

**IIPA 2022 SPECIAL 301 REPORT
ON
COPYRIGHT PROTECTION
AND
ENFORCEMENT**



**SUBMITTED JANUARY 31, 2022
TO THE
UNITED STATES TRADE REPRESENTATIVE
BY THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**



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for Innovation and Intellectual Property, Office of the United States Trade Representative

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January 31, 2022

Submitted via regulations.gov Docket No. USTR–2021–0021

Mr. Daniel Lee

Assistant United States Trade Representative for
Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: IIPA Written Submission in Response to USTR’s Request for Comments and Notice of a Public Hearing Regarding the 2022 Special 301 Review, 86 Fed. Reg. 70885 (Dec. 13, 2021)

Dear Mr. Lee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the above-captioned Federal Register Notice as a part of the “Special 301” review. The filing focuses on three copyright industry concerns in U.S. trading-partner countries: (i) inadequate copyright and related laws, particularly where rights holders are unable to fully exercise their rights; (ii) inadequate and ineffective enforcement of existing copyright and related laws; and (iii) market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings.

The annual Special 301 review requires the U.S. government to identify “foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”¹ IIPA members appreciate USTR’s efforts to maintain Special 301’s focus on improving and strengthening copyright protection and enforcement in the reported countries and on opening up these markets for U.S. creators, producers, and workers who rely on copyright protection—as the statute requires and as Congress intended. As USTR has noted in past Special 301 Reports, Congress expressed concern that intellectual property (IP) protection and market access deficiencies “seriously impede the ability of the United States persons that rely on protection of intellectual property rights to export and operate overseas, thereby harming the economic interests of the United States.”² The ultimate goal of the Special 301 review, therefore, is not to catalog trade barriers or admonish foreign governments for deficient laws or enforcement regimes as such, but rather to open markets for American copyrighted materials in digital and hard copy formats.³

American creators, producers, workers, and consumers all benefit when U.S. trading partners enact strong IP laws, effectively enforce those laws, and eliminate barriers to their markets. Strong IP protection and enforcement also help U.S. trading partners develop, nurture, and enjoy the economic and cultural benefits from their own cultural and creative sectors, ultimately for the benefit of local consumers. Dynamic digital market conditions, including fair and

¹19 U.S.C. Section 2242(a)(1).

²See, e.g., 2021 Special 301 Report at 4, citing Omnibus Trade and Competitiveness Act of 1988, § 1303(a)(1)(B), and referencing S. Rep. 100-71 at 75 (1987) in footnote 2 (“Improved protection and market access for U.S. intellectual property goes to the very essence of economic competitiveness for the United States. The problems of piracy, counterfeiting, and market access for U.S. intellectual property affect the U.S. economy as a whole. Effective action against these problems is important to sectors ranging from high technology to basic industries, and from manufacturers of goods to U.S. service businesses.”).

³The most recently identified market access and other trade barriers around the world, including those pertaining to intellectual property rights, as well as key barriers to digital trade, are detailed in the U.S. Trade Representative’s 2021 National Trade Estimate Report on Foreign Trade Barriers (March 31, 2021). That report is available at <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>.

equitable market access, create enormous opportunities to further expand economic growth, which results in more well-paying jobs and foreign sales.

These benefits to American creators, producers, and workers are demonstrated in IIPA's December 2020 update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2020 Report*, prepared by Economists Inc. (2020 Report). Based on 2019 data, the report generally does not reflect the impact of the COVID-19 pandemic on the creative industries, but it shows that the copyright industries continued to be a significant contributor to the United States economy and will likely remain so when the impact of the virus has been mitigated. According to the 2020 Report, in 2019, the "core" copyright industries in the United States: (i) generated over \$1.5 trillion of economic output; (ii) accounted for 7.41% of the entire economy; and (iii) employed approximately 5.7 million workers, which is 3.79% of the entire U.S. workforce and 4.46% of total private employment in the United States.⁴

The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 43% higher wages than other U.S. workers. Further, according to the 2020 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.87% between 2016 and 2019, while the U.S. economy grew by 2.48%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2020 Report calls the "total" copyright industries), the numbers are even more compelling. The 2020 Report and statistics amply demonstrate the economic importance of the copyright industries to the U.S. economy and to the livelihoods of millions of American workers, as well as the value of improving protection, enforcement, and market access abroad.

On behalf of its member associations, IIPA has filed comments every year since the 1988 Trade Act established the Special 301 review proceeding. A particular focus of this IIPA submission is on the improvements necessary to the legal frameworks of trading partners to further enhance digital trade in copyrighted works and recordings. For two decades, the copyright industries have been at the forefront of digital technological advances, creating and disseminating copyrighted materials using a wide variety of media and ever-more sophisticated systems (including new services and applications (apps)) and new digital business models. The end-result of these digital technological advances is that more copyrighted material is now legally available, in more diversified ways and with more varied pricing options than at any other time in history, for the enrichment and enjoyment of consumers.⁵ As the copyright sector has moved dynamically to electronically produce and deliver its products and services to meet global consumer demand, laws and enforcement regimes in many foreign markets have failed to keep pace. The success of

⁴See Economists Incorporated, *Copyright Industries in the U.S. Economy: The 2020 Report* (December 7, 2020) available at <https://iipa.org/reports/copyright-industries-us-economy/>. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth has been well documented by the World Intellectual Property Organization (WIPO). See, e.g., *WIPO Studies on the Economic Contribution of the Copyright Industries: Overview* (2014), available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf. The WIPO website provides links to 51 country studies employing virtually the same agreed-upon methodology as the Economists Inc. methodology. See <http://www.wipo.int/copyright/en/performance/>. These studies provide the economic underpinnings for efforts to reform copyright laws, improve enforcement, and lower market access barriers. For the video game industry, see a December 2020 report by ESA *Video Games in the 21st Century: The 2020 Economic Impact Report*, available at <https://www.theesa.com/wp-content/uploads/2019/02/Video-Games-in-the-21st-Century-2020-Economic-Impact-Report-Final.pdf>. This report highlights how video games not only provide rich interactive entertainment experiences, but also power an innovative industry that has a significant impact on U.S. economic growth and jobs. For the music industry (RIAA), see the *2018 Jobs & Benefits Report* (currently being updated): <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwek-Economists-Inc-April-2018-1-2.pdf> and, the *50 States of Music* website – <https://50statesofmusic.com/> – that provides (qualitative and quantitative) state-by-state contributions. There are also music industry reports on employment and economic contributions in specific regions, e.g., Europe, available at https://www.ifpi.org/wp-content/uploads/2020/11/IFPI_music_in_Europe_WEB_spreads.pdf, as well as in specific countries, e.g., India, available at https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/IMI%20report_singlePage.pdf. For the motion picture industry (MPA), see the 2019 U.S. economic contribution infographic, available at https://www.motionpictures.org/wp-content/uploads/2020/02/MPA_Economic_contribution_US_infographic_2019_Final.pdf. See also individual (country) MPA economic contribution reports for Australia (<https://www.mpa-apac.org/wp-content/uploads/2020/02/MPA-ANZSA-Study-Final.pdf>), India (https://www.mpa-apac.org/wp-content/uploads/2020/07/20200708_India-ECR-2019_Finalized.pdf), and the United Kingdom (<https://www.mpa-emea.org/wp-content/uploads/2018/09/OO-UK-AV-sector-economic-contribution-report-FINAL-2018.09.21.pdf>). These reports illustrate the economic value of the production and distribution of motion picture and television programs, and include analyses of direct and indirect economic impacts (i.e., employment and tax analyses).

⁵For example, there are now over 60 million licensed tracks on some of the major music streaming services. See e.g., <https://www.apple.com/au/apple-music/> and <https://www.amazon.com/music/unlimited> and hundreds of digital music services. The number of subscriptions to online audiovisual services worldwide increased to 863.9 million in 2019, a 28% increase from 2018. See, <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>. For more information generally on the proliferation of services, see, <https://www.motionpictures.org/watch-it-legally/> (movies and television content); and <http://www.whymusicmatters.com>, <http://www.pro-music.org/>, and the IFPI Global Music Report 2021 at <https://gmr2021.ifpi.org> (music).

the creative community in digital trade depends on strong copyright laws and enforcement practices that foster a legitimate online economy. Open markets and modern copyright laws, when combined with effective and efficient enforcement of those laws, have resulted in creators and producers investing in the creation and dissemination of new high-quality materials, ultimately meeting worldwide consumer demand. To maximize market potential, rights holders must remain at the forefront of technological developments to expand markets and creative activity and to launch new business models.

Finally, we note that the global health crisis unleashed by the COVID-19 pandemic has taken a toll on individuals, governments, and industries around the world. The copyright sector is no different. While the creative industries have adapted and responded to the crisis by making available more online resources for both distance learning and entertainment through flexible licensing mechanisms, these businesses are themselves contending with economic stresses. Thus, especially in the age of COVID-19, the need for strong copyright protection remains critical to incentivize the investment in the creation and dissemination of entertaining, informative, and educational content.

In sum, IIPA members very much appreciate that USTR has made the Special 301 process a positive catalyst for change to effectively address the challenges faced by the U.S. creative industries in key markets around the world. In our view, the process has yielded results, including productive legal reforms, enforcement actions, and the removal of market access barriers. In addition to recommending improvements, IIPA's comments also highlight some of the recent successes and positive outcomes in several countries.

I. IIPA RECOMMENDATIONS ON DESIGNATIONS AND A SUMMARY OF COUNTRY REPORTS

IIPA's submission focuses on the markets where IIPA members believe active engagement by the U.S. government can reap positive results for creators and the industries that support and invest in them. The Country Reports contained in the filing include a summary of developments from 2021 along with key issues to focus on in 2022. Most of the Country Reports identify key priorities and, wherever possible, detail the legal, enforcement, and market access concerns specific to each market. Some Country Reports also contain details of specific trade obligations to the United States in bilateral or multilateral trade agreements or identify unfulfilled obligations that, if addressed, could improve the local market. In a few instances, the Country Reports focus on only a few key issues or one or two industries.

IIPA's 2022 Submission includes this [Cover Letter](#) plus two appendices—[Appendix A](#) and [Appendix B](#).

Appendix A includes 19 Country Reports with recommendations for designation in USTR's Special 301 Report this year.⁶ These 19 Country Reports cover: **Argentina; Brazil; Canada; Chile; China; Colombia; Ecuador; India; Indonesia; Mexico; Poland; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; Ukraine; United Arab Emirates; and Vietnam.**

⁶The Country Reports were prepared by IIPA Staff, including Linda Quigley, Madeline Dunn, and the undersigned. We particularly thank Madeline Dunn for her contributions to the preparation, production and distribution of this submission. The Country Reports are based on information furnished by IIPA's member associations. The information contained in this submission should not be construed as providing legal advice.

For these countries, the IIPA recommends:

IIPA 2022 Special 301 Recommendations–Country Reports	
Priority Watch List	Watch List
Argentina	Brazil
Chile	Canada
China	Colombia
Ecuador	Poland
India	Switzerland
Indonesia	Taiwan
Mexico	Thailand
Russian Federation	United Arab Emirates
South Africa	
Ukraine	
Vietnam	
11 Countries Total	8 Countries Total

Appendix B provides a Historical Chart of countries’ placement on Special 301 lists by USTR since 1989 and IIPA’s 2022 Special 301 recommendations.⁷

II. ABOUT IIPA AND IIPA’S INTEREST IN SPECIAL 301

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and/or distributed by IIPA-member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services, as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases, and software in all formats.

III. INITIATIVES TO STRENGTHEN IP PROTECTION AND ENFORCEMENT IN FOREIGN MARKETS

IIPA highlights a few positive developments in the following markets in the past year:

⁷A number of countries/territories have appeared on a Special 301 list every year since 1989, or for a considerable number of years. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of “priority foreign countries,” provides that USTR must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.” *Uruguay Round Agreements Act Statement of Administrative Action*, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

Brazil: In 2021, nine states in Brazil participated in Phase Three of “Operation 404,” and 334 websites, 94 applications, and 20 internet protocols were suspended, in compliance with 11 search and seizure warrants. Operation 404 continued with a phase dedicated solely to video game sites and e-shops that has resulted in action against approximately 85 additional sites. Brazil also reduced the industrial product tax (IPI) for consoles, gaming accessories, and handheld devices, which was a positive result for the video game industry. In addition, the music industry received positive support from law enforcement agencies to address the problem of websites that engage in manipulation of streaming services, with several of these sites ending such activities following law enforcement initiatives. See the Brazil Country Report for additional details.

China: On June 1, 2021, amendments to the Copyright Law of China entered into force that provide for: equitable remuneration rights for sound recordings used in broadcasts and for communications to the public (covering the rights in Article 15 of the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT)); protections against the circumvention of technological protection measures (TPMs); and several improvements to China’s enforcement framework, including a ten-fold increase in maximum “punitive” damages and the ability to shift the burden of proof to the accused infringer. See the China Country Report for additional details.

Ecuador: In July 2021, the Ecuadorian Intellectual Property Office (SENADI) ordered all Internet service providers (ISPs) to disable access to some of the most popular stream ripping sites globally including *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, *2conv.com*, and *notube.net*. The order also encompasses sites that facilitate access to the sites subject to the order. Users who attempt to access the sites subject to the order will be redirected to an educational landing page. This marks the first successful action in Ecuador to disable access to stream-ripping sites.

Peru: Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOP), along with the courts, continued in 2021 to issue injunctions against local sites that contain unauthorized infringing music and film materials. In December 2020, the first site blocking order was issued against the most popular stream ripping service in Peru, *Y2Mate*. The order was directed to all ISPs and was swiftly complied with, resulting in disruption to this pirate site and an estimated 84% reduction in traffic to the site. Subsequently, additional orders were issued by INDECOP in May 2021, including one *ex officio* action, resulting in permanent blocking of 10 stream ripping services, many of them dedicated to the unauthorized copying of music videos and sound recordings of national and international labels and artists. IIPA encourages INDECOP to continue exercising its *ex officio* powers to develop a long-term campaign against sites that facilitate online piracy including the most prevalent form of music piracy in Peru, stream ripping.

Singapore: In November 2021, the parliament adopted a bill that introduced sound recording public performance and broadcast rights. The new law will guarantee the recording industry an important source of revenue, which was absent for such a long time in the territory, and will enable the industry to invest in new music and new artists locally and provide a new market for U.S. rights holders.

Spain: The motion picture industry reports positive engagement by the Spanish National Police on domestic piracy operations and international copyright crime cases. For example, in March 2021, the Spanish National Police took action to disable access to illegally streamed audiovisual content provided through the *Mobdro* app, which is one of the most popular illegal streaming apps in the world.

IIPA welcomes these 2021 positive developments and looks forward to continuing to work with governments to foster a healthy ecosystem for the creative industries. Despite these positive developments, serious additional legal reform and enforcement issues remain in several of these countries. The details of these and other issues in certain of these countries can be found in the respective Country Reports in [Appendix A](#).

IV. ADDITIONAL CONCERNS IN OTHER KEY FOREIGN MARKETS

As detailed in the Country Reports, there are several countries, notably **South Africa, Canada, Ecuador, and Switzerland**, where the press for reforms and modernization of national copyright laws have failed to keep pace with market and technological trends. In some cases, reform efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments, including by introducing broad exceptions and limitations. In addition to the problematic legal reform efforts identified in the Country Reports, the governments of several other countries, including **Costa Rica, Germany, Kenya, Saudi Arabia, Malaysia, Nigeria, and South Korea**, have introduced legislation or taken other actions that threaten to significantly weaken, not strengthen, copyright protections or enforcement in those countries. Further details of the serious concerns in these markets are provided below. IIPA encourages the U.S. government to monitor developments in these countries and proactively engage with these governments to ensure their legal reform efforts result in adequate and effective copyright protection and enforcement.

A. **Costa Rica**

Costa Rica is undertaking a partial reform of its Copyright Law to implement the Beijing Treaty on Audiovisual Performances, which entered into force on February 13, 2021. In April 2021, the Copyright Register announced that a proposal was drafted, and a consultation process would follow, but the government has not yet held consultations with stakeholders. The recorded music industry's local Collective Management Organization (CMO) FONOTICA has been informed that a proposal for implementation already has been sent to the Office of the Minister of Justice for review and approval. This lack of transparency raises concerns and casts doubt on the content and purpose of the reform. The Copyright Register should open a consultation process that includes access to the implementing text and consideration of comments from stakeholders.

In addition, to address shortfalls in Costa Rica's existing legal framework, the copyright reform process should be expanded to include a new chapter dedicated to collective management of rights, with enhanced provisions to support the role of collective management organizations (CMOs) in the licensing market, including clear obligations that these organizations must fulfil. In particular, the new chapter should include the following reforms to CMO operations:

- *ad causam* legitimacy for CMOs to facilitate the enforcement of rights before the judiciary in cases of non-compliance;
- powers to set non-discriminatory tariffs based on the real use of phonograms;
- legal tools for the enforcement of rights, such as preliminary injunctions and deterrent fines for non-compliant users;
- transparency obligations such as publication on the webpage of the bylaws, tariffs, distribution rules, and the list of members;
- an internal conflict resolution procedure in cases of counterclaims submitted by members;
- public disclosure of the list of non-identified works and recordings;
- publication of the webpage of financials and external audits reports;
- voting rights that take into account the amounts distributed to each member;
- voluntary membership for rights owners; and
- distribution at the track level and based on real and effective use of phonograms by users.

B. **Germany**

The 2021 transposition of the European Union (EU) Directive 2019/790 on copyright and related rights in the Digital Single Market (DSM Copyright Directive) into German legislation and the changes to Germany's Copyright Act

introduced broad new exceptions for copyright protected works on online content-sharing service providers, including an overbroad limitation on the exercise of exclusive rights for “presumably permitted uses,” which applies to uses of copyrighted content that is less than 15 seconds and combined with other content. These exceptions exceed the “three-step test” of the Berne Convention and the WTO TRIPS Agreement and will lead to an untenable situation in which certain uses would be permitted in Germany but not elsewhere in Europe or worldwide.⁸

C. Kenya

While the Government of Kenya has indicated its intention to ratify the WIPO Copyright Treaty (WCT) and the WPPT (collectively, the WIPO Internet Treaties), it has yet to do so or to set a timeframe for accession. Kenya should ratify and implement the WIPO Internet Treaties as part of its ongoing Copyright Act amendment process. Kenya’s 2019 Copyright Act amendment was intended to address some of the challenges of the digital age, but Kenya’s copyright framework remains deficient in several significant respects. A 2020 draft Intellectual Property Bill (IP Bill), which largely incorporated 2019 amendments to the Copyright Act, failed to address many of these deficiencies and included additional provisions that fall short of Kenya’s international obligations and best practices. To ensure its legal framework provides adequate and effective protection and enforcement of intellectual property rights, Kenya’s government should revise the IP Bill to address shortcomings in Kenya’s copyright and enforcement framework, including by:

- deleting the provisions requiring copyright registration and compulsory recordation of assignments, and removing the requirement in the Copyright Act that authentication devices be affixed to sound recordings, all of which are incompatible with Kenya’s international obligations, including under the Berne Convention, the TRIPS Agreement, and the WPPT;
- ensuring that the exclusive rights of communication to the public and making available are clearly defined and meet the requirements of the WPPT;
- ensuring that exclusive rights apply to all sound recordings, including “born digital” recordings;
- retaining the rights of communication to the public and broadcasting as exclusive rights;
- providing adequate and effective protections for TPMs and rights management information (RMI), in line with international standards;
- providing a term of protection consistent with international norms (life of the author plus 70 years, or at least 70 years from fixation or publication for sound recordings or works not measured by the life of a natural person);
- expressly incorporating the three-step test into the law to properly confine the scope of exceptions and limitations to copyright protection;
- adding online liability principles to ensure adequate legal incentives for cooperation between ISPs and rights holders;
- clarifying the correct scope of ISP safe harbors from liability as applying to only passive and neutral intermediaries that do not contribute to infringing activities;
- revising notice and takedown procedures to ensure expeditious takedown of infringing materials and other measures demonstrated effective in preventing or restraining infringement and to remove onerous notice requirements;
- introducing an obligation for ISPs to adopt and implement a repeat infringer policy;
- ensuring effective, transparent, and accountable collective management of rights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights;
- introducing a rate-setting standard applicable to the licensing of collectively managed rights requiring that rates reflect the economic value of the use of the rights in trade (i.e., willing buyer/willing seller standard);

⁸Article 13 of the WTO TRIPS Agreement obligates WTO members to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” See also Berne Convention Article 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Article 10 (same, as to all Berne exclusive rights and all exclusive rights granted under the WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Article 16(2) (same, as to all rights provided for under WPPT).

- providing deterrent civil and criminal penalties to combat piracy; and clarifying the role of the proposed IP Tribunal.

D. Saudi Arabia

The Government of Saudi Arabia has indicated to stakeholders that it has begun the process to amend its copyright law. In any copyright law reform, the Government of Saudi Arabia should address the following issues to ensure its legal framework provides adequate and effective protection and enforcement of copyrights:

- accede to and implement the WIPO Internet Treaties and ensure that the legal framework, including the Copyright Law and Implementing Regulations of Copyright Law, is compatible with the WIPO Internet Treaties and international standards and best practices;
- clarify key definitions and rights to ensure they are consistent with the WIPO Internet Treaties, including the definition of “sound recordings” and the rights of communication to the public, broadcasting, and making available, which should be separately enumerated and defined;
- extend the current 50-year term of protection for copyrighted works and sound recordings to 70 years;
- introduce voluntary, transparent, and accountable collective management of rights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights;
- provide for effective, deterrent sanctions against both physical and digital copyright infringement; and
- confine exceptions and limitations to the three-step test, particularly the existing personal use exception of Article 15(1) of the Copyright Law and the quotation exception of Article 15(2).

E. Malaysia

Malaysia acceded to the WCT and WPPT in December 2012 but has not fully implemented the treaties. Instead, it has instituted some problematic regulatory measures in recent years to limit rights holders’ abilities to properly and freely exercise their rights. In November 2019, there were additional consultations between MyIPO and some rights holder groups, but the legal reform process has, to date, not been transparent, which is concerning to rights holders. Since the 2019 consultation, related government agencies have been discussing draft provisions with the Attorney-General’s Chambers. However, to date, Malaysia has yet to release a draft or organize further stakeholder consultations for this important copyright reform process. As of June 2021, the Communications and Multimedia Ministry (KKMM) is reviewing laws governing the arts and creative industries, including the 1987 Copyright Act. IIPA encourages Malaysia to enact amendments to the Copyright Act to fully implement the WIPO Internet Treaties and bring Malaysia’s copyright law in line with best international practices, including by:

- improving protections against the circumvention of TPMs;
- addressing online piracy of film and television content with criminal provisions aimed at piracy devices;
- providing a clear ISP liability framework to ensure that safe harbors apply to only passive and neutral intermediaries that do not contribute to infringing activities;
- maintaining the broadcasting and public performance rights for sound recordings as exclusive rights;
- extending the term of protection for sound recordings to 70 years;
- amending the Criminal Code to sanction unauthorized communications to the public;
- narrowing overly broad exceptions that exceed the “three-step test,” including so-called “flexible exceptions” regarding “quotations” and “transient and incidental” copies;
- avoiding a mandatory registration system (which would run afoul of the Berne Convention); and
- aligning definitions, including the definition of “broadcast” and “sound recording,” with those of the WIPO Internet Treaties to provide greater certainty.

F. Nigeria

Nigeria ratified the WPPT and WCT in 2018, but it has not fully implemented the treaties, and, as a result, its legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2017, was re-circulated as an Executive Bill in 2021 (alongside a Private Member Bill). The Executive Bill has several significant deficiencies that should be corrected for Nigeria to properly implement the WIPO Internet Treaties and to ensure adequate and effective copyright protection and enforcement, including the following:

- The draft legislation does not, but should, clearly define TPMs to refer to technologies that prevent infringement as well as to technologies that are designed to have that effect. At present, the draft law provisions on TPMs are not compliant with the WIPO Internet Treaties.
- The draft law does not include an exclusive right of distribution as required by the WPPT and proposes only a remuneration right for broadcasting for sound recordings in lieu of an exclusive right.
- The definition of “broadcasting” should be limited to “wireless” means, consistent with the WPPT (and the Rome Convention), and the rights of preexisting sound recordings, incorporated into audiovisual works, should be protected in accordance with the Agreed Statements to Article 2 of the WPPT.
- To be compatible with the Berne Convention and international treaties, the draft law should abolish the requirement for a copyright registration; registration can be voluntary, but it cannot deny the “enjoyment or exercise” of rights under the Berne Convention (nor should it be subject to fines or other detrimental consequences for non-registrations, as in the current draft law).
- The draft law proposes draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This proposal is unprecedented and disproportionate to any intended purpose and should be deleted from the draft law.
- Any new law also should ensure that the scope of limitations and exceptions do not exceed the three-step test. In particular, the overbroad quotation exception should be revised to limit the use of a quotation to purposes of criticism or review. In addition, the draft appears to provide for a hybrid fair use-fair dealing provision that is substantially broader than the U.S. fair use doctrine.
- Section 35 of the bill would introduce a compulsory license scheme that is arguably incompatible with Nigeria’s international obligations under the Berne Convention and the WCT. Under this provision, the Nigeria Copyright Commission (NCC) could bypass the copyright owner and authorize the use of a copyrighted work “by any person for the purpose of rectifying the abuse of a dominant market position or to promote public interest.” The provision would undermine rights holders’ ability to assert their rights in or license their works because any user could request that the NCC bypass the copyright owner and authorize or prohibit certain uses of a work based on the mere allegation that the user “made a reasonable effort to obtain permission from the owner of copyright on reasonable commercial terms and conditions and that the effort was not successful.”
- The bill also would provide for compulsory licenses for translation and for reproduction of published works. This provision should be revised to ensure it is calibrated according to the terms of the Berne Convention appendix.
- Amend the provisions in the draft law that would grant broad immunity to ISPs from copyright liability. These safe harbors should apply to only passive and neutral intermediaries that do not contribute to infringing activities. The draft law should also include expeditious timetables for takedowns, provide for other measures demonstrated effective in preventing or restraining infringement, and include provisions to address repeat infringers.
- Private copying exceptions, and with them, provisions for levies, should apply to only content that is lawfully acquired—the exceptions should not be misused as a license to legalize piracy—and ensure that rights holders receive adequate shares of collections made, deductions are kept to a minimum, and compensation is payable directly to rights holders.
- The term for sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years.

- The draft law includes a proposal to add extended collective licensing (ECL) in Nigeria. An ECL system is appropriate in only well-developed collective rights management systems, where organizations represent a substantial number of rights holders for each segment of the collective marketplace. For these reasons, such a system is not appropriate in Nigeria and IIPA recommends that these provisions be removed.
- While the draft provision includes helpful measures to prevent access to infringing content online, the bill should be improved to ensure the availability of effective injunctive relief against any intermediary (including without limitation, Internet access providers, domain registrars, search engines, content delivery networks, etc.) whose services are used in connection with infringements of copyright.

An additional concern in Nigeria is the absence of an accredited CMO for music rights holders to manage their public performance and broadcast rights. This absence is the result of a dispute between the NCC and the CMO COSON Limited, which was responsible for managing performance rights in musical works and sound recordings, but whose operating license was withdrawn by the NCC. Since then, working with rights holders, steps were taken to improve COSON's transparency and governance. As a result, IIPA recommends COSON should be reinstated. Additionally, the draft law should define CMOs and their proper governance, so that CMOs should exist only if they are owned or controlled by their member rights holders and are non-profit organizations. Finally, Nigeria also needs to more effectively enforce against the numerous unlicensed online entertainment services that operate in Nigeria, which are harming many markets inside and outside of Nigeria. With these provisions in place, CMOs would be able to license effectively in Nigeria.

G. South Korea

In September 2020, South Korea's Ministry of Culture, Sports and Tourism (MCST) proposed several amendments to the Copyright Law, which remain under consideration by the National Assembly. The MCST proposal has one positive provision—to sanction websites that provide links to unauthorized works—but it also includes several problematic proposals, some of which are inconsistent with South Korea's international obligations:

- A proposal for an ECL regime would, in an unprecedented manner, apply to online music services and also to film and television programs. The proposed ECL system would be a limitation on the exercise of exclusive rights that is inconsistent with the three-step test (e.g., Article 13 of the TRIPS Agreement), and should not be enacted for either online music services or audiovisual works. For films, it would deprive rights holders of their exclusive distribution rights in South Korea, including the right to determine release dates for cinemas.
- The right of “digital audio transmission” (DAT), which has caused damaging legal and commercial uncertainty, should be removed, and not extended to include “visual works.”
- A proposal to extend collective management for educational uses of music should be significantly narrowed or abandoned. In addition, the proposals for public institutions to be designated as “remuneration bodies” and for undistributed revenues to be given to third parties completely unconnected to the rights in question should be withdrawn.
- Several other provisions, including those regarding contract adjustment, would undermine the freedom and sanctity of contracts, particularly in the film and music industries.
- However well-intentioned, a proposal to decriminalize minor copyright infringements could, if not carefully crafted (and explained to the public), result in a dramatic rise in infringements by individual users diluting the deterrent effect of proper sanctions for harmful infringements.
- Several other proposals would harm the film industry, including proposals that would: (i) change the relationship of ownership between juridical entity owners of films (by employees); and (ii) create a “portrait” right in individuals distinct from copyright without an expressive works exception. If adopted, this would significantly stifle the production of films about or inspired by real people and events.
- For sound recording producers, the proposed public performance right needs to be remedied by fully recognizing the right (as opposed to limiting it to specific uses) and providing only very limited exceptions.
- Any proposed exception for text and data mining should be narrowly drawn and well-defined.

- The scope of exceptions for educational purposes should be clearly defined to ensure they do not conflict with existing licensing practices. Also, permitted digital uses should be limited to a closed environment, not over the open Internet.
- The proposed upper limit on civil damages should be removed.

There are several additional concerns in South Korea. South Korea's ISP liability framework (including safe harbors) is outdated and susceptible to abuse by user uploading services and other online infringers, and it should be modified to ensure that safe harbors apply to only passive and neutral intermediaries that do not contribute to infringing activities. One market access concern in South Korea for the motion picture industry is a proposed screen quota on the number of screens and percentage of showing on any single film. The proposal would, if adopted, impede the free market and have the unintended effect of creating a vacuum of consumer demand. This would encourage piracy of films otherwise blocked from legitimate distribution or theatrical exhibition and destroy both the rights holders' value in their films, as well as the investments made by South Korean distributors licensing American titles. Finally, while a procedure for disabling access to infringing content is available to rights holders and the government has an active approach to combatting torrent sites, authorities are reluctant to apply it, or insist on unworkable criteria, regarding two other forms of infringing services, cyberlockers and stream ripping services.

V. KEY CHALLENGES FOR THE COPYRIGHT INDUSTRIES—PROTECTION, ENFORCEMENT, AND MARKET ACCESS ISSUES

Notwithstanding the positive developments noted above, the U.S. copyright industries face complex challenges in overseas markets that fall into three distinct, but overlapping, categories: (i) inadequate copyright and related laws; (ii) inadequate and ineffective enforcement of existing copyright and related laws; and (iii) market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings. Below is a summary of the major challenges across the global markets in each of these categories:

A. Inadequate Copyright and Related Laws

Although the Country Reports highlight specific concerns and deficiencies in the copyright legal regimes in each of the identified countries, some concerns are common to many countries. First, the current legal regimes of many U.S. trading partners fail to meet their obligations to the United States, evolving global norms, or the minimum standards of the WIPO Internet Treaties. Second, in several countries, CMOs are not operating fairly or properly, resulting in the denial of monies to rights holders. Related to these concerns, as outlined above, several countries undertaking major overhauls of their copyright and related laws, are considering or adopting proposals that would weaken rather than strengthen copyright protections or enforcement. As discussed, some countries already have adopted, or are considering adopting broad exceptions and limitations, which undermine markets for the digital creation or dissemination of rights holders' materials.

