

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Vietnam should be elevated to the Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** IIPA's recommendation to elevate Vietnam this year to the Priority Watch List recognizes: the increasing importance of this potential market; unacceptably high piracy levels which are increasingly harming the emerging online and mobile marketplaces; the continued unwillingness on the part of the Vietnamese Government to mete out deterrent administrative fines, or to launch any criminal prosecutions against piracy; and onerous market access barriers. The Vietnamese Government has long recognized that piracy in the country is increasingly "sophisticated" and involves violations of "[m]ost of the objects of the rights,"<sup>2</sup> but its actions have not been commensurate with that acknowledgement. The Government has taken the first administrative enforcement actions against a couple of Internet piracy sites under a Ministry of Information and Communications (MIC) and Ministry of Culture, Sports, and Tourism (MCST) Joint Circular, and the software industry reports a greater number of raids against unauthorized use of software in enterprises. These are positive signs, but a more intensive approach to copyright enforcement will be needed to reduce piracy levels and make space for legitimate businesses. The Vietnamese Government should further signal its intention to ease market access restrictions and remove film quota language causing uncertainty in the market for right holders.

### PRIORITY ACTIONS REQUESTED IN 2014

#### **Enforcement**

- Enforce with greater vigor the Joint Circular, taking effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report.
- Devote greater MCST Inspectorate, Economic Police, and High Tech Police manpower to running administrative and criminal raids, meting out maximum fines and bringing criminal prosecutions where appropriate.
- Reduce piratical imports from China.
- Develop and finalize the IP Manual for Judges, including reference to civil, administrative, and criminal remedies.

#### **Legislation**

- Issue implementing guidance for the revised Criminal Code, confirming: 1) its application to online distributions and other violations of the IP Code; and 2) that "commercial scale" includes significant infringements without profit motive.
- Make necessary changes to its laws and implementing decrees to ensure Vietnam is in full compliance with its Bilateral Trade Agreement (BTA) with the U.S., and with other international obligations, and otherwise facilitate the free exercise of rights by copyright owners.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Clarify that Decree No. 85 measures imposing onerous collective management do not apply to foreign collective management organizations (CMOs) or to the administration of foreign rights.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.

<sup>1</sup>For more details on Vietnam's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Vietnam's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009 (on file with IIPA).



## Market Access

- Eliminate 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.

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Prior IIPA reports on Vietnam contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>3</sup>

**The Vietnamese Government Should More Vigorously Attack Internet and Mobile Piracy:** 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. As of the end of 2012, the International Telecommunications Union (ITU) estimated 39.5% of Vietnamese use the Internet – 35 million users (including more than 4.5 million fixed broadband subscriptions). Mobile subscriptions have exploded, with Vietnam well surpassing the 100% penetration mark and boasting 134 million mobile subscriptions as of the end of 2012 (according to ITU). 3G mobile Internet users are now well above the 16 million reported in late 2012 (18% of the country's population).<sup>4</sup> These developments present enormous opportunities for copyright owners seeking to launch legitimate services in Vietnam. These opportunities are evidenced by more Internet content providers being licensed as of the end of 2013, e.g., 24H (*nhac.vui.vn*), NCT (*nhaccuatui.com*), and Viettel Media (*keeng.vn* and *imuzik.com.vn*).

In an attempt to help effect a transition to legitimate services, some music labels have licensed notorious market *Zing* for certain parts of their service. However, *Zing* has continued to operate as a distribution hub for infringing music to our great disappointment, and continues to be a major contributor to an environment that prevents the Vietnamese legitimate music online marketplace from fully developing. Indeed, major independent Vietnamese record company Lang Van filed an action in a U.S. court against *Zing's* parent company, VNG, as well as a U.S. investment group, IDG, just weeks ago, highlighting the scope of injury that *Zing* inflicts on the Vietnamese market.

Unfortunately, the vast majority of remaining websites dealing in copyright content are unlicensed, including streaming and download sites, blogs/forums, video streaming sites, search engines, deeplinking sites, cyberlockers, and social networks. All these channels are employed to deliver unlicensed copyright content, including music, movies, video games, software, and published materials. Many Vietnam-based or Vietnam-directed sites offer unauthorized copyright materials, and the Vietnamese Government has been notified of some of these sites.<sup>5</sup> Most of these sites generate revenue through advertisements or paid premium subscriptions. Only a few sites are reported to have relationships with media companies that have rights over Vietnamese, Chinese, Korean, or other movies, although no sites have rights from U.S. major motion picture companies.

Right holders are looking to Vietnamese Government agencies (e.g., MIC and its Vietnam Internet Network Information Center, VNNIC) to take a much stronger approach in dealing with online piracy. IIPA is pleased that MCST took successful administrative actions against three notorious piracy services.<sup>6</sup> The MCST actions mark a milestone in combating online piracy in Vietnam. IIPA would like to see Vietnamese authorities take more effective

<sup>3</sup>See, e.g., IIPA, *Vietnam, 2013 Special 301 Report*, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301VIETNAM.PDF>.

<sup>4</sup>*Vietnam Ranks World's 18th for Most Internet Users*, Global Times, December 4, 2012, at <http://www.globaltimes.cn/content/748146.shtml>.

<sup>5</sup>The motion picture industry has filed administrative referrals with MCST in respect of the following sites: *phim47.com*; *v1vn.com*; *pub.vn*; *phimvong.com*; *phimvong.org*; *coiphim.vn*; *maxphim.net*; *rapphim.vn*; *hayghe.com*; *phimphim.com*; *vtube.com*; and *xemphim.tv*. Other suspect sites (some of which have been previously reported by IIPA) include *tamtay.vn* (331st); *socbay.com* (3,125th); *vietvideos.vn* (152nd, having a tag line of "Vietvideos.vn - the largest video sharing networks Vietnam"); *viettorrent.vn* (325th); *hdviet.com* (103rd, having the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications"); *hayhaytv.vn* (108th, having the tag line "View movies or online, HD, constantly updated full category, load super fast, super watch FREE!"; unauthorized audio files have been detected on the site); *vnsharing.net* (135th); and cyberlockers like *fshare.vn* (90th); and *4share.vn* (225th).

<sup>6</sup>The three sites subject to administrative sanctions (essentially, a sanction order in the form of a warning and instruction to cease infringing) were the above-mentioned *phim47.com*; *v1vn.com*; and *pub.vn*. While the three sites went clean for a while, we understand they are back now engaging in suspect activities via social networking or under different names.

measures in 2014 against notorious infringing sites whose business models are based on providing access to infringing content, employing many of the actions set out in *Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks* (which went into force August 2012) (JC).<sup>7</sup> The Inspector of MIC should use the authority granted under the JC to enforce against these types of violations more effectively, particularly against those websites which are under MIC licenses.

In the absence of JC implementation or administrative or criminal enforcement, right holders have largely been left with self-help measures including requests for voluntary cooperation by service providers and websites to respond to notices and take down infringing content. In the past, this has been a disappointing route since service providers largely ignored right holder requests (e.g., the music industry reported a 2% takedown rate in 2012). In 2013, there seemed to be more awareness of the issue and the need to positively respond to right holders (e.g., the takedown rate for music went up to 31%). Some sites, like *chiasenhac.com*, *mp3.rola.vn*, and *rappervn.net* started to respond positively to takedown requests, another encouraging sign. However, right holders are often increasingly frustrated by measures adopted by infringing sites and online (or mobile) infringers to hide accurate contact information. Many such websites are becoming more sophisticated, providing user-friendly interfaces and access to infringing content without requiring users to register or log in.

With rapid increases in the number of mobile phone subscribers in Vietnam, there has also been an increase in mobile piracy over the past year. Right holders now face two major challenges in the mobile space: 1) mobile device vendors loading 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. 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. These phenomena must be addressed with swift and deterrent enforcement. To our knowledge, Vietnamese authorities have done nothing to counter such activities.

**Continue Actions Against Unauthorized Use of Software by Enterprises:** The software industry reports positive support from MCST and the High Tech Crimes Department of the Public Security Ministry (High Tech Police) in addressing the unauthorized use of software by enterprises in Vietnam. The number of actions targeting unlicensed software use by corporate end-users increased from 14 in 2012 to 42 in 2013. Nonetheless, the software piracy rate is extremely high in Vietnam, far exceeding the global (42%) and regional (60%) averages. In 2011, the software piracy rate in Vietnam was 81%, representing a commercial value of unlicensed software of US\$395 million.<sup>8</sup> BSA relies on administrative enforcement, although fines remain too low to constitute a deterrent. To our knowledge, no software piracy case has ever been brought to civil or criminal court, although BSA members are considering some test cases in the near future. Other problems in Vietnam for software publishers include retail piracy (e.g., counterfeits imported from China) and hard disk loading of unlicensed software onto computers at the point of sale. The industry also notes the need for legalization of software use within Vietnamese Government

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<sup>7</sup>The Joint Circular (JC) imposes high standards of performance on “providers of intermediary services” to: 1) take affirmative steps to “[e]stablish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights”; 2) “[u]nilaterally refuse to provide a service that runs counter to the laws on copyright and related rights”; and 3) “[r]emove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other Government authorities in accordance with the law.” Additional requirements are imposed upon social network operators to “send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights.” The JC requires providers of intermediary services to be “[s]ubject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related rights.” Finally, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for “[h]aving operations like a secondary distributor of the digital content generated from violations of the copyright and related rights.”

<sup>8</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

agencies. To this end, the Vietnamese Government should take effective measures to ensure the purchase and use of authorized software by the public sector. Some initial discussions on government legalization occurred between BSA and MIC, with a focus on legalization procedures and the need for the Government to avoid any mandates or preferences for the purchase of specific types of software as part of its legalization program.

**Ex Officio Enforcement Against Hard Goods Piracy Needed:** Prior IIPA reports have documented in detail the hard goods piracy problems in Vietnam, including traditional CD/DVD piracy (e.g., high-quality counterfeits from China as well as home-made pirated optical discs), and “media box” piracy.<sup>9</sup> Though MCST has indicated its recognition of the hard goods piracy problem, it has devoted few resources, and has not undertaken *ex officio* actions to date. Vietnamese Customs authorities should take *ex officio* actions to intercept infringing imports, especially high-quality counterfeits from China.

**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 harm foreign publishers. Unauthorized translations produced by university lecturers or professors have been detected, in which the lecturers or professors append their name to the translated textbook. The English language teaching market continues to be hard hit. Much of the market (private-sector education and universities) is supplied by unauthorized reprints and adaptations. State-sector publishers (such as the Ministry of Youth and the General Publishing House of Ho Chi Minh City) also have an interest in making sure their licenses are not misused. Concerns about piracy have been raised at many levels (national, provincial and district), and local provincial authorities will conduct the occasional raid when prompted by a right holder, generally resulting in nothing more than the confiscation of goods and the imposition of a small, non-deterrent fine. Moreover, there are currently no university or government efforts to address the endemic piracy on university campuses. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

**Unauthorized Use of Music Videos in Vietnamese TV Content:** A unique problem has emerged in Vietnam, in which some companies producing legitimate TV programs sold to pay TV channels are utilizing infringing music videos. We urge the Vietnamese Government to assist right holders in the music and audiovisual materials in halting such practices without authorization (or payment) to right holders.

**Court Reform Efforts Remain Lacking:** The general inactivity of the courts in dealing with copyright infringement issues remains a major disappointment in Vietnam. 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 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. Industry and the U.S. Government were working with the Supreme Court in drafting an “IP Manual for Vietnamese Judges,” but we understand that effort has stalled. The Manual should be concluded as soon as possible, including sentencing guidelines to create a level of deterrence in copyright cases. IIPA also recommends frequent outreach with judges (and prosecutors and police) as part of the judicial reform effort, to sensitize these officials to the enormous commercial harm being caused by piracy and seek a mutual path forward toward successful resolution of right holder claims involving infringement.

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<sup>9</sup>“Media box” (set-top device) piracy is a fast-growing phenomenon by which people purchase devices directly connected to foreign websites to access pirated materials, or those with a hard disk to store pre-loaded or subsequently downloaded content.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (as last amended 2009), the Criminal Code (as amended in 2009), and the Administrative Violations Decree which took effect December 15, 2013.<sup>10</sup> The Civil Code remains as a vestigial parallel law, implemented by Decree No. 100, and as amended in late 2011 by Decree No. 85. The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, include a basic structure which could if fully implemented address online/mobile and hard goods piracy in the country, although further improvements should be sought. They also include measures that implement the WCT and WPPT. Vietnam should now be encouraged, as an immediate next step, to join those treaties.

**Criminal Code Should Cover All IP Code Violations, Not Just Reproduction and Distribution, and Comply With BTA:** The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” While amended Article 170a improved Vietnam’s statutory framework in some respects,<sup>11</sup> it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.<sup>12</sup> Vietnam also appears by virtue of the changes to be out of compliance with its BTA commitments to the United States, in which it agreed to provide criminal remedies for all “infringement of copyright or neighboring rights on a commercial scale,” as well as for satellite signal piracy.<sup>13</sup> The Vietnamese Government should immediately issue implementing guidance for the Criminal Code to confirm that all infringement and signal theft can attract criminal liability, and to confirm that “commercial scale” infringements are not limited to those undertaken with a profit motive. Otherwise, the U.S. should commence consultations in accordance with Chapter VII, Article 5 of the BTA, to resolve these trade agreement violations.

**New Administrative Enforcement Decree Must Be Implemented in Practice:** The new Administrative Violations Decree seems to be an attempt to fine-tune the administrative enforcement mechanisms, but it may send the wrong signal since it reduces the maximum administrative fine for an individual to VND250 million (US\$11,800), while the maximum fine for an organization is VND500 million (US\$23,600). The following fines are also set forth: 1) VND400 to 500 million against an organization that imports an unauthorized copy; 2) VND70 to 100 million against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million against an individual that reproduces unauthorized copies of phonograms or video recordings. In addition to these fines, infringers may face remedial measures, such as confiscation of infringing goods and any (false) registration certificates, as well as the forced suspension of business, consultancy, or service activities. Since the previous maximum fines were rarely, if ever, imposed, time will tell if the administrative measures under the new Decree will be carried out in practice with greater frequency and maximum deterrence, which is needed to make an impact on piracy.

**Decree No. 85 Questions Remain:** IIPA previously reported on Decree No. 85 (2011), which amended certain provisions of the Civil Code.<sup>14</sup> While Decree No. 85 contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam’s compliance with international norms and best practices. Most notably, Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management which, if applied to foreign right holders, would be onerous and would conflict with the ability for

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<sup>10</sup>Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights, entry into force December 15, 2013 (replacing Ordinances No. 47 and 109).

<sup>11</sup>For example: 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 technically aligned with the TRIPS minimum standard; and 2) fines are increased to a range from US\$2,350 minimum to US\$23,500 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$18,800 minimum to US\$47,000 maximum.

<sup>12</sup>The 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 TPMs, decryption of encrypted satellite signals, and other acts. Please refer to IIPA’s previous submission on Vietnam for more detailed discussion.

<sup>13</sup>See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), chapter II, Art.14.

<sup>14</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>15</sup> It should also be clarified that the “Principles and methods of payment of royalty, remuneration and material benefits” which the Decree adds in a new Article 45a of Implementing Decree No. 100 are not compulsory.

### **IP Code as Amended Remains Incompatible with the BTA and Vietnam’s International Obligations:**

The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions with respect to Vietnam’s compliance with the BTA and other international obligations/standards. Among issues that should be resolved in the current Code are the following:

- The IP Code does not provide a term of protection of 75 years from publication (or 100 years from fixation) for sound recordings (BTA Article 4.4).
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of “making available.”<sup>16</sup>
- An apparent inadvertent gap was created in the 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.
- Articles 7(2), 7(3), and 8 of the IP Code appear to give the State power to remove copyright protection in ways similar to provisions in China’s Copyright Law, found by a WTO panel to violate China’s WTO obligations.<sup>17</sup>
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners.
- Certain exceptions in the IP Code may be overly broad and call into question Vietnam’s compliance with its international obligations.<sup>18</sup>
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for “non-commercial purposes,” rather than destroyed. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS Agreement obligations.

In addition to addressing these issues in the IP Code, IIPA also recommends: 1) introducing pre-established (statutory) damages upon the election of the right holder, which can be very important in civil cases when the amount of reproduction or distribution having occurred is difficult to calculate; 2) adopting a measure outlawing the use of (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work, in whole or part; and 3) adopting a long-awaited optical disc regulation to address production over-capacity in Vietnam.

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<sup>15</sup>For 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. In the absence of immediate changes, it should be clarified that these provisions do not apply to administration of foreign rights.

<sup>16</sup>At the least, 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.

<sup>17</sup>Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances. Article 7(3) permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights. Article 8 establishes impermissible content-based restrictions of protection under copyright.

<sup>18</sup>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 problematic. Article 25(2) of the Implementing Decree also allows 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, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audio-visual recordings for commercial “broadcasting” violates international standards at least as to the works involved and cannot be remedied by the addition of three-step test language.

## **MARKET ACCESS BARRIERS IN VIETNAM**

Vietnam restricts foreign companies from setting up subsidiaries to produce or distribute “cultural products.” 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.<sup>19</sup> Unfortunately, their restrictions on foreign investment in cultural production undermine this objective, impoverishing the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials. The restrictions also fuel demand for pirate product, instigating a vicious circle in which less legitimate product is produced. 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.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides updates only and is not meant to be an exhaustive list of the issues.

**Laws Leave Potential Quotas In Place:** The amended Cinematography Law creates the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Minister issued a *Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030.”* The *Decision* sets an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. While the Law’s stated quota and *Decision* appear to be hortatory in nature, the Vietnamese Government should confirm that it will not impose these quotas which would amount to a serious market access barrier. Such quotas are highly disfavored, and it is clear that, as Vietnam produces only about 20 films per year, the imposition of the quota, combined with the local industry’s inability to meet demand, would have a devastating effect on the distribution infrastructure and foreign filmmakers’ and distributors’ abilities to do business in Vietnam. IIPA also notes the hortatory preference to show “valuable” foreign films. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese Government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam.

Certain articles of the Cinematography Law 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%.<sup>20</sup> This quota should be lifted or eased significantly.

**New Decree Risks Exacerbating Already Onerous Market Access Restrictions for Software and Video Game Right Holders:** On September 1, 2013, *Decree No. 72 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information* went into force. The new Decree, and other measures on IT services reportedly being considered by the Vietnamese Government, may undermine the ability of companies, particularly in the areas of software and video games, to provide various digital or online services in Vietnam.

With respect to entertainment software and video games, overall, compared with the draft Decree IIPA reviewed in late 2012, the final Decree appears to create some room for foreign video game companies to operate in Vietnam. However, foreign companies still seem to be held at arm’s length, and there is a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. The new Decree appears to lift the 2010 ban on issuance of new licenses for online games and the ban on advertising of online

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<sup>19</sup>See 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](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

<sup>20</sup>*Decree 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.

games, and omits other restrictions that appeared in earlier drafts of the Decree. However, IIPA remains concerned that the Decree will limit the ability of foreign companies to offer online games in Vietnam. Article 31(4) provides, “[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam’s law in accordance with this Decree and the laws on foreign investment.” The decree establishes four categories of games. In category G1 (multiplayer games in an interactive online environment) the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including many involving censorship of the content of games in order for them to be approved; content within games that is outright prohibited (*see, e.g.*, Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; license duration limits; and other restrictions. IIPA will be monitoring very carefully the implementation of this Decree to ensure it does not create structures which unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or which discriminate against them.

With respect to software, the Decree and other measures reportedly being considered on IT services appear to impose onerous requirements on server localization and cross-border data flows that will undermine the ability of companies to provide digital services in Vietnam. This would include software through cloud computing, which offers many potential economic benefits, especially to small- and medium-sized enterprises. The Decree specifically requires that at least one server be located in Vietnam in order to: 1) establish an online social network; 2) establish a general information website; 3) supply content services on a mobile telecommunications network; or 4) provide online gaming services. In addition, there are also licensing and registration requirements in the Decree that could significantly restrict the ability to conduct cross-border data business. A separate IT Services Decree under consideration by the Vietnamese Government could include similar problematic provisions. IIPA recommends that Vietnam reconsider and revise or rescind these policies to avoid discouraging investment in Vietnam and to avoid imposing market access restrictions that may be inconsistent with Vietnam’s commitments in the WTO and BTA.

**Onerous Market Access Restrictions on the Music Sector:** Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, also inhibit anti-piracy efforts. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights of U.S. content largely on its own, a task at which it has not succeeded thus far. 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,<sup>21</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

## **TRANS-PACIFIC PARTNERSHIP (TPP)**

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, including Vietnam. Enhancement of copyright protection and enforcement standards, building upon those agreed to by current U.S. FTA partners, Australia, Singapore, Chile, and Peru, and found in the more recent in-force agreement with Korea, should be extended to other countries in the region through the TPP. Such an outcome will contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the Administration’s goals. Vietnam has taken strides in its substantive laws which will make meeting the legal and enforcement

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<sup>21</sup>The importation of cultural products like music is governed by Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural (promulgated together with the Government’s Decree No. 10.V200/ND-CP of November 6, 2009). Decree No. 103 provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level CST Departments. The Decree provides for application procedures. However, limitations on foreign companies’ setting up subsidiaries to produce or distribute “cultural products” in Vietnam also thereby limit foreign companies’ abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.



obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, many gaps remain, and some recent changes threaten to move Vietnam further from those standards. 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 and in prior IIPA submissions. The TPP E-Commerce chapter and market access provisions for services and investment should require Vietnam not only to eliminate discriminatory taxes and policies, but also to open Vietnam's market to foreign competition including in the creative and cultural sectors. We remain hopeful that Vietnam's participation in TPP negotiations will aid in eliminating discriminatory barriers, as well as bringing its copyright law and enforcement regime into alignment with evolving global norms.