

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2017.<sup>1</sup>

**Executive Summary:** Vietnam's market for legitimate creative goods and services remains a fraction of its potential, hampered by Vietnam's mounting piracy problems and its onerous market access barriers. While Vietnam's Government has indicated a willingness to cooperate with right holders and a recognition of the "sophisticated" and serious nature of its piracy problem, much more needs to be done. As the chair of the Asia-Pacific Economic Cooperation (APEC) for 2017, the time has come for Vietnam to make good on its international commitments, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace. Vietnam must take more affirmative enforcement actions against piracy, such as issuing deterrent administrative penalties against infringers and spearheading criminal prosecutions, beginning with major online piracy operations based in Vietnam. Vietnam's piracy problems would also be reduced if the country removed its highly restrictive market access barriers, which, by limiting Vietnamese consumers' access to legitimate content, pushes them towards illegal alternatives. A positive development, which IIPA hopes the Government of Vietnam and Vietnamese industry will support, is the establishment of a pilot program to ensure online advertisers and brand owners do not inadvertently place their ads or products onto piracy websites. In addition, a new film classification system, which entered into force in January 2017, should have a positive impact on the development of the theatrical market. Vietnam should build on recent regulatory reform efforts, move to eliminate discriminatory barriers, and take steps to bring its copyright protection and enforcement frameworks into alignment with the Bilateral Trade Agreement (BTA) with the United States and with evolving global norms, including those it agreed to implement in the Trans-Pacific Partnership (TPP).

### PRIORITY ACTIONS REQUESTED IN 2017

#### 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, including against operators of such sites.
- Have the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, Ministry of Information and Communication (MIC) and Ministry of Public Security (MPS) IPR/High-Tech Police and related police units conduct more operations focused on online infringement, issuing deterrent administrative penalties, and bringing criminal prosecutions where appropriate.
- Encourage universities to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks and other course materials.

#### Legislation:

- Make necessary changes to laws and implementing Decrees and Circulars, including the IP Code and the Criminal Code, to ensure Vietnam is in full compliance with its BTA, TRIPS, and other international obligations, including, in particular, clarifying and confirming that "commercial scale" IP violations under the Criminal Code

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<sup>1</sup>For more details on Vietnam's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Vietnam's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



(1) apply to online distributions; and (2) that the thresholds can be interpreted to include infringement that is significant even absent a profit motive.

- Afford adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Extend the term of copyright protection to be in line with the international trend 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.
- Eliminate the legal and procedural impediments that interfere with the ability to take effective action against Illicit Streaming Devices (ISDs) and the apps that enable ISD piracy.

## Market Access

- Eliminate foreign investment restrictions, quotas, 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.<sup>2</sup>

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>3</sup> Yet, thus far, Vietnam’s actions to combat piracy, including actions taken pursuant to a 2012 MIC and MCST Joint Circular 07<sup>4</sup>, have been inadequate to address its piracy challenges, including those identified below.

**Internet and Mobile Opportunities, Challenges in Vietnam:** More than half of the Vietnamese population is online, with most of that access stemming from mobile broadband subscriptions.<sup>5</sup> Vietnam’s large population of young people and rapidly growing online and mobile user base offer enormous new opportunities for legitimate services for creative content. And, indeed, a growing number of licensed Internet content providers are trying to take 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 as vehicles for the distribution of content, including local Vietnamese content. Two new video on demand (VOD) services were launched in Vietnam in 2016: Film+ (“film plus”) and Danner. Netflix is also available.

As these opportunities increase, however, Vietnam faces the mounting challenge of combating online and mobile network piracy, including through streaming and download sites, peer-to-peer (P2P) networks, linking sites, video streaming sites, search engines, cyberlockers, and social media networks. Streaming of unlicensed music through websites and mobile apps is rising. One major global piracy site, *putlocker.is*, is operating out of Vietnam.<sup>6</sup> Other piracy sites include *chacha.vn*, which makes available a significant amount of infringing music, including both

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

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

<sup>4</sup>*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* (in force August 2012) (“Joint Circular 07”).

<sup>5</sup>According to Internet Live Stats, in 2016 52% of Vietnam’s population was using the Internet. See Internet Live Stats at <http://www.internetlivestats.com/internet-users-by-country/>. The International Telecommunication Union (ITU) indicates that 39% of Vietnamese people had mobile broadband subscription in 2015. See ITU’s *Measuring the Information Society Report 2016*, at p. 247, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>.

<sup>6</sup>*Putlocker.is* allows users to stream pirated versions of motion pictures and television programs from cyberlockers using an embedded player on the site as well as links. The movie industry noted *putlocker.is* in its submission to the U.S. Trade Representative (USTR) in advance of its 2016 out-of-cycle review of “notorious markets.” USTR recognized *putlocker.is* on its 2016 list, one of a number of notorious sites hosted in Switzerland, noting that its operator is located in Vietnam.