1. Failure to Meet Legal Reform Obligations, Evolving Global Norms, and Global Minimum Standards.

As detailed in the Country Reports, U.S. trading partners have many unmet legal reform obligations from the numerous bilateral, regional, and multilateral trade agreements with the United States. These agreements include: (a) the WTO TRIPS Agreement, to which 164 countries have now acceded (and over 20 additional countries are in the process of acceding); and (b) free trade agreements (FTAs) or trade promotion agreements (TPAs) with over 20 countries, including the 2020 **U.S.–Mexico–Canada Agreement (USMCA)**, as well as bilateral agreements that entered into force in 2012 with **South Korea, Colombia, and Panama**. These agreements are intended to open foreign markets to U.S. goods and services dependent on copyright protection, chiefly (although by no means exclusively) by mandating improved and modernized copyright laws, and, in most cases, higher standards for on-the-ground enforcement of these laws. The United States also has a series of Bilateral Investment Treaties (BITs) that are

increasingly relied upon to resist efforts by foreign governments to impose heavy-handed regulations, such as mandated local-content quotas, purchase requirements, or restrictions on audiovisual over-the-top (OTT) businesses.

Some signatories to existing FTAs have not met their agreement obligations, yet these countries continue to enjoy unfettered access to the valuable U.S. markets for goods and services. These concerns are detailed in the Country Reports, notably in **Chile** and **Colombia**, where the legal frameworks for online enforcement remain deficient. As detailed in the **Mexico** Country Report, Mexico has enacted key copyright reforms to implement certain obligations under the USMCA (and longstanding commitments under the WIPO Internet Treaties), but IIPA is concerned about the pending constitutional challenge to these reforms, which if successful would seriously undermine Mexico's compliance with its USMCA obligations.

The U.S. government has entered into other wide-ranging bilateral agreements, including binding trade agreements, in which our trading partners have committed to taking steps to modernize and strengthen their copyright laws and/or enforcement regimes.⁹ Some of the agreements were negotiated bilaterally in the context of accession of U.S. trading partners to international entities such as the WTO, or in the settlement of WTO disputes, while others constitute “action plans” or similar pledges resulting from negotiations to resolve bilateral issues, including for example, online enforcement obligation agreements with **Ukraine** and **Russia** that have never been fully implemented. As detailed in the **China** Country Report, the Economic and Trade Agreement (Phase One agreement)¹⁰ with China includes copyright enforcement obligations and purchasing obligations for licensing of audiovisual services. IIPA urges China to follow through on its Phase One commitments.

Some of the provisions in certain bilateral or multilateral agreements are outmoded and no longer fit the original intended purpose. For example, some provisions meant to address digital technologies were negotiated more than a quarter century ago, before the dawn of digital markets and interactive uses that have so dramatically changed the landscape of the marketplace for goods and services protected by copyright. In such instances, the U.S. government should seek higher standard remedies that support the current business models of the creative industries—including remedies that effectively respond to current challenges and reflect international best practices—to ensure the proper delivery of digital works and services.

Our trading partners should be urged to bring their laws into line with evolving global norms regarding duration of copyright protection. Setting the term of copyright protection at life of the author plus 70 years (or at least 70 years from fixation or first distribution for works or sound recordings not measured by the life of the author) has become a *de facto* global norm. More than 80 countries, including most of the United States' major trading partners in Europe and in the Americas, and all but a handful of Organization for Economic Cooperation and Development (OECD) countries already meet or exceed this norm for some or all categories of creative works and recordings. Several U.S. trading partners have not yet adopted longer terms for works or sound recordings, or both. It is hoped that countries that have not yet adopted this longer term, particularly in Asia and Africa, will follow recent examples (many in Latin America) and extend copyright term accordingly.

The U.S. government should also make it a priority in 2022 to encourage all U.S. trading partners to both accede to and fully implement the WIPO Internet Treaties. At the time they came into force, the WIPO Internet Treaties set the global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. The treaties also include an overarching commitment for countries to enable effective exercise of these rights in practice and to provide deterrent levels of enforcement of these rights online (and offline). The WIPO Internet Treaties also were the culmination of a global consensus on the need to provide legal protection for TPMs that

⁹See, for example, the intellectual property rights agreements compiled by the Commerce Department's Trade Compliance Center, available at: http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/index.asp.

¹⁰ See *Economic and Trade Agreement Between the United States and China*, available at: https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Txt.pdf.

copyright owners (or their licensees) use to control access to and the copying of their works and recordings. These controls, particularly access controls, are key enabling technologies for a full range of online digital services, such as subscription streaming services, that deliver creative works to consumers at a time and place convenient to them, and in a manner that protects the rights of and payments to creators and producers. IIPA urges the U.S. government to remain vigilant on this issue, especially regarding legislation in any country purporting to implement the WIPO Internet Treaties and copyright reforms undertaken in countries that are parties to an agreement, such as an FTA, with the United States. In particular, anti-circumvention prohibitions (e.g., protections for TPMs) should protect access controls regardless of the method or technology and should apply independent of whether there is an accompanying copyright infringement. Only in this way can TPMs legislation establish effective, practical, and enforceable anti-circumvention prohibitions that protect and support digital content services.

2. *Laws and Regulations Governing Collective Management Organizations (CMOs):*

Direct licensing of copyrighted works and sound recordings by individual right holders of their exclusive rights should always remain the baseline. However, in certain circumstances where it makes economic sense, rights holders may prefer to exercise some of their rights voluntarily on a collective basis, e.g., through CMOs. For audiovisual works, for example, collective licensing of rights is the exception and not the rule. It applies (with all of the above-noted limitations) for simultaneous transmissions of broadcast signals, but mandatory collective rights management is otherwise opposed by the motion picture and television industry. For musical works and recordings, certain public performance and broadcasting rights are more frequently licensed collectively, because often a large number of users (potential licensees) are involved, for example, from cafés and restaurants to hundreds of radio stations, and the value of individual transactions may be relatively small compared to the transactional costs.

Royalties for the retransmission of audiovisual works and public performances of musical works and recordings are significant revenue sources for all music right holders. This also represents an important source of monies for the financing of the production and dissemination of new works and recordings. This importance has heightened the need for efficient, transparent, and accountable collective management services. It is therefore essential, in particular for music industry rights holders, to set up and govern their own CMOs on a voluntary basis. Governmental roles should be limited to establishing regulatory frameworks that enable efficient, fair, and non-discriminatory operations of CMOs backed by rights holders, and, where appropriate, providing expert fora for the resolution of disputes on certain aspects of collective management, including by ensuring that users cooperate in good faith in the licensing process and that rights are properly valued based on reliable economic evidence (using the willing buyer/willing seller standard). Serious concerns regarding collective management laws and regulations in key markets are detailed in the Country Reports in [Appendix A](#), as well as in the section above regarding additional concerns in other key foreign markets.

B. *Inadequate and Ineffective Enforcement of Existing Copyright and Related Laws*

As a minimum standard, the WTO TRIPS Agreement requires “effective action” and “remedies that constitute a deterrent” to infringement, through civil, administrative, and criminal channels, and effective adjudication in the courts.¹¹ To be effective, enforcement tools must address the modern infringement challenges of all rights holders, including all variety of online uses and those outside a territorial jurisdiction (frequently running anonymously), and often across multiple countries. Moreover, enforcement authorities need adequate resources and the capability to do their jobs effectively. As digital technologies have expanded consumer access to copyrighted materials, rogue services have exploited those technologies to facilitate different forms of piracy that undermine rights holders’ investments in the production and distribution of new and existing materials and services. For example, cloud computing and streaming technologies are used by cyberlockers and various platforms that do not have licenses for the content they make available. In addition, various stream-ripping sites and applications circumvent TPMs and convert licensed

¹¹See WTO TRIPS Articles 41 and 61. There are many obligations for civil, administrative, and criminal remedies in Articles 41 through 61, including for provisional relief and judicial procedures (e.g., injunctive relief), which are particularly critical for online enforcement.

streams (i.e., music authorized only for online streaming) into unlicensed downloadable content. Stream-ripping is currently the most prevalent form of online infringement of music. Thus, enforcement systems (and trade commitments to address enforcement) must be adaptable, agile, efficient, and effective to deter the myriad forms of unauthorized activities.

This Section highlights some of the enforcement challenges confronting IIPA members. The Country Reports in [Appendix A](#) provide detailed discussions of these challenges where they are present in those key markets.

1. **Online and Mobile Network Piracy**

Digital delivery, whether through wired online or mobile networks, is the dominant form of delivery for copyrighted works, including music, films and television programs, journal publications, and video games—both by licensed and unauthorized services. The entrenchment of infringing services (including those misconstruing laws to avoid licenses) is a leading barrier to U.S. creators and rights holders in markets worldwide. To address these concerns, IIPA continues to recommend the following four steps:

(1) Identification: Identify and close down services and actors engaged in infringement activities, especially criminal syndicates, through the use of criminal enforcement remedies. This step has been effectively undertaken by USTR as part of its “Special 301 Out-of-Cycle Review of Notorious Markets.”¹² As detailed in the Country Reports, there have been many successes with the closure of Internet sites and services identified as notorious markets by USTR. IIPA’s long-standing recommendation is that USTR should urge trading partners either to convert sites and services to licensed disseminators of works and recordings, or these notorious markets should be taken down followed by, where appropriate, criminal enforcement actions.

(2) Create an Adequate and Effective Legal Framework: The goal is a legal framework that: (i) prevents the operation of services that promote or otherwise induce infringement; (ii) criminalizes online infringement; and (iii) provides strong incentives for neutral intermediaries to work with rights holders to curb the use of their proprietary networks and services for infringing purposes. Such a legal framework should: (i) provide the relevant panoply of exclusive copyright and related rights (as well as effective TPMs and RMI protections) starting with the minimum standards mandated by the WIPO Internet Treaties, and adopt global best practices for copyright protection in the digital environment; (ii) ensure that any ISP liability limitations, if present, do not reduce the scope of substantive copyright protections; (iii) recognize online piracy as a form of cybercrime (consistent with the Budapest Convention and global best practices); and (iv) foster cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration.

While systems for notice and takedown of infringing materials are in place in many markets, often a mistaken perception exists that they are the only means of online enforcement. The mere takedown obligation is not sufficient or effective and should not be the only *quid pro quo* for limiting liability. Moreover, some services, including some clearly pirate services, attempt to rely on notice and takedown procedures to avoid proper copyright licensing. Clear primary and secondary liability rules are necessary to discourage abuses and to avoid inaction or license evasion. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement can be an effective remedy against commercial platforms. Proposals granting overbroad immunity to ISPs and other platforms from any civil or criminal liability remain a concern. IIPA members urge foreign governments to include clear language in legislative proposals to ensure that any blanket immunities do not apply to IP violations and that such immunity does not hinder IP enforcement.

¹²The most recent report is USTR’s Out-of-Cycle “2020 Review of Notorious Markets for Counterfeiting and Piracy” (January 2021), available at: [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (NM 2020 Report).

Separately, any copyright safe harbors should apply to only passive and neutral parties that do not contribute to infringements. Additionally, there are concerns with provisions that immunize parties who induce or facilitate infringement of copyright. Mitigating and preventing online piracy should be a shared responsibility with balanced obligations between online intermediaries and rights holders, particularly because online intermediaries are best positioned to assist with the mitigation and prevention of online piracy. Absent legal incentives to foster the cooperation of ISPs and other online intermediaries, such intermediaries have little interest to fully cooperate with rights holders.

(3) Provide Injunctive Relief: A country's failure to take effective action against its own ("homegrown" or otherwise) notorious online marketplaces that target consumers in other markets causes harm to the markets of its trading partners. Increasingly, responsible governments have pushed back against this "offshoring" of enforcement responsibility by developing means and processes to restrict or disable access to foreign pirate sites from within their borders. Government agencies and courts in over 36 countries—including **Australia, Belgium, Brazil, Denmark, France, Germany, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden,** and the **United Kingdom**—employ injunctive relief or administrative orders to order ISPs to disable access to copyright infringing websites. However, several important markets do not yet provide a legal basis for doing so, including **China** and **Taiwan**, as discussed in the respective Country Reports. **Japan** is another example of a major market that needs to do more to address effectively "offshore" infringements. An amendment was adopted in 2020, confirming liability against linking sites, but additional measures are necessary to take effective action against offshore piracy. Japan's Intellectual Property Strategy Headquarters' (IPSH) first ten anti-piracy measures, which were issued in their 2019 strategy document, are now being evaluated. However, piracy remains serious, which underscores the need for Japan to introduce additional effective measures to prevent access to copyright infringing services, including infringing websites operated both within and outside of Japan.

In Europe, Article 8(3) of the EU Copyright Directive (2001/29/EC) requires Member States to ensure injunctive relief is available "against intermediaries whose services are used by a third party to infringe a copyright or related right." Unfortunately, **Poland** has not fully implemented this provision (as detailed in the Poland Country Report) nor has **Bulgaria**, which does not provide a legal basis for permanent injunctions.¹³ In short, there is a wide spectrum of judicial and administrative means through which to impose restrictions, under defined circumstances, when other domestic remedies are insufficient, and this deserves the close attention of the U.S. government. After over a decade of experience, studies have shown that injunctive relief can reduce usage of infringing sites and increase traffic to legitimate offerings of copyrighted material. These steps are also effective for service operators who cannot be identified or who avoid service of legal process.

(4) Develop Inter-Industry Cooperation: Because Internet services (including piratical services) are enabled by and interlinked with a wide spectrum of supporting services, combating systematic online infringement of copyright requires the active cooperation of all participants in the e-commerce ecosystem, including: online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services); payment processors; hosting providers (including reverse proxy providers and related optimization services); domain name registrars and registries; search engines; and marketplaces and app stores. As entities with a direct stake in a secure and stable Internet, and in the healthy growth of legitimate e-commerce, including e-commerce in products and services protected by copyright, cooperation against threats to that security, stability, and health is part of a sound business strategy for all Internet intermediaries. Governments in many countries can do much more than they are currently doing to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer online marketplace. For example, governments should encourage all relevant intermediaries to implement "know their business customers" policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers. Additionally, governments should ensure that industry agreements, especially those that provide enforcement rights, properly reflect

¹³ The Bulgaria Copyright and Neighboring Rights Act (CNRA) provides for a legal basis for injunctive relief against third party infringers, but the provision appears to provide for only precautionary and provisional measures, not for a permanent injunction. See Article 96a(8) of the CNRA.

the needs of industry stakeholders, and that any remedies outside of a legal framework are available to all copyright owners.

2. Circumvention of Technological Protection Measures (TPMs), Including Stream-Ripping

The range and variety of legitimate material now digitally available to consumers, in so many formats and on so many platforms, is possible because of the widespread use of TPMs by content producers and licensed services. TPMs have fostered many of the innovative products and services available online by allowing creators and rights holders to control and manage access to copyrighted works, as well as to diversify products and services and their pricing. In short, new business models depend on these technological controls. TPMs also ensure that works made available in hard goods (DVDs and Blu-ray discs), in the online or mobile environment (including e-books and video games), or through on-demand streaming services or conditional access (e.g., pay-TV, pay-per-view) are not easily stolen and that pirated copies of video games are not playable on console platforms.

Unfortunately, there are business models built entirely around providing services, or manufacturing and distributing technologies, software, devices, components, or tools, to circumvent TPMs to gain unlawful access to the content or to copy it without authorization. One example is stream-ripping, which was highlighted as a problem by USTR in its 2016 Notorious Markets report and in subsequent Notorious Markets reports, for example in 2020, including services such as *Flvto.biz* and *Mp3juices.cc*.¹⁴ Stream-ripping services infringe the making available right and circumvent the TPMs used to prevent download of music streams. These services have proliferated in the last few years, making stream-ripping, as noted above, the dominant method of music piracy globally. Stream-ripping sites, services, and apps enable users to make a permanent, free download of music that was licensed only for streaming on a video website such as YouTube and then allow that consumer to listen to it whenever and wherever they wish, without paying for a licensed download or a premium streaming subscription or accessing the stream on the licensed platform. This harms both legitimate streaming services and channels for authorized downloads. While legal protection of TPMs, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are often undermined by countries that have yet to implement any adequate protections.

3. Piracy of Books and Journals

Unauthorized photocopying of academic textbooks, and scientific, technical, and medical books, in many markets; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); as well as unauthorized translations of popular consumer books remain significant problems for book and journal publishers. Combatting book piracy requires consistent action by law enforcement authorities against entities engaged in unauthorized reproduction of textbooks and other professional books. Counterfeit books continue to be produced for domestic sale in certain markets, but they may also be exported to some developed markets. Government agencies and educational institutions (especially those that are state-funded or state-operated) should do more to promote and adopt appropriate use and copyright policies, and in particular, the use of legitimate textbooks and journal publications, as well as to discourage the use of unauthorized copies of all literary, educational, and professional works in educational settings. Journal piracy is likewise a significant concern for the publishing industry. Piracy sites such as *Sci-Hub* and the *Library Genesis Project (Libgen)* act in concert to acquire massive amounts of infringing copies of books and journal articles and enable the seamless flow of the illegally obtained content between the two sites, as well as the multiple *Libgen* mirror sites.¹⁵ This group of sites have increased in sophistication over the last few years, now aggregating all active mirror sites, reading IP address data from their users, and enabling the network to re-direct users to mirror sites that are more readily accessible in their region. As of October 2021, *Sci-Hub* boasts that it holds some

¹⁴See USTR, 2016 Out-of-Cycle Review of Notorious Markets, <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf> and USTR, 2020 Review of Notorious Markets for Counterfeiting and Piracy, [2020 Review of Notorious Markets for Counterfeiting and Piracy \(final\).pdf \(ustr.gov\)](https://ustr.gov/sites/default/files/2020-Review-of-Notorious-Markets-for-Counterfeiting-and-Piracy-Final.pdf).

¹⁵As of September 2021, there appear to be some 108 active *Libgen* mirror sites.

87.97 million journal articles and academic papers. *Libgen*, in turn, claims that it hosts 2.4 million non-fiction books, 80 million science magazine articles, 2.2 million non-fiction books, 0.4 million magazine issues, and 2 million comic strips.

4. Piracy of Motion Picture and Television Programs by Piracy Devices:

A damaging piracy ecosystem has emerged around piracy devices and apps, i.e., “illicit streaming devices” (ISDs). These piracy devices and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content, as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. Motion Picture Association (MPA) members continue to suffer enormously from a growing threat of these devices and apps. Streaming devices that are preloaded with infringing apps and illicit TV/Video-on-Demand (VOD) subscription services can be found online and in physical markets. The challenge is particularly acute in countries where the legality of the devices (i.e., boxes) and of activities surrounding their trafficking, remains in doubt. Additionally, illegal apps that can place infringing material on otherwise legitimate streaming devices can be found through a myriad of mainstream and specialty app repositories. This issue was the focus of USTR’s 2017 Notorious Markets Report.¹⁶

Because these piracy devices and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, enforcement against them presents complex challenges. Under the right fact patterns, the retailer/distributor can be held liable; alternatively, the app developer can be prosecuted (if identified). Governments can also take action against key distribution points for devices that are used illegally, including marketplaces (both online and physical) where such devices are sold. Many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling piracy devices and apps, or stalls, kiosks, or “repair” shops that offer to load unauthorized copyright material or piracy-enabling apps onto any device. Vigorous action is needed to lessen the growing harm to the legitimate digital delivery of copyright materials by these devices.

5. Illegal Camcording of Theatrical Motion Pictures:

In addition to the problem of piracy devices and apps, another priority for the motion picture industry involves stopping camcording or the illegal recordings of movies in theaters. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether the image or sound or both) from the theater screen and sound system. One digital (camcorder) copy, uploaded to the Internet and made available around the world, can undermine global markets and the huge investments needed to produce and distribute a feature film. Illicit camcording in theaters decreased significantly in 2021, because many theaters closed due to the COVID-19 pandemic. MPA anticipates that once theatrical markets recover, illicit recording of films in theaters will resume.

A multifaceted approach is needed to tackle camcording that includes: (i) enacting and enforcing anti-camcording legislation to outlaw the use or attempted use of an audiovisual recording device in a theater to make or transmit a copy of all or part of a motion picture; (ii) educating the public about how unauthorized camcording hurts both businesses and the consumer; and (iii) working with the private sector to identify and prevent unauthorized camcording in cinemas. This strategy has been implemented in many foreign markets (including **Canada, Japan, and South Korea**) with good results.

¹⁶In its 2017 Notorious Markets Report, USTR spotlighted the growing problem of Piracy Devices (i.e., PDs), concluding that they “pose a direct threat to content creators, sports leagues, and live performance, as well as legitimate streaming, on-demand, and over-the-top (OTT) media service providers.” See USTR, 2017 Out-of-Cycle Review of Notorious Markets at 8-9, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

6. **Pay-TV Piracy and Signal Theft:**

Another long-standing problem for the motion picture and recorded sound industries is the unauthorized broadcast, cablecast, or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet. There are many sophisticated forms of cable and satellite piracy, including: the use of hacked set-top boxes; decoding or decrypting signals; and, stealing signals from neighboring countries that are within the satellite's footprint (i.e., "overspill" signals). Satellite signals are usually encrypted so infringers must circumvent the encryption to access content. Thus, enforcement actions (and regulations) need to focus on: (i) prohibiting the trafficking in pay-TV or signal theft devices or technologies; (ii) the unlawful decryption of encrypted cable or satellite signals; and (iii) the forwarding of decrypted signals (whether lawfully or not) without the authorization of the rights holders of the content or of the signal. These actions can help to foster the licensing of broadcasters and cablecasters and to weed out unlicensed television distributors.

A significant source of cable and satellite piracy is through illegal Internet Protocol TV (IPTV) services that provide access to stolen telecommunication signals or channels and offer on-demand infringing film and episodic television content to a global audience via dedicated web portals, third-party applications, and piracy devices configured to access these services. Over a thousand illegal IPTV services operate worldwide, offering hundreds of channels sourced from multiple providers, along with VOD content of unauthorized movies and television programs.¹⁷ Many of these illegal services are subscription-based, for-profit services, with monthly or yearly user packages. The technical infrastructure of these services is often vast and complex, making the identification of content sources and service operators extremely challenging. The marketing and sale of these IPTV services are often carried out by a network of global IPTV re-sellers who purchase subscriptions at wholesale prices and re-sell them for a profit, further complicating investigations. IPTV services have been the driving force in the emergence of related illegal businesses, including those engaged in the re-sale of IPTV services or the theft, distribution, and sale of channel feeds. In addition, IPTV services rely on infrastructure and support services, including from hosting providers, media servers, and panel hosts, sometimes without the knowledge or approval of the illegal services or product (but sometimes in cooperation with these services). As a result, criminal enforcement against these large-scale operations is the most effective deterrent.

C. **Market Access Barriers that Inhibit the Licensing and Dissemination of Copyrighted Works and Sound Recordings**

In addition to the key challenges pertaining to copyright protection and enforcement, which constitute *de facto* market access barriers, the U.S. copyright industries are also adversely affected by a variety of formal market access barriers, investment restrictions, and discriminatory measures that make it difficult for U.S. producers and distributors to participate fully in crucial foreign markets. These barriers also include interference with rights holders' contractual freedoms or with their licensing practices. The issues of copyright protection of authorized materials and enforcement against infringing goods are moot if rights holders cannot disseminate legitimate American works and recordings in a particular market in a fair and equitable manner to meet consumer demand. Market access barriers take many forms, including:

- Restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;
- High tariffs (such as through inclusion of royalties in the calculation of duties), taxes, or fees on core copyright businesses and their products and services;

¹⁷ In the United States, these illegal services are valued at over \$1 billion in piracy subscriptions alone (and estimated profit margins range from 56% for retailers to 85% for wholesalers worldwide). See, *Money for Nothing: The Billion-Dollar Pirate Subscription IPTV Business*. Digital Citizens Alliance and NAGRA (August 2020) at <https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/DCA-Money-for-Nothing-Report.pdf>.

- Arbitrary restrictions on the ability of rights holders to decide how to manage their rights, in particular by mandatory collective licensing combined with government interference in the operation of CMOs and rate setting;
- Quotas on audiovisual programming or complete bans on foreign programming, which overall curb the ability of film and television producers to compete fairly, and which limit consumer access to legitimate content;
- Local content investment requirements;
- Restrictions on advertising, including local content requirements;
- Restrictions on ownership and investment in copyright-related businesses;
- Discriminatory, onerous, and/or dilatory content review/censorship systems;
- Periods during which foreign governments prevent U.S. producers from opening their films or impose onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);
- Mandatory local replication requirements for films (that may also compromise the security of digital materials); and
- Other forms of government interference with the exercise of rights or contractual freedoms by rights holders.

One recent trend has seen governments seeking to regulate the online marketplace in the same manner as the traditional television market, threatening the vitality of fast-growing and dynamic business segments such as VOD and other OTT television and film services. For example, **Australia** is close to finalizing a new consultation process that could lead to increased regulation for VOD services to invest in local content. In November 2020, the Australian government released a consultation paper that proposed an obligation on VOD services to invest five percent of local revenue in Australian content. This requirement is unnecessary as VOD services are already investing heavily in local content and would run afoul of Australia's obligations under the U.S.-Australia Free Trade Agreement.

The Country Reports in [Appendix A](#) include detailed discussions of these formal market access barriers in the markets in which they occur. Whatever form they take, all market access restrictions that impede the entry of legitimate products increase the appeal of unauthorized production and distribution operations. Often these illegal operations cement strong loyalties with consumers, making them even harder to dislodge. U.S. officials should continue to strive to open markets for American creators and producers, and to eliminate or phase out market access barriers, as identified in this year's IIPA submission. IIPA members are committed to the promotion and protection of cultural diversity and believe that governments can, in lieu of market access barriers, effectively rely on the flexibilities built into FTAs, including permissible support programs, to promote their cultural interests.

VI. CONCLUSION

As detailed in the *Copyright Industries in the U.S. Economy: The 2020 Report*, the U.S. economy depends on a thriving copyright sector to create revenue, jobs, and exports. Likewise, the health and competitiveness of our trading partners' economies also depend on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster jobs in the creative industries, increase cultural diversity, promote international trade and exports, increase tax revenues from legitimate businesses, and attract more foreign direct investment. It is essential to the continued growth and future competitiveness of the U.S. creative industries that our trading partners provide high standards of protection for copyright; more effective policies and tools to enforce that protection; and more free and open markets. IIPA continues to urge the U.S. government to use the Special 301 review and other trade tools to encourage the countries and territories identified in our submission to make the necessary political commitments and take the necessary actions to bring real commercial gains for the U.S. creative industries, by strengthening copyright protection and enforcement regimes worldwide.

We look forward to continuing to work together with USTR and all the U.S. agencies engaged in copyright legal reforms, enforcement, and market access to meet the goals identified in this submission.

Respectfully submitted,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum, Executive Director
International Intellectual Property Alliance

APPENDIX A

COUNTRY SURVEYS

PRIORITY WATCH LIST

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina be maintained on the Priority Watch List in 2022.¹

Executive Summary: Argentina lacks the resources and political will needed to match high rates of piracy, which accelerated and diversified in 2021. Argentina must recognize at the highest levels the need to foster a digital market that is free from illicit content within its highly connected population. There is a dire need for an agenda and strategic policy for enforcement and interagency cooperation, especially between prosecutors and law enforcement cybercrime experts. The spike in demand for pirate content that Argentina experienced in the initial pandemic lockdown has enabled pirate sites to take hold and expand to other Spanish-speaking countries. Satellite and signal piracy also persists in Argentina. Hard goods piracy remains rampant through both importation and production, linked to organized crime groups. Market access obstacles persist, including film and television quotas, and high taxes on copyrighted content. Unauthorized Digital Goods (UDGs) for video game platforms are rampant and took advantage of the e-commerce boom generated by the pandemic to consolidate its market among local game consumers. While sales of music recordings on physical media have declined in recent years, there is still a significant problem for the Argentinean recording industry with the offer of unauthorized copies of new releases.

IIPA urges the Government of Argentina to make use of the recently established Coordination Center to Combat Cybercrime (*Centro de Coordinación de Combate al Cibercrimo*, known as C4) within the Cybercrime Investigations Directorate in the Ministry of Security, to combat rampant online piracy in conjunction with its anti-cybercrime efforts. The government should also revisit efforts to strengthen the Penal Code to improve the enforcement landscape for copyrighted works.

PRIORITY ACTIONS REQUESTED IN 2022

To address its significant piracy problems, IIPA urges Argentina to take the following actions.

- Increase resources and political backing for a coordinated, long-term antipiracy agenda at the federal level to address online piracy.
- Partner with rights holders to maximize industry expertise in the fight against cybercrime.
- Engage cybercrime and ENACOM authorities to monitor and perform online operations against high profile sites and commercial activities on marketplaces and e-shops.
- Continue to apply the Civil and Commercial Code to Internet service provider (ISP) liability cases including for storing infringing content.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and support the development of the local digital economy.
- Create a specialized IP Prosecution Office and establish federal jurisdiction over copyright crimes.

¹For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop commercial piracy.
- Actively involve the Argentinean Customs Office (DGA-AFIP) in copyright enforcement actions.
- Remove quotas for motion pictures and television content, and electronic devices, and refrain from extending quotas to over-the-top (OTT) services.
- Engage customs authorities to monitor and perform border operations against counterfeit high value products (such as circumvention devices and modified game consoles) entering the country via airports and land borders.
- Assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*).
- Refrain from increasing the already high tax burden on legal content through such proposals as the Digital Tax.

THE NATURE OF PIRACY IN ARGENTINA

The levels of online piracy of copyright works in Argentina worsened in the past year, showing no signs of recovery from the spike in piracy that the country suffered during the spring of 2020, coinciding with the lockdown put in place to contain the initial spread of the COVID-19 pandemic. The country's Internet penetration rate of 93% is the highest in the region, with 41.6 million users, but a robust legitimate online content market cannot take hold until the government makes concerted efforts to address the country's rampant and increasing digital piracy via torrent sites, downloading, streaming, stream-ripping, and linking sites.

As in 2020, Argentina, like the region as a whole, continues to see an increase in the usage of Piracy Devices (PDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television content. In recent years, IIPA has also seen an increase in consumption of films and television through piracy mobile apps and add-ons.

According to *Centro De Estudios De Telecomunicaciones De América Latina*, during the twelve months ending in February 2020, illegal platforms received 53% more visits than websites with authorized audiovisual content, and 17% of searches (45 million searches) for illegal online content in Latin America came from Argentina. Pirated content applications were downloaded 473,000 times, while applications for streaming authorized content were downloaded 1.8 million times. Illegal sports broadcasting websites received 22 million visits in the course of the year.

Following this period, the response to the COVID-19 pandemic triggered a sharp rise in piracy of motion pictures and video games. According to TorrentFreak, there were over 508,000 daily downloads of pirated content through BitTorrent protocols in Argentina on March 17, 2020 (three days before the official lockdown order was issued) and 706,000 daily downloads a week later. During this same period, IP addresses sharing Torrents also increased from 179,000 to 254,000.

