foreign Pay TV channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. All foreign programming is required to be edited and

⁴²Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) of the Code apply the same standard of proof as Article 203.

⁴³Article 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.”

⁴⁴The government of Vietnam points to “Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008,” which indicates that in case any law of Vietnam or international treaty to which Vietnam is party “provides that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.” This response seems helpful, although it may not fully satisfy the default rule in the IP Code, since that Code does not compel the destruction of infringing goods.

⁴⁵See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, at http://www.nhandan.com.vn/english/culture/171208/culture_v.htm.

⁴⁶Decision No. 20/ 2011/ QD-TTg Dated 24 March 2011 Promulgating the Regulations on Management of Paid Television (effective May 15, 2011).

translated by an approved licensed press agent, there are new local language subtitling requirements for most programming, imprecise content guidelines, and new registration requirements. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced in Vietnam. These measures, if fully implemented, are unduly restrictive and could severely impede the continued growth and development of the Pay TV industry in Vietnam. Further, these regulations essentially expand censorship requirements to all channels, while such regulations had previously applied solely to “sensitive” channels. This mandate also appears to impose new “editing” fees on international channels.

Restrictions on Trading Rights for Films and Distribution Services: Importation (trading rights) and distribution of foreign films are limited to cinemas and business entities that own or have the right to operate a qualified cinema for at least five years and have a license from the Ministry of Culture and Information (MOCI). The import plan and the contents of foreign films must also be pre-approved by MOCI.

Quantitative Restrictions on Foreign Films Imported for Theatrical Distribution: 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. Also, the number of foreign films projected by each cinema is only allowed to reach two-thirds of the total projected films in a given year. Since the domestic film industry is underdeveloped and the number of domestic films produced has generally ranged between 10-15 films or less per year, these restrictions, if enforced, would be a significant barrier to the import and distribution of foreign films in Vietnam. The Cinematography Law amendments appear to leave the possibility for quantitative restrictions on importation of films for distribution.

Laws Leave Potential Quotas In Place: IIPA has in previous submissions noted the concern over potential quotas for foreign film projection in Vietnam in the Cinematography Law as amended. Such quotas should be disfavored. Certain articles also endanger the television broadcast market, for example, Article 35(2) provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of Decree No. 96 implementing certain provisions of the Cinematography Law requires that the proportion of Vietnamese films broadcast on TV must be at least 40%.⁴⁷ Such quotas are disfavored and should be lifted.

Foreign Investment Restrictions: Foreign investment in cinema construction and operation in Vietnam is limited to 51% and must be through joint ventures which are state-approved. A foreign investor cannot establish a distribution network for home video if they do not engage in manufacturing, and foreign investors may only engage in videotape, VCD, and DVD production in Vietnam in the form of a joint venture with local interests.

Government Monopoly Over TV Broadcasting/Foreign Broadcast Quotas: The Vietnamese government controls and owns all television stations in the country. It does not allow private- or foreign-owned TV stations, or foreign investment in broadcast stations. Foreign content is reportedly limited to 50% of broadcast time, and foreign programming is not allowed during prime time.

Censorship Process for Filmed Entertainment: MOCI maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. Films that require editing are subject to an additional review, though importers are not assured a right of appeal. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

⁴⁷Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

Onerous Market Access Restrictions on the Music Sector: Onerous Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. Vietnam maintains investment barriers against foreign sound recording companies, many of which are of a discriminatory nature. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under GATS as part of its WTO accession. Vietnamese restrictions on the business of making and selling music stifle the development of the Vietnamese music industry, and deny participation of U.S. companies in the market.⁴⁸ The lack of a meaningful commercial presence of U.S. record companies in Vietnam also inhibits IIPA members' anti-piracy efforts – the effectiveness of which is further hampered by restrictions on the ability of our industry to investigate the activities of pirates in Vietnam. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights of U.S. content largely on its own. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

Discriminatory Consumption Tax on Imported Game Products: IIPA had previously received information about a draft decree of the Ministry of Information and Communication targeting games for a discriminatory 30% special consumption tax imposed only on imported online and offline games. The Draft Decree remains up on the MIC website, but we are unaware of developments toward issuance of this Decree.⁴⁹ The Vietnamese Government should refrain from imposing such discriminatory taxes which prejudice legitimate right holders and ease the way for pirates who do not have to contend with such costs.

Onerous Market Access Restrictions on the Online Game Industry: The Vietnamese Government controls the country's online games market through an onerous licensing process. Game operators without a license are foreclosed from the market. In 2010, the Vietnamese Government banned issuance of new licenses for online games and banned advertising of online games, with a disproportionate impact on foreign game publishers.⁵⁰ Reports indicated that the ban remained in effect in 2011.⁵¹ Prior to the ban, obtaining a license required the approval of three separate government ministries, and was limited to companies that were at least partially domestically owned.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with the TPP countries – including Vietnam – with the objective of shaping a

⁴⁸Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute "cultural products" is unclear. It appears that foreign sound recording companies must license a Vietnamese company. Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already readily available in the Vietnamese market. Thus, rights holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted 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. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam's failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, IIPA believes, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies cannot do business in Vietnam, pirates will fill the void, forming a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. rights holders, but also local artists. One way to make headway into the damaging piracy that has resulted from lack of market access for foreign sound recording companies in Vietnam is to permit legitimate companies to participate in the growing mobile and Internet markets for music. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers. Further, foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users.

⁴⁹See *Draft Decree Guiding Some Articles of the Law on Information Technology for Information Technology Services* (28/04/2010 9:19 CH), Article 14, at <http://mic.gov.vn/lavyknd/Trang/duthaonghidinhhuongdanmotsodieucualuatcongnghethongtinvedichvucongnghethongtin.aspx>.

⁵⁰The ban is imposed pursuant to MIC Inter-Ministerial Circular No. 60 (2010) and, to IIPA's knowledge, remains in effect.

⁵¹*Unlicensed Games Still Rife in Vietnam*, Gameland International, August 7, 2011, at <http://en.gamelandvn.com/news/596/unlicensed-games-still-rife-in-vietnam.html>.

high-standard, broad-based regional agreement.⁵² Negotiations are proceeding apace with an aggressive schedule and a goal of completion in 2012. IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.⁵³ Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the current Administration's goals.⁵⁴ Vietnam has taken strides in its substantive laws which make meeting the legal and enforcement obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, as noted, recent changes threaten to move Vietnam further from those standards, and in addition, Vietnam has some of the most restrictive market access barriers in the world. IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein. The TPP e-commerce chapter, and the TPP's market access provisions for services and investment, should require TPP partners to eliminate discriminatory taxes and policies and open Vietnam's market to foreign competition. We remain hopeful that Vietnam's participation in TPP negotiations will aid in the elimination of such discriminatory barriers.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC §§ 2462(c)(4) and (5).

On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States in response to a Federal Register notice on whether to designate "the Socialist Republic of Vietnam as a GSP Beneficiary Country." While the IIPA filing did not oppose granting Beneficiary Developing Country status to Vietnam under the Generalized System of Preference trade program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria. Now that the GSP program has been reauthorized, the piracy and market access barriers highlighted in this report are key reasons Vietnam should be scrutinized closely before being granted beneficiary status under the GSP program.

⁵² See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/pressreleases/2009/december/trans-pacific-partnership-announcement>.

⁵³ International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009). See also International Intellectual Property Alliance, "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement," 75 Fed. Reg. 64778 (October 20, 2010).

⁵⁴ We note that President Obama signed the Korea-U.S. (KORUS) free trade agreement on October 21, 2011, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.