Vietnamese and popular foreign music.<sup>7</sup> *Chiasenhac.com* (Alexa ranking 144) is another popular music site that allows users to stream unlicensed Vietnamese and international music.<sup>8</sup> *Zing.vn* provides access to unlicensed music for download and streaming.<sup>9</sup> Other sites providing unlicensed music and music video content for download and streaming include *nhac.pro.vn* (also *nhacpro.net*) (960th), *nhac.vn* (324th), and *tainhacmp3.vn* (855th). Sites such as *nghenhac.in* (and related sites), *phimmoi.net* (38th), *hdonline.vn* (80th), *phim14.net* (128th), *phim3s.net* (107th), *xemphim.com* (and related sites), *socbay.com* (and related mobile app), *HDViet.com* (136th),<sup>10</sup> *phim22.com*, *tamlay.vn* (718th), *animetvn.com*, *xemphimso.com*, *phimnhanh.com*, *viettorrent.vn* (423rd), and cyberlockers like *fshare.vn* (97th), and *4share.vn* (351st) remain of concern to the motion picture and television industry. Most of these sites generate revenue through advertisements or through paid subscriptions for premium service. Even licensed sites inadvertently contribute to global piracy because most music sites do not have efficient geo-blocking systems and, therefore, the content becomes available elsewhere.<sup>11</sup> The harm caused from online piracy is significant and makes it nearly impossible for legitimate online platforms to compete with pirated sites. And, for the motion picture industry, it implicates the life cycle of filmed entertainment, as 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.<sup>12</sup> In June 2016, MIC and MCST took an important step by promulgating a Joint Circular to provide guidance for changing and revoking domain names that infringe intellectual property laws.<sup>13</sup> Yet it remains to be seen whether this Joint Circular will be effective in disrupting online infringers. In addition, the MIC, in response to an administrative complaint, recently imposed a fine on an infringing website and ordered it to take down infringing content. More such actions are needed, especially against the top infringing sites.

Unfortunately, however, industry notes the process of addressing infringements is cumbersome and is done on a case-by-case basis. It is not helpful that Vietnam's domain registrar, Vietnam Internet Network Information Center (VNNIC), is not required to provide contact and registration information of website owners in the WHOIS lookup database, making tracing the owners of infringing websites extremely difficult and hampering enforcement. Many offending rogue sites remain in operation and are growing in popularity. 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 07 (JC), including bringing criminal prosecutions.<sup>14</sup> The Inspector of MIC should use the authority granted

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<sup>7</sup>*Chacha.vn*, a free to use direct download site, has a large amount and wide variety of infringing music available on the site. 1554 takedown notices were sent to the site in 2016, which included 8624 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.

<sup>8</sup>*Chiasenhac.com* (also *chiasenhac.vn*), which has an Alexa ranking of 144 and receives 5 million monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC. As a result of an administrative complaint filed in 2016 with the Ministry of Information and Communications against *chiasenhac.com*, the site was fined and ordered to remove all infringing contents.

<sup>9</sup>Although *Zing.vn*, the top music platform in Vietnam, 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. That said, in 2016, *Zing.vn* has implemented a geo-blocking system, which at least is helping to prevent access to infringing content from outside Vietnam.

<sup>10</sup>This site has the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications."

<sup>11</sup>SimilarWeb estimates that visitors from the United States and Japan are the second and third top foreign visitors to Vietnam's music sites.

<sup>12</sup>For example, in 2014, reportedly, two infringing mobile applications were shut down and administrative penalties were imposed on the developers/operators. In April 2013, the Ministry of Culture, Sports, and Tourism (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*.

<sup>13</sup>See Joint Circular 14/2016/TTLT-BTTTT-BKHCN.

<sup>14</sup>Joint Circular 07 (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

under the JC to enforce against these types of violations more effectively, particularly against those websites that are under MIC licenses. IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, including the MCST Inspectorate, MPS IPR/High-Tech Police and related police units (including the Hanoi local High Tech Crime Police (PC50), the High Tech Crime Police (National) (C50), and the Security Police (P83)); and increased prosecutions by the Supreme People's Procuracy.

The level of cooperation with Internet Service Providers (ISPs) improved in 2016 due to the introduction of new legitimate services, which are provided on some key ISPs. The music industry, for example, reports an improved takedown rate from of 92% in 2016. Unfortunately cooperation is limited because ISPs claim that under the JC they are unable to take action against piracy websites without government intervention. Thus, while high piracy levels continue to distort the marketplace, ISPs will only take down infringing content when instructed by government authorities. The JC should be amended to correct this problem and encourage greater cooperation.

A positive development is that the local audiovisual industry, with U.S. rights holders, has established a pilot program to work with online advertisers and brand owners to ensure they do not inadvertently place ads or sell products on piracy websites in Vietnam. IIPA would welcome support of this initiative from the Government of Vietnam as well as from Vietnamese industry to begin to choke the revenue stream of piracy sites. 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 music industry intends to discuss the possibility of a Memorandum of Understanding with ISPs in the coming year to increase cooperation. The situation for motion picture companies is also difficult. In general, most ISPs are cooperating by not placing pirated films on their VOD services, but more needs to be done to ensure full compliance on all the services they provide. For example, under the terms and conditions with websites they host, there is 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 devices at the point of sale; and 2) "apps" designed to access infringing sites from mobile networks. As an example of this phenomenon, Socbay developed a mobile app called *Socbay iMedia*, which provides a variety of unauthorized entertainment content, including music files.

**Illicit Streaming Devices (ISDs) and Apps:** ISDs<sup>15</sup> are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world. China is a hub for the manufacture of these devices. The devices, gaining popularity in Vietnam, may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities is enabling users through apps, to access remote online sources of unauthorized motion pictures or television programming. The apps may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an "after sale" service, or by the users themselves, often utilizing easy to follow instructions provided by the vendor. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The Vietnamese Government, including MCST and MIC, must

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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>15</sup>In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement. Moreover, Vietnam should take action against key distribution points for devices that are being used illegally.

**Ex Officio Enforcement Needed Against Hard Goods:** 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, including of audiovisual “box sets,” as well as home-made pirated optical discs) remains a real threat. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions. To the extent the Criminal Procedure Code does not currently make it possible to take *ex officio* actions, it should be amended.<sup>16</sup> 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.

**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. In 2015, in the course of its cease-and-desist campaign against multiple copy shops and bookstores in Ho Chi Minh City and Hanoi, the Association of American Publishers (AAP) uncovered a domestic book printer that appeared to be engaged in unauthorized reproduction and distribution of the copyrighted works of AAP member publishers. The book printer produced large quantities of unauthorized ELT materials and text books, and openly sold them in book stores that it operated. Unlicensed print overruns also continue to harm foreign 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 civil and criminal courts are not a realistic 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.

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<sup>16</sup>Article 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.

**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. A camcording of a major motion picture was recently found on Youtube with Vietnamese subtitles. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. 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 CGV cinema. The perpetrator also admitted that he had recorded and uploaded additional films.<sup>17</sup> 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.

## **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).<sup>18</sup> 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.

Vietnam committed to raising its standards in the TPP and, although TPP is unlikely to enter into force, Vietnam should press forward with reforms to spur development of Vietnam’s creative industries. As the chair of APEC for 2017, Vietnam has an opportunity to show the world a positive example on intellectual property rights protection and enforcement. At minimum, Vietnam should close the gaps between its current legal framework and its unmet international obligations, including those it committed to in the BTA with the United States.<sup>19</sup> Unfortunately, some recent changes noted below may have moved Vietnam further from those standards. We are hopeful that Vietnam will raise its standards for copyright protection and enforcement to at least meet its BTA obligations as quickly as possible.

**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. 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 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.”<sup>20</sup>

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<sup>17</sup>Six 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.”

<sup>18</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>19</sup>Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA), Chapter II on Intellectual Property Rights.

<sup>20</sup>Article 30(1)(b) should be clarified to ensure it provides a making available right, as well as a distribution right, and that it covers any form of transmissions of sound recordings, including interactive and non-interactive digital transmissions. 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 WIPO Performances and Phonograms Treaty (WPPT).

- 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, which were found by a WTO panel to violate China’s WTO obligations.<sup>21</sup>
- 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, including TRIPS Article 13 and Article 4.9 of the BTA.<sup>22</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.
- Article 203 fails to provide an adequate presumption of copyright ownership, potentially running afoul of Vietnam’s commitments in the BTA (Article 3.2), as well as TRIPS.

**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,<sup>23</sup> it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.<sup>24</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 (pay-TV) piracy.<sup>25</sup> Vietnam should amend the Criminal Code to ensure all infringement on a commercial scale and signal theft can be subject to criminal liability. The Vietnam Government should immediately issue implementing regulations for the Criminal Code to confirm that it applies to online distributions and other violations of the IP code, and 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.

**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\$11,057), and set the maximum fine for an organization at VND500 million (US\$22,115). The following fines are also set forth: 1) VND400 to 500 million (\$US17,692 to \$22,115) against an organization that imports an unauthorized copy; 2) VND70 to 100 million (US\$3,096 to \$4,401) against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million (US\$663 to \$1,546) 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

<sup>21</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>22</sup>Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes”; Article 25(1)(f) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns”; and Article 25(1)(j) allowing importation of copies of others’ works for personal use remain problematic. 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 audiovisual 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. Articles 7(2), 7(3), and 8, referenced above, are overbroad exceptions that run afoul of the three-step test.

<sup>23</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>24</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 submissions on Vietnam for more detailed discussion. See e.g., IIPA, *Vietnam*, 2009 Special 301 Report, February 17, 2009, available at <http://www.iipawebsite.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

<sup>25</sup>See BTA Article 14.

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.<sup>26</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 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.<sup>27</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.

**Decree No. 72 Ignores Piracy:** Decree No. 72 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information unfortunately fails to include copyright infringement on the list of prohibited acts that trigger sanctions and remedies. Vietnam should amend this decree to ensure that piracy is included among the Decree No. 72's prohibited acts and, thus, eligible for remedial action, including the remedy of disabling access to infringing websites.

**Certain Enforcement Provisions Inconsistent with the BTA:** A number of Vietnam's enforcement provisions are inconsistent with obligations in the BTA. For example, the availability of pre-established damages is limited and the amount is inadequate. BTA Articles 12.2.D and 12.3, require the availability of pre-established damages "adequate to compensate for the injury the right holder has suffered..." As noted above, Vietnam's remedies for civil and administrative enforcement allow for distribution or use for non-commercial purposes of infringing goods and the materials and means for producing them, falling short of Vietnam's obligations in BTA Article 12.4 and TRIPS Article 46. Similarly, Vietnam's remedies for infringement at the border also allows for distribution or use for non-commercial purpose of infringing goods, which does not meet its obligations in the BTA (Article 15.12) and TRIPS (Article 59).

**ISP Liability Should be Amended to Meet Modern Challenges:** Joint Circular 07 (JC) merely requires intermediaries to take down infringing content and terminate services under certain circumstances, but this authority has been used only where online services and websites are directly infringing, and no contributory liability provision exists in the JC or elsewhere in Vietnam's legal framework. The JC does not include any requirement for intermediaries to take down infringing content in response to a notice received directly from a right holder and the requirements of JC Article 5 appear to apply only where the government has intervened. What is needed are clear legal incentives, including secondary liability, that ensure online platforms do not engage in infringing activities, especially regarding the making available right, and, secondly, that ensure neutral intermediary service providers will cooperate with right holders to deter unauthorized storage and transmission of copyrighted materials. For example, the "right" for ISPs to take measures to prevent infringement under Article 4 should be required as an obligation, rather than a right. And the requirements in Article 5 for ISPs to remove and erase digital content that violates copyright and suspend services should be clarified to ensure ISPs are held liable at least for infringements that ISPs control, initiate, or direct, and for infringements that ISPs fail to expeditiously remove or disable access to upon obtaining knowledge, such as notification from a right holder.

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<sup>26</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

<sup>27</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.

## 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.<sup>28</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 pirated 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, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. 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 the Decision appear to be hortatory in nature, the Vietnamese Government should, in the recently proposed amendment to the Cinematography Law, remove the quota. 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 Vietnamese films must be at least 40% of those broadcast on TV.<sup>29</sup> 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. In 2016, MIC indicated it is considering treating pay-TV services as a form of utility, which could affect the current free market pricing and competition. 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—and the process lacks transparency. In a positive development, MCST introduced a

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<sup>28</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, available at [http://www.nhandan.com.vn/english/culture/171208/culture\\_v.htm](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

<sup>29</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.

film classification and rating system in January 2017. IIPA is hopeful that the classification and rating system will spur development of the theatrical market.

### ***Barriers Specific to the Video Game Industry***

**Decree No. 72 Restricts Video Game Right Holders:** Decree No. 72 on the management of Internet services and online information 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. We also urge Vietnam to work towards commitments agreed to in TPP to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

### ***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 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,<sup>30</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

As outlined above, Vietnam's copyright protection and enforcement frameworks are inconsistent with its international obligations in many respects. These include the following:

- all infringement on a commercial scale is not subject to criminal liability consistent with TRIPS Article 61 and BTA Article 14;
- a number of copyright exceptions are overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;

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<sup>30</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 MCST 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.

- remedies for civil, administrative, and border enforcement permit “non-commercial” distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- inadequate enforcement framework including no criminal infringement cases proceeding to the courts, complicated and non-transparent civil procedures, and inadequate training for enforcement officials which is inconsistent with Vietnam’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- term of copyright protection falls short of the requirements of BTA Article 4.4;
- presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2; and
- inadequate remedies against signal theft, in violation of BTA Article 5.