The illegal distribution of physical and online video games and entertainment software in Argentina has consistently grown in recent years, and during the pandemic video game piracy spread over an even greater diversity of formats, including: BitTorrent game content available on Spanish-language illegal linking and download sites, increased availability of online UDGs,² and an increase of illegal consoles and devices available from small, local

²Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

businesses. According to ESA data, Argentina ranks 6th in the world for peer-to-peer (P2P) piracy for the video game industry. The 76% spike in P2P piracy that coincided with the spring 2020 COVID-19 lockdown did not subside. Instead, the volume of UDGs available on the country's major platforms increased further, by an estimated 40% in 2021. The Argentinean audience of Spanish-language illegal piracy game sites increased by 15% over the last year. While the overall use of cyberlockers decreased among the top ten most popular services and sites (*mega.nz*, *zippyshare*, *4shared*, *1fichier*, *pandafiles*, *rapidgator*, *uploaded*, *mixdrop*, *anonfiles*, *uptobox*, and *mediafire*), general audiences for online marketplaces remained high, as noted by the 20% increase of various online payment providers. Game titles represented 16% of traffic on the BitTorrent network, an increase from a level of 13% in the past two years. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina. SimilarWeb reports that monthly visits to infringing linking sites also grew by 15% in 2021 as compared to growth from the previous year. The volume of game titles on the BitTorrent network also increased to 16% (from 13% in the previous two years). Online marketplaces, such as Mercado Libre, remain increasingly popular with providers of unauthorized copies of video games, counterfeit consoles, circumvention devices and modification services. During the lockdown period in Argentina to contain the spread of COVID-19, the availability of listings on *Mercado Libre* for illegal game titles, UDGs, or physical video game products, including counterfeit controllers and modified game consoles, increased overall by 40% on the popular marketplace; however, removals have also increased. Social media platforms enable online pirates of all varieties to attract wider audiences.

The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2021 (MCS) found that Argentina had the highest music piracy rate in the world, with the exception of India and China. 48.2% of Internet users (and 58.8% of 16-24-year-olds) had pirated music at least once in the previous month. 41.5% of all Internet users aged 16-64 downloaded pirated music through stream ripping sites or applications. In total, 16.8% of internet users reported using the stream ripping site *Y2Mate* and a further 4.8% had used the stream-ripping site *Flvto.biz*.

According to SimilarWeb, the stream-ripping sites with the most visits from Argentina in the third quarter of 2021 were *y2mate.com* (more than 18 million visits), *snappea.com* (more than 6.3 million visits), and *savefrom.net* (more than 6.1 million visits). Other popular stream-ripping sites include *mp3y.download* (formerly *mp3-youtube.download*), *yt1s.com* and *flvto.biz*. *Y2Mate* is one of the top 100 most popular websites of any kind in Argentina. *Snappea* also promotes a popular stream ripping mobile app called *SnapTube* which had more than 6.3 monthly active users in September 2021. Other popular sites based on SimilarWeb data included the cyberlockers *mega.nz* and *1fichier.com*.

From time to time, there are seminars and forums about the necessity for specific regulation to enable effective enforcement action online in balance with freedom of expression and other fundamental rights on the Internet. For instance, a heated debate on piracy and copyright protection took place in late April 2020, spearheaded by authors and publishers after Virtual Library, a Facebook site with 16,000 followers, published PDF versions of a series of books, without author authorization. Writers that complained of IP theft were the object of online bullying, principally from campaigners for free access to "cultural productions" and knowledge, who leveraged the pandemic to support their opposition to online copyright protection. Creative industries have maintained their position that protection for freedom of speech and copyright are not opposing interests, rather, strengthening copyright protection can strengthen freedom of speech. Despite those debates and discussions, the current government has not adopted a public position on the matter.

Physical piracy continues to be a problem. After 217 days of closure due to the lockdown to contain the COVID-19 pandemic, the notorious market *La Salada* reopened in October 2020 with strict protocols all of which were blatantly violated when throngs descended on the market for Christmas shopping in December. Its owner was released from prison under house arrest in December of last year, and now accuses the former Administration of abuse of power for the closure of his market and illegal interference with his operations.

Camcording. The COVID-19 pandemic, which caused the widespread closure of cinemas in Argentina for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume and Argentina will continue to be the home to a number of release groups, which source camcorded material from all over the region and resell it online.

COPYRIGHT ENFORCEMENT IN ARGENTINA

In 2021, in the absence of significant enforcement improvements to promote a legal online environment during the pandemic, Argentina experienced rapid expansion of already high levels of piracy. Law enforcement authorities suffer a severe shortage of the resources and coordination needed to efficiently monitor and control digital piracy and the use of Illegal Streaming Devices (ISDs). Reforms in enforcement efforts are needed to stop the import of ISDs into the country, conduct full-scale raids against piracy websites and applications, and take actions against unlicensed retransmission and theft of pay-tv signals. The Government of Argentina should establish greater cooperation among federal enforcement agencies to address online piracy as a united front.

Rights holders report no significant cases of copyright enforcement actions by Argentina's law enforcement in 2021. General inaction and lack of coordination in online infringement investigations and cases between federal and state jurisdictions remain major concerns. For example, when an online IP crime is reported, both the Federal Police and the State Prosecutor might independently proceed processing the case without communicating or sharing data, with the federal police seeing it as a federal crime and the state prosecutor seeing it as a crime involving a local Argentinean citizen. There are other procedural challenges, such as defaults in evidence chain of custody for cybercrime cases and the characterization of profit and economic benefits from online advertisements. Furthermore, Argentina lacks legislation establishing protections relating to technological protection measures (TPMs) and rights management information (RMI), which are critical for enabling legitimate online business models and products. The lack of these legal tools is a further obstacle to enforcement against circumventions and hacks of copyright works.

Argentinean law enforcement authorities need to be trained to recognize the importance of online IP protections as an important piece of Argentina's digital economic development and its collateral benefits for public security policies. Additionally, law enforcement authorities should take further concrete steps to establish an agenda that reflects short- and long-term goals for tackling illegal sites and piracy groups operating in the country.

Enforcement actions against piracy linking and direct download sites require complex investigations involving data requests to multiple service providers, who in turn require the support of judicial authorities for the requested actions. Unfortunately, because law enforcement authorities generally fail to prioritize online copyright infringement cases, rights holders must instead rely on self-help measures. While there are some positive examples of private sector cooperation, there are no clear incentives from the government to generate cooperation between private and public sectors, causing a shortage of voluntary and beneficial initiatives.

In 2021, rights holders continued to rely more on cooperation with other actors in the online ecosystem. The video game industry has increased its cooperation with *Mercado Libre's* regional office, based in Buenos Aires, as a strong partner through which UDGs and other infringing video game items are removed from listings, and to combat commercial game piracy in the entire region. ESA reports that in the past year, *Mercado Libre* successfully completed approximately 85% of takedown requests. Although ESA has seen good cooperation with *Mercado Libre*, its members have noted issues with other marketplaces offering circumvention devices and pre-loaded consoles, such as *Shopix-co.ar* and *Shopee*, which is soon to be launched in Argentina but offers pirated goods currently in other countries in the region. The sound recording industry requests the removal of pirate site through notices sent to registrars and hosting services. In some cases, these notices result in successful site removal. The sound recording industry also sends daily notifications to Google services and YouTube to request the removal of pirate sites from search results and infringing user uploaded content.

In May 2021, Argentina approved the 2nd Additional Protocol of the Budapest Convention. This bolsters the welcome development of August 2020, when the Fernandez Administration created the Coordination Center to Combat Cybercrime (C4) within the Cybercrime Investigations Directorate in the Ministry of Security. However, the National Plan for Cybersecurity (NPAC), which was initiated in 2019 and which established C4, has yet to come fully into force. The goal of the commission is to monitor the implementation of the NPAC, and to coordinate actions against cybercrime through the collaboration among security forces, public-private initiatives and cooperation with international organizations. This task force is comprised of representatives from four federal security agencies: the Navy, Federal Police, National Gendarmeria, and Customs. At the moment, C4 concentrates on crimes such as large-scale money laundering, fraud and crimes against sexual integrity, trafficking and paedophilia. The creation of C4 could be part of a long-awaited solution for enhanced coordination to tackle online IP crimes. At present, the Ministry of Security is responsible for tracking and releasing official public security statistics, but does not track IP crime data. It is crucial that the Ministry of Security view rights holders as strategic allies to this important initiative.

IIPA urges Argentina's authorities to partner with rights holders in order to use industry expertise to combat cybercrime. Additionally, Argentina should use the public policy instruments currently in place to create forums of cooperation with the private sector in order to accelerate law enforcement actions to the increasing problem of online crime in Argentina. The Ministry of Justice and Human Rights and the Ministry of Security, as well as Ministry of Communications, could engage more with the industry on the commissions already in place to listen and discuss the matter of IPR protection and promotion, looking for common grounds of short and mid-term cooperation

Law enforcement or administrative authorities are not promoting actions by the private sector, nor are they taking any initiatives to tackle copyright piracy through securing assistance of domain names and registrars. Based on feedback from the criminal enforcement authorities, it is understood that they view any infringing site which makes money through advertising as not making direct profits from copyright infringement, and so, ineligible to be criminally prosecuted. This narrow interpretation of the law is not compatible with the TRIPS Agreement obligation that its parties ensure that criminal enforcement measures are available, at least, against commercial scale copyright infringement.

Despite the successful blocking of *The Pirate Bay* as a landmark case in 2014 (which remains in effect today), civil litigation for new website blocking remains impracticable in Argentina due to a combination of factors such as the timeframe and coverage of available injunctions, considering the number of sites that need to be blocked to generate impact over the pirate ecosystem.

On September 23, 2019, the sound recording industry filed a judicial review action challenging the constitutionality of the Executive Order No. 600/19, which created a single public performance tariff for all hotels and established a governmental control system over tariff rates. The action claims that the Order is an unconstitutional and confiscatory measure because it deprives rights holders of the freedom to set rates according to the nature and specifics of different uses, and to enter into freely negotiated agreements with users' associations. In 2021, the case was still pending for resolution before an administrative court of first instance in Buenos Aires.

COPYRIGHT AND RELATED LAWS IN ARGENTINA

Copyright-related legislative initiatives regarding the Penal Code and digital media came to a halt as the country turned its focus to the COVID-19 pandemic in 2020 and throughout 2021.

Proposals for reform of the Penal Code under the previous administration, addressing: 1) reproduction of copyrighted material and programs from the Internet without proper authorization; 2) manufacturing, storing or selling copyrighted programs without authorization; and 3) circumvention of TPMs; lost parliamentary status in 2021 and are not expected to be revisited soon. The Macri Administration proposed the Penal Code Reform Bill (PE-52/19) in 2019, an initiative that would have: incorporated monetary fines as penalties for copyright violations; made theft of IP equivalent to theft of physical objects, made the incorrect reporting of pay-TV subscriber numbers a penalty under the law, and barred the importation or use of any physical or virtual aid to "communicate, distribute, and retransmit" copyright protected material without authorization. However, the proposal also contained provisions that could have

hindered enforcement. For instance, legal actions for IP infringement would have been prosecuted only upon a complaint from the victim, rather than *ex officio*, as is currently the case, and copyright violations would be listed within the new criminal code rather than in the Copyright Law, effectively downgrading their seriousness and importance.

During his administration, former President Macri established the National Communications Agency (known as ENACOM), with the goal of drafting a Convergent Communications Bill (#S-0709/2019) to amend, reform, and consolidate the central text of Law No. 26,522 (the so-called Audio-visual Communication Services Law, also known as the Media Law) and of Law No. 27,078 (the Digital Argentina Law). However, in the past year ENACOM has slowed its development of legislation on digital convergence. Under the current President, the Bill did not move forward, losing parliamentary status in 2021. As a result, the Media Law now remains in force unchanged, while modifications have been proposed to the Digital Argentina Law.

In 2021, Senator Alfredo Luenzo of the Committee on Systems, Media and Freedom of Expression introduced Bill S-1802/21, which aims to establish the Internet and other services as “essential public services.” The Bill would authorize ENACOM to regulate the prices of services including Internet, Cable television with spectrum and satellite use, and mobile telephone. Of significance to rights holders, the Bill would set exemptions in rates, fees, and charges for certain of these services with special attention to those that provide access to educational and health content, and would empower ENACOM to establish free access to the Internet in educational, health, or other content when there are exceptional or *force majeure* circumstances. If the Bill is adopted as currently drafted, it may conflict with the activity of (and enforcement actions by) rights holders. For instance, although the Bill expressly indicates that content regulation is excluded, because of the unclear definition of “transmission” in Article 1, rights holders may lose control over the release of content protected by copyright in the event of national emergencies and other similar situations. In addition, excessive control over Internet services could amount to an obstacle for the growth of digital services and hinder competition in the sector.

President Alberto Fernandez issued an Emergency Decree (DECNU 690/2020) on August 23, 2020 pledging to guarantee universal access to telecom services (including mobile, Internet services) rendered “essential public interest services” by the pandemic. The decree excluded satellite television services from the definition of public services. As a result of this Decree, fees for these services remained frozen for the rest of 2020 and approval from telecom regulator, ENACOM, will be required for future tariff increases. A 15% tariff increase was authorized as of November 2021, well below 2020’s 36.1% yearly inflation and this year’s expected inflation of over 50%. Nevertheless, a series of judicial challenges by affected parties have prevailed on appeal, exempting the successful plaintiffs from the restrictions that the Presidential Decree had applied with strict limitations on rate increases. An appeal to the Supreme Court, unlikely to be heard, remains ENACOM’s last possibility of prevailing.

Law 27.588, which implements the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, ratified by Argentina in 2014, was enacted on November 11, 2020.

MARKET ACCESS IN ARGENTINA

A number of economic conditions in 2021, combined with a heavy tax burden on content, have driven audiences in Argentina to seek pirated materials online as a less expensive alternative.

Local Content Quotas. Resolution 4773 E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and accompanying regulation (Decree 1225/10) went into effect on January 1, 2018, but it has never been enforced. The quota regime requires free television licensees to air eight Argentine feature films per calendar year. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.5% of the previous year’s annual turnover to acquire, prior to filming, the broadcast rights to independent Argentine film and TV movies.

Media Law 26.522 (promulgated through Regulatory Decree 1225/2010), established a registry of national films at the National Film and Audiovisual Arts Institute (INCAA) from which pay-TV programmers select productions to comply with the quotas imposed by Article 67 of Media Law 26.522. The list includes both existing and yet-to-be-filmed productions. Both INCAA and ENACOM have yet to establish compliance procedures for pay-TV programmers. The decree presents several problems, such as whether channels with highly specific content will be able to find suitable content in the registry and whether programmers are subject to fines if they do not broadcast productions that ultimately fail to be completed.

Local filmmakers increased pressure on ENACOM and INCAA to enforce existing quotas and modify Media Law 26.522 to also impose quotas on streaming services. Another proposal by local interests groups would modify the 1994 Law 17.741 for the Promotion and Regulation of Film production (also known as the Film Law) to implement screen quotas on digital platforms and subscription-based media for which more than 50% of broadcast content is fiction, documentary, or animation programs: 35% must consist of nationally-produced audiovisual content by companies or studios not associated or part of the exhibitor, 75% of which should be at most two years old. All audiovisual broadcasting services including free-to-air television signals, mobile telephony with video platforms, would also be required to produce at least 20 hours of national audiovisual productions per year. IIPA remains wary of proposals for additional quotas because they negatively impact non-Argentinean content industries.

In July 2018, INCAA published a resolution (Resolution 1050/2018) regulating content quotas for movie theatres, which came into force on July 10, 2018. Domestically produced films must represent 30% of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen. While that 30% content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film. Under the new regulation, should the exhibitor share the screen with another movie, it will be considered a partial fulfillment, and the local production must be shown for two weeks (a minimum of one screening per day for at least one additional week) or until the full quota is fulfilled. Also in July 2018, ENACOM announced Resolution 4513 establishing that a 30% local content quota would be enforced on free-to-air TV in urban areas (10-15% for lesser populated markets). IIPA recommends that this quota provision be eliminated, as quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

Temporary Services Export and Import Tax. In late 2019, the Fernandez Administration extended the 2019 Temporary Services Export Tax to December 31, 2021, via Decree 99/2019. The decree modifies the Customs Code and includes “services rendered in the country whose use or effective exploitation is carried out abroad” to be included in the concept of “merchandise,” including “copyrights and intellectual property rights.” It also provides that services can be considered exporters. While the 2019 Decree reduced the tax rate from 12% to 5%, it also eliminated the four-peso-per-dollar cap that had benefited exporters due to the steep depreciation of the peso over the past year.

In December 2020, Decree 1034/2020 reduced the Temporary Services Export Tax to 0% for companies registered to benefit from the Knowledge-Based Economy Law 27.570 (October 26, 2020). The Registry of the Knowledge-Based Economy Promotion Regime Beneficiaries was only made available in March 2021, but the slow and tedious procedure to register has led to a marginal impact of the well-intended measure. As announced by the Ministry of Economy in September 2021, the Temporary Services Export Tax will not be extended after December 2021. That announcement would mean the end of export taxes on services to all companies, regardless of their status vis á vis the Knowledge-Based Economy Law. Before the measure had been published in the Official Gazette, Economy Minister Martín Guzmán explained that the decision to eliminate all export taxes on services seeks to increase competitiveness, investment, and employment in a sector that is already the second-largest exporter of the country, with international sales of over US\$5.7 billion in 2020.

Additionally, Argentina assesses customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium. This runs counter to international best practice and is a form of double taxation, as royalties are subject to withholding, income, value-added, and remittance taxes.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which negatively impacts the video game industry as well as consumers who resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law also imposed a 21% Value Added Tax (VAT) on OTT services as well as on a range of services provided by companies in the “collaborative economy.” Then, in December 2019, the Fernandez Administration imposed a 30% Social Solidarity and Productive Reactivation Tax (PAIS Tax) over OTT services, including video game, music, and movie services. The PAIS tax is currently in force and will expire on December 31, 2024. Additionally, on September 19, 2020 Argentina’s Central Bank imposed a 35% fee on foreign credit card charges, which has a negative impact on Internet and streaming services such as online game platforms operated in the country on the basis of foreign currency. These laws contradict international norms and should be amended or repealed.

Election commitments made at Alberto Fernández’ 2019 inauguration and the ongoing comments if AFIP, further supported by discussions on the topic within the G20 and OECD, hint that the government could send a Digital Tax Bill next year to start implementing it in 2023. The government is waiting for further international discussions on the topic, including technical guidelines on how to calculate the income for companies before submitting a Bill to Congress.

Distribution of Performance Rights. Argentina’s current law, approved in 1974, establishes that collections on behalf of music performers and phonogram producers shall be distributed 67% to performers and 33% to producers. This unfair distribution rule, imposed by law, goes against international practice and basic fairness. We urge Argentina to consider legislation that establishes a more balanced distribution of 50% to performers and 50% to producers.

TRAINING AND OUTREACH

The Secretary of Public Innovation recently engaged in an awareness campaign launching a series of training programs about cybersecurity and the protection of national network infrastructure, aiming to make the general population more informed and thus able to act against digital crimes . The training program shared important information designed to enable Argentinian citizens to detect and prevent illicit actions against intellectual property and prevent informational security incidents on a national level.

The Ministry of Science and Technology recently carried out a training course to raise awareness about the registering of intellectual property. IIPA recommends Argentina expand training programs on the importance of intellectual property rights to a broader population, which could include, for example, university students and participants of government-sponsored initiatives that support the creative economy in Argentina (such as the *Argentina Programa* training and users of the *Mercado de Industrias Culturales Argentinas* Platform (MICA)).

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Priority Watch List in 2022.¹

Executive Summary: The digital market for creative content in Chile is teeming with illegal materials, a problem exacerbated by a weak legal framework and inadequate dedication or coordination of government resources for online enforcement.

Chile's copyright law, which more than ten years ago established what at the time was an experimental notice-and-notice online piracy response system, has utterly failed to deter infringement online. The law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, such as protections against circumvention of technological protection measures (TPMs) and deterrent remedies against infringement. Other major gaps in Chile's legal framework include: the absence of clear and comprehensive secondary copyright liability standards to encourage voluntary cooperation from intermediaries; a counterproductive court order requirement for online content removal; and broad exceptions to copyright. The country lacks many of the standard copyright enforcement measures and procedures available in other similar markets. We urge Chile to improve and update significantly its legal framework for Internet service provider (ISP) liability and online copyright enforcement to foster the development of a healthy digital marketplace.

Recently, a number of legal developments in Chile threaten to hinder, rather than advance, enforcement efforts. The pending amendment to Article 24-H of the Telecommunications law would create an unlimited net-neutrality principle, with no distinction between legal and illegal content, and would prevent ISPs and copyright holders in Chile from addressing mass online infringement. The Digital Platforms Bill is another misguided proposal that could make online enforcement more difficult. Proposed Criminal Code reform would downgrade copyright infringement to a misdemeanor, among other problematic changes. IIPA members are also concerned about legislation imposing national content quota requirements that, if implemented, would discriminate against non-Chilean audiovisual works and would contravene Chile's FTA commitments. The Chilean government should abandon these proposals in favor of reforms that would promote a vibrant, legal environment for creative content.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean government held a referendum on October 25, 2020 in which the vast majority of voters favored rewriting the country's constitution. IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's intellectual property rights (IPRs) landscape and, in particular, to closely monitor how any reform will permit Chile to adequately implement its existing international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access.

¹For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2022

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.435 of 2010 to: (i) distinguish clearly between neutral and passive intermediary service providers, and active services that cannot benefit from limitations on liability; (ii) enable and meaningfully incentivize intermediary service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) eliminate the court order requirement prior to content removal or takedown; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory (e.g., pre-established) damages, improved injunctions, including an express legal basis for injunctions against intermediaries to prevent access in Chile to domestic and foreign-based infringing websites, and an effective civil *ex parte* search remedy; (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent; and (vi) adopt and enforce TPMs legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services.
- Create a centralized copyright authority, responsible for all copyright-related matters such as registration and enforcement, in order to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.
- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property Law.
- Ensure that the eventual overhaul of the country's constitution and other laws adequately ratifies the country's international, multilateral, and bilateral commitments to strong copyright protection, enforcement, and equitable market access.
- Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.
- Ensure that proposed amendments to the Telecommunications Law (Law #18.168) and the Digital Platforms Bill (Law #14.561-19) do not interfere with the enforcement of IPRs online, including through voluntary initiatives agreed between rights holders and ISPs.

THE COPYRIGHT MARKETPLACE IN CHILE

The overall level of piracy in Chile remains high in 2021, after worsening in 2020 in the early months of the COVID-19 pandemic. Digital piracy takes a variety of forms, such as: Piracy Devices (PDs) including, for example, infringing streaming devices (ISDs); piracy apps; stream-ripping; file sharing of infringing content over peer-to-peer (P2P) networks; illegal use of cyberlockers; hyperlinks to infringing materials; online sales of circumvention software; devices and modification services for use with illegal video game files; illegal mobile downloads; signal theft; and, increasingly, Internet protocol television (IPTV) services.

Chile remains active in the sale of circumvention devices such as video game copier devices and modified or unlocked consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. Businesses sometimes offer console modifying services for sale through their *Mercado Libre* listings, where modified console offerings include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. *Mercado Libre* continued to have a steady audience in 2021 with 8.7 million unique monthly users in Chile, ranking as the 10th most popular site in the country by Alexa. Data indicates that around 15.7% of all game titles offered at *Mercado Libre Chile* are illegal and are predominantly unauthorized digital goods (UDGs), primarily digital unauthorized account resales.² An increasingly popular online marketplace, *www.linio.cl* (owned by the popular

²Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

commercial entity, *Falabella*), has been relatively unresponsive to requests from the video game industry to take down counterfeit products despite having a rudimentary online notification system. The commercial area of Providencia in Santiago, *Paseo Las Palmas*, is well-known for the sale of video games and related products. Stores offer handheld consoles for sale at different prices, depending on whether the consoles have been modified or not. Known hackers have identified their “official reseller” in Chile for the sale of Nintendo SX Pro/SX OS as *chile-server.cl*, which, in turn refers to hacking groups as “our partners.” In 2021, Chile placed 22nd (an improvement from 20th last year) in the world in terms of the number of peers participating in the unauthorized file-sharing of select video game titles through personal computers on public P2P networks. Chile ranked 11th in the world in P2P infringement of console-based video games (also an improvement since last year when it ranked 10th).

The most prominent forms of music piracy in Chile are stream-ripping and use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com*, *savefrom.net*, and *mp3-youtube.download*. These sites received 6.5 million, 1.8 million, and 1.6 million visits from Chile respectively in the third quarter of 2021, according to SimilarWeb data. The most popular cyberlocker in Chile is *Mega.nz*, which received 8.6 million visits from Chile during the third quarter of 2021. *1fichier.com* and *Zippyshare.com*, other popular cyberlockers, received over 2.4 million and 1.1 million visits respectively during this same period. BitTorrent indexing sites are also popular in Chile, most notably *thepiratebay.org*, with over one million visits in the same quarter.

In 2021, the motion picture industry continued to see an upward trend in audiovisual consumption through streaming, but unfortunately, much of it is on unauthorized platforms, PDs, and piracy mobile apps. PDs, in particular, are extremely problematic because the sale of the devices can be legal if used with legitimate services and programming, but the simple download of software or piracy apps on the devices opens the door to infringing material. PDs are freely offered in markets in Santiago without proper response from law enforcement. Similarly, law enforcement against free-to-air boxes is lacking because of the dual legal and illegal uses of the device. The pay-TV industry in Chile also continues to experience problems with signal and content theft.

COPYRIGHT ENFORCEMENT IN CHILE

IIPA members report a widespread lack of enforcement efforts to tackle content piracy by the Government of Chile. Chile remains the only country in Latin America without a dedicated, centralized authority responsible for copyright protection and enforcement. Currently, copyright matters are handled by four different entities: (1) *Departamento de Derechos Intellectuales en la Dirección de Bibliotecas, Archivos y Museos*, Ministry of Education; (2) Minister of Education; (3) *DIRECON – Dirección de Economía, Departamento de la PI*, Ministry of Foreign Affairs; and (4) the IPR prosecutor. The implementation of a unified department would advance the fight against copyright infringement and help deliver the kinds of significant results that have been made possible in other countries that have set up such organizations. The Chilean government should create a copyright national authority, in charge of all copyright matters and duties, in order to better coordinate all policies for the promotion, protection, and enforcement of rights. This central copyright office would also assume all currently dispersed duties such as registration. The fact that no central and dedicated authority exists in the copyright sector speaks volumes about the lack of political will on the Chilean government to prioritize copyright in the national agenda.

Additionally, specialized Internet/online crime police units from *Carabineros* and *Policía de Investigaciones* are not focused on pursuing intellectual property (IP) crimes or any disruptive strategy for broader IPR enforcement actions, despite a good level of technical investigative skills.

The video game industry reported in 2020 that Chilean Customs conducted several border seizures. As many of these seizures involved repeat importers, IIPA urges Chile to implement policies and measures that deter repeat importers of infringing products.

LEGAL REFORM IN CHILE

A number of recent proposals of law in Chile threaten copyright protection and enforcement efforts. These arise on a backdrop of an imperfect copyright regime. In the U.S.-Chile Free Trade Agreement (FTA), Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.³ Yet, Chile's copyright law regime remains inadequate and lags far behind both international best practices and the baseline for member countries of the Organization for Economic Co-operation and Development (OECD). Although Chile adopted amendments to its copyright law in 2010, Ley No. 20.435 is detrimental to effective online copyright enforcement. For years, IIPA has repeatedly voiced concerns regarding Chile's deficiencies regarding copyright protection, and the urgency for reform is as strong as ever.

Chile's FTA Obligations

Broad ISP safe harbor: Article 85Ñ of Chile's copyright law establishes a safe harbor for hosting service providers and search engine, linking, or reference services that do not have "effective knowledge" of IPR infringement, which – by law – can only be established by a court order (issued as per procedure under Article 85Q). This provision significantly limits the circumstances where a hosting, search, or linking service provider can be liable for infringements committed by its users. This article also opens the door to abuse because online services that engage in making copyright-protected transmissions routinely seek to portray themselves as mere 'hosting' services to avoid liability under copyright law. Article 85O, which sets out the conditions for liability limitation, also poses problems due to its conflicting criteria. The provision at first appears to narrow down the safe harbor by setting out an additional eligibility criterion that "service providers" must meet to avoid liability for IP infringements, namely: "that the service has not generated, nor selected the material or the recipient" (Article 85O (c)). However, the last sentence of Article 85O then sets out that providers of "search, linking or reference services" are exempt from these additional conditions. This carve-out from the safe harbor eligibility criteria also creates a scope of abuse of the copyright liability limitations.

Content Removal: Where ISPs are eligible for the above safe harbor privileges, Article 85Q of the copyright law requires ISPs to remove or disable access to copyright infringing content only following a court order that rights holders obtain after a lengthy and complicated court process that can take over a year. This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs who would otherwise react to rights holders' takedown requests expeditiously. There is no incentive for ISPs to act expeditiously to remove infringing material, and there are no fines or sanctions for non-compliance with takedown notices. Instead, the law provides time consuming and disproportionately burdensome obligations on rights holders such as requiring rights holders to have a legal representative in Chile to send notices of infringement. Currently, the only method of tackling infringing content online is to follow the burdensome and ineffective notice-and-notice system (Article 85U), which requires ISPs to pass on takedown requests to uploaders. However, rights holders have no way to know whether an infringer has actually been notified to take down material, and there are no provisions to deter repeat infringers or to ensure that the notified content stays down. The cost and ineffectiveness of Chile's "notice- and-notice" system has prompted the music industry to discontinue using it altogether. The only remaining option available to rights holders is to initiate a civil case directly against the user, a practical impossibility given the very high numbers of infringing users. We urge the Chilean government to amend its 2010 law to develop a meaningful legal framework for addressing copyright infringement online. As part of this, to avoid abuse of the "safe harbor" provisions, the law should also clarify that liability privileges are available only to passive and neutral intermediaries that do not contribute to infringing activities. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including removing infringing content on sites that have been identified by the rights holder.

Statutory Damages and Civil Remedies: Pursuant to the FTA, Chile is required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products. Yet,

³The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

Chilean copyright law does not establish adequate statutory damages (e.g., pre-established damages), nor does it provide a dedicated procedure for obtaining injunctions or an effective civil *ex parte* search remedy.

Protection of TPMs and Criminalization of Circumvention Devices: Even in light of its 2018 legislation criminalizing satellite signal decoders, Chile still falls short of its FTA obligation to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work. The sale of video game copier devices and modification services on online marketplaces and through social media is prevalent. Also, music rights holders are left without support to tackle the problem of stream-ripping sites that allow users to download content, without authorization, through circumvention of TPMs. Chile should amend its law to provide adequate legal protection for all forms of TPMs.

Exceptions to Protection: The law contains certain exceptions that appear to be incompatible with international norms (as well as the FTA). These include: a reverse engineering exception that is not restricted to achieving interoperability; exceptions that could allow libraries to reproduce entire works in digital form without restriction; and the lack of overarching language consistent with the three-step test set forth in international treaties (and the FTA) to ensure that all exceptions and limitations are properly calibrated.

Lack of Secondary Copyright Liability Rules: In the civil liability area, general tort law principles do not help copyright holders in establishing secondary liability in Chile. We urge Chile to incorporate secondary liability principles in its copyright law to incentivize platforms to cooperate in the fight against piracy, among other goals.

Constitutional Reform. Chile held a public consultation on October 25, 2020 on whether to redraft the country's constitution. With a favorable vote of about 80%, the country decided that a new constitution should be prepared and voted on in 2021. Following the establishment of a "Constitutional Convention" on July 4, 2021, sessions focused on passing internal rules and preparatory work, as opposed to substantive work. However, IFPI Chile and other civil society organizations contacted Convention members to make sure all future work of the Convention preserves, at least, current levels of protection for IP rights in the Political Constitution. There is a concern that future work for a new Constitution may aim to further reduce protections for IPRs. Rights holders seek to achieve the right balance among all fundamental rights. IIPA urges the Convention to ensure that any reform adequately implements the country's existing international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access. IIPA urges USTR to monitor the constitutional reform and its implications for copyright protection and enforcement, particularly in view of Chile's FTA obligations.

Concerning Proposals for a Reform of the Criminal Code. In early 2019, the Minister of Justice announced a proposal for comprehensive amendment to the Penal Code, aiming to unify and consolidate all criminal provisions scattered in special laws, such as the Intellectual Property Law. At present, the draft is still under consideration at the Ministry of Justice with no specific timeframe for submission to Congress. Like many other projects and initiatives in Chile, the future of the proposal awaits the final outcome of the ongoing Constitutional process. The proposal would downgrade copyright infringement to a misdemeanor, dramatically reduce all penalties for copyright infringement, and eliminate specific sanctions for the unauthorized reproduction of phonograms while reducing sanctions for other illegal uses. Such changes would be incompatible with the FTA and the requirements of the TRIPS Agreement.

Digital Platforms Bill (Law #14.561-19). Chile's Senate is considering a bill to regulate digital platforms. The initiative aims to address harmful activity mainly on social media networks, but with broad references to "digital services platforms" and "providers for digital platforms," the bill could have a spillover effect for all Internet applications operating in the region, including curated video on demand services. Moreover, as currently drafted, the bill contains language that could negatively impact the way IP rights are currently enforced online in Chile, as Internet applications might delay or be prevented from applying their own policies and procedures in response to notices from rights holders.

Amendments to Telecommunications Law (Law #18.168). In May 2020, amendments to the Telecommunications Law were passed at the Specialized Commission of Transports and Communications in the Senate. After consideration, the Bill was returned to the aforementioned Commission in July 2021 for further study and consideration. The core of this reform is the proposed modification of Article 24-H (sections “a” and “b”). Under the modification, ISPs are prohibited from implementing any policy measure for the purpose of prioritizing traffic, or any measure that would have the effect of causing delay to Internet access. The Bill also removes from Article 24-H the all-important “legal” requirement that would distinguish between access to ‘legal’ content, websites, and apps on the Internet, and ‘illegal’ content, websites, and apps on the Internet. It would also have the effect of hindering the use of tools or devices on the Internet to inhibit access to such materials online. In sum, the Bill imposes an unlimited and unrestricted net neutrality principle in Chilean legislation with no limitation or distinction regarding the legality of the content, device, or website accessed by the Internet users. This proposed “unlimited” net neutrality proposal is in stark contrast with the law in both the US and the EU, where net neutrality principles apply only to legal Internet traffic and content. The Bill also proposes to further enshrine the position that access to illegal content can be blocked “only by judicial order.”

The implications of this proposal are especially relevant to the consolidation of a digital music market in Chile. An unlimited net neutrality principle would make it even more cumbersome for right holders in Chile to enforce their IPRs online. The idea of resorting to the judiciary for all and every infringement of copyrights or neighboring rights is a *de facto* diminution of the level of protection in Chile because most of the infringement cases committed online can be addressed by coordinated and voluntary action between right holders and ISPs. The reform could imply that Internet users in Chile have a *de facto* right to freely access pirated music content, and that ISPs and rights holders cannot do anything to prevent or deal with such infringements. Due to the lack of priority of this Bill, it is difficult to predict any time frame for a vote on the floor.

Website Blocking. The music, sports, and TV industries have pursued successful test cases regarding infringing websites in Argentina, Peru, Mexico, Uruguay, Brazil, and Ecuador, but these industries report that Chile lacks a legal mechanism for website blocking. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not block access to other non-infringing content. This limitation hampers enforcement under the provision, as the posting of a single non-infringing work can be relied on to oppose blocking measures, and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online infringement. This contrasts with the situation in the EU and a number of Latin American countries where courts have ordered ISPs to block access to websites while considering the totality of the circumstances. The music, sports, and TV industries further report that the Article 85R procedure, in conjunction with the last line of Article 85L, is also seen by some ISPs as *preventing* them from cooperating with IP right holders on a voluntary basis.

Camcording. IIPA continues to urge the Chilean government to enact specific legislation that would criminalize illicit camcording in theaters, including deterrent penalties. Such legislation should not include any requirement of proof of the camcorder’s intent to profit.

MARKET ACCESS IN CHILE

Screen Quota Bill: In January 2020, the Chamber of Deputies passed a bill adding a chapter on screen quotas to the Audiovisual Promotion Law. The initiative awaits further debate and would require exhibitors to show at least one fifth of nationally produced or co-produced audiovisual works as part of their total showings when ticket sales for a Chilean or co-production film, taken as an average from Thursday to Sunday, constitute at least 10% of overall cinema hall capacity in peak season, and 6% in off-peak season. In free-to-air television prime time, 40% of content would have to be of Chilean origin and at least 15% would have to correspond to Chilean cinematographic works, such as feature films, series, and miniseries, among others. In July 2021, the proposal was approved by the Senate’s Education Commission (*Comisión de Educación*). U.S. motion picture exporters remain concerned that the screen quota, if signed into law by the president and implemented, would discriminate against non-Chilean works and would contravene Chile’s bilateral FTA commitments.

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2022 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: Supported by the largest Internet user base in the world, China’s online marketplace continues to expand. China also leads the world in the number of cinemas with over 82,200 movie screens—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen—and is the largest theatrical market in the world for the second consecutive year, with total box office revenue in 2021 of \$7.3 billion (RMB 47.3 billion), up 131.5% from 2020. Further, China is now the seventh largest music market, the second largest music streaming market in the world by revenue, and the largest market for video games with an estimated 743.5 million gamers and revenues estimated at \$46.4 billion in 2021. Yet legislative shortcomings, persistent and evolving piracy, and growing market access concerns hamper, or block altogether, rights holders’ ability to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in China.

Serious challenges in China include piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services and social media platforms, unlicensed content available on user-uploaded content (UUC) platforms, including short-video streaming platforms, unauthorized distribution of journal articles, and the proliferation of thousands of “mini video-on-demand (VOD)” facilities that screen unauthorized audiovisual content. Contributing to these problems, many platforms financially benefit from broad Internet service provider (ISP) safe harbor rules, allowing such services to avoid seeking licenses to copyrighted material available on their platforms. While several enforcement actions moved forward in 2021, including the imposition of criminal sentences against the operators of the piracy service *yyets* and a successful criminal case in Shanghai involving piracy of the video game “Legend of Mir,” criminal enforcement efforts generally remain stunted by burdensome evidentiary requirements (particularly application of the “server principle”), and high thresholds that are ill suited to effectively combat piracy in the digital environment. Increased civil actions initiated by rights holders, including a case brought against the operators of piracy app *RenRen ShiPen*, are positive signs, but this increased activity must contend with a backlog in Chinese courts, which may necessitate a recalibration of resources. Moreover, civil litigation is generally time consuming, costly, and can be non-deterrent, underscoring the value of administrative actions undertaken by the government. Helpfully, the National Copyright Administration of China (NCAC), in cooperation with rights holders, continues to pursue administrative actions against certain online services that facilitate piracy. Unfortunately, these actions alone are not sufficient to meaningfully deter widespread online piracy. Greater efforts should be made to improve online enforcement, including building capacity of law enforcement agencies on copyright cases, and additional legal reforms are needed to ensure China’s online marketplace reaches its full potential for rights holders and licensed businesses, in the face of evolving piracy challenges.

In a positive development, China’s Copyright Law Amendment, which came into force on June 1, 2021, added the rights of broadcasting and public performance for producers of sound recordings, which are critical protections for the music industry; enforcement reforms, including a ten-fold increase in maximum “punitive” damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable the digital trade of copyrighted works; and certain elements of the three-step test into the law to appropriately confine exceptions and limitations. It is critical that the implementing measures, expected in 2022, meet

¹For more details on China’s Special 301 and Section 306 monitoring history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of China’s Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



global best practices and China's international commitments. Unfortunately, the amendments did not include several reforms that remain necessary to bring the standard of copyright protection and enforcement in line with global norms and best practices and meet the challenges of the digital age. While China made some notable improvements to its enforcement framework in 2021, China should fully implement its commitments under the *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including to regulate websites to remove pirated materials, and under the Economic and Trade Agreement Between the United States and China (Phase One agreement), and reform to its intermediary liability framework, all of which would help address many of the concerns raised in this report.

China should eliminate the market access barriers highlighted in this report, including the prohibition against online publishing by foreign entities and foreign investment and ownership restrictions in the cultural and entertainment sectors, which exacerbate the piracy problem by impeding access to sought-after U.S. content. IIPA seeks further reforms and enforcement of China's existing obligations under the 2012 U.S.–China Film Agreement, which mandated review and additional compensation in 2017, and the improvement of access for U.S. film producers to China's well-established theatrical film market, including by increasing theatrical revenue share and allowing private Chinese distributors the ability to distribute films to cinemas without interference from state-owned enterprises, or the imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content continued to be severely curtailed during 2021, with licensing opportunities on all distribution platforms significantly hampered by opaque regulations, obscure content review processes, and a “soft ban” on new or never released U.S. imports. This has effectively prevented access by U.S. producers to one of the largest consumer markets in the world. China should fully implement its purchasing commitment under the Phase One agreement for the intellectual property (IP) licensing of audiovisual works. Further, building on the Phase One agreement's principles of reciprocity and national treatment, China should remove restrictions that have hindered market access of U.S. content and not erect further barriers.

PRIORITY ACTIONS REQUESTED IN 2022

Enforcement:

- Improve effectiveness of administrative enforcement, including by:
 - taking measures demonstrated effective in preventing or restraining infringement, including imposing sanctions that deter infringement;
 - imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content and, where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without requiring rights holders to issue a new complaint;
 - continuing to increase transparency (e.g., notifying rights holders of the results of administrative actions);
 - facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that criminal thresholds are met;
 - improving and making more effective the mechanism between NCAC, the Ministry of Industry and Information Technology (MIIT), and ISPs for shutting down infringing websites operating without a business license (consistent with the *Guidelines*); and
 - expanding resources and capability at the NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs)
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
 - piracy websites, whether operating from within or outside China, such as *2447.net*, *80lib.com*, *wsyyb.com*, *52flac.com*, *dytt8.net*, *dy2018.com*, *dycod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbt20.com*, *pihua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, *fqfilm.com*, *yyp3.com*, *musicool.cn*, *xh127.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*;

- piracy facilitated through cloud-based services that foster piracy, such as *Baidu Pan*, including by encouraging such services keep pace with other similarly sized services across the globe that provide prompt and consistent processing of takedown requests, apply rigorous filtering technology to identify and remove infringing content, and take more effective action to suspend or terminate accounts of repeat infringers;
- unauthorized content available on UUC platforms (e.g. *Youku* and *Miaopai*), including short video-sharing platforms (e.g., *XiaoHongshu*, *Douyin*, *Dou Yin's Huo Shan*, and *Kuaishou*); and
- apps such as *99kubo*, *Juhe yingshi*, *WanMei*, *YingShi DaQuan*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, including criminal actions, with transparency, against:
 - the manufacture, promotion, distribution, and exportation of Piracy Devices (PDs) (including against dedicated piracy apps);
 - the manufacture, promotion, distribution, and exportation of circumvention devices and software components;
 - unauthorized movie broadcasts in mini VOD facilities;
 - unauthorized theatrical camcording;
 - unauthorized broadcasting of movies and music;
 - services trafficking in, or providing access to, unauthorized copies of journal articles; and
 - hard goods piracy (including against production and supply of high quality counterfeit books and optical discs, USB flash drives containing high volumes of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games).

Legislation:

- Expedite the process to revise the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the copyright amendments in line with international best practices and China's international commitments, including regarding broadcast and public performance rights for sound recordings, imposing "punitive" damages in line with the increased maximums, providing adequate and effective protections for TPMs, shifting the burden of proof to the accused infringer, and ensuring exceptions and limitations to copyright protections comply with the three-step test.
- Enact additional reforms to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular:
 - ensuring a remedy against websites and apps facilitating infringement (especially where infringing content is hosted remotely), including by rejecting the "server principle";
 - prohibiting unauthorized Internet retransmission of live broadcasts;
 - providing a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;
 - clarifying that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors from monetary liability and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement;
 - providing a term of protection in line with international norms, e.g., 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years;
 - implementing the *Guidelines*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, streamlining evidence processes, establishing a list of repeat infringers, and regulating websites to "remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information";

- revising the 2011 Intellectual Property Rights (IPR) Opinions to enable more effective and more frequent criminal investigations and prosecutions;
 - revising the criminal threshold to ensure deterrent-level criminal penalties are available against all instances of commercial scale piracy (consistent with the *Guidelines*); and
 - Consistent with the *Guidelines*, providing a legal basis for no-fault injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders' notices of infringement and, consistent with the Phase One agreement, eliminating liability for erroneous takedown notices submitted in good faith.

Market Access:

- Take action on the following long-delayed issues to improve the marketplace for U.S. films and TV programs: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) establish defined and prescribed content review time frames for theatrical and online distribution; increase the frequency of content review windows; remove the burden of resubmitting film and television programs that have already been approved; and establish a fast track system for content review under special circumstances; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.
- Open key elements of the entertainment and cultural sectors to foreign investment, particularly regarding film and TV production and distribution companies, and online video game services; reconsider the Negative Investment List, Online Publishing Rules as well as other measures prohibiting foreign involvement in online publishing activities, and allow distribution of audiovisual content on online video platforms where the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP); State Administration of Press and Publication (SAPP) should increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures—including the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas, Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and content approval regulations for mobile video games—that discriminate against foreign content by imposing requirements such as registration, onerous, opaque, and *de facto* discriminatory content review procedures, restrictions on foreign content on broadcast, pay-TV, and online video, and strict quotas on foreign films and television programming, with further limitation by genre-basis; adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious; refrain from extending China's burdensome content review regime to books printed in China but otherwise intended for distribution in other markets; and abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China's National Radio and Television Administration (NRTA) for further regulating the production and distribution of foreign audiovisual content.

CHINA'S ONLINE MARKETPLACE AND COPYRIGHT PIRACY UPDATES

China's expanding online marketplace provides consumers with access to a vast array of legitimate music, video games, movies, TV programming, and other works available through an increasing number of licensed digital services. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. According to the China Netcasting Services Association, China's online audiovisual users have grown from 461 million in 2015 to 944 million in June 2021. The seventh largest music market in the world, the music industry estimates that in 2021, Chinese consumers spent almost 23 hours listening to music each week (up from almost 18 hours in 2019), with 45% of music listening time spent on short form video apps.² In a 2021 report, NCAC announced that China's online copyright market reached 1 trillion RMB (USD\$182 billion) in 2020. Yet serious piracy concerns persist. The COVID-19 pandemic has exacerbated China's online piracy challenges over the past two years, resulting in substantially increased Internet traffic to both legitimate sites and known piracy websites. Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's Special 301 filing serves as a supplement to those submissions, and does not provide an exhaustive review of all concerns.³

Online Piracy Remains Very Serious: Online piracy in China—including illegal downloading and streaming of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a significant concern. For example, in 2021, China ranked 19th in the world in number of connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 15th in the world for mobile game titles. The music industry reports that 69% of Internet users in China admitted to downloading pirated music in the previous month, with stream-ripping from unauthorized content on UUC sites a particular problem. As discussed below, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a major concern, including illegal download sites; P2P piracy sites; deep linking sites; "hybrid" sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, PDs, circumvention devices, high quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *wsyyb.com*, *52flac.com*, *dytt8.net*, *dy2018.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbt20.com*, *piahua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, *fqfilm.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *bthaha.bizz*, *ciligou.top*, and *btdoor.cc*. In 2021, the music industry reports an increase in hotlink websites, which are sites that provide users with services to circumvent TPMs.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *yymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their locations and have stopped responding to takedown request notices. Short video-

²See International Federation the Phonographic Industry (IFPI) Music Listening in 2021, P22, <https://www.ifpi.org/wp-content/uploads/2021/10/IFPI-Engaging-with-Music-report.pdf>.

³See, e.g., IIPA's 2021 Special 301 submission on China ("IIPA 2021"), available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301CHINA.pdf> and IIPA, *China's WTO Compliance – "Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments"* (86 Fed. Reg. 46066, August 17, 2021), September 15, 2021, available at <https://www.iipa.org/files/uploads/2021/09/International-Intellectual-Property-Alliance-Comments-on-Chinas-WTO-Compliance-2021-2.pdf>.

sharing platforms, such as *XiaoHongshu*, *Douyin*, *Dou Yin's Huo Shan*, and *Kuaishou*, have become increasingly popular distributors of pirated popular movies, television series, video games, and music. Users break up the content into short videos and distribute them on these platforms. In 2021 this form of piracy increased significantly, particularly from Multi-Channel Network (MCN) accounts.⁴ In response to this growing problem, domestic rights holders and streaming platforms formed an alliance and launched public campaigns against widespread piracy on MCN accounts. Piracy operators also use short video platforms to attract users to piracy websites and applications. In addition, these platforms have begun providing live stream functions that enable infringers to provide unauthorized video content in real time.

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage services (or cyberlockers), such as *Baidu Pan*, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.⁵ Given its market dominance, it is critical that Baidu cooperate fairly and transparently with rights holders and establish rigorous content protection standards and practices to set the right example for other Internet businesses in China. Instead, rights holders in China have been forced to bring legal actions against *Baidu Pan* for facilitating infringement.⁶ Unfortunately, Baidu's services continue to be used for piracy and their notice and takedown system remains largely ineffective.⁷ China's government should encourage Baidu to keep pace with other similarly sized services across the globe that do more to combat piracy, including improving implementation of takedown tools, applying rigorous filtering technology to identify infringing content, and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

A significant problem for the video game industry is "plagiarism," or "game cloning." This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images soundtracks and voices. The video game industry is encouraged by recent judicial decisions finding infringement against entities engaged in plagiarism of video games.⁸ As discussed below, China needs to enhance its enforcement framework to effectively address this problem, including by adopting streamlined takedown mechanisms on Chinese app platforms.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions), remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating, and there remains legal uncertainty regarding the "server principle."⁹ China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing apps that allow users to access pirated content (i.e., PDs). The devices often target overseas users and their proprietary apps are not accessible in China, leaving rights holders without a remedy or, at best, with

⁴A Multi-Channel Network (MCN) is an organization that works with social media platforms to attract users by, among other things, providing platforms with influencers and content.

⁵USTR identified *Baidu Pan* in its 2020 Notorious Markets Report. Baidu is the most popular search engine in China with over 75% of the market, and the second largest search engine in the world by user base.

⁶In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against *Baidu Pan* for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. The Supreme People's Court (SPC) accepted Sohu's application for retrial but dismissed it after review. Sohu has filed two additional cases against Baidu for copyright infringement of additional licensed content. In 2017, Youku sued *Baidu Pan* over the unauthorized availability on the service of a popular local television drama series, prevailing in a first instance case heard by the Beijing Haidian District People's Court. An appeal was heard by the Beijing Intellectual Property (IP) Court, which upheld the decision of the Beijing Haidian District People's Court. The Chinese affiliate of a Hong Kong television station, TVB, filed suit against Baidu for copyright infringement, losing a first instance case in the Guangzhou Tianhe District People's Court. The case was appealed at the Guangzhou Intermediate People's Court. Currently, *Baidu* has made an application of retrial at the High People's Court of Guangdong Province.

⁷Takedown rates on Baidu's services are inconsistent and removal of infringing links can take too long (from one day for one of its services to as long as 15 days for another). Moreover, rights holders must send up to thousands of infringement notices for a single piece of infringing content proliferating on *Baidu Pan* because of its enormous size.

⁸In *Blizzard & NetEase v. 4399*, the Shanghai Pudong District Court found certain descriptions of character skills or elements are copyrightable. In the *Legend of Mir* case concluded in 2021 by Guangzhou Internet Court (first instance), the court also recognized certain elements of game design are protectible, including the scene, character design (e.g., professions, attributes, and skills), and fighting models.

⁹Certain Chinese IP judges have unfortunately embraced the "server principle," interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

an uncertain remedy.¹⁰ Examples include EVPAD, SVI Cloud, and the “Ubox,” which is manufactured and distributed by Unblock Tech (*unblocktech.com*).¹¹ Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.¹² Examples include *99kubo*, *Juhe yingshi*, *WanMei*, and *YingShi DaQuan*, which facilitate infringement of audiovisual content. There are also Chinese-developed or operated apps that target foreign music markets. An infringing Karaoke app that is extremely popular in China and Hong Kong is *Tian LaiK Ge*. China must do more to combat the growing threat of the app piracy ecosystem. Civil cases launched in 2021 by the audiovisual industry against the operators of piracy app *RenRen ShiPin*, which provides access without permission to many popular TV series, is a positive development.

Licensed streaming and digital piracy compete side by side in China, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. In recent years, music piracy has shifted primarily to streaming of unlicensed music videos, mostly short videos, from partially licensed or unlicensed UUC platforms (such as *weibo.com*, *youku*, and *miaopai.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),¹³ domestic and international P2P sites (such as *ThePirateBay*), forums, and streaming sites, remains a problem. As discussed below, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that although the takedown rate of infringing links is high, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently. There is hope that the pending Information Networks Implementing Regulations and new Supreme People’s Court (SPC) judicial rules will strengthen the responsibility of ISPs to review and manage UUC will be helpful in combating online piracy.

Book and Journal Piracy: The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journals to continue to operate.¹⁴ Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *Keyandi*,¹⁵ *Ureader*, *2447.net*, *80lib.com*, and *Baidu Paperhelp*, continue unhindered. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in several other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities absent a new complaint from rights holders.¹⁶

In addition, pirated print publications and compromised log-in credentials continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell these illegal products to overseas buyers. In part due to China’s inadequate online enforcement

¹⁰IIPA has provided extensive information on Piracy Devices (PDs) in prior reports. See prior IIPA China country reports (e.g., IIPA 2019 at 19).

¹¹Ubox runs on Android and incorporates peer-to-peer (P2P) technology as well as branded apps to enable access to pirated video-on-demand (VOD) and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech’s set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

¹²Piracy apps are sometimes advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or chat functions on other apps.

¹³Three cyberlockers continue to provide file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

¹⁴Although the *KJ Med* entity has been defunct for some years, several similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

¹⁵*Keyandi* is an online entity that makes available English e-books for download without publisher authorization, charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandi* site appears to have migrated to a new site, *www.bbs.keyanmi.com*, and the relationship between these two entities is unclear.

¹⁶For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action. Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.

framework, sending notifications of infringement to remove these products remains unduly complicated.¹⁷

Circumvention Devices: As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices and software components, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass TPMs in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing games distributed over the Internet to be played on handhelds or consoles. The harm they cause is not limited to console makers because almost all games developed for play on consoles, including those developed and published by third parties, can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in webshops and online marketplaces, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. More targeted and transparent enforcement actions and deterrent-level criminal sanctions and penalties against the manufacturers, suppliers, and exporters of circumvention devices and software components are necessary to meaningfully stem the downloading of infringing video games.

Unauthorized Camcording Remains a Problem: Illicit theatrical camcording in the region remains a significant challenge in China, though in 2021 there was a notable decrease in illicit camcording in the country and globally because of theater closures. In general, the quality of films camcordered in China has improved over the years, threatening the legitimate theatrical and home entertainment markets.¹⁸ Live-streaming of theatrical broadcasts of films online is a growing concern. While China has taken some successful enforcement actions in recent years, a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility.¹⁹ Further, as discussed below, to address live-streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online.

Pirated/Counterfeit Books and Hard Goods of Certain Copyright Products, Including for Export, Remain a Concern: Certain copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirated/counterfeit textbooks and trade books remains a significant concern, with unauthorized children's books and academic textbooks marketed and sold through e-commerce sites. AAP member publishers report that there have been instances where counterfeit textbooks exported from China have been sold, through online marketplaces, into the U.S. market. China remains an export center for pirated music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.²⁰ Online sales of USB flash drives containing high volumes of infringing sound recordings have become a growing concern, particularly since these flash drives are exported to other Asian markets, including Taiwan and Hong Kong.²¹ Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world. These machines are found in kiosks and shopping malls in many countries and are sold through several online marketplaces.

Unauthorized Mini-Video-on-Demand (VOD) Locations: Regulations on mini-VOD cinemas and chains entered into force in March 2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses, and are routinely screening U.S. content without authorization. In early 2019, China's

¹⁷An e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site worked with publishers to address the sale of infringing copies of textbooks on the platform.

¹⁸During 2019, a total of 29 camcords (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcords (11 audio and 13 video) in 2018. The 2020 and 2021 camcord statistics are anomalous due to the widescale closure of theaters due to the COVID-19 pandemic.

¹⁹For a discussion of recent successful enforcement actions, see IIPA 2021 at 18-19.

²⁰Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but ongoing changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

²¹On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2,000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1,000 tracks in a single flash drive.

investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are “entertainment premises” and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law.

ENFORCEMENT UPDATES IN CHINA

As highlighted in past filings, in recent years China has increased its enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors; but these actions, while helpful, are not enough to deter widescale piracy, particularly when compounded by China’s many informal and formal barriers that restrict the distribution of legitimate foreign content in China. China’s growing Internet user base creates opportunities for rights holders; but China’s enforcement deficiencies, including application of the “server principle,” a broad interpretation of ISP safe harbor rules, a longstanding toleration for piracy, and protracted delays in moving investigations and administrative cases forward, have kept the creative marketplace from reaching its potential, hampering the development of legitimate services.²² In 2021, the impact of the COVID-19 pandemic continued to strain China’s enforcement resources and hinder the progress of investigations in the country. IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress in addressing some of the concerns identified below.

Administrative Actions Helpful, But Insufficient: China has been operating its annual “Sword Net” anti-piracy campaign for over 17 years. While those administrative enforcement campaigns have been important, notably following NCAC’s 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns on their own are not enough to deter widescale piracy.²³ Targets of the 2021 campaign included “short videos” from unauthorized films or TV programs; livestreaming programs disseminating unauthorized films, music, photos, games, and other works; public accounts uploading or disseminating unauthorized programs of major sports events on network platforms; and the unauthorized use of copyrighted content in teaching and educational materials.²⁴ While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed.

Identifying Infringers Problematic: It is often very difficult to identify those responsible for piracy sites because many infringers use fake registration information to register their websites.²⁵ These rogue services effectively cannot be sued. The Government of China should improve the mechanism between NCAC, MIIT and ISPs to shut down infringing sites operating without a business license and, consistent with the *Guidelines*, take immediate steps to guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information.”

More Sustained, Holistic Enforcement Approach Needed: Even when it is possible to identify piracy

²²It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all “commercial scale” piracy.

²³For a summary of recent Sword Net campaigns, see, e.g., IIPA 2021 at 20 and 2020 at 21.

²⁴According to a recent National Copyright Administration of China (NCAC) press release, copyright law enforcement departments at various levels have investigated 445 cases involving online copyright infringement, shut down 245 illegal websites and mobile applications transmitting pirated content, and removed 618,300 infringing links since the 2021 campaign was launched on June 1 by NCAC in collaboration with three other central departments. During the period from June to September 2021, at the request of NCAC, Internet platforms removed more than 8.46 million infringing links, and major short video platforms removed about 80,400 infringing links associated with the Tokyo Olympic Games.

²⁵All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or “Whois” data.

operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing or hindering case development (including the restrictions on foreign investigations in China); high costs; often high burdens of proof (notwithstanding the recent Copyright Law amendments and ancillary regulations intended to address this problem); and high risks for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for foreign rights holders (as discussed above). Moreover, civil suits, while helpful, to date have been ultimately insufficient to address major piracy problems because damages have been awarded on a per-title basis and are relatively low and non-deterrent due also to the general difficulty of obtaining injunctive relief, while civil litigation costs are high for rights holders, especially foreign ones.²⁶ Improvements in the legal framework (discussed below) have led to rights holders bringing more civil cases, but the backlog in Chinese courts necessitates a recalibration in the allocation of court resources. Law enforcement agencies would also benefit from further training to address the lack of technical expertise and to improve understanding of the copyright framework to better enable such offices to effectively pursue online enforcement cases. In a positive development, Chinese courts have taken some recent steps to improve protections for video games. For example, recent court decisions in China have made it clear that video games are copyrightable, and courts also have applied the unfair competition law to protect video games.²⁷ In addition, in September 2021, a local court in Changsha, Hunan Province, issued the first interim injunction order against video game account rental services.

Criminal enforcement is inadequate mainly because criminal thresholds are too high.²⁸ Nevertheless, several criminal enforcement actions were recently successfully concluded.²⁹ The recent imposition of criminal sentences against the operators of the piracy site *yyets* (known as *rrys.tv* and *mys2020.com* in recent years) raises hope that enforcement authorities may be relaxing their unwieldy threshold requirements. Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

To improve enforcement against Internet piracy, IIPA urges the Chinese government to undertake the following measures:

²⁶As previously reported, the motion picture studios prevailed in a lawsuit (originally filed in January 2015) against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles. Xunlei withdrew its appeals and paid the civil damages awards plus costs of nearly US\$250,000. Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

²⁷In March 2021, the Guangzhou IP Court found that a video-sharing platform streaming game-play videos of Tencent's video game "King of Glory" constituted copyright infringement, holding that game-play graphics and videos, although they remain subject to the player's operation of the game, are still within the scope of copyrightable content of the video game as a whole. In May 2021, the Shenzhen Intermediate People's Court issued a similar judgment, also finding copyright protections applied to "King of Glory." In some cases where the copyright law was not applied, courts have relied on unfair competition law to protect video games, including the anti-confusion/misrepresentation clause, the trade dress clause, and the product name clause.

²⁸Currently, in cases of Internet piracy, the criminal threshold of "500 copies" is interpreted as 500 titles. As a result, a single television episode is not considered a "title"; rather an entire season or even all seasons of a television program are calculated as a single title. However, for local rights holders, authorities have recently been more flexible with this threshold or have used a 50,000-click threshold (or a combination of thresholds under the Criminal Law and judicial interpretations) to bring criminal enforcement actions against piracy websites that clearly have high visitations or piracy apps that clearly have huge numbers of downloads.

²⁹Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins, but in 2021, the Shanghai No. 3 Intermediate Court held a defendant criminally liable for pirating the game "Legend of Mir" by downloading copyrighted game materials and developing a game engine to run on private servers. The court sentenced the defendant to 3.5 years of imprisonment. As reported last year, a case brought by the Shenzhen Market and Supervision Administration (MSA) and local police against the operators of *Daquan Vision*, a mobile piracy app for pirating movies, and a case brought by the Tianjin Cultural Task Force and Tianjin Police involving illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia concluded successfully in 2020. See IIPA 2021 at 21. Also reported last year, in July 2020, the police of Shanghai Jing'an District undertook an enforcement action against Shanghai Sigan Network Technology Co., Ltd., the operator of pirated app *Diyidan*, which had disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million (US\$1.56 million) and advertisement fees of RMB 24.26 million (US\$3.83 million), for total illegal gains of RMB 32.18 million (US\$5 million). In May 2021, the Shanghai Putuo District People's Court imposed a fine of RMB 1.3 million (US\$205,000) against the company, sentenced the CEO to three years imprisonment with a four-year probationary term and fined him RMB 240,000 (US\$38,000), and sentenced 26 others to imprisonments ranging from nine months with a one-year probationary term to three years with a three-year probationary term and ordered them to pay fines ranging from RMB 2,000 (US\$315) to RMB 300,000 (US\$47,000). The police in Hubei Province investigated the website *91zy.cc* (along with *91zyw.com*, *imeizy.com*, and *ouyadz.com*) and found that it supplies over 100,000 domestic and overseas films and TV dramas, including more than 554 MPA titles to more than 500 rogue sites, which have been shut down. Eighteen criminal suspects located in nine cities/provinces were arrested and illegal gains of RMB 2.5 million (US\$394,000) were confiscated in 2019. In November 2020, the principal defendant was sentenced to four years imprisonment and fined RMB 450,000 (US\$71,000), while 15 other criminals received fixed-term sentences and were ordered to pay a fine.

- Adopt further reforms to the Copyright Law (as detailed below) and follow through on implementation of the *Guidelines* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, including to guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information.”³⁰
- Adopt reforms that address shortcomings in China’s Criminal Law that IIPA has identified in previous reports.³¹ In particular, China should meet its obligations in the WTO TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a “commercial scale” (which is addressed in the *Guidelines*),³² and separately define criminal violations regarding trafficking in devices, technologies, or services to circumvent TPMs used by copyright owners to protect their works in the digital environment.
- Ensure prompt transfer of administrative cases for criminal investigation and prosecution, where appropriate.
- Issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with timely and detailed information regarding the process and the results of administrative actions.
- Improve the mechanism between NCAC, MIIT, and ISPs for shutting down infringing websites operating without a business license to make it more effective (consistent with the *Guidelines*).
- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers (i.e., reject the “server principle”).
- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions should be available against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content that has been subject to administrative law enforcement action, but remains available.
- Consistent with measures by the SPC implementing the Phase One Agreement, streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of monetary damages.
- Revise the 2011 IPR Opinions³³ to enable more effective and more frequent investigation and criminal prosecution of online copyright infringement cases, including ensuring MPS prioritizes criminal investigations.
- Enhance expertise among police throughout the country to facilitate effective criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.
- Expand resources and capability at the NCAC, local CAs, and LCEAs.

COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of

³⁰See, e.g., IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China’s Central Committee (CPCCC) and the State Council. The Guidelines would, among other things, direct the government to revise the criminal law, including “lowering the threshold for criminal prosecution of IPR offenses” and “enhance punishment[s]” (Clause 2.1); standardize criteria of evidence, lighten rights holders’ burden in giving evidence, establish efficiencies in the notarization process, including bringing down costs, and establish “e-notarization” (Clauses 2.2, 2.4); issue a “judicial interpretation on evidence rules for intellectual property rights (IPR) infringement in the civil justice system” (Clause 2.2); establish a list of repeat infringers (Clause 2.3); and guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information” (Clause 4.10).

³¹See, e.g., IIPA 2017 at 15. China’s Ninth Amendment to its Criminal Law (“Ninth Amendment”) in 2015 failed to address the IP provisions, but added a potentially helpful offense of “assisting criminal activities over information networks.” Implementation of this provision should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. In late 2019, the SPC and the Supreme People’s Procuratorate issued an Interpretation, which entered into force in November 2019, defining the conditions for “knowing others are using information networks to perpetrate crimes.” It is unclear what practical impact this Interpretation will have.

³²China should clarify that a single episode of a television program counts as one copy toward the threshold.

³³Opinions of SPC, Supreme People’s Procuratorate and Ministry of Public Security on Several Issues Concern the Application of Law in Handling Criminal Cases Concerning the Infringement of IPR (2011).

copyright, including copyright and criminal law reform efforts.³⁴ These reform processes, including the ongoing implementation of the Phase One agreement, provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

Copyright Law Amendments Welcome, but Implementation is Critical and Further Reforms Needed:

After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the National People's Congress (NPC) passed amendments that entered into force in June 2021. IIPA encourages China to expedite the process to revise the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the amendments, as discussed below.

IIPA is pleased that the amendments include rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. It is vital that China swiftly and effectively implement these new performance rights, including securing protection for foreign sound recordings, ensuring the effective exercise and management of these rights in accordance with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.³⁵ The amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for “punitive” damages ten-fold and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence.³⁶ In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Article 13) into the law to appropriately confine exceptions and limitations. China should implement all exceptions to and limitations on copyright protection in the Copyright Law to ensure they are appropriately narrow in scope and otherwise consistent with the three-step test.

IIPA is also encouraged that the amendments include protections against the circumvention of TPMs, including prohibitions against the act of circumvention as well as trafficking in circumvention devices or components. It is critical that China properly implements these amendments to ensure these protections are adequate and effective. For example, protections should apply to both TPMs that control and manage authorized access to copyright works (“access controls”) and TPMs that protect rights (including against unauthorized copying) in those works (“copy controls”). As China is the world's leading exporter of video game circumvention devices and software components, the law should prohibit the “export” of circumvention devices or components, which drives significant amounts of online video game piracy around the world. Furthermore, certain exceptions—including for educational or scientific research, encryption research, and reverse engineering—appear overbroad (certainly broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut the exclusive rights of copyright owners. China should also ensure that circumvention devices or components are effectively removed from the channels of commerce, and that rights holders have standing to bring suit in cases in which the TPM was employed by a licensee platform. Lastly, China should clarify that criminal liability is available not only for circumvention of TPMs, but also for the manufacture, distribution, and exportation of circumvention devices and software components and the trafficking of circumvention services. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

There are other positive aspects of the amendments—including destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling “competent authorities” to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to

³⁴See, e.g., IIPA 2021.

³⁵Unfortunately, China maintains its reservation of Article 15 of World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT). This reservation remains an obstacle for the protection of international sound recordings in China. It is urgent that China withdraw this reservation to ensure Article 45 of the new Copyright Law is effectively implemented.

³⁶Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB. Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the IP without permission under the Copyright Law.

suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders. However, the amendments did not address several deficiencies in China's legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of “communication over information networks” to reject the “server principle”;
- provide a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;³⁷
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live-streaming);
- update China's outdated term of copyright protection to bring it in line with evolving global norms, e.g., 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years;³⁸
- consistent with the requirements of the *Guidelines* (as noted above), clarify the legal basis for no-fault injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to disrupt access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;³⁹ and
- clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement⁴⁰

Criminal Law Reform: China's 11th amendment to its Criminal Law was issued in December 2020 and entered into force in March 2021. Among other things, the reform included some positive changes to the provisions on criminal copyright infringement (Articles 217 and 218 of the Criminal Law), including increased criminal penalties for copyright infringement.⁴¹ In addition, the reforms expanded the scope of criminal liability to include the right of transmission over an information network, performers' rights, and the prohibition on circumvention of TPMs (although there is no express prohibition against trafficking in circumvention devices, technologies, and services). Finally,

³⁷While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

³⁸China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). This would not only ensure Chinese creators receive the full global benefits from their creations, but would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This, in turn, would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

³⁹Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties. The Cyberspace Administration of China (CAC) released draft Measures on Administration of Internet Information Services in January 2021, which appears to stipulate a mechanism that would provide for no-fault injunctions similar to procedures in place and successfully enforced in some 35 countries worldwide that provide an essential tool to rights holders by disabling access to piracy websites. Many piracy websites offering pirated music to Chinese Internet users have moved their hosting out of China, underscoring the need for this remedy, as well as improved enforcement cooperation measures in foreign territories.

⁴⁰Safe harbors from monetary liability regarding IP under the current Internet service provider (ISP) liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the online market for creative content and contributed to the proliferation of pirated content, such as music videos and other works, available for streaming on these services. Clarification is needed regarding the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China.

⁴¹Criminal detentions are no longer applied to the crime of copyright infringement (Article 217) and the crime of selling infringing copies (Article 218). The minimum criminal punishments are fixed-term imprisonment, with the maximum sentence raised from seven years to 10 years imprisonment for the crime of copyright infringement and from three years to five years imprisonment for the crime of selling infringing copies.

“disseminating to the public through information network” was explicitly added as a prohibited act of criminal copyright infringement.

Fully Implement Phase One Agreement: IIPA welcomed the conclusion of the Phase One agreement, signed by the United States and China on January 15, 2020. In the agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding IPR enforcement. While implementation is ongoing, in August 2020, the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One agreement, transfers of administrative IP cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds are likely to have been met in order for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members, and IIPA is hopeful that this new rule will be effectively applied by both transferring administrative authorities and receiving criminal authorities, although implementation by local law enforcement and public security authorities has so far been uneven. IIPA is also encouraged by recent measures enacted or proposed by the SPC and the NCAC to implement aspects of the agreement that we hope will improve the enforcement framework in China.⁴² IIPA urges China to follow through on its Phase One commitments and encourages the U.S. government to work with China to ensure full implementation.

China’s “e-commerce” law requires platform operators to take “necessary measures” against infringing goods or services and, importantly, the standard of knowledge for a platform operator to take action is that the platform “knows or should know” that the good is infringing.⁴³ Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to rights holders’ notices of infringement. As IIPA reported last year, the new Civil Code and SPC’s Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement provide for improved takedown procedures that are consistent with Article 1.13 of the Phase One agreement.⁴⁴ In August 2021, the State Administration for Market Regulation (SAMR) proposed amendments to the e-commerce law that included revisions to Article 43 that would improve the takedown procedures in the law, but unfortunately the proposal did not eliminate rights holders’ liability for erroneous notices submitted in good faith as required under Article 1.13 of the Phase One agreement.⁴⁵ It is critical that implementation of the e-commerce law is consistent with the Phase One agreement, supports rights holders’ actions to prevent illegal trafficking of infringing goods on e-commerce platforms, and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is

⁴²For example, Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9), enacted by the SPC on Aug.24, 2020, entered into force on Sept.14, 2020; Interpretation on Several Issues of Application of Law in Handling Criminal Cases about IP Infringement (III) (Fa Shi [2020] No.10), enacted by the SPC on Aug.31, 2020, entered into force on Sept.14, 2020; Guiding Opinions on Hearing Cases about IP Disputes Involving E-Commerce Platforms (Fa Fa [2020] No.32), enacted by the SPC, entered into force on Sept.10, 2020; Draft Guidelines on Enforcement of IP Judgments was released by the SPC on Mar.15, 2020 for public comments; Provisions on Evidence in Civil Litigation Related to IP (Fa Shi [2020] No. 12), enacted by the SPC on Nov. 9, 2020, entered into force Nov. 18, 2020; Opinions on Strengthening the Protection of the Copyright and Copyright-Related Rights (Fa Fa [2020] No. 42), released by the SPC Nov. 16, 2020; Notice on Evidence Examination and Determination in Copyright Administrative Enforcement (Guoban Fa [2020] No. 2), released by the NCAC on Nov. 15, 2020; and Opinions on Increasing Sanctions against IP Infringements (Fa Fa [2020] No.33), released by SPC, entered into force on Sept.14, 2020.

⁴³As previously reported, the e-commerce law entered into force in January 2019 and applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations. The interpretation and implementation of the e-commerce law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

⁴⁴See, e.g., IIPA 2021 at 24-25. In May 2020, China enacted a new Civil Code, which took effect in January 2021, that includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action “within a reasonable period of time” of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) (“Reply”), which entered into force on Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links.

⁴⁵Under the proposed provision, the deadline for rights holders to file a complaint following receipt of a counter-notification to a takedown notice would be extended from 15 to 20 working days; an in-platform seller would have to provide double compensation when a false counter-notification it submitted causes expanded loss to a rights holder; in serious cases, the operating licenses of an e-commerce platform operator that fails to take necessary measures according to the law could be revoked; and an in-platform seller may provide guarantees to ensure it can pay compensation for losses caused by IP infringement to enable the e-commerce platform operator to temporarily suspend account deletion and other measures after receipt of a notification from the rights holder.

already good cooperation.⁴⁶

Regulations on Optimizing the Business Environment and Opinions on Strengthening Intellectual Property (IP) Protection: State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, entered into force in January 2020. According to the Regulations, China will enhance IP protection by establishing a punitive damages system for IP infringement, promoting the establishment of a rapid protection mechanism for IPR, and improving the settlement mechanism for IP disputes. The Government of China in 2021 took certain positive steps toward establishing a system for punitive damages, but more should be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.⁴⁷

MARKET ACCESS UPDATES AND RELATED ISSUES

The piracy and enforcement concerns outlined above are exacerbated by China's pursuit of policies that have the effect of impeding foreign creators' access to the Chinese marketplace, thereby restricting the supply of legitimate product to Chinese consumers. China is still not in compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. regarding many market access barriers in music, audiovisual products, and publications.⁴⁸ After the case concluded in 2009, China eased several market access restrictions,⁴⁹ but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the "publication and editing of books, newspapers, journals, audiovisual products and electronic publications," and foreign investment in audiovisual production studios, movie distribution, and online video services. While the prohibition of foreign investment in audiovisual production studios is also a barrier facing U.S. record labels in China, Item 17 of the 2020 Negative Investment List permits foreign investment in online music services, which is a welcome and positive step. Rather than continue to pursue policies that impede access to its marketplace, China should meet its trade commitments and take steps to open its marketplace for the music, publishing, video game, and motion picture and television industries by eliminating the market access barriers discussed below.

Increasing Online Market Access Barriers: As we have noted in prior reports, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.⁵⁰ Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and "network publication services" remained on the "Prohibited" list. MIIT's 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed,

⁴⁶High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, as discussed above, PDs and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

⁴⁷As noted above, the Copyright Law amendments increased "punitive" damages ten-fold. In addition, in March 2021, The Judicial Interpretation of the SPC on Application of Punitive Damages in Civil Litigations of IPR Infringement came into effect, and, among other things, provides for the application of the scope of punitive damages and how to determine "intentional infringement," gravity of circumstances, and calculation base and multiples of punitive damages, making the application of punitive damages pragmatic and workable in civil enforcement of IPR.

⁴⁸*China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <https://www.wto.org/>.

⁴⁹China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of "music videos" is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

⁵⁰Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, SAPP has tightened the approval process for the publication of video games and in August 2021, SAPP suspended the approval process altogether. SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games. Finally, many of the increasing audiovisual market access barriers discussed below are applicable to online distribution.

In addition to existing online barriers, China has introduced several alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, the draft Radio and Television Bill released by NRTA in March 2021 could tighten regulation standards for online audiovisual programs and restrict foreign producers from participating in radio and television activities, including online. In May 2016, the former State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.⁵¹ In June 2016, China published new content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

Extension of Content Review to Books Printed for Export: China appears to now be applying its content review regime to content intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets are now also being subject to China's burdensome content review regime. This appears to be the case even for books that were previously being printed in and exported from China without issue. Extending the reach of its burdensome content review regime to books printed in the country but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who, for decades, have used printing partners in China, and is arguably a disguised restriction on international trade.

Audiovisual Market Access Concerns: China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry's ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In 2014, the government imposed rules capping the online distribution of foreign films and TV dramas at 30% and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, because there are only two opportunities to submit content for registration and review per year, U.S. producers are unable to submit a full season of a television series when that season is current due to the nature of television production. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and in practice further reduced the foreign content caps to less than 30%. In September 2018, the NRTA proposed two draft regulations expanding the 30% cap for online distribution of foreign audiovisual content to broadcasting and applying the cap on a genre-basis to film, TV, animation, documentaries, and "other" programs.⁵² While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented, and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies.

Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers' ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system. China should also shorten the time for content review to provide certainty of release, increase frequency of content

⁵¹The proposal was for leading online video platforms to sell up to a 10% "special management stake" and cede at least one board seat to a selected state-owned media company. While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge.

⁵²The "Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs" would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs" seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

review windows, remove the burden of resubmitting film and television programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process will attract investment and boost China's potential as a regional film and television production hub.

In addition, the 2016 Rules clearly intended to promote domestic Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.⁵³ A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.⁵⁴ Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These types of documentation requests (unique to China's marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China.

China also maintains several longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry. For example, China prohibits foreign-owned investment in online video services, which would appear to violate China's General Agreement on Trade in Services (GATS) commitments. China also prohibits foreign investment in audiovisual production studios and distribution. As noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions.⁵⁵ U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

In addition to these many longstanding and more recent barriers (and the theatrical market access barriers discussed below), since mid- 2019, without any official announcement, Chinese government agencies and distribution platforms significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms. This so-called "soft ban" dramatically decreases available U.S. content online in China. U.S. content has also been blocked from online distribution by a combination of Chinese government delays and censorship failures. Without a prior censorship certificate from theatrical release—which most independent and many other U.S. titles fail to receive—there is no avenue to reach online distribution in China. Finally, Chinese private distributors are inhibited from risking any investment in new U.S. content due to uncertainty about their government's measures and intent. As a result, U.S. producers are largely shut out of the second largest market (and one of the fastest growing) in the world and are also increasingly unable to make significant investments in U.S.-origin content.

China needs to meet its trade commitments and open its marketplace to U.S. producers instead of continuing

⁵³The June 2016 Statement and Rules on Importing Television Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a "major guiding role" in production if the Chinese party does not "fully obtain intellectual property rights" in the program. Only two of these "foreign" programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

⁵⁴According to the Notice, if 66% of a cinema's total annual gross box office comes from Chinese films, that cinema will receive a refund of half of the money generated from Chinese films within the 5% of box office that the cinema contributed to the Film Development Fund.

⁵⁵Other examples include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners' contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders' ability to control the print quality or trace the source of camcording piracy.

down its current protectionist path. It is critical to send a strong message that these policies are unacceptable—particularly when China is now the largest film market in the world—and should be reversed. As discussed below, China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations, including IP licensing of audiovisual works, as well as other market opening steps for the motion picture and television industries.

U.S.–China Film Agreement Implementation: China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Xi and then-Vice President Biden. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.⁵⁶ Unfortunately, more than nine years after its signing, China has failed to meet its obligations under the Agreement. The result of not implementing key provisions of the Agreement has been a steady further deterioration of U.S. producers’ (especially independent producers) ability to access the Chinese theatrical marketplace as well as the broader marketplace for other types of distribution in China, such as via VOD and television.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.⁵⁷ In the case of “flat fee films,” which are imported by private distributors outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the number of these films that can be imported. Furthermore, China has retained governmental control of key elements of distribution, severely limiting the ability of private Chinese distributors to import and distribute any foreign content. These barriers virtually eliminated U.S. independent films from China’s theatrical marketplace, with only 10 films theatrically released in the country in 2020, for 0.8% share of the theatrical box office revenue. Just 10 independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by IFTA. U.S. independent producers who rely on private distributors and the payment of minimum guaranteed or flat license fees to raise production financing and secure distribution have seen their licensing revenues plummet and in many cases stop altogether.

China further committed in the Agreement (and reconfirmed in commitments at the June 2015 U.S.–China Strategic and Economic Dialogue (S&ED)) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any state-owned enterprise, including China Film Group (CFG) and Huaxia Film Distribution Company Ltd. This requirement has also not been implemented. The newly formed CFA, which replaced SAPPRFT in 2018, still permits only one film importer (CFG) and two distributors of foreign films: CFG and Huaxia. While China affirmed in the Agreement that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private Chinese distributors. CFG also still dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to market and obtain the full value of the film.

IIPA recommends that China immediately take action on the following issues, which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017 (such review has been delayed almost 5 years), liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers’ share of

⁵⁶According to a 2012 White House Press Release:

“This agreement with China will make it easier than ever before for U.S. studios and independent filmmakers to reach the fast-growing Chinese audience, supporting thousands of American jobs in and around the film industry,” said Vice President Biden, who spent the day in the Los Angeles area with Vice President Xi Jinping of China.

“At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world.”

See <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/united-states-achieves-breakthrough-movies-dispute-china>.

⁵⁷IFTA Research and Analysis, “China Theatrical Market 2010–2019”.

revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) establish defined and prescribed content review time frames for theatrical and online distribution; increase the frequency of content review windows; remove the burden of resubmitting film and television programs that have already been approved; and establish a fast track system for content review under special circumstances; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.

Full Implementation of the Phase One Agreement: The Phase One agreement also includes purchasing requirements (Article 6.2) that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully implemented, this requirement could improve market access for the film and television industry by increasing the licensing of U.S. audiovisual products for VOD services within China’s 30% quota, as well as increasing revenue share and the number of U.S. films allowed into China.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As noted above, China is still not in full compliance with the WTO’s market access case (DS 363) and many of the market access barriers discussed above raise concerns under China’s international obligations, including under the GATS, TRIPS Agreement, and the Phase One agreement (including Article 1.2 to ensure fair and equitable market access to persons that rely upon IP protection).⁵⁸

In terms of copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. thresholds that are too high or unclear, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. In addition, China’s civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in other bilateral engagements, including the Phase One agreement, the Comprehensive Economic Dialogue (CED), the U.S.-China Joint Commission on Commerce and Trade (JCCT), and the S&ED, addressing many of the issues discussed above, including full implementation of the U.S.–China Film Agreement, enhanced enforcement against PDs, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

⁵⁸For example, in the *2020 Report to Congress on China’s WTO Compliance*, USTR noted: “NRTA and other Chinese regulatory authorities have also taken actions to prevent the cross-border supply of online video services, which may implicate China’s GATS commitments relating to video distribution.” See page 60, report available at <https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf>.

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Ecuador on the Priority Watch List in 2022.¹

Executive Summary: Five years since the enactment of *Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación* (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador's creative sector has stagnated due to COESCI's dramatic weakening of the country's copyright protection. In sum, COESCI upends the copyright framework, asserting that public domain is the norm, and copyright is the exception. COESCI features 30 copyright exceptions and limitations (up from 11 in the prior law), many of which clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement and interfere with rights holders' ability to contract and freely transfer rights. In addition, COESCI includes a five-factor "fair use" clause, which is an unwelcome first for a Latin American country and is broader than the fair use provision found in U.S. law. Ecuador, unlike the United States, has a civil law system in which courts do not follow judicial precedent, and Ecuadorian judges have no experience or training on the doctrine of fair use. These realities impair the proper application of the fair use doctrine and create unacceptable legal uncertainty for both rights holders and users.

In November 2020, Ecuador implemented regulations of some of COESCI's provisions. Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) do not adequately correct COESCI's egregious deficiencies and do not bring Ecuador into compliance with its international obligations. IIPA understands that the *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology, and Innovation, SENESCYT) is working on a legislative proposal to amend some of COESCI's exceptions. IIPA commends SENADI and SENESCYT for undertaking these initiatives and urges them to engage in consultation with all relevant stakeholders to ensure that both regulations and amendments to the law meet the country's treaty obligations and best practices for copyright protection.

To foster a vibrant, legitimate, creative marketplace, IIPA also recommends that Ecuador direct considerable attention and resources to its enforcement efforts. IIPA commends the Ecuadorian National Assembly for introducing intellectual property (IP) crimes into the Ecuadorian legal system in 2021 to punish, with imprisonment, those who violate IP rights. IIPA also commends SENADI's issuance of several administrative site-blocking orders in 2021 against pirate sites. These are steps in the right direction for combatting piracy. However, Ecuador's piracy problems remain and require prompt action. For instance, the country's pay-TV penetration has declined in recent years due to piracy. Camcording legislation is still necessary because, once the COVID-19 pandemic ends, Ecuador will likely continue to rank as a top regional provider of camcordered films.

PRIORITY ACTIONS REQUESTED IN 2022

- Urgently amend COESCI and its regulations to bring Ecuador's framework for copyright protection and enforcement in compliance with its treaty obligations and international best practices and to do so in a transparent process that provides the private sector and all affected parties the opportunity to intervene.
- Encourage SENADI to continue issuing administrative *ex officio* blocking orders against online piracy platforms, notorious stream-ripping sites, and other online infringing services as warranted, by providing more resources and funds.

¹For more details on Ecuador's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators, including the state-owned cable TV company, pay royalties for the music and sound recordings that they use.

THE COPYRIGHT MARKETPLACE IN ECUADOR

Official government statistics indicate that, for 2020, more than 70% of the population used the Internet and over 81% had a smartphone.² According to the International Federation of the Phonographic Industry's (IFPI's) 2021 Global Music Report, digital revenues in Ecuador amount to 84.7% of total music revenues and streaming sales make up 83.1% of total music sales. There are nine legitimate online music services.³

Stream-ripping is the predominant form of music piracy in Ecuador. While the most popular stream-ripping sites were *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*, with a combined number of 42.6 million visits during the period of March 2020 to February 2021, website blocking actions ordered by SENADI against these sites have meant that their popularity has fluctuated, with traffic shifting to other stream-ripping sites. In addition, online piracy of film and television content, including through illicit streaming devices (ISDs), has been on the rise during the COVID-19 pandemic in 2021.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, which makes it the third largest source of movie theater piracy in Latin America, behind Mexico and Brazil. Although 2021 was an exceptional year due to the COVID-19 pandemic, Ecuador is likely to remain a major regional provider of camcorded films as movie theaters re-open.

COPYRIGHT LAW IN ECUADOR

Ecuador's 2016 COESCI established numerous exceptions and limitations to copyright, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"). These exceptions are overbroad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention, Article 13 of the WTO TRIPS Agreement, and the corresponding provisions of the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), each in force in Ecuador since 2002).

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns regarding the overbroad exceptions. Instead, the November regulations imposed numerous new obligations to Collective Management Organizations (CMOs) that go beyond the regional standards and, in practice, mandate CMOs to invest significant time and resources on attending multiple requests and inquiries from SENADI. SENESCYT is reportedly working on a legislative proposal to amend some of COESCI's exceptions. IIPA urges SENADI and SENESCYT to reverse the most damaging provisions in COESCI and to bring the law into compliance with the country's international obligations.

Fair Use: Ecuador's attempt to transplant the U.S. fair use provision in the COESCI law creates an unacceptable level of uncertainty and risk in the copyright ecosystem. COESCI's Article 211 is broader and more uncertain than the U.S. provision on which it is purportedly based, because it adds a fifth factor, "use and enjoyment of other fundamental rights." This factor is essentially a catchall and creates great uncertainty as to what constitutes "other fundamental rights" and how this factor will relate to the other four. Furthermore, while decades of case law and the principle

²See *Information and Communication Technologies 2020 Summary*, NEC (last visited Nov. 23, 2021), <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

³See *Legal Music Services Ecuador*, PRO MUSIC (last visited Nov. 23, 2021), <https://www.pro-music.org/legal-music-services-latin-america.php>.

of *stare decisis* enable U.S. courts to appropriately interpret and confine Section 107 of the U.S. Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, no body of case law exists within the legal system in Ecuador to which a judge may refer in evaluating whether the contested use is indeed fair. Also, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, it is clearly overbroad on its face due to the broad, uncertain fifth factor and the lack of any case law to confine the exception. Finally, Article 211 may further negatively impact online enforcement in Ecuador because Internet platforms may be less willing to take down infringing content if they construe the fifth factor broadly and decide that non-authorized access to protected works is a fair use pursuant to “enjoyment of other fundamental rights” (e.g., right to sports, right to education, right to communication, etc.). Thus, as written, the provision conflicts with the normal exploitation of works, unreasonably prejudices rights holders’ legitimate interests, and goes beyond the “special case” required by the three-step test, which establishes the international standard for the scope and application of exceptions and limitations to copyright.⁴

Making matters worse, Article 211 includes language akin to a fair use savings clause that suggests that if a use that is generally regulated by a specific exception does not meet the requirements of such exception, it may still be considered under the fair use provision. The fair use savings clause applies to each enumerated exception in the law, effectively broadening each exception beyond the scope of the three-step test. If the use does not meet one of these exceptions, then the fair use savings clause allows the user to try and qualify under the overly broad fair use provision, with all of the problems identified above.

Other Exceptions: COESCI’s list of other exceptions and limitations is extensive. The following exceptions allow widespread uses that conflict with the normal exploitation of works and unreasonably prejudice rights holders’ legitimate interests, also in clear contravention of the three-step test.

Exception 9 for libraries and archives allows libraries and archives to reproduce a copyrighted work to: (1) deliver to another library or archive that may, in turn, make its own additional copy for purposes of lending to its users or preserving the copy it received; and (2) replace the lost or destroyed copy of the requesting library or archive. The provision also provides for eight further acts that a library or archive may undertake without authorization or payment, including text and data mining and the translation of works originally written in a foreign language if, after three years from publication, they have not been translated into Spanish or other local languages. Again, this exception is overly broad in violation of the three-step test, especially in that they may use the copies created under the exception for lending to users. Unfortunately, Article 64 of SENADI’s regulation does not correct the overbroad scope of this provision. For instance, the regulation allows libraries, archives, and museums to reproduce a work “in the amount necessary” and to rely on third parties for the reproduction of a work for preservation purposes. As drafted, these library exceptions and their regulations can harm publishers’ legitimate market and go beyond certain special cases.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This lengthy period of retention makes this exception a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music rights holders in Ecuador from licensing the reproduction rights and unreasonably interferes with rights holders’ normal business. Instead, the exception should be limited to a standard term of 30 days.

Exception 24 allows websites, without the permission of rights holders, to reference or link to online sites, as well as for the reproduction and storage of content when necessary for the operation of a search site provided there is no “violation” of the protected content. This exception is contradictory because any “use” of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is itself a “violation” of copyright.

⁴Berne Convention, Art. 9 (“Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”); see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

Exception 26 allows small businesses to freely communicate works to the public. Given that most businesses in Ecuador qualify as “small businesses,” the exception is not limited to special cases. This exception is one of the most damaging in COESCI as it results in unreasonable harm to the economic interests of copyright and related rights holders. It conflicts with the normal licensing of sound recordings in numerous venues across the country and fundamentally undermines rights holders’ legitimate economic interests in 95% of the Ecuadorian public performance market.

Exception 27 eliminates music rights holders’ ability to license to private transportation companies for the public performance of their works and recordings, especially coaches and “*busetas*,” which are popular forms of transportation in the region and a non-negligible market for music rights holders. This overbroad, unfair, and unjustified exception is another example of protecting a particular interest of a group of companies against the legitimate interest of copyright and related rights holders.

Exception 30 allows “community radios” to communicate works to the public without permission from rights holders or remuneration. Radios covered by this exception account for 30% of the radio broadcasts in the country, operate as commercial businesses, sell advertising, and compete with other broadcasters. This exception is, therefore, prejudicial not only to the music sector as content producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for “public communication,” which can encompass any means by which works are made accessible to the public, including through digital media.

In addition to the foregoing exceptions, other problematic COESCI provisions include compulsory licenses and various rights and “default” clauses to govern contracts within the creative sectors, unless expressly excluded, and sometimes even despite such an exclusion. For instance, Article 217 establishes a compulsory license for the translation of literary works that are not available in Spanish or other local languages in the national market. Articles 69 and 70 of SENADI’s regulations insufficiently narrow the scope of this provision by requiring a seven-year period of unavailability and that the party who seeks the license show there is a need for the work among “the general public or for school or university teaching.” COESCI’s Article 221 imposes a mandatory interpretation of the law in favor of the author if a conflict exists regarding related rights. Such provisions are discriminatory and not adequate to fulfill its intended purpose of awarding better protection for authors and composers. In today’s world, copyright owners and related rights holders, including singers and musicians, need equal protection to secure the normal exercise of their rights according to their contributions in the production and distribution chain of music and other protected content.

Camcording legislation: SENADI is working on a legislative proposal to amend Article 208A of Ecuador’s Penal Code, which establishes penalties for piracy and counterfeiting, to penalize camcording.

COPYRIGHT ENFORCEMENT IN ECUADOR

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. In a positive development, since August 30, 2021, IP crimes have been introduced into the Ecuadorian legal system to punish, with imprisonment, those who violate IP rights. IIPA hopes the reform, explained in greater detail below, will address problems with a lack of deterrent sentencing and *ex officio* authority that historically have hampered effective enforcement and protection against infringing acts in Ecuador.

As part of the reform, IP crimes will be punished with six months to one year imprisonment, confiscation, and a fine of eight to three hundred unified basic salaries (currently US\$ 3,200 – US\$ 120,000). When a company commits an IP crime, it will be punished with the confiscation of the offending assets, as well as with a fine, regardless of the criminal responsibility of the persons involved in the commission of the crime. The judge may order the offending goods to be destroyed. However, in cases in which the government determines the seized merchandise may satisfy a social need, the offending IP will be removed and the goods will be distributed, as long as this action does not affect the nature or functionality of the merchandise. This use may be highly problematic, however, as the government may

not be in the best position to judge whether distributing such goods is harmful to either users or rights holders.

Further, the reform includes important amendments that help alleviate gaps and obstacles to customs regulations and border measures. There will be mandatory communication between the IP authority (SENADI) and the customs authority (SENAE) because both institutions will interconnect their systems and records. SENAE will inform the owner of the registered IP right that it discovered merchandise that would allegedly violate their rights. If SENADI determines an IP infringement occurs, the offender will be punished with a fine of between 1.5 to 142 unified basic salaries (currently between US\$ 600 – US\$56,800), in addition to other precautionary measures. IIPA commends Ecuador for this reform effort to protect rights holders who continue to struggle to enforce their copyrights in practice.

In another positive development, in the past three years, SENADI has issued administrative site-blocking orders against pirate sites. In particular, in August 2021, SENADI ordered the administrative site-blocking of 40 URLs and over 40 Internet Protocol addresses that illegally transmitted Pay-TV signals. On July 23, 2021, following applications filed by Sociedad de Productores de Fonogramas (SOPROFON), a sound recording industry CMO, SENADI issued four precautionary measures ordering all ISPs in the country to implement blocking against the most popular stream-ripping sites in Ecuador: *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*. Following the blocking, visits to these four sites from Ecuador dropped from 3.79 million in June 2021, the month prior to the blocks, to just 0.85 million in September 2021, a fall of 77.7%. These orders are the first of its kind in Ecuador against sites dedicated to the infringement of IP rights in sound recordings and music videos of national and international artists and set a positive precedent for copyright enforcement in the online environment.

Despite the impact of this first action, stream-ripping remained a key music piracy threat in Ecuador. Blocking four major stream-ripping destinations was successful in stopping the vast majority of visits to the targeted sites, but a wide variety of alternatives remained for users in Ecuador eager to download music illegally through stream-ripping. For instance, following the blocking of the four sites mentioned, visits from Ecuador to stream-ripping site *Snappea.com* alone rose from 0.82 million in June 2021 to 5.83 million in September 2021. We urge SENADI to continue this type of action with other sites to foster the growth of Ecuador's creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were originally designed to provide a faster and less expensive alternative to civil litigation. However, the music industry's experience has been the opposite. A single administrative action is subject to four instances of review before a final ruling and, at that point, the alleged infringer has the option to challenge the administrative decision before the judiciary. Additionally, SENADI's section in charge of deciding these cases, known as the *Órgano Colegiado de Derechos Intelectuales*, has an erratic record in decisions about related rights.

For example, in 2020, the Judiciary Panel, *Órgano Colegiado de Derechos Intelectuales*, decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers' and performers' rights. These cases were initiated in 2014 by SOPROFON when SENADI (then known as IEPI) ruled in favor of SOPROFON and imposed fines to DIRECTV for about half a million USD for the unauthorized communication to the public of sound recordings. Despite the favorable 2020 decisions, DIRECTV's fines were reduced to about half of their initial value. Additionally, DIRECTV has paid no fine, because every administrative ruling triggers another automatic review of the case, known as a “reposition.” This situation impinges on the effective protection of phonogram producers' rights in Ecuador and is a major obstacle for the industry's business development. Ecuador should conduct a comprehensive review of the administrative procedure for copyright infringement cases in the context of the COESCI amendments process to make the process expeditious and effective.

In addition, CNT, the state-owned cable TV company that signed an agreement with SOPROFON in 2019 to settle claims for uses of phonograms from 2011 to 2019, is now at fault again after failing to comply with the licensing agreement that covers the use of sound recordings from 2020 to 2023. This lack of compliance sets a bad precedent for the rest of the paid-TV market in Ecuador, and thus, the Ecuadorian government should instruct CNT

to honor its licensing agreement with SOPROFON and make the corresponding payments. Further, SENADI should call the attention of CNT's board of directors to this situation, noting that the unauthorized communication to the public of sound recordings is a crime penalized in the Ecuadorian Criminal Code with prison time and fines.

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2022.¹

Executive Summary: India plays an important role in the growth of the content creative industries, with its large population of consumers and status as the second largest market in the world.² For both Indian and foreign-based creative industries, however, the promise of continued growth is threatened by piracy, market access barriers, attempts to expand statutory licenses for broadcasting of literary and musical works and sound recordings to include Internet transmissions, criminal enforcement difficulties, inadequate term of protection, undue regulation of transfers of rights, and broad and unclear exceptions. Strong copyright protection and enforcement that meets international standards and best practices, as well as adequate legal protection and effective legal remedies against the circumvention of effective technological measures, would help address many of these challenges and could transform India into a more engaging business environment for the creation and dissemination of copyrighted works.

India's copyright legal framework is missing key provisions to comply with international treaties to which India has acceded, including, the Berne Convention, the Geneva Phonograms Convention, the World Trade Organization (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), and the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties). IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties, including by amending its existing provisions on technological protection measures (TPMs), which fall short of treaty requirements. Regarding India's review of the Copyright Act of 1957, IIPA respectfully requests that USTR continue to monitor this process closely and to encourage India to pursue changes to its Copyright Act that comport with the country's international commitments and align the law with international best practices. In particular, IIPA greatly appreciates the U.S. Government's engagement with India regarding the highly concerning proposal from the Parliament of India to amend Section 31D of the Copyright Act to impose a statutory licensing system on Internet transmissions and welcomes the continued engagement of the United States to urge the Government of India to reject the proposal.

While enforcement in India is generally challenging, judicial enforcement, particularly through the Delhi High Court, has been successful. The seminal 2019 Delhi High Court decision in *UTV Software Communication Ltd. v. 1337x.TO et ors.* established permanent site blocking in India against "rogue" piracy sites. The decision led to the closure of the notorious piracy site *Tamilrockers*. Orders are issued quickly and are "dynamic," meaning that variations of the same piracy service can be blocked quickly and efficiently. IIPA also commends the work of the dedicated intellectual property (IP) crime unit within the Maharashtra Police (MIPCU, formerly MCDU) for its work to reduce online piracy. Still, issues with piracy sites persist, including with "copycat" sites that spring into action in the vacuum of some of the more popular domains that have been blocked (including copycat sites for *Tamilrockers*, such as *Tamilblasters* and *TamilMV*). The Indian government must mobilize to address these largely home-grown piracy services and must modernize its laws on secondary liability, knowledge, and constructive knowledge to appropriately address the threats of web hosts and middleware providers like *HostPalace*, *IPTV Smarters*, and *HostSpicy*.

¹For more details on India's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of India's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²*The future of the Internet is Indian*, CNN Business, available at <https://edition.cnn.com/interactive/2018/11/business/internet-usage-india-future/>.



PRIORITY ACTIONS REQUESTED IN 2022

Enforcement

- Strengthen and standardize the national IP enforcement regime through a central authority to coordinate with state-level enforcement units. Establish uniform, state-level cybercrime law and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.

Legislation

- Reject the Department Related Parliamentary Standing Committee's (DRPSCC) proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings and musical works, as well as literary works, in breach of India's obligations under the WCT, WPPT, and WTO TRIPS Agreement (TRIPS).
- Ensure the open-ended review of copyright laws is used as an opportunity to shore up stronger IP protections for the online environment and does not result in the weakening of existing protections.
- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining TPMs, ensuring sanctions apply to both acts of circumvention and trafficking in devices, software, components, and services that circumvent, and providing civil and criminal penalties; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Amend Section 52(1) of the Copyright Act to clarify that: (i) service providers will attract secondary liability for copyright infringement if they have actual or constructive knowledge of infringing content or links on their services or networks and they fail to remove the copyright infringing content or links to such content expeditiously and ensure that the same works do not reappear on the service upon gaining such knowledge or awareness; and (ii) only neutral and passive online intermediaries that meet the specific conditions for safe harbor protection are eligible for the liability privilege.
- Ensure the private use exception is compatible with the three-step test.
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Repeal the exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers' and other rights holders' right of public performance in respect of "social festivities associated with a marriage."
- Enact proposed Cinematograph Bill amendments that make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Address online piracy, introduce "Know Your Business Customer" (KYBC) regulatory obligations for online operators to identify themselves on their website, as well as obligations on the businesses listed to know their customers, and require hosting, payment, advertising, domain name, and proxy service providers to do business with only known commercial entities.

Market Access

- Simplify the rules and procedures for cinema construction.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national Good and Services Tax (GST) and simplify compliance rules.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Eliminate the Telecom Regulatory Authority (TRAI) mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle and therefore to properly exercise their exclusive rights and also ensure that TRAI or any other regulatory body does not seek or propose rates (price controls) for digital service providers.
- Eliminate the proposed mandate on non-personal data sharing with government and business competitors that undermines content owners' ability to maintain high standards of data security and intellectual property rights, and

severely disadvantages competition in the Indian market.

- Eliminate “must provide” requirements, which further hinder rights holders’ ability to exercise their exclusive rights.
- Ease the prohibition on direct-to-home (DTH) operators from entering exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.
- Remove revisional powers of the central government in the proposed Cinematograph Bill amendments that would give the central government the authority to re-examine any certified film that has a valid certificate from the Central Board of Film Certification (CBFC) under Article 19(2) of the Constitution of India.

THE DIGITAL MARKETPLACE IN INDIA

By the end of September 2021, India reached 794.88 million broadband Internet subscribers.³ After China, India is the second largest Internet market by number of users in the world. For instance, the use of licensed music streaming services grew by over 20% in 2020 and encompassed over 85% of the overall revenues of the Indian recorded music market.⁴ On the audiovisual front, it is estimated by KPMG that India will reach more than 500 million users of online video by 2023, positioning the country as the second largest market for video-on-demand (VOD) after China.⁵

Online piracy: Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, peer-to-peer (P2P) file sharing, video streaming, torrent, and stream-ripping sites, many of which feature and profit from advertisements of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come either pre-loaded with apps that allow users to circumvent subscription services to access infringing content or are accompanied by instructions on where such apps can be downloaded by users. Through its different forms, online piracy is the greatest threat to the film, television, and music industries in India, which rose 62% in March 2020 at the start of the pandemic.⁶ The losses due to streaming piracy in India are expected to reach US\$3.08 billion by 2022.⁷ IIPA requests an explicit, stand-alone obligation to impose civil and criminal liability and penalties on app stores that sell or provide free-of-charge dedicated piracy apps that provide streaming and/or direct download access to titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable the take-down of infringing apps, which may involve a national-level unit, coordinating with state-level enforcement if appropriate.

The *Telegram* app, which has over 500 million users globally, has gained a huge following in India, which currently has the highest number of active users in the world (28% of *Telegram*’s monthly active users’ share). *Telegram* has become a major conduit for pirated audiovisual content, because it creates anonymous channels for members of unlimited size and enables the sharing of files larger than 1GB. While the operators of *Telegram* are responsive to rights holders’ requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage operators to responsibly cooperate.

The film and television industry reports that Internet piracy is its greatest threat in India. According to a 2018 study by anti-piracy consulting firm Muso, Indian consumers ranked third highest globally for the number of visits (17 billion) to piracy websites. The industry has had some success in disabling access to piracy domains through Delhi High Court no-fault injunction orders and is now working cooperatively with search engines to close the “back door” through search delisting after the “front door” is closed through site blocking. However, while the Copyright Act is the

³Telecommunications Regulatory Authority of India, Press Release 46/2021 (October 21, 2021), available at <https://www.trai.gov.in/notifications/press-release/trai-releases-telecom-subscription-data-30th-september-2021>.

⁴International Federation of the Phonographic Industry (IFPI), 2021 Global Music Report, p. 123.

⁵*India’s Digital Future*, KPMG, August 2020, p. 66, available at <https://assets.kpmg/content/dam/kpmg/in/pdf/2020/09/year-off-script-kpmg-india-media-and-entertainment-2020.pdf>.

⁶*India see big spike in film piracy post covid-19*, Mint, May 11, 2020, available at <https://www.livemint.com/news/india/india-sees-big-spike-in-film-piracy-post-covid-19-11589183182123.html>.

⁷*With digital piracy on the rise in India amid pandemic, original content creators lose revenue*, FirstPost, June 6, 2021, available at <https://www.firstpost.com/entertainment/with-digital-piracy-on-the-rise-in-india-amid-pandemic-original-content-creators-lose-revenue-9689181.html>.

basis for site blocking, laws in India have not been used to date to address other Internet piracy phenomena like middleware providers (that provide the backbone for piracy turn-key solutions that are used worldwide) and services like *IPTV Smarters*, *Host Spicy*, and *Host Palace*. The Indian government should ensure the laws are fit-for-purpose to address such businesses that profit off the piracy services of their customers.

Recorded music piracy is also a major issue in India. Despite considerable growth in the use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Spotify*), music piracy rates are higher in India than in any other country worldwide except for China, according to the International Federation of the Phonographic Industry's (IFPI) 2021 Music Consumer Survey. Some two-thirds (68 percent) of Indian Internet users reported that they downloaded pirated music in the previous month. Stream-ripping remained the key method of piracy with 66 percent of pirated music accessed through stream-ripping sites or apps in the previous month. Based on analysis of SimilarWeb data, there were 178 million visits to music piracy sites by Indian internet users in August 2021. The most popular domestic music pirate site was Tamil music piracy site *masstamilan.in*, which received more than 4.5 million visits from India in August 2021. The most popular stream-ripping site was *mxtube.net*, which received over 21.3 million visits in August 2021, according to SimilarWeb data. This site is focused on domestic Indian content. *Savefrom.net* also remained popular with visits from India the third highest of any country in the world at 13.1 million in August 2021. Other popular stream-ripping services include *yt1s.com*, which received over 10 million visits, and *ytmp3.cc*, which received over 9.9 million visits in August 2021. As time goes on, stream-ripping is becoming an industry-wide problem to monitor and address.

For 2021, the video game industry reports that India remained fourth in the world (where it ranked in 2020 and 2019) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public P2P networks, as well as in infringement of games for the PC platform. India fell from second place in 2020 to fourth place (as it was in 2019) in infringement of games on mobile devices.

The scale of online piracy of books and journals is likewise a threat to the publishing industry. *Sci-Hub* and *Libgen*, two notorious pirate sites, continue to provide access to millions of infringing copies of journal articles and books in the country. Despite the Delhi High Court having issued blocking orders against several notorious online sites engaged in the unauthorized distribution of pirated content, it is curious that a similarly expeditious grant of injunctive relief against an adjudged pirate site such as *Sci-Hub* has not occurred. At the outset of the litigation initiated by two journal publishers in December 2020, the site operator obligated herself to refrain from further uploading purloined articles to the site. Yet, in September 2021, the pirate operator—in open contravention of an obligation she undertook to the court—uploaded a further 2 million journal articles illegally obtained from journal publisher databases.

Unauthorized Camcording: Unauthorized camcording remains an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were traced to Indian theaters. During 2020 and 2021, the COVID-19 pandemic led to the wide-scale closure of theaters in India, so while there were a number of unauthorized camcords of major U.S. motion pictures, the numbers from this period are generally anomalous. However, India is likely to remain a major provider of camcorded films once movie theaters fully re-open. The high number of audio cams reflects the strong demand for local language audio files, which are sourced for various international release groups. A key camcorder was referred to police in Kolkata for criminal investigation in mid-2018, and all forensic evidence and identifying details were provided to the police. However, the enforcement unit has yet to take meaningful steps in the investigation. State authorities should undertake efforts to tackle this pervasive problem, and the Cinematograph Bill should be adopted to codify a nationwide legal standard.

Unauthorized Book Copying: The publishing industry continues to be concerned with the unauthorized commercial-scale photocopying⁸ and unauthorized reprint of academic textbooks and professional books (for both the domestic and export markets). While India-only, lower-priced editions of textbooks are made available in the domestic

⁸Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

market to meet domestic needs, these editions continue to be found in several markets around the world. Customs officials should be empowered to take *ex officio* actions with respect to illegal exports of lower-priced textbooks (similar to how imports are addressed).

Other Physical and Retail Piracy: Although the growing focus of the copyright industries is on online piracy, physical and retail piracy continue in India in many forms, including: (i) optical discs, mobile devices, and flash or pen drives (the “side loading” issue for the recording industry); (ii) the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles; and (iii) unauthorized reproduction of textbooks (as noted above).

COPYRIGHT ENFORCEMENT IN INDIA

Enforcement has continued to improve over the past year in the area of judicial site blocking. Due to the COVID-19 pandemic, the courts had shifted primarily to electronic filings and virtual hearings, which has greatly eased burdens previously imposed on rights holders (such as the old requirement to sign every page of pleadings). However, most hearings are back to in-person as of December 2021. In addition, the courts have expanded their reach incrementally, now blocking “proxy portal” sites used principally to circumvent site-blocking orders. The data indicates that these actions are having a positive impact in reducing traffic to piracy sites—though only for certain types of content.

However, other enforcement against online piracy operators remains inadequate given the current scale of the problem, officers’ general lack of familiarity investigating and handling digital forensic evidence, and the sophisticated nature of the pirate criminal enterprises operating notorious piracy sites and services. Such piracy operations can easily evade enforcement with the help of anonymizing software. Additionally, the prospect of seeking criminal enforcement for intellectual property violations is very daunting due to the absence of a centralized IP enforcement authority and the lack of effective inter-agency cooperation at the national level and across the country’s 28 states and nine Union Territories. For example, while criminal copyright infringement falls under a national criminal code, cybercrime enforcement and related proceedings fall upon the individual states. India needs to improve the coordination of its enforcement framework against criminal piracy syndicates.

IIPA recommends the following steps: (i) India should focus on inter-state operations of organized crime units engaged in piracy and establish state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) India should establish a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and Central Bureau of Investigation (CBI), that is overseen by the Department for Promotion of Industry and Internal Trade (DPIIT) and directed at copyright infringement occurring online and on mobile devices; (iii) India should establish a centralized IP crime unit within the CBI’s Cyber Crime Detective Unit; and (iv) India should focus on training prosecutors and police officers on the seriousness of IP offenses and their links to organized crime.

Civil Enforcement and Case Developments: Significant positive developments have occurred from 2019 through 2021 for copyright protection through the courts in Delhi. In April 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. V. 1337x.To*, the court issued “dynamic” orders that allowed for the inclusion of additional domains accessing the site already blocked. In July 2019, the same court decided *Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*, in which the court created a “doubly dynamic” system wherein domains can be added to a blocking order while a case is still being adjudicated. As a result of these decisions, and many new cases and “impleadments” (whereby additional domains related to the originally blocked rogue piracy sites are added to the orders), there has been a significant decrease in traffic to the blocked sites and in overall piracy in India.

In addition, on October 19, 2020, the operators of notorious pirate site *Tamilrockers* announced they would be shutting down the service, after many site-blocking actions were conducted and a significant number of notices were issued. The Indian authorities should complement this effort by halting newly emerging or copycat sites feeding

off the same traffic, such as *Tamil Blasters* and *TamilMV*. Moreover, the law still does not expressly confirm whether facilitation of piracy, for example, through the commercial provision of middleware to pirate operators, is actionable with actual knowledge of a specific infringing act. This liability should be clarified, since to date, operators of almost turn-key services providing pirates with the blueprint for their operations have been able to skirt enforcement.

Domain Registry Outreach: A few pirate sites in India, and many pirate sites around the world, employ the *.in* country code in their domains. Since 2017, the music and film industries had good cooperation with National Internet Exchange of India (NIXI), the agency in charge of *.in* domain registrations used by commercial-scale copyright infringers, and the state-based enforcement units, such as the Maharashtra Cyber Digital Crime Unit (MCDCU), to suspend the *.in* domains used by commercial-scale copyright infringers. Registrars like *GoDaddy* were also cooperative in cancelling these registrations based on false or fraudulent Whois data. These efforts illustrate how KYBC requirements—whereby Internet intermediaries verify and record the identity of their customers—could work in practice, particularly as *GoDaddy* was willing to take a proactive stance whenever it discovered fraudulent activity. The Indian government should revisit ways to integrate KYBC disciplines to foster a healthier Internet.

Collective Management of Producers’ “Performance” Rights: Following Phonographic Performance Limited India’s (PPL) reorganization and application for an operating license, DPIIT should re-register PPL as a collecting society to license public performance and broadcasting rights without further delay. Following the initial and unexpected denial of its registration by DPIIT, PPL has approached the Delhi High Court asking the court to vacate the DPIIT decision. The case remains pending; however, DPIIT should reconsider its decision on its own initiative and re-register PPL, which represents the vast majority of domestic and international rights in India.

COPYRIGHT LEGISLATION AND REGULATION IN INDIA

In 2012, Section 31D of the Copyright Act created a statutory license for the use of musical works and sound recordings for radio and television broadcasting.⁹ In July 2021, DRPSCC Report on Review of the Intellectual Property Rights Regime in India recommended extending Section 31D of the Copyright Act to include “internet or digital broadcasting” within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings found within that section. The Government of India held a consultation on the DRPSCC recommendation to amend Section 31D, and IIPA, as well as other industry representatives, filed comments.¹⁰ IIPA is grateful for the U.S. Government’s intensive engagement with India, including as part of the U.S.-India Trade Policy Forum (TPF) ministerial held in November 2021, as well as the TPF Intellectual Property Working Group and other bilateral engagement, and notes with appreciation the reference to India’s commitments under the WCT and WPPT in the TPF Joint Statement.

The proposal to amend the Copyright Act remains inconsistent with India’s obligations under the WCT, the WPPT, and the TRIPS Agreement. Under the WPPT, for example, the definition of “broadcasting” clearly excludes interactive Internet transmissions. The WPPT defines broadcasting as “the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also ‘broadcasting’; transmission of encrypted signals is ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent.”¹¹ The Guide to the Copyright and Related Rights Treaties Administered by WIPO (Publ. No. 891) clearly explains that “[b]roadcasting’ is not to be understood as

⁹Following the 2012 revision to the Copyright Act, the Department of Industrial Policy & Promotion drafted a 2016 Office Memorandum that sought to extend the Section 31D statutory license to Internet transmissions. The 2016 Office Memorandum, however, is inconsistent with the Copyright Act, the 2012 revision of the Act, and relevant international copyright agreements. The text of the law and legislative history are clear that Section 31D as currently written is limited to radio and television broadcasting and was not intended to extend to Internet transmissions. The Bombay High Court has held that the 2016 Office Memorandum went too far and that Section 31D applies only to television and radio broadcasting and not Internet transmissions. See *Tips Industries Ltd. vs. Wynk Music Ltd. & Anr.*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, Bombay High Court (April 23, 2019).

¹⁰See IIPA Comments on India’s Review of the Intellectual Property Rights Regime in India by the Department Related Parliamentary Standing Committee (DRPSC), September 3, 2021, available at <https://www.iipa.org/files/uploads/2021/10/IIPA-Comments-on-Review-of-the-Intellectual-Property-Regime-in-India-Final.pdf>.

¹¹WIPO Performances and Phonograms Treaty, Article 2(f), available at <https://www.wipo.int/treaties/en/ip/wppt/>.

including interactive making available of works and objects of related rights over computer networks (where the time and place of reception may be individually chosen by members of the public).¹² Moreover, the recommendation to extend the Section 31D statutory license to cover interactive Internet transmission is incompatible with India's obligation under the WCT and the WPPT by denying rightsholders the exclusive right to make available to the public their content.¹³ Finally, the proposed amendment is inconsistent with the three-step test in the TRIPS Agreement, among other international treaties. IIPA urges the Government of India to reject the proposal and to provide certainty by committing to not extend the Section 31D statutory license to Internet transmissions.

In October 2020, the Indian government announced an open-ended process to review whether changes should be made to the Copyright Act of 1957, in light of the COVID-19 pandemic. IIPA submitted comments to the Registrar of Copyrights with specific recommendations. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that would weaken copyright protection, purportedly to respond to exigencies of the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations and align with best practices on copyright protection. IIPA urges USTR to monitor this process closely and to encourage India to ensure that any changes to its Copyright Act comply with the country's international commitments.

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, IIPA members believe the current law falls short of full compliance in some respects. To fully implement the WIPO Internet Treaties and to align with international best practices, key changes to the Copyright Act of 1957, last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013) are needed, including:

- Section 52(1)(c)
 - Clarify that service providers are subject to liability for copyright infringement if they had actual or constructive knowledge of infringing content or links on their services or networks and they fail to remove the copyright infringing content or links to such content expeditiously upon having gained such knowledge or awareness;
 - Require Internet service providers (ISPs) to employ measures demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific infringing content identified by the rights holder;
 - Clarify that the term "person" in this Section includes ISPs;
 - Eliminate the requirement that rights holders obtain an injunctive court order to prevent infringing content from being reinstated within 21 days of submitting a notice of infringement; and
 - Amend Rule 75 sub-rule (3), (Chapter XIV) giving intermediaries 36 hours to take down content in line with recommendations to more effectively address the speed of distribution of illegitimate content online.

- Section 65A—WCT Article 11 and companion language in WPPT Article 18, require Contracting Parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures." These articles establish a right against unauthorized access that is independent from acts of traditional copyright infringement. To fully comply with these requirements, the following amendments are necessary:
 - Define the phrase "effective technological measure" to expressly cover common TPMs, such as access and copy controls;
 - Expressly prohibit the manufacturing, importing, trafficking and dealing in circumvention devices and software, as well as the provision of circumvention services and devices;
 - Establish civil *and* criminal sanctions for acts of circumvention, trafficking in circumvention devices

¹²Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 270, available at <https://www.wipo.int/publications/en/details.jsp?id=361&plang=EN>.

¹³See World Intellectual Property Office (WIPO) Copyright Treaty (WCT), Article 8, available at <https://www.wipo.int/treaties/en/ip/wct/>, and World Intellectual Property Office (WIPO) Performances and Phonograms Treaty (WPPT), Article 14, available at <https://www.wipo.int/treaties/en/ip/wppt/>. See also, WPPT, Article 10.

- and software, and offering circumvention services;
 - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
 - Narrow the scope of exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act”; and
 - Adopt definitions and sanctions for the unauthorized removal of RMI.
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission is not an infringement of copyright. Similar or equivalent provisions in other jurisdictions are narrower, and IIPA urges the Government of India to emulate similar limitations. For instance, the exception should require the stored copy to be only temporary, that the copying does not have independent economic significance, and that the sole purpose of the reproduction is to enable transmission in a network between third parties. These safeguards would prevent infringing services or those seeking to avoid fair licensing terms from benefitting from the provision.
 - Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to at least life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings from 60 to at least 70 years accordingly.
 - Section 39A—Eliminate the over-regulation of private contracts involving sound recordings. This Section appears to impose contractual limitations for authors established in Sections 18 and 19 on the ability of performers to decide the terms on which to license or transfer their exclusive rights in sound recording agreements. These limitations result in unreasonable changes to established practices in the recording industry. Section 39A does make clear that Sections 18 and 19 shall be applied to performers’ rights “with necessary adaptations and modifications.” Such “adaptations and modifications” should remove any restrictions on the transfer of performers’ rights in sound recording agreements.
 - Section 52(1)(a)—Ensure the private use exception is compatible with the three-step test codified in the Berne and TRIPS agreements and the WIPO Internet Treaties.
 - Repeal the unjustifiable exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers’ and other rights holders’ right of public performance in respect of “social festivities associated with a marriage.” Although it is not uncommon for national laws to include limited exceptions for the use of certain copyright works in religious ceremonies, this exception extends to purely social functions, which are customarily subject to the public performance right.
 - Enact proposed Cinematograph Bill amendments that would make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility. Such amendments would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

Information Technology (Intermediary Liability and Digital Media Ethics Code) Rules: On February 25, 2021, the Ministry of Electronics and Information Technology (MeITY) introduced the 2021 Information Technology (IT) Rules, extending the scope of obligations on intermediary platforms. Although the 2021 IT Rules provide increased accountability and obligations on intermediary platforms, they do not improve the inefficient notice and takedown regime. By way of example:

- Rule 3(1) of the 2021 IT Rules provides for a takedown mechanism pertaining to complaints regarding copyright infringement. However, it directs the ISP to take down infringing content only upon being notified by an appropriate government authority. Further, the 2021 IT Rules provide a 36-hour deadline for removal, which is too long for infringing content to remain on the internet.
- Rule 3(2) of the 2021 IT Rules provides for a grievance redressal mechanism that directs an intermediary to take all reasonable and practicable measures to remove or disable access to content that is hosted, stored, published, or transmitted by it, within 24 hours of receiving a complaint from an individual or any person. However, under the said Rule, the scope of what content may be included is limited to any material or content that exposes the private area of such an individual, shows such an individual in full or partial nudity, shows, or

depicts such an individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such an individual. The recorded music industry in India strongly believes that the issue of copyright infringement ought to be included within the scope of content to be taken down within 24 hours of receiving a complaint from an individual or any person.

Indian legislation currently provides ample opportunities for digital services, including User Upload Services, to avoid liability for copyright infringing content on their platforms. The music industry has been lobbying the government for amendments to the relevant legislation, but proposals have thus far been inadequate. The recently adopted 2021 IT Rules have placed increased obligations on platforms, however, the rules lack clarity. Further, the 2021 IT Rules do not go far enough to address the flaws in the system. While the National E-Commerce Policy published in 2019 includes positive proposals, it is not clear whether legislative action will follow.

ISP Safe Harbor Provisions: The Indian Copyright Act regulates limitations on the liability of ISPs in respect of copyright infringements. These provisions are extremely problematic from the perspective of robust protection of copyright online and its effective enforcement, because: (i) they are not limited to truly neutral and passive ISPs that have no knowledge or control of the data; (ii) they do not prevent the abuse of these safe harbors by services that are designed to facilitate or enable copyright infringement; and (iii) the takedown mechanism under Section 52(1)(c) essentially requires rights holders to obtain an injunctive court order to activate a takedown, which defeats the idea of efficient resolution of infringement by notice and takedown procedure. The inclusion of a court order requirement for these purposes is also inconsistent with international practice.

Section 79 of the IT Act exempts an intermediary from liability for any third-party information, data, or communication links made available or hosted by the intermediary. It remains unclear how the two sets of provisions—in the Copyright Act and the IT Act—interact, which is a cause of legal uncertainty and results in loopholes in copyright enforcement. In particular, the notice and takedown mechanism should be improved to prevent reappearance of the same infringing content.

In July 2020, DPIIT released a Draft National E-Commerce Policy for stakeholder comment. It is unclear whether any legislative proposals will materialize based on this draft Policy. Nevertheless, IIPA suggests this should be an opportunity to meaningfully improve the ISP Safe Harbor provisions (and online copyright enforcement more generally). The proposed draft Policy should in particular: (i) limit, to begin with, safe harbor protection to purely technical, automatic, and passive intermediaries; (ii) have ISPs implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific infringing content as identified by the rights holder; and (iii) enable consultation among industry stakeholders, including creative industries, to make determinations on “Trusted Entities” (whose complaints are resolved on a priority basis by ISPs) rather than leaving such decisions to the sole discretion of ISPs as provided under the existing draft. Despite the importance of the Policy, no revised drafts or policy proposals have been seen since.

Exception for Weddings: The existing exception for weddings from the public performance right is resulting in a loss of substantial revenue for record producers. The exception is incompatible with the three-step test, because it goes beyond certain special cases and conflicts with the legitimate interests of rights holders. The public performance of music at weddings impacts a major commercial activity for music producers.

Term of Protection: Under Section 27 of the Copyright Act, the term of copyright in sound recordings subsists until 60 years from the beginning of the calendar year following the year in which the sound recording was published. This is shorter than the term of protection in the US, the EU, and in over 70 countries worldwide.

MARKET ACCESS ISSUES IN INDIA

The negative economic effects of market access barriers in India cannot be underestimated. Some of the more egregious market access barriers for IIPA members include:

Foreign Direct Investment Caps: Although India in recent years has raised the foreign direct investment (FDI) cap for Indian television news channels from 26% to 49%, FDI above 49% for news channels requires government approval. Further, FDI in digital news sites is still restricted to the earlier limit of 26%. However, 100% of FDI is allowed in non-news channels with government approval.

Local Body Entertainment Tax: In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. Effective October 1, 2021, the GST rate for “content licensing, right to broadcast and show original films” is taxed at a single rate of 18%. However, the LBET collected by state governments have been left out of the GST, prompting state governments (Madhya Pradesh, Tamil Nadu, and Kerala) to attempt to tax entertainment products (particularly cinema tickets) over and above GST. Local body taxes significantly increase the tax cost for exhibitors and work against the principle of “One Nation, One Tax” and the intent of the GST model, i.e., to remove a multiplicity of high taxes. IIPA urges India to subsume all local taxes on cinema tickets into the national GST system.

Tariffs: High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement to reduce tariffs on goods that enhance digital trade in India.

Bill on the Registration of Press and Periodicals: Introduced in November 2019, this bill may have detrimental implications for U.S. journal and book publishers operating in India or seeking to enter the Indian market. The bill would require printing press owners, as well as periodical publishers, to register and obtain a Certification of Registration from the Press Registrar General before engaging in any kind of publication, subject to a penalty of INR 50,000 (around US\$700). The bill is unnecessarily broad in scope and could potentially apply to all print and digital publications—regardless of whether they were published in India. The bill is replete with undefined requirements that would make it difficult for press and periodical publishers to navigate. For instance, the bill does not clearly identify the criteria on which decisions on registration will be made, or the factors that would adjudge an applicant press or publication eligible for registration.

Mandatory Sharing of Non-Personal Data: In July 2020, the Expert Committee on Non-Personal Data under the Ministry of Electronics and IT released a report proposing to require the sharing of “non-personal data” with the Government of India and business competitors in India. Subsequent iterations of the report have continued to maintain this stance. Such proposal raises serious concerns regarding content owners’ ability to maintain high standards of data security in India, severely disadvantages competition in the Indian market, and has the potential to undermine intellectual property rights if copyrighted materials are not expressly exempted. Additionally, recent developments on India’s privacy law indicate that the originally envisaged “personal data” law is now likely to become an all-encompassing data legislation that will regulate both personal and non-personal data. It also appears that specific rules on non-personal data will likely be the subject of delegated legislation, which will be crafted by the regulatory body yet to be created under the proposed data law. The unpredictability this would cause for businesses and content owners is deeply problematic from the perspective of intellectual property rights, digital trade, and ease of doing business.

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Priority Watch List in 2022, mainly due to ongoing serious legislative and market access challenges, including collective management issues, and all of which should be reflected more fully in this year's Special 301 Report. If, at the conclusion of the Generalized System of Preferences (GSP) investigation, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below, IIPA requests suspension or withdrawal of Indonesia's GSP benefits, in whole or in part.¹

Executive Summary: Indonesia is an important growth market for the creative industries. Several years ago, the Government instituted several positive changes to its copyright law and enforcement system, which have helped rights holders protect their rights in the online environment and made progress towards liberalizing Indonesia's investment framework. Unfortunately, the Government has recently taken some troubling steps backward on market access, including shifting back to a less business and investment friendly regulatory environment by maintaining screen quota and dubbing restrictions for imported films, and on copyright reform, by contemplating changes that would weaken existing protections and upend rights holders' longstanding commercial arrangements. In addition, enforcement efforts remain largely lacking, and rights holders have noticed a slowdown in actions to disable access to infringing websites.

Under the revised Copyright Act and Regulation Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to disable access to domains associated with piracy websites. These regulations have led to significant disruptions of piracy in the country, but the Government of Indonesia should improve them by ensuring faster response times to rights holders that apply through the Directorate General of Intellectual Property (DGIPR) (as rights holders from the motion picture and television industry and the recording industry report recent significant delays in scheduling "verification meetings"). Those industries also urge the Government of Indonesia to provide a more efficient mechanism to address "domain hopping," a common tactic pirates use to evade government-ordered site blocking. The Government of Indonesia also should do more to improve the efficiency and capacity of law enforcement in handling digital piracy cases. Highlighting the enforcement shortcomings in Indonesia, criminal groups behind sites like *Indoxxi*, *lk21*, and *Nonton*, which are notorious for piracy, continue to operate these sites by routinely "hopping" domains or through hundreds of copycat domains.

IIPA recommends that in 2022 the Government of Indonesia build on past progress and increase efforts to combat online piracy by updating aspects of its legal framework to add effective remedies and close existing gaps in protection. The DGIPR is considering a partial revision of the Copyright Law focused on exceptions and limitations, film ownership, and collective management issues, and it is unclear whether this revision will enhance or weaken copyright protection. It would be timely to revisit the revision of the Copyright Law given that Indonesia is due to ratify the Regional Comprehensive Economic Partnership (RCEP) that entered into force for all other Members on January 1, 2022. It is critical that any new exceptions or limitations are confined to the three-step test, consistent with Indonesia's international obligations, that existing problematic exceptions are narrowed or deleted, and that copyright ownership in films resides with the producer unless there is an agreement to the contrary, in accordance with international norms and best practices. Any revision of the Copyright Law should revisit a number of problematic provisions that create legal and commercial uncertainty for the copyright industries, including by removing the 25-year reversion of rights provision applicable to transfers of rights in musical works and performers' rights, removing an overbroad exception to the making available right, clarifying rights of making available and communication to the public, setting forth clear

¹For more details on Indonesia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Indonesia's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



principles of secondary copyright liability, and improving protections for technological protection measures (TPMs) and rights management information (RMI). The government should also extend the copyright term of protection for all categories of works to the life of the author plus 70 years, and to at least 70 years for sound recordings and all works for which term is calculated from publication, in line with evolving global norms. In addition, Indonesia should provide clear guidelines that camcording and live streaming are illegal and implement measures to reduce instances of these activities.

While the government in 2016 took the very positive step of easing its negative investment list and allowing 100% direct foreign investment in film and sound recording production and film distribution and exhibition, Indonesia has unfortunately regressed to a protectionist path. Indonesia should reverse course and address the many market access and investment barriers, and the discriminatory treatment against U.S. copyright materials that make it difficult for the U.S. copyright industries to do business and compete in the country. The broadcasting and radio sectors remain closed, and in late 2020, the government enacted Implementing Regulation for Government Regulation No. 71 of 2019 on the Implementation of Electronic Systems and Transactions (MR5/GR-71) to regulate the over-the-top (OTT) sector. While GR-71 included some improvements over earlier drafts, onerous localization and registration requirements, a content review mechanism with mandatory takedown requirements, and disproportionate penalties for non-compliance remain. Further, Indonesia's government doubled down on the harmful 2009 Film Law, which continues to cause significant uncertainty for all rights holders and local exhibitors, issuing regulations in 2019 that affirmed many of the most harmful aspects of that law. Moreover, IIPA remains concerned that the Government of Indonesia may not agree to further extensions of the WTO e-commerce moratorium and may seek to charge duties on electronic transmissions. Such duties could significantly harm the country's market for creative digital content and related services. For the music industry, the mandatory multi-layered collective licensing system remains a problem, especially when the government-appointed national collective management organization (CMO) (LMKN) determines tariffs and distribution matters without adequate rights holders' representation and may take as much as 10% of the collections from rights holders as "operational costs." Finally, Indonesia should join the WTO Information Technology Agreement (ITA) Expansion Agreement.

PRIORITY ACTIONS REQUESTED IN 2022

Enforcement:

- Improve enforcement of the Copyright Law and Regulation Nos. 14 and 26 of 2015 to disable access to piracy sites and domains, by speeding processing times from application to verification meetings, and by establishing and implementing an efficient, dynamic, site-specific blocking to cover variants, new primary domains, redirects, mirrors, and proxy domains and sites; and, develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders.
- Combat unauthorized camcording and streaming piracy, including live streaming, by implementing a government program to strictly enforce the laws against the same.
- Monitor the marketplace and combat the proliferation of piracy devices (PDs) (including illicit streaming devices/set-top boxes) and piracy apps.

Legislation:

- Amend or clarify Regulation Nos. 14 and 26 of 2015 on site blocking to speed timeframes from application to verification meeting, and to prevent "domain hopping" by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.
- Revision of the Copyright Law should include the following amendments and implementing regulations:
 - Repeal Articles 18 and 30 of the Copyright Law, which provide that the rights in literary and musical works and performers' rights automatically revert to the author or performer 25 years after their assignment.
 - Repeal the broad copyright exception related to Internet uses (Copyright Law, Article 43(d)).

- Clarify the rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practices.
- Narrow the scope of the broad exception under Article 44 that allows several different uses of copyrighted works for a wide array of purposes, ranging from education to criticism to "security and maintenance of government," because these exceptions appear to be broader than the three-step test under the WTO TRIPS Agreement (TRIPS) Article 13, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
- Maintain copyright ownership of audiovisual works in the producer who arranged for the work to be made and is best positioned to exploit the work commercially, consistent with international best practices.
- Provide clear guidelines or regulations explaining that live streaming and camcording in cinemas are illegal and violate rights holders' exclusive rights.
- Extend the copyright protection term to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated from publication, in line with international best practices and to avoid discrimination against local creators and artists.
- Strengthen the protection of RMI and TPMs consistent with Indonesia's international treaty obligations and international best practices, including by ensuring the protection of access controls.
- Amend the definition of "piracy" to encompass acts of online copyright infringement and to remove the requirement of financial gain.
- The Implementing Regulation for Government Regulation No. 71 of 2019 on the Implementation of Electronic Systems and Transactions should be improved by enhancing transparency requirements and introducing general duties of care on all types of online intermediaries to take reasonable steps to stop and prevent online copyright infringements.

Market Access:

- Eliminate provisions from the Film Law that serve as barriers to market access and may damage local exhibitors, such as local screen quotas and the prohibition on dubbing imported films.
- The proposed Film Law amendments are on the 2022 National Legislative program. In addition to the Film Law, MR 34/2019 was issued in September 2019 without industry consultation and added further limitations on screen time by a single distributor, importer, or producer to 50%. Indonesia should remove such barriers and ensure international stakeholders are engaged in the process.
- Ensure that OTT regulations comport with Indonesia's international obligations and international best practices that protect copyright and related rights, do not interfere with the exercise of these rights, and promote competition through light-touch regulation on commercial and content review matters, including by not imposing content review or classification requirements on Video-on-Demand (VOD) providers and avoiding localization requirements.
- Improve regulations related to collective management by ensuring that the management of the LMKN is well represented by music rights holders and eventually eliminate the LMKN, which is an unnecessary extra layer to the CMO system.
- Join the expanded WTO ITA and eliminate the tariff on physical imported films.
- Support an extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Remove the requirement in the Broadcasting Law that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced.

THE NATURE OF PIRACY IN INDONESIA

High levels of piracy in Indonesia continue to inflict losses on Indonesian creators, as well as U.S. book, motion picture and television, music, and video game creators. While the Indonesian government has made efforts to fight online piracy, all actions the government takes are based on applications by or information from the industry. The most significant concern for the audiovisual and music industries continues to be online piracy, which consists of various types of websites, including linking, streaming, torrent sites, and stream-ripping sites, among others. Indonesia

is also a major market for cyberlockers operating from outside the territory. Homegrown piracy sites and “brands” such as *Ik21*, *Nonton*, and *Dunia21* are harming the already fragile creative industry ecosystem.² Such sites engage in domain hopping (i.e., even after several administrative site-blocking actions brought by the industries and implemented by the government, the sites remain available through alternative domains and copycat sites). The government should address this issue of domain hopping by swiftly issuing orders related to the “hopped” domains and copycat sites and domains. Indonesia should also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content, including the growing problem of illegal camcording and live-streaming piracy, and PDs and apps, which have emerged as a significant means through which pirated motion picture and television content is accessed.

Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law: Increasing access to the Internet in Indonesia, including through mobile devices, means enormous potential exists for the legitimate commercial market for online dissemination of copyright works: services like iTunes, Spotify, JOOX, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ, and several other international streaming services now operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting legal distribution channels from reaching their full potential.

Working with the motion picture and music industries (including local associations APROFI (Indonesia Producers Association) and ASIRI (Indonesian Recording Industry Association)), the government has taken effective action by disabling access to hundreds of piracy websites and pirate domains since the process began in 2016. Many of the domains that have been the subject of these actions are related to notorious pirate sites like “Indo Twenty One” (i.e., *indoxxi*, *indoxx1*), *Nonton*, *Layarkaca (Ik21)*, or *Dunia21*. In late December 2019, the operators of *Indoxxi* announced plans to cease operations voluntarily, but numerous piracy domains believed to be associated with the same syndicate have continued to proliferate.³ In addition, dozens of copycat piracy sites have sprung up. The self-help actions of industry, with cooperation from the Indonesian government, have resulted in reductions in visits to the blocked audiovisual and music piracy sites, although most well-known piracy sites employ domain hopping to circumvent the results of site-blocking efforts.⁴ Infringing music apps have also become a problem. For example, two app developers, *xyzmedia* and *9media*, created hundreds of mobile apps available on the Android market that offer infringing music streaming services to mobile users. The government should streamline the process for rights holders to ensure access to infringing sites is disabled and to deal efficiently with the problem of domain hopping.

Music Piracy: Online copyright piracy in Indonesia, like elsewhere, keeps evolving. Piracy is tenacious and efforts to thwart it must remain powerful and nimble. In recent years, stream-ripping emerged as the major piracy threat to the recorded music industry. Data demonstrates that stream-ripping has emerged as a major piracy threat to the recorded music industry in Indonesia, and both international and domestic language stream-ripping sites have provided Internet users with the bulk of illegal downloads. However, Indonesia also has a major issue with a number of well-known cyberlockers. Data from internet monitoring service SimilarWeb showed that eight of the top ten piracy destinations in the country were stream-ripping sites; two of these were focused on Indonesian visitors (*downloadlagu321.net* with 20.3 million visits from Indonesia in the third quarter of 2021 and *metrolagu.site* with 9.2 million visits). 95% of all visits to *downloadlagu321* were from Indonesia and 66% of visits to *metrolagu* were also from the country). Some ripping sites that catered to a much wider audience were even more popular: *Y2mate* recorded 43.9 million visits from Indonesia alone in the third quarter of 2021; *savefrom.net* received 42.8 million visits;

²Sites like these employ gambling advertising and sometimes pornography to lure users.

³Indo 21” and related brands remain popular for piracy in Bahasa language throughout Indonesia and Malaysia. Notwithstanding *Indoxxi*’s announcement that it is shutting down, the *Indoxxi* group has continued to operate via a network of websites, which are constantly being redirected, including to nameless IP addresses, altered, and modified to evade tracking and extensive site-blocking efforts. It is estimated that the “indo 21” brand comprises approximately 45-50 domains, and hundreds of other domains use related piracy “brands” to attract traffic, such as “*nonton*” and “*dunia21*.” For example, the most popular site of 2019, “*indoxx1.center*,” has been redirected to “*idtube.me*,” and had 360,856 visits in August 2020. These sites use a U.S.-based reverse proxy service to mask the location of the websites’ servers. Currently, the most popular of the Indo 21 domains is “*layarkacaxxi.org*,” with 1,029,382 visits in August 2020. At last available update, the site was hosted by India-based Host Palace. Many domains associated with this syndicate have been blocked in Indonesia, Malaysia, and Australia.

⁴Notably, traffic to the most popular music piracy websites, *Planetlagu* and *Laguaz*, dropped substantially in 2018. *Laguaz.net*, the second most visited piracy music service in Indonesia, ended its service in November 2018. But *Planetlagu* constantly changes its domain names, although its monthly visits are now only a small fraction (around 2 million monthly visits) as compared to the peak in 2017 (around 36 million monthly visits).

and *ytmp3.cc* more than 24 million visits.

Despite the popularity of stream ripping overall, the cyberlocker *Zippyshare.com* remained the single most popular piracy site in Indonesia during the third quarter of 2021. It received over 87.7 million visits alone from Indonesia during the third quarter of 2021, and the country was responsible for the highest proportion of traffic to the site worldwide (22.3%, three times as much as the United States). Other very popular cyberlockers include *Mega.nz* with 15 million visits from Indonesia in the third quarter of 2021 and *Uptobox.com* with 8 million visits.

Unauthorized Camcording/Live-Streaming of Movies: Illicit camcording continues to pose a threat in Indonesia. Unfortunately, there was an increase in camcording incidents in 2019.⁵ Because of the widespread closure of theaters in 2020 and into 2021 due to the COVID-19 pandemic, illicit camcord data for the region is anomalous. Illegal camcording and live-streaming piracy remains a big concern. The government should issue clear guidelines and regulations on illegal camcording and live-streaming piracy, including expressly outlawing these activities and prioritizing a decrease in these illegal acts. Further, the government should seek to strengthen enforcement against illicit camcording by: (i) fostering greater cooperation with cinema owners to fully uphold and enforce the Law; (ii) taking and supporting targeted enforcement actions; and (iii) where warranted, proceeding with prosecutions against those engaged in this damaging activity.⁶

Piracy Devices (PDs) and Apps: PDs include media boxes, set-top boxes, or other devices that allow users, through piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. Often used on smart TVs in homes, the devices are sometimes advertised as enabling infringement of copyright or other illegal activities. Chief among these activities is enabling users to access unauthorized motion pictures or television programming, often through apps that connect to remote online sources. This content may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale as an “after sale” service, or loaded by the users themselves. PDs and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. Sellers of PDs often do not install the infringing apps and thus claim that the manufacture and/or sale of the devices themselves is not illegal. Resellers instead provide a code for their customers to install infringing apps. There are also illegal IPTV subscription offerings, such as *JoyTV* and *MYIPTV6K* providing access to live channels and VOD content. However, in a recent survey conducted under the auspices of the Asia-Pacific Economic Cooperation (APEC) Intellectual Property Enforcement Group, the Indonesian government expressed that Indonesian law may indeed prohibit the boxes.⁷ IIPA encourages the Indonesian government to take steps to crack down on piracy apps and on device manufacturers or resellers who pre-load the devices with apps that facilitate infringement, as well as to take action against key distribution points for devices that are being used illegally.

ENFORCEMENT UPDATES

Although the Indonesian government has taken significant strides to combat online infringement, notably through implementation of regulations for disabling access to piracy websites, more should be done to address this

⁵Thirteen video captures and two audio captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from five in 2018.

⁶Preferably, an express provision would have been added to the Explanatory Memorandum to the 2014 Copyright Law, defining the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a strict liability criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, agreed in 2011 on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken. These include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States, 11 November 2011.

⁷In an Asia Pacific Economic Cooperation (APEC) initiative in 2021, Indonesia participated in an “Intellectual Property Experts Group” (IPEG) survey of laws and activities related or Access Rights to Use Violations of Copyright and/or Related Rights in the Electronic System. The government also indicated in that survey that it believes “the current civil damages and/or penalties provided for in your economy viewed as being sufficient to deter the sale or distribution of ISDs.” See *Report on Results of Survey Questionnaire on Domestic Treatment of Illicit Streaming Devices by APEC Economies Intellectual Property Experts Group*, March 2021, available at <https://www.apec.org/Publications/2021/03/APEC-Report-on-Domestic-Treatment-of-ISDs> (noting that ISDs are a “serious problem” and noting several laws, including Law Number 28 Year 2014 on Copyright, and Joint Ministerial Regulation Between Minister of Law and Human Rights and Minister of Communication and Informatics Number 14 Year 2015, Number 26 Year 2015 Regarding Implementing Closure of Content and/or Access Rights to Use Violations of Copyright and/or Related Rights in the Electronic System).

significant problem. Indonesia should increase the capacity of its enforcement officials, who generally lack familiarity in investigating and handling digital forensic evidence and do not understand the ease with which pirates are able to use anonymizing software and infrastructure to evade detection. The operator of *Dunia21* was arrested in September 2020 and convicted of violating several provisions of the Criminal Code. He received a sentence of fourteen months imprisonment by the Jambi District Court in April 2021.⁸ However, online piracy operators rarely receive deterrent-level penalties. The government should criminally investigate operators of major online piracy services, such as *Indoxxi*, and issue penalties strong enough to serve as a deterrent to others. In addition, the government should develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders and enhance industry efforts to disable access to infringing content with additional enforcement actions in 2022, with the goal of encouraging consumers to migrate to legitimate offerings.

Site-blocking (Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo)): As noted above, implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015 continued to be successful in 2021. The motion picture and television industry and the recording industry noted that upon stakeholders' applications, the Indonesian government has issued numerous administrative orders to disable access to piracy domains that resolved to sites that primarily infringed or facilitated infringement of copyright. These industries also note that these actions are the strongest form of self-help available to copyright owners in Indonesia and that these regulations have led to significant disruptions of piracy in the country. However, the motion picture and television industry and the recording industry also noted that the Government of Indonesia should improve them by ensuring faster response times to rights holders that apply. Emerging issues raised by the motion picture and television industry and the recording industry in 2022 include the ability to disable access to hopped domains, copycat sites, proxy portal sites, and host sites (i.e. cyberlockers) where the primary purpose or primary effect of the site is to infringe or facilitate infringement of copyright. The above-mentioned industries recommend that the government prioritize intellectual property (IP)-related cases in issuing site-blocking orders and improve the regulations to enable "dynamic injunctions" to prevent domain hopping by allowing variants, new primary domains, redirects, mirrors, and proxy sites to be added to the blocking list quickly and easily.

Moreover, other than administrative site-blocking actions, enforcement in relation to online copyright infringement is generally lacking, and the motion picture and television industry and the recording industry note that even for administrative site-blocking actions, speed of action appears to have slowed and become more difficult during the COVID-19 pandemic. These industries assert that authorities should act in accordance with the regulations and with efficiency as the pirates are currently able to adjust quickly meaning any delays in enforcement exacerbate the problem. It is hoped that Indonesian authorities will take the further step of criminally investigating and holding to account the operators of major online piracy services.

Comprehensive Enforcement and Judicial Reform: The National IP Task Force took the first steps towards the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. Under the direction of the Task Force and with the oversight of the Anti-Corruption Commission, Indonesia should undertake comprehensive enforcement reform and implement judicial reforms. IIPA has outlined recommended steps for such comprehensive enforcement reform and judicial reform in prior filings.⁹

COPYRIGHT LAW AND RELATED ISSUES

Copyright law in Indonesia is governed by the Law Concerning Copyright (Number 28 of 2014), which entered into force in 2014, replacing the prior 2002 law, and Regulations Nos. 14 and 26 of 2015, which sought to implement key provisions concerning online and digital forms of infringement, including provisions intended to implement Indonesia's international obligations under the WTO TRIPS Agreement, the Berne Convention, the WCT, and the

⁸See <https://jambi.tribunnews.com/2021/04/27/pelaku-pembajakan-film-keluarga-cemara-dihukum-14-bulan-penjara>.

⁹See e.g., IIPA 2019 at 151.

Concerning Provisions in the Copyright Law

DGIPR is currently considering a partial revision of the Copyright Law, focusing on copyright ownership and collective management issues, as well as exceptions and limitations. Whilst revision is welcome in principle as it provides an opportunity to address a number of long-standing concerns of right holders, the direction of planned reform is far from clear. The first phase focuses on (1) exceptions and limitations for education, libraries, and archives, and (2) clarifying copyright ownership in films. In the next phase, DGIPR intends to establish a CMO for films in cinemas and on VOD. It remains to be seen whether this revision will result in enhanced or weakened copyright protections. The priority for the Indonesian government should be to remedy the concerns listed by IIPA in its submissions on copyright shortcomings (see above). Any new exceptions or limitations (including mandatory collective management of rights or statutory licenses) must be confined to the three-step test, consistent with Indonesia's international obligations (e.g., TRIPS Article 13). Imposing collective management or statutory licenses regarding uses of exclusive rights currently individually licensed would clearly not be consistent with the three-step test. On copyright ownership in films, in accordance with best international practices, the copyright should reside with the producer who arranged for the film to be made and is best positioned to exploit the film commercially, unless there is an agreement to the contrary. Finally, consistent with international best practices, any CMO must be voluntary, transparent, and governed by rights holders, without interference by Indonesia's government.

As mentioned, any revision of Indonesia's Copyright Law should address, in the first place, certain provisions that raise serious concerns, including, in some cases, clarifying such provisions through implementing regulations. These provisions include:

Internet Exception: The Law provides a broad exception under Article 43(d) for "making [available] and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating." Both parts of this provision set an undesirable precedent and, if interpreted incorrectly, would severely undermine legitimate business models built on the rights to control the manner and means in which rights holders authorize the making available and disseminating of their content through information and communication technologies. On its face, this provision collides with Indonesia's international obligations under TRIPS, the Berne Convention, WCT, and WPPT. For these reasons, it should be deleted in its entirety.

Termination of Transfers: Articles 18 and 30 (and the transitional provision in Article 122) of the Law provide that rights in literary and musical works and performers' rights that are transferred shall revert automatically to authors and performers after 25 years. This reversion rule frustrates the freedom to contract and is an unlawful deprivation of property rights, which are protected by the Indonesian Constitution. It is also unclear how these provisions operate in practice, which has created substantial legal uncertainty. One apparent result of this legal uncertainty is that large catalogues of recordings are not available on digital music services in Indonesia, to the detriment of producers, performers, authors, publishers, and the Indonesian public. These provisions should be removed.

Clarification of the Making Available/Communication to the Public Right: Article 27 of the Copyright Law provides equitable remuneration rights to producers and performers for broadcasting and communication to the public of sound recordings. However, the Law defines communication to the public to include making available. This definition is inconsistent with Articles 23 and 24, which provide exclusive rights for performers and producers to make available their sound recordings in accordance with Article 14 of the WPPT. The definitions in the Copyright Law should be amended to remove this inconsistency and to ensure the law does not contravene Indonesia's obligations under the WPPT.

¹⁰Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

Criminal Case Structure and Penalties Weakened: For criminal cases, the Law took steps backward from the 2002 law by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and providing for non-deterrent fines, including for landlord criminal liability. In addition, Article 95 of the Law is highly unusual in that it appears to mandate “mediation” before a piracy case can be prosecuted. The purpose and operation of this provision in practice is unclear.

Exceptions and Limitations/Compulsory License: Article 44 of the Law contains a broad exception defining a number of different uses for a wide array of purposes as not copyright infringement, ranging from education to criticism to “security and maintenance of government.” On its face, the broad scope of the uses and purposes contained in this exception appears to go well beyond what is permissible under TRIPS, the Berne Convention, WCT, and WPPT, despite a well-intentioned, but ineffective, attempt to narrow the provision through inclusion of part of the Berne three-step test. The references in Subsections (1)(a) and (d) to the three-step test omit the limitations of “certain special cases” and uses that do “not conflict with a normal exploitation of the work by the copyright owner.” The two other subsections included in this exception do not contain any safeguards required under the three-step test. IIPA recommends that the Indonesian government clarify the application of the full three-step test to each use and purpose contained in this exception through amendment of the provision itself or by implementing regulations. Furthermore, implementing regulations should provide guidance to help prospective users determine whether their use falls within the appropriate bounds of the three-step test.

In addition, Article 84 of the Law includes a compulsory license provision that applies to “works” and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it is consistent with obligations under TRIPS, the Berne Convention, WCT, and WPPT.

RMI Violations and Technological Protection Measures (TPMs) Provisions: The Law provides that RMI violations occur only when moral rights are affected. WCT and WPPT clearly require “adequate and effective legal remedies against . . . acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*” (bracketed text in WCT only; emphasis added). The scope of the RMI provisions should be expanded accordingly. Protections for TPMs should be strengthened consistent with Indonesia’s obligations under the WCT and the WPPT, and with international best practices, including by ensuring the protection of TPMs that control access to copyrighted works (i.e., access controls).

Registration, Invalidity, and Recordation Requirement: While registration of copyright remains voluntary under the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another previously registered work as a ground for refusal. This substantive examination is intended to enable the authorities to review and invalidate false applications or registrations to address a concern about abuse of the voluntary copyright registration process. IIPA suggests introducing a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Additionally, the registration and recordation system potentially violates the prohibition of formalities under the Berne Convention. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license “shall have no legal effect on third parties.” This provision appears to be a Berne-prohibited formality if, for example, lack of recordation was used to deny the exercise of copyright from a particular licensor or licensee. Implementing regulations should clarify that a failure to record transfers and other changes will not deny copyright protection to the registrant. Moreover, recordation is not feasible for industries and rights holders that control a large number of works.

Provisional Measures: Under Article 108 of the Law, preliminary (provisional) injunctions take too long to obtain. Under the Indonesian law, no legal remedies, such as preliminary injunctions, are available to the claimant before submitting the claim. In that respect, Indonesian law does not meet the standards of the TRIPS Agreement (i.e., Articles 41 and 50), which require that countries must make available “fair and equitable” civil remedies and procedures to stop and prevent infringements, including provisional measures granted *inaudita altera parte*.

Statutory Damages: Indonesian copyright law does not provide statutory damages. In the case of copyright infringement, the copyright holder can claim a justifiable amount by way of compensation. Compensatory and punitive damages are available under the Civil Procedure Code. Judges, however, may grant damages only based on what the parties request in their claim, and judges are prohibited from granting damages that exceed what the parties previously requested. The successful party must prove losses with sufficient and actual evidence.

Overly Restrictive Definition of Copyright “Piracy”: Article 1, Subsection 23 of the Law provides an overly restrictive definition of copyright piracy as “distribution” of unlawfully duplicated “goods” to “obtain economic benefits.” This definition is largely redundant because all acts of copyright infringement amount to “piracy” (unless permitted under an exception). It is also inconsistent with Article 61 of the TRIPS Agreement because it is limited to goods and requires a showing of financial gain. The definition should be amended to expand the scope to include acts of online copyright infringement and to remove the requirement of financial gain.

Regulations Nos. 14 and 26 of 2015 (Site Blocking): As noted above, there is currently no efficient way to prevent domain hopping other than to file a separate application to block the “hopped” domains, which is time consuming and cumbersome. The regulations should be amended to prevent domain hopping by allowing variants, new primary domains, redirects, mirrors, proxy sites, and alphanumeric variations to be added to the blocking list quickly and easily.¹¹ This would bring Indonesia’s regulation in line with other countries’ site-blocking provisions or rulings, which allow for such “dynamic” injunctions (examples include the United Kingdom, Australia, India, and Singapore).

Other Needed Legal Reforms

Unauthorized Camcording and Live-Streaming of Motion Pictures and Television Content: The Explanatory Memorandum to the 2014 Copyright Law indicates that the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. Regulations should be introduced that provide a clear legal basis to prohibit camcording (as well as live streaming) in cinemas and strengthen enforcement remedies available.

Term Extension: The Government of Indonesia should extend copyright term of protection to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated based on publication, in line with international norms. This extension will provide greater incentives for production and give producers a stronger incentive to invest in local industry, thus spurring economic growth and tax revenues, and enable producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, the term of protection of certain categories of works, including books, music, dramas, visual art, and architectural works, are protected for the life of the author plus 70 years. However, the protection for other categories of works, such as cinematographic works and video games, remains at life of the author plus 50 years, and the term of protection for sound recordings and all works owned by a legal entity is just 50 years from publication.¹² There is no justification for such varied treatment, and protection should be extended accordingly.

Strengthening the Organized Crime Statute: Because many operators of piracy websites are engaged in other criminal activities, copyright infringement should be included as a predicate crime for remedies under the Indonesian organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, and asset seizure, etc.

¹¹Specifically, new subsection (3) to Article 6 of the Regulations could be amended to provide: “Additional domains, sub-domains, URLs, or other IP addresses whose sole or predominant purpose is to enable or facilitate access to the same website in the report shall be added to the receipt report register of copyright infringement and/or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation.”

¹²Note that the term of protection has limited practical effect for certain works in view the 25-year reversion of rights regarding literary works, performances, and musical works, as discussed above.

Online Intermediary Regulations: The Indonesian government should seek to improve transparency and accountability of online service providers and intermediaries. Regulations should: (i) have certain intermediaries, including payment providers, domain registrars, and hosting services implement a “know your business customer” (KYBC) policy and make sure their resellers do the same; (ii) require a public registry for domain registrants that includes accurate data held by domain registrars, registries, or the Ministry of Communication and Information Technology; and (iii) create a legal basis for rights holders to obtain details from the Ministry regarding certain online service providers known as “private scope Electronic System Administrators,” which would allow rights holders to take direct action. The regulations should also include a “duty of care” on all intermediaries that requires them to take reasonable steps to limit, stop, and prevent online copyright infringements if they have actual or constructive knowledge of infringing content or links on their services or networks, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining copyright infringement. Non-compliance should result in liability and fines for those intermediaries that have actual or constructive knowledge of infringing content or links on their services or networks.

MARKET ACCESS AND RELATED ISSUES

Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List (NIL) and Continue Removing Barriers to Entry for Other Sectors: In May 2016, the Government of Indonesia issued Decree No. 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, as well as film distribution and exhibition. The Indonesian government should follow this very positive move by issuing clear guidelines on the implementation process of the decree and removal of market barriers. In addition, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.¹³ While the removal of the film industry sectors from the NIL is a positive step, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors.

Eliminate Problematic Provisions from the Film Law: In September 2019, without official notice, “Ministerial Regulation (MR34/2019) Concerning the Procedure for the Distribution, Exhibition, Export, and Import of Film” was issued. While these regulations have yet to be enforced, they maintain the 60% local screen quota and dubbing restrictions and add further limitations on screen time by a single distributor, importer, or producer to 50%. In recent years, domestic films have accounted for a growing and substantial share of the market and local films are seeing greater investment without the imposition of heavy-handed regulations. Moreover, these restrictions undercut Indonesia’s laudable 2016 decision to remove the film sector from the NIL.

Furthermore, the 2009 Film Law and regulations therein include some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration and arbitrary limits on vertical supply between content distributors and theatrical exhibitors. Indonesian authorities should remove these provisions because they could have unintended consequences, such as restricting foreign participation in the market and curbing business efficiency. Indonesia should amend the Film Law and incorporate international best practices, notably recognizing the exclusive rights of copyright owners to determine whether, how, and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia’s plan to attract foreign direct investment in the film sector.

Collective Management Organizations (CMOs): A December 2018 amendment to the Regulation for Collective Management Institutions (Regulation No. 36/2018) has not improved collective licensing issues faced by

¹³The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

the music industry. Certain CMOs for musical works and sound recordings continue to be placed under the single-window LMKN as a “national CMO” that adds an unnecessary extra layer to the collective licensing system. The government appointed LMKN sets the tariff, collects the remuneration (through agents), and decides how the collections are split among different groups of CMOs; yet, the management of LMKN is not adequately represented by the rights holders whose rights it purports to represent. As a result, those rights holders involved have little control over LMKN’s governance and operations, including the setting of tariffs, which are fixed and set extremely low. Even though LMKN delegates the collection function to some of the CMOs, the regulation permits LMKN to deduct 10% from the collections as operation costs at the expense of rights holders’ interests. Further, the problem of the existence of numerous CMOs to manage the same categories of rights remains, which has caused unnecessary confusion and inefficiencies in collective licensing.

Advertising Restrictions: Indonesia’s Broadcasting Law (No. 32 of 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, the Indonesian Broadcasting Commission’s (KPI) 2015 statements regarding implementation raised concerns. If implemented, such a burdensome rule would be harmful to consumers, who would likely absorb the additional associated costs. The timeline for revising the Broadcasting Law remains unclear.

Customs Valuation: Indonesia imposes a tariff on imported films that is based on the running time of the film, resulting in high duties for many U.S. feature films. Indonesia should join the expanded ITA to address this issue and to stay consistent with international best practices.

Customs Duties on Electronic Transmissions: In creating new tariff lines for digital products that are transmitted electronically, which includes a threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has indicated that it may not agree to further extensions of the moratorium. These actions could significantly harm the country’s market for creative digital content and related services, including Subscription-based Video-on-Demand (SVOD) services.

Content Review: In October 2015, KPI notified platform operators regarding pre-release content review and classification requirements for programs on all TV channels. KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice.

Over-the-top (OTT) Regulations: The Ministry of Communication and Information Technology (MCIT) has drafted onerous OTT regulations that would require foreign OTT service providers to obtain certification, set up local permanent establishments, localize data, and use local national payment gateways, in addition to providing content filtering and censorship mechanisms. In November 2020, MCIT issued MR5 (Private Scope Digital Service Provider Regulation) that requires OTT services to register with MCIT by January 2022; legally take down “prohibited” content within 24 hours of request; as well as grant authorities’ access to electronic systems and/or electronic data for surveillance and criminal enforcement. These regulations contain significant penalties for non-compliance including blocking of service delivery within Indonesia.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In January 2020, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights (IPRs) and market access issues and to determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the U.S. must consider, in determining whether a country should continue to be designated as a GSP beneficiary country, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets . . . of

such country.”¹⁴ While the Indonesian government has made past progress towards meeting the GSP criteria, these efforts have recently stalled and regressed in some respects. IIPA urges the Government of Indonesia to make further progress to remedy the deficiencies outlined in this report to avoid suspension or withdrawal of Indonesia’s GSP benefits, in whole or in part.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While passage of the Copyright Law of 2014 made progress toward fulfilling Indonesia’s obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. As set forth in more detail above in the “Copyright Law and Related Issues” section, the broad exceptions and compulsory license provision, provisions regarding civil and criminal remedies, limited RMI violations provision, definitions of making available and communication to the public, and recordation requirement appear to be out of compliance with Indonesia’s international obligations. In addition, as set forth in the “Market Access” section, the Government of Indonesia may fail to provide equitable and reasonable market access to foreign rights holders in certain areas, as set forth in the GSP criteria.

¹⁴19 U.S.C. §§ 2462(c)(4) and (5).

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2022.¹

Executive Summary: Since 2020, the Government of Mexico has made significant improvements to the country's intellectual property (IP) regime as part of the government's endeavors to implement its obligations under the U.S.–Mexico–Canada Agreement (USMCA), which entered into force on July 1, 2020. These improvements include revising its Copyright Law and Criminal Code, as well as the Federal Protection of Industrial Property Act. Although Mexico ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) in 2002, the country did not implement these treaties until 2020. Two significant 2020 reforms include the addition of protection against the circumvention of technological protection measures (TPMs) and protection for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models like streaming and on-demand services. These developments are very positive, because, in the absence of these provisions, the growth of the digital marketplace in Mexico has been significantly hampered by an IP legal framework that is decades behind international norms.

Obstacles remain, however. Despite Mexico implementing the WCT, the full implementation of the WPPT and the USMCA, with its reforms to the Federal Copyright Law and the Federal Criminal Code, is endangered by constitutional challenges. Parts of the 2020 legal reforms are being challenged in court on constitutional grounds. Although the new laws remain in force in the interim, the challenges generated a chilling effect on practical implementation of the reforms, because authorities are not willing to address cases based on a law that has been questioned. Moreover, in 2021, a series of legislative initiatives were developed to counteract the reforms made in the Copyright Law, with proponents of these initiatives claiming that the changes unlawfully restrict freedom of speech. However, considering that the reforms to the Copyright Law were grounded in the new obligations of the USMCA, the challenges and initiatives to overturn them should not be approved or produce any legal result. If the constitutional challenges or the legislative initiatives were to succeed, it would create a significant setback for IP rights holders and make Mexico less globally competitive. IIPA urges the Government of Mexico's executive and legislative branches to robustly defend the 2020 Copyright Reform from the constitutional challenges and bills filed against key provisions. This task is crucial to secure the progress achieved. Moreover, these new laws will need to be properly enforced and adjudicated, with proper staffing and resources.

For a long time, criminal enforcement activity pertaining to IP infringement in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. Unfortunately, the legal reforms of 2020 did not fully address these deficiencies. Under existing law, success in a criminal case still depends on proving a “direct economic benefit” to the infringer, instead of focusing on the harm caused to a rights holder by infringement (the exception—the result of a 2020 reform—is for criminal prosecutions against camcording). The “direct economic benefit” for criminal cases (unique to Mexico) is a difficult hurdle to overcome for a prosecutor willing to commence a case in a country already short on resources for such cases. Due to the lack of political will to prosecute IP crimes, enforcement in this area has become non-existent. Additionally, budget cuts in recent years, including in several key IP enforcement agencies, particularly the Attorney General's Office (FGR), have led to reductions or curtailments in effective enforcement activities, seizures, and campaigns. One of the major institutional challenges has been to achieve an effective transition from the General Administration of Customs to the recently created National Customs Agency of Mexico, which will play a key role in the detection and detention of counterfeit and pirated products in transit.

¹For more details on Mexico's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake and are slowed by procedural hurdles. In a positive development, 2020 saw the enactment of new laws that mandate compliance with notices to remove infringing content, with measures to prevent infringing content from being uploaded again, as well as providing safe harbors for services and platforms that comply with the notices. However, the IP legal regime is still missing some of the basic tools to address online infringements, including by spurring cooperation between rights holders, website owners, and service providers. For example, the current law specifies only general liability instead of a clear principle of third-party liability for those inducing or promoting copyright infringement, which would incentivize Internet service providers (ISPs) to take preventive actions.

PRIORITY ACTIONS REQUESTED IN 2022

IIPA recommends that the Government of Mexico prioritize the following legal reforms and enforcement measures for 2022:

Legal Reforms

- The Secretary of Culture and the Copyright Office (INDAUTOR) should publish the implementing regulations of the 2020 copyright amendments. These regulations are a key element of the implementation of numerous important provisions from the new legislation.
- Implement all legal reforms required under the USMCA and other treaty obligations—in the Copyright Law, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes by:
 - increasing compliance with the reforms required under the USMCA, which remain incipient;
 - removing the proof-of-profit (“direct economic benefit”) requirement as a prerequisite to criminal liability (including for satellite and cable decryption); adding aiding and abetting criminal provisions for both physical and online piracy; removing the for-profit limitation on the making available right, and clearly including a violation of making available in the Criminal Code;
 - implementing the presumption of copyright protection arising from copyright notices, exceptions to the circumvention of TPMs, and providing civil remedies for satellite and signal piracy;
 - granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the FGR and Customs can and will act against so-called “goods in transit”;
 - amending the Civil Code to add pre-established remedies and to recover costs and attorney’s fees; current law does not provide compensatory damages, including lost profits or sufficient monetary damages, nor costs or fees (Mexico needs to amend its copyright law to provide for “pre-established” and/or “additional damages” consistent with the USMCA Article 20.82.6 that are “an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm” as set forth in Article 20.82.8.);
 - enacting legislation to provide clear modern rules establishing third-party liability for copyright infringement, including for parties contributing to, inducing, or promoting infringement of copyright and related rights, along with proper injunctive relief and incentives for efficient and effective notice and takedown systems with ISPs, and including repeat infringer measures.

Criminal Actions, Raids, and Prosecutions

- Fully implement the USMCA enforcement obligations by:
 - implementing a strategic national *ex officio* anti-piracy campaign with a consistent focus on major targets, emphasizing coordination of police and prosecutorial resources, and prominently using (and properly resourcing) the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) within the FGR;
 - improving the FGR forensic standards for digital enforcement and eliminating the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases;

- addressing the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages (and enhancing penalties against repeat importers); the reform does not clearly cover in civil laws “trafficking in devices or services or software” that circumvent and does not include proper sanctions in civil or criminal law for these activities as required by the USMCA;
- ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their entry into the market;
- eliminating the welfare marketplaces initiative; and
- using *ex officio* authority to enforce the new anti-camcording criminal penalties.

Administrative Enforcement

- Fully implement the USMCA enforcement obligations by providing the Institute of Industrial Property (IMPI) with:
 - (1) the resources, training, and political guidance to apply its *ex officio* powers to investigate online infringements and initiate audits of infringing websites, including foreign websites;
 - (2) sufficient resources for the takedown of infringing materials;
 - (3) the ability for regional officers to conduct local enforcement actions (and improving IMPI coordination with the Federal Police so IMPI can take enforcement actions in difficult or risky areas with police security);
 - (4) coordinated investigative and other support from the Scientific Police (in the National Guard);
 - (5) resources to implement conciliation proceedings according to the new Federal Law for the Protection of Industrial Property; and
 - (6) resources to help empower the newly formed Anti-Piracy Committee.
- Providing the INDAUTOR with more resources to increase and strengthen its mediation capabilities, including appointing a Director General, a position that has been vacant since October 2020.

Prosecutions, Judges, and Courts

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including jail time and fines;
- Initiate actions against entities failing to provide remuneration for the public performances or broadcasting of sound recordings; there are very serious concerns that rule of law problems render actual royalty collections currently both unsafe and ineffective; and
- Investigate and prosecute IP infringement cases absent proof of actual lost profits.

THE COPYRIGHT MARKETPLACE IN MEXICO

As online access, as well as mobile phone and smartphone use have grown exponentially in Mexico in recent years, legitimate online markets have developed, but their growth has been hindered by weak enforcement and outdated laws. A wide variety of popular pirate services compete with legitimate digital markets in Mexico, including stream-ripping services; sites offering unauthorized downloading and streaming of music, film, and video games; MP3 search engine sites that provide links to enable the downloading of film, music, and video game content hosted on cyberlocker platforms; BitTorrent index sites; and online markets offering video game-related digital goods, including usernames, passwords, and user account information. The COVID-19 crisis has increased the consumption of unauthorized materials, and, to a lesser extent, it has also driven traffic to legal sites. Although some large pirate websites are hosted locally, many infringing sites and services routinely accessed by individuals in Mexico are hosted outside of the country (e.g., in Peru, Chile, Colombia, Argentina, Germany, and France, among others).

A major concern that inhibits the growth of healthy legal markets is the increased availability of piracy devices, also referred to as illicit streaming devices (ISDs), including media boxes, set-top boxes, or other devices that allow users, in combination with illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The motion picture industry reports that subscription television piracy and the

use of piracy devices are the two fastest growing piracy challenges in Mexico. The use of hardware devices and apps to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican grey markets. This type of piracy includes the use of web browsers and video apps to allow playback of films and television programming. These devices are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are advertised as facilitating easy access to remote online sources of unauthorized entertainment content. The devices are imported into Mexico pre-loaded with the apps, the apps are added as an after-sale service, or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal enforcement actions against device vendors and the operators of the infringing apps used on these devices.

Online piracy continues to rise in Mexico, severely compromising the growth of the audiovisual market in the territory and abroad. The lack of efficient monitoring and control by government entities regarding digital piracy and the use of ISDs, caused by a severe shortage of resources and lack of coordination among government agencies, are among the primary factors that contribute to the poor performance of copyright enforcement. The return of the public to movie theaters may also result in an increase in illicit camcording in the region, following a reduction in such activity because of public health restrictions from COVID-19. It is estimated that 80% of Mexican citizens regularly consume or utilize some sort of pirated product, with few active initiatives focused on improving the country's condition in this regard, making the country a significant liability to the protection of IP rights and diminishing its global competitiveness. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to the legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide.

In 2021, Mexico ranked 23rd overall in the world (down from 19th in 2020) in the number of connections by peers participating in unauthorized file sharing of video games on public peer-to-peer (P2P) networks. Mexico ranked eighth (down from seventh in 2020) in unauthorized file-sharing of console-based games, fifth for video games on mobile devices (up from 12th in 2020), and 29th using PCs (down from 23rd in 2020). For some video game companies, Mexico is now among the top countries for P2P sharing of infringing video game files and unauthorized digital goods (UDG), including cheats and hacks, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of video game subscriptions, account usernames, and passwords are rampant in the country.

For recorded music, the vast majority of legitimate revenue in Mexico is from digital music services, including subscription services. Although music industry revenue continues to increase, per capita spending on music in Mexico is only US\$1.60 per year, compared with US\$23.91 per capita in the United States.² At the same time that music streaming services are developing, the most widespread source of music piracy is stream-ripping. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study (2021) found the rate of piracy in Mexico was 50%, one of the highest in the world, with high rates of stream-ripping and mobile app downloading, as well as high rates of cyberlocker and BitTorrent site use. Popular stream-ripping sites such as *y2mate.com*, *mp3-youtube.download*, *savefrom.net*, and *flvto.biz* (each with millions of visitors per month), and several cyberlockers (e.g., *1fichier.com* and *zippyshare.com*) are the most problematic, along with "linked" piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links, and these platforms are especially popular distribution channels for pre-release piracy.

The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of online infringement of entertainment software in Mexico. Circumvention is accomplished by installing "modification chips" ("mod chips") in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated video games, or by modifying the video game platform's operating system to facilitate the play of pirated video games (so-called "soft modding"). Circumvention devices are typically manufactured overseas and shipped in component pieces

²International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 156.

that are then assembled in Mexico. Top sellers on Mercado Libre (on the U.S. government's Notorious Markets list for online piracy sites in 2020) offer a wide variety of mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. ESA members report that on marketplaces, like *Mercadolibre.com.mx*, offer loaded game cards with pirated games can be sold for MXN\$8,000 - MXN\$10,000 (approximately USD\$390 - USD\$500) and circumvention devices for approximately MXN\$599 (approximately USD\$30). Members, however, also report very high compliance rates with these marketplaces for the removal of these listings. Until the 2020 amendments, enforcement actions against distributors of circumvention devices have not been available, because Mexican criminal law prohibited only the domestic manufacture of such devices, but not their distribution. The 2020 laws correct this deficiency by shutting off the supply of devices and systems, not only if domestically manufactured, but also if imported into or distributed in Mexico. IMPI has indicated it will now proactively engage in this type of online enforcement, which is encouraging.

Arcade pirated consoles have become increasingly popular in online marketplaces, making their way into legitimate online marketplaces, such as Mercado Libre and Walmart, as well as in physical markets, including several popular department stores. Piracy is exacerbated by the presence of organized crime, and the lack of enforcement from criminal prosecutors. As an emerging and harmful form of piracy, digital streaming has been identified as a growing threat to rights holders that has superseded other sources of online infringing activities, such as downloads and cyberlockers. Furthermore, video game piracy is not only a challenge with respect to physical devices, such as counterfeit preloaded gaming consoles, modification, or circumvention devices, and other infringing video game accessories, it is also a major concern with respect to digital goods, such as cheats, hacks, and illegal primary and secondary game accounts.

Camcord Piracy: Criminal enforcement against illicit camcording has historically been ineffective in Mexico for two reasons: (1) inadequate laws and (2) weak and infrequent enforcement of the existing laws. One of the 2020 amendments adopted to comply with the USMCA corrects the legal regime deficiency. New Article 424*bis* of the Criminal Code criminalizes camcording, and, in the only exception in the Code, deleted the for-profit motive as a prerequisite for criminal infringement, which had thwarted effective prosecutions of camcording. However, the new provision does require a rights holder to file a claim. Until the 2020 change, the few camcording criminal convictions that had been successful were the result of prosecutions based on an array of crimes other than camcording. As reported in prior IIPA filings, in recent years, many MPA member films have been sourced from illicit camcords in Mexican theaters. Following the 2020 theater closures due to the COVID-19 pandemic, camcords have resurfaced as a piracy problem in Mexico in 2021, and it is hoped the new laws and improved enforcement will properly address this problem.

Satellite and Cable Issues: Satellite and signal piracy remain a major concern in Mexico. Another positive development in 2020 was the adoption of two amendments to the Criminal Code (Federal Penal Code) to: (1) impose criminal sanctions for infringers receiving or distributing encrypted programs transmitted via satellite signals without authorization from the legal satellite distributor (Article 168*bis*); and (2) criminalize the modification and distribution of devices or systems intended for signal theft (Article 426). Prior to these changes, the Criminal Code covered only encrypted-program-carrying satellite signal theft. The new provisions also include penalties for those aiding or abetting these activities. 2020 also saw Mexico amend the right of public communication in the Copyright Law to include the making available of works through wire or wireless means (as required by the USMCA), so there is clear protection for both cable and satellite dissemination. Thus, Mexico provides limited criminal sanctions for the manufacturing, importation, sale, or lease of devices or systems carrying satellite signals, but not for carrying cable signals. It also provides limited sanctions for acts of interrupting or interfering with cable and satellite signals and for decrypting satellite signals, but only if undertaken "for profit." In accordance with the USMCA Article 20.86.3, Mexico should provide civil and criminal remedies for cable piracy, as well as satellite piracy. Additionally, Mexico needs to amend its Criminal Code to eliminate the "for profit" requirement for acts of decryption of satellite signals and include cable systems in the decryption laws.

Hard Goods Piracy: Although the copyright industries have prioritized the fight to stem digital piracy, hard

goods piracy continues to present a challenge on the street and at physical markets. Three physical markets were on the U.S. government's Notorious Markets 2020 list (released in January 2021). The first two have been on the list since 2012: (1) *El Tepito* in Mexico City, an open-air 80-square block market in the middle of Mexico City selling video games, modified consoles, and game circumvention devices; and (2) *Mercado San Juan de Dios* in Guadalajara, the largest indoor market in Latin America, with close to 3,000 vendors selling pirated films, music, video games, and video game circumvention devices (sold by an estimated one-third of all of the market's vendors). A third market, *La Pulga Rio* in Monterrey, which was added to the 2020 list, has 300 stalls selling video games (as well as counterfeit apparel and products).

COPYRIGHT ENFORCEMENT IN MEXICO

Budget cuts in recent years, including in several key IP enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. The Government of Mexico has yet to produce a coherent or coordinated plan to address online piracy, as hard goods piracy remains the primary focus of enforcement officials. One long-recommended enforcement measure is the development and adoption of a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities. This plan would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including local authorities that rarely work on combating piracy at all. Instead of a centralized coordinator for copyright enforcement, three federal agencies are engaged in copyright enforcement in Mexico. The FGR (formerly the PGR) is responsible for federal criminal enforcement. IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR is responsible for registering copyrights and can conduct mediation proceedings for aggrieved rights holders. In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaria de Gobernacion*) have assisted rights holders by providing information on illegal software websites and seizing the domain names of infringing sites.

Criminal Enforcement

Since Mexico transitioned to an adversarial justice system, criminal copyright cases are no longer prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This change has resulted in prosecutorial delays of IP-related crimes, including at FGR. Good cooperation continues to exist between rights holders and IMPI, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR. However, FGR prosecution continues to suffer from outdated procedures, insufficient resources, long delays (years) for cases to resolve, and the lack of deterrent sentences.

A complicating element in combating video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by FGR) that each copy of an infringing product must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*). This requirement is followed as a general practice, even though the law does not explicitly require it. Under the existing system, when the comparison involves multiple copies of the same infringing game, music, or film, rights holders must submit an equal number of legitimate game, music, and film DVD copies to the experts for comparison. The *peritos*' reports take much too long to complete, and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Although Article 5 of the Copyright Law refers to copyright registrations as only voluntary ("recognition of copyright and neighboring rights does not require registration"), in practice, the FGR and courts require registrations to commence a criminal case. The USMCA (Article 18.72.1) requires Mexico to provide clear presumptions of ownership in civil, criminal, and administrative matters, based on the copyright notice appearing on the work, or on a screen, and, without the need for a mandatory and certified registration. Mexico needs to make this change to its Copyright Law for all works (it exists for sound recordings), even after the 2020 amendments. Lastly, a continuing obstacle to effective criminal enforcement is that file sharing via online networks is generally not considered a serious legal violation by Mexican courts. Consistent with its WTO TRIPS obligation, Mexico should have "effective" criminal remedies, including "imprisonment and/or monetary fines," available in cases of "willful . . . copyright

piracy on a commercial scale.” Unfortunately, Mexico’s remedies for commercial-scale piracy have not been effective and are hampered by the noted procedural hurdles.

Under the current Administration, FGR and UEIDDAPI have been reluctant to prosecute IP crimes, and there have been very few criminal enforcement actions regarding piracy and counterfeit goods, both in the online and physical realms. Notwithstanding the significant and commendable progress made by the Government of Mexico in its efforts to strengthen the country’s Intellectual Property regime consistent with its obligations under USMCA, there does not appear to be any political will to prosecute IP crimes in Mexico at this time.

Structural Reforms and Jurisdictional Issues: IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement.³ IIPA urges the Government of Mexico to undertake, and to prioritize, the implementation of a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies to identify and target individuals responsible for large-scale distribution and importation of pirated goods, including major organized crime syndicates. The priority should be criminal enforcement directed against digital piracy with a coordinated plan among FGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO), and the Federal Police. SAT remains engaged with FGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. The piracy situation is getting worse in Mexico. The enforcement activities of FGR, particularly the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), have been lacking and ineffective in combating illegal conduct in online and physical marketplaces, and counterfeit and piracy goods continue to be sold across Mexico. Because FGR and UEIDDAPI have ceased executing border measures to detain containers with pirated goods, including preloaded video game consoles, preloaded handheld systems, video game accessories, counterfeit legacy game cartridges, and merchandise bound for the local market, or stop in-transit shipments and trans-shipments, IMPI and Customs have created an effective partnership to fill in the void. These agencies have delivered timely and decisive results in the realm of piracy-related border interdictions. However, high turnover in these offices in 2021 have significantly delayed these seizure cases.

Mexico’s “welfare marketplace” (in Spanish: “*tianguis del bienestar*”) initiative, which takes goods that have been seized by the authorities and offers them to the general public, is problematic from a consumer health and safety standpoint,⁴ and it clearly violates the “effective protection” clauses in the USMCA, the TRIPs agreement, and more than 30 trade agreements to which Mexico is a party.

UEIDDAPI needs resources and training focused on technology to properly undertake criminal investigations directed against digital piracy. Until 2016, there was a specialized IP enforcement sub-unit within UEIDDAPI, which has since been disbanded. The Government of Mexico needs to properly staff and resource UEIDDAPI to address IP cybercrimes, as well as staffing other key IP enforcement units in FGR and the police. FGR can still take *ex officio* actions, but criminal cases cannot proceed without a complaint filed by a rights holder. As with other IP enforcement-focused government entities, IMPI, the specialized agency for intellectual property authorized to take administrative actions against infringers, is also severely under-resourced and hampered by outdated procedural rules. One positive 2020 change in the Federal Industrial Property Law adds the ability for rights holders to calculate and collect damages for IMPI-imposed sanctions against infringers.

FGR has a special deputy attorney general department to focus on organized crime syndicates—the Office

³See, e.g., IIPA 2019, 46-47, available at <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf>.

⁴See the U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement’s characterization of counterfeit goods as a danger to public safety here: <https://www.ice.gov/features/dangers-counterfeit-items>. See also, the DHS report from 2020 here: https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf. Finally, see the United Nations Office on Drugs and Crime Fact Sheet on counterfeit goods here: https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf.

of Attorney General for Federal Crime Investigation (SEIDF), which also created UEIDDAPI—but this unit is under-resourced. The FGR Organized Crime Investigative Division (FGR-SIEDO) has excellent investigators, attorneys, and resources that the other divisions do not have, including paid informants, wire-tapping authority, and witness protection programs. IIPA members recommend better coordination between FGR-SIEDO and SEIDF, as well as additional resources and training.

A third structural recommendation is to coordinate municipal, state, and federal government criminal enforcement actions (across Mexico's 32 states and 2,400+ municipal governments). Also, another long-standing IIPA recommendation has been for enforcement agencies to adopt clear and consistent policies for the expeditious destruction of seized infringing goods. Another of the positive 2020 amendments (in the Federal Industrial Property Law) gives IMPI the authority to order the destruction of infringing goods 15 days after a final court decision, which is an accelerated timetable. The copyright industries have also successfully utilized the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the FGR enforcement operations continue to find their way back into the black market. A fourth recommendation that is important to those industries still confronting hard copy piracy is for PROFECO to use its *ex officio* powers for consumer protection, and its resources against street market piracy.

Intellectual Property Rights (IPR) Expertise in the Judiciary: A continuing weak spot in Mexican IP criminal enforcement is the judiciary. Training to improve IPR expertise by judges is an ongoing need—especially training on technology, digital distribution and piracy, and the use of circumvention technologies. Other weaknesses include the absence of specialized IP judges and courts and non-deterrent sentencing in most criminal cases, where sentences are rare. Mexico should consider mandatory sentencing regulations for criminal copyright cases or have the Supreme Court issue recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (*reparación del daño*). The Supreme Court should also issue an advisory to criminal judges nationwide to act expeditiously on search warrant applications. Additionally, Mexico should provide sufficient resources for the IP magistrates with the Tax Court and consider creating specialized IP administrative circuit courts.

Civil Enforcement

The 2020 package of amendments adopted notice and takedown procedures, defined ISPs, and provided legal remedies and safe harbors to ISPs providing mere conduit, caching, and storage and information location tools, by limiting monetary damages—but not injunctive relief or administrative sanctions—for ISPs that respