

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2016.¹

Executive Summary: IIPA's recommendation again this year to elevate Vietnam to the Priority Watch List reflects the growing unrealized potential of Vietnam's market for legitimate creative goods and services, the ineffective response by Vietnam's government to address its enormous piracy challenges, and Vietnam's market access barriers. Vietnam's government has indicated that it recognizes the "sophisticated" nature of its piracy problem and has shown a willingness to begin to address it, including recent administrative enforcement actions against Internet piracy sites; but actions taken thus far have been inadequate. Vietnam must take more effective enforcement actions, including issuing deterrent administrative penalties against infringers and initiating criminal prosecutions. Vietnam's piracy problems would also be reduced if the country removed its highly restrictive market access barriers, which limit Vietnamese consumers' access to legitimate content. The conclusion of the Trans-Pacific Partnership (TPP) negotiations and the upcoming implementation process represent critical opportunities for Vietnam to eliminate these discriminatory barriers, and to bring its copyright law and enforcement regime into alignment with evolving global norms.

PRIORITY ACTIONS REQUESTED IN 2016

Enforcement:

- Take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report.
- Have the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate and Ministry of Public Security (MPS) IPR/High-Tech Police run more raids, issue deterrent administrative penalties, and bring criminal prosecutions where appropriate.
- Ensure Customs' IPR Unit has needed authority to address high-quality counterfeits/pirate materials at the borders, including on an *ex officio* basis.
- Develop and finalize the IP Manual for Judges, including reference to civil, administrative, and criminal remedies.
- Encourage universities to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks and other course materials.

Legislation:

- Issue implementing guidance for the 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 a profit motive.
- Make necessary changes to 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 to prepare for TPP implementation.
- Afford adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

¹For 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/2016SPEC301HISTORICALCHART.pdf>.



- Extend term of protection in line with the international trend and consistent with the TPP, to 70 years after the death of the author, or when term is calculated based on publication, at least 75 years (or 100 years from fixation) as provided for in the BTA.
- Amend the Criminal Procedure Code so as to permit *ex officio* criminal actions.
- Clarify that Decree No. 85 measures imposing onerous collective management restrictions do not apply to foreign collective management organizations (CMOs) or to the administration of foreign rights.
- Adopt legislation providing for criminal procedures to deter unauthorized camcording in movie theaters.

Market Access

- Eliminate foreign investment restrictions and other entry barriers with respect to production, importation and distribution of copyright materials, whether in the physical, online, or 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.²

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.”³ Yet, thus far, Vietnam’s actions to combat piracy, including actions taken pursuant to a 2012 Ministry of Information and Communications (MIC) and Ministry of Culture, MCST Joint Circular⁴, have been inadequate to address its piracy challenges, including those identified below.

Internet and Mobile Markets Face Opportunities, Challenges in Vietnam: With over 48% of the population using the Internet as of 2014, and 31% having a mobile broadband subscription (up from less than 8% just 4 years earlier), Vietnam offers enormous new opportunities for legitimate services for creative content. And, indeed, a growing number of licensed Internet content providers are taking advantage of these opportunities, including 24H (*nhac.vui.vn*), NCT (*nhaccuatui.com*), Viettel Media (*keeng.vn* and *imuzik.com.vn*), iTunes, and Deezer. Mobile applications like Pops TV are also pioneering the availability of music and audiovisual content, using iTunes, Amazon MP3, Android, Windows Phone, and Samsung Smart TV vehicles for distribution of content, including local Vietnamese content.

As these opportunities increase, however, Vietnam faces the mounting challenge of combating online and mobile network piracy, including via streaming and download sites, peer-to-peer (P2P) networks, linking sites, video streaming sites, search engines, cyberlockers, and social networks. One example is the site *chacha.vn* (7th most accessed site in Vietnam), which makes available a significant amount of infringing music, including both Vietnamese and popular foreign music.⁵ Another popular music site in Vietnam, *chiasenhac.com*, allows users to stream unlicensed Vietnamese and international music.⁶ *Zing.vn* provides access to unlicensed music for download and streaming.⁷ Sites such as *nghenhac.in* (and related sites), *phimmoi.net* (38th most accessed site in Vietnam), *hdonline.vn* (80th), *phim14.net* (128th), *phim3s.net* (107th), *xemphim.com* (and related sites), *socbay.com* (and

²See, e.g., IIPA, *Vietnam, 2014 Special 301 Report*, February 7, 2014, available at <http://www.iipa.com/rbc/2014/2014SPEC301VIETNAM.PDF>.

³Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009 (on file with IIPA).

⁴Joint 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 (in force August 2012) (“Joint Circular”).

⁵*Chacha.vn*, a free to use direct download site, has a large amount and wide variety of infringing music available on the site, including Vietnamese repertoire (approximately 60,000 tracks) and many popular international songs (approximately 30,000 tracks). 3505 takedown notices were sent to the site in 2015, which included 2652 infringing files. While the site does remove content of which it has been notified, it takes an excessive amount of time, and notwithstanding its active engagement with, and organization of, infringing content, it does not employ any measures to address infringement. Its business model is dependent upon providing access to infringing content.

⁶*Ciasenhac.com* which has an Alexa ranking of 205 and receives 3,400,000 monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC.

⁷Although *Zing.vn* has negotiated licenses with some record companies for certain uses, it continues to provide access to infringing materials as a core part of its business.

related mobile app), *HDViet.com* (136th),⁸ *phim22.com*, *tamtay.vn* (718th), *viettorrent.vn* (423rd), and cyberlockers like *fshare.vn* (97th), and *4share.vn* (351st) remain of concern to the motion picture and television industry. Rogue sites like *kickass.so* (199th) also remain popular in Vietnam. In addition, a couple of notorious infringing sites that primarily target the global market, *putlocker.is* and *itemvn.com*, are operated in Vietnam.⁹ Most of these sites generate revenue through advertisements or paid premium subscriptions. The harm caused from online piracy is significant and makes it difficult to impossible for legitimate online platforms to compete with pirated sites. For example, online piracy in Vietnam is directly impacting the motion picture theatrical sector, because new movies are frequently available online while they are still in their theatrical run.

Vietnam has taken some important steps in its enforcement against online piracy over the past few years, demonstrating a willingness to cooperate with right holders in enforcement actions and training and capacity building.¹⁰ Unfortunately, industry notes the process of addressing infringements is cumbersome and is done on a case-by-case basis; thus, many offending rogue sites remain in operation and are growing in popularity. For example, the movie industry reports that the site *hayhaytv* removed infringing motion picture and television content in 2015 as a result of administrative sanctions issued by MIC; however, the site was not in fact shut down and currently shows unauthorized movie trailers. Vietnamese authorities including the MIC Inspectorate (which indicates it is authorized under *Decree 131* to address online infringement), MCST, and MPS, are currently being asked to take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content, employing the remedies set out in the MIC/MCST Joint Circular (JC), including bringing criminal prosecutions.¹¹ 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 that are under MIC licenses.

Perhaps due to increased effort from government authorities, the level of cooperation with service providers improved incrementally in 2015. The music industry, for example, reports an improved takedown rate from 82% in 2014 to 85% in 2015. However, more must be done to effectively address Vietnam's online piracy problem. The absence of a more effective means of encouraging responsible practices, including by taking enforcement actions against sites that knowingly distribute infringing music, or whose business practices are based on the distribution of infringing music and which therefore promote infringement, has left the online music market in disarray and dominated by piracy. The situation for motion picture companies is difficult. Among the significant ISPs, only VNPT (the largest ISP in Vietnam) is cooperating by not permitting pirated films to be placed on their video on demand (VOD) service. Most other ISPs' terms and conditions with websites they host make no provision for the termination of services due to copyright infringement. With rapid increases in the number of mobile phone subscribers in Vietnam, there has also been an increase in mobile network piracy over the past couple of years. Right holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto

⁸This site has the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications."

⁹The movie industry noted *putlocker.is* in its submission to the U.S. Trade Representative (USTR) in advance of its 2015 out-of-cycle review of "notorious markets". USTR recognized *putlocker.is*, one of a number of notorious sites hosted in Switzerland, in its 2015 list, noting that its operator is located in Vietnam. The recording industry noted *itemvn.com*, an unlicensed music service entirely in English that is operated in Vietnam, in its 2015 notorious markets submission to USTR.

¹⁰For example, in 2014, reportedly, two infringing mobile applications were shut down and administrative penalties were imposed on the developers/operators. In April 2013, MCST reportedly took administrative actions against three notorious piracy services, *phim47.com*; *v1vn.com*; and *pub.vn*, but two are back up and running (only *v1vn.com* is down) and are still providing access to infringing major motion pictures on the sites. Additionally, in September 2013, the Motion Picture Association referred another nine sites, four of which (*phimvang.com*, *vuighe.net*, *hayghe.com*, and *xemphim.tv*) are still up and providing access to infringing major motion pictures. The full list of sites sent to MCST for administrative referral includes: *phim47.com*; *v1vn.com*; *pub.vn* (now *pubvn.tv*), *phimvang.com*; *vuighe.net*; *coiphim.vn*; *maxphim.net*; *rapphim.vn*; *hayghe.com*; *phimphim.com*; *vtube.com*; and *xemphim.tv*.

¹¹The Joint Circular (JC) imposes high standards of performance requiring "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."

devices at the point of sale; and 2) illegal music channels or “apps” set up to be accessed on mobile networks. As an example of this phenomenon, Socabay developed a mobile “app” called Socabay iMedia which provides a variety of unauthorized entertainment content including music files.

Ex Officio Enforcement Needed Against Hard Goods and STB Piracy: Although hard goods piracy has decreased in Vietnam, largely due to the onslaught of online and mobile network piracy, and is not as commercially devastating as online piracy, traditional CD/DVD piracy (e.g., high-quality counterfeits from China as well as home-made pirated optical discs) remains a real threat. In addition, set-top box (STB)/media box piracy is also growing in Vietnam as it is elsewhere in the region. STBs are used in conjunction with apps that permit users to access unauthorized content over-the-top (OTT) and/or through piracy web services. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions, and has done nothing to stop STB piracy. To the extent the Criminal Procedure Code does not currently make it possible to take *ex officio* actions or address STB piracy, it should be amended.¹² In addition, because high-quality counterfeits are being imported into Vietnam (mostly from China), Vietnamese Customs authorities as well need to commence *ex officio* actions to intercept such infringing imports.¹³

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers report unauthorized photocopying and some illegal print piracy, mostly of English language teaching (ELT) materials. The proliferation of small ELT schools makes enforcement against widespread use of unauthorized reproductions of ELT materials at such institutions extremely difficult. Many students are reportedly photocopying entire textbooks. Bookshops, roadside vendors and copy shops routinely sell unauthorized copies of bestselling trade books, travel books, and academic textbooks, including ELT materials. Unlicensed print overruns also continue to harm foreign publishers. In 2015, AAP ran a cease-and-desist campaign in Ho Chi Minh City, resulting in multiple copy shops and book stores agreeing to cease producing unauthorized copies of books from U.S. publishers. Unfortunately, the enforcement environment in Vietnam remains challenging for right holders. The agency tasked with administrative IPR enforcement has little experience or expertise, and there is presently no accredited authority to issue expert opinions on copyright infringement. Local publishers (such as the Youth Publishing House and the General Publishing House of Ho Chi Minh City) have an interest in making sure their licenses are not misused. Yet efforts by universities and the government to address the endemic piracy at university campuses have not been nearly commensurate with the magnitude of the problem. 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.

Court Reform and IPR Training Needed: As reported, the courts are not an ideal avenue for copyright owners. First, criminal cases are not proceeding to the courts in the area of copyright infringement. 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 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 that effort stalled. The Manual should be concluded as soon as possible, and should include 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 commercial harm wrought by piracy, and to seek a mutual path forward toward successful resolution of claims involving infringement.

¹²Article 105 of the Criminal Procedure Code currently requires a formal complaint from a copyright owner as a condition for prosecution and acts as a disincentive to police and prosecutors, relative to other kinds of offenses. IIPA encourages Vietnam to ensure its criminal enforcement authorities are able to take *ex officio* action, because this is a TPP requirement that Vietnam will need to address as part of implementation. See TPP Art. 18.77.6(g).

¹³IIPA encourages Vietnam to take the immediate step of ensuring its customs officials have *ex officio* authority because this is a TPP requirement that Vietnam will need to address as part of implementation. See TPP Art. 18.76.5.

Increase Efforts Against Camcording: A vast number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These illicit copies are then distributed to pirate “dealers” throughout the world and over the Internet. Illegal camcording destroys entire windows for distribution of audiovisual works, and damages not only the U.S. film industry, but also local cinema businesses. In 2015, Vietnam’s Ho Chi Minh City Police initiated its first enforcement action against camcording, issuing administrative sanctions against a professional camcorder for camcording in a CVG cinema. The perpetrator also admitted that he had recorded and uploaded additional films¹⁴. Although this is a good start, more needs to be done to address this insidious problem, including adopting a measure providing for criminal procedures to deter unauthorized camcording in movie theaters, as is required by TPP Art. 18.77.4.

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), the *Joint Circular* (2012), and the *Administrative Violations Decree (No. 131)* (2013).¹⁵ The *Civil Code* (last amended 2011 by *Decree No. 85*) remains as a vestigial parallel law, implemented by *Decree No. 100*. The laws, while not entirely in compliance with Vietnam’s international or bilateral obligations, include a basic structure that, if fully implemented, can be used to successfully address online, mobile network, and hard goods piracy in the country. They also include measures that implement the WCT and WPPT. IIPA encourages Vietnam, as an immediate next step, to join those treaties, especially considering this is a TPP requirement.

To implement the TPP, Vietnam will be required to improve its framework for protection and enforcement of copyrights. Vietnam has taken strides in its substantive laws that will make meeting the TPP standards less challenging. At the same time, some gaps remain, and some of the more recent changes noted below may have moved Vietnam further from those standards. With a view towards TPP implementation, we are hopeful that Vietnam will raise its standards for copyright protection and enforcement to meet the TPP requirements as quickly as possible including, at a minimum, addressing the following deficiencies in its current legal framework.

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.” As reported previously, while amended Article 170a improved Vietnam’s statutory framework in some respects,¹⁶ it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.¹⁷ 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 (pay-TV) piracy.¹⁸ Again, we request that the Vietnamese Government immediately issue implementing guidance for the Criminal Code to confirm that all infringement on a commercial scale 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 violations.

¹⁴Six other titles were found on his laptop including “Mad Max: Fury Road”, “Pitch Perfect 2”, “She’s Funny That Way”, “Helios”, “Lat Mat”, and “Spy”.

¹⁵*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).

¹⁶For 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.

¹⁷The 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 submissions on Vietnam for more detailed discussion. See e.g., IIPA, *Vietnam*, 2009 Special 301 Report, February 17, 2009, available at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

¹⁸See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), chapter II, Art.14.. These are also TPP requirements. See TPP Art. 18.77 and 18.79.

Administrative Enforcement Decree Must Be Implemented in Practice: As reported previously, the *Administrative Violations Decree (No. 131)* reduced the maximum administrative fine for an individual to VND250 million (US\$11,800), and set the maximum fine for an organization at VND500 million (US\$23,600). The following fines are also set forth: 1) VND400 to 500 million (\$US18,100 to \$23,600) against an organization that imports an unauthorized copy; 2) VND70 to 100 million (US\$3,160 to \$4,520) against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million (US\$680 to \$1,580) 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. Notwithstanding the reduction in the maximum, the government should employ these maximum fines to full and deterrent effect forthwith.

Decree No. 85 Questions Remain: *Decree No. 85 (2011)* amended certain provisions of the Civil Code.¹⁹ 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 that, if applied to foreign right holders, would be onerous and would conflict with the ability of collective management organizations to operate freely and determine on what terms their rights will be administered.²⁰ 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 regarding Vietnam's compliance with the BTA and other international obligations, and with Vietnam's ability to meet the standards set forth in the TPP. Among the issues that should be resolved in the current Code are the following:

- The IP Code does not provide a term of protection in line with the international trend (and consistent with the TPP), to 70 years after the death of the author, or when term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of "making available."²¹
- 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.²²
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners.
- Certain exceptions and limitations in the IP Code may be overly broad and call into question Vietnam's compliance with its international obligations.²³

¹⁹Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

²⁰For 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.

²¹At 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. Accession to the WPPT is required by the TPP.

²²Article 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.

²³Article 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 further codifies a broad broadcasters'

- 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, as well as the requirements of TPP Art. 18.76.7.

In addition, in accordance with TPP Art. 18.77.4, IIPA also encourages Vietnam to quickly adopt a measure providing for criminal procedures to deter unauthorized camcording in movie theaters.

MARKET ACCESS BARRIERS IN VIETNAM

It continues to be the case that Vietnam generally 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.²⁴ 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 or available.

To facilitate commercial development of Vietnam’s cultural sector, Vietnam should look to internationally accepted standards and practices, including the standards set forth in the TPP, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. To implement the TPP, Vietnam will need to address the significant market access barriers identified below. Although it is unfortunate that some of these protectionist barriers may be covered by Vietnam’s Annex of Non-Conforming Measures, most of these impediments are clearly inconsistent with provisions in the TPP that liberalize trade for creative content, including: the market access protections for services, including the prohibition of numerical restrictions, such as quotas, on the supply of services;²⁵ the most-favoured-nation protections for services and investment,²⁶ the ban of performance requirements for investments, including local content requirements;²⁷ and the prohibition of discrimination against trade in digital products.²⁸ Considering that a primary goal of the TPP is to liberalize trade and investment between the parties and with TPP implementation on the horizon, IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

Barriers Specific to the Audiovisual Sector

Laws Leave Potential Quotas In Place: The amended Cinematography Law created 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 Ministerial *Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030”* set an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. Although the Cinematography 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 and would clearly be inconsistent with TPP’s market access protections for services. 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

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. These provisions are also inconsistent with TPP Art. 18.65.

²⁴See 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.

²⁵See TPP Art. 10.5.

²⁶See TPP Art. 9.5 and 10.4.

²⁷See TPP Art. 9.9.

²⁸See TPP Art. 14.4.

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 Vietnamese films must be at least 40% of those broadcast on TV.²⁹ This quota should be lifted or eased significantly.

Regulatory Intervention in the Pay-TV Sector: A draft *Decree on the Management, Provision, and Use of Broadcast Services (No. /2014/ND-CP)* would, if implemented, place undue and excessive regulatory control into the hands of MIC, including allowing it to set prices for pay-TV services, extend foreign translation requirements beyond those already in place, and impose a further quota on foreign programming and additional fees on the pay-TV industry. Regulations for the pay-TV industry enacted in 2011 require foreign channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Most foreign programming is required to be edited and translated by an approved licensed press agent. These measures, if fully implemented, would unduly restrict and impede the continued growth and development of the pay-TV industry in Vietnam. Further, these regulations essentially expand censorship requirements to all channels instead of “sensitive” channels as previously provided. This mandate also appears to impose new “editing” fees on international channels.

Censorship Uncertainties: All films are subject to censorship by the Department of Cinema under MCST. The results are unpredictable and arbitrary — films that require editing are subject to a re-review, though importers are not assured of a right of appeal. IIPA understands that MCST is planning to introduce a film classification and rating system. Easing these restrictions, and introducing a classification and rating system, would spur development of the theatrical market.

Barriers Specific to the Video Game Industry

Decree No. 72 Restricts Video Game Right Holders: On September 1, 2013, *Decree No. 72 72/2013/ND-CP on the Management, Provision, and Use of Internet Services and Online Information* went into force. The Decree creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. 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. 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: restrictions that involve censorship of the content of video games in order for them to be approved; outright prohibition of content within video games (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; and license duration limits. The implementation of this Decree must not create structures that unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or that discriminate against them.

Barriers Specific to the Music Sector

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

²⁹*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.*

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 hinder anti-piracy efforts. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights related to 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,³⁰ and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

³⁰The 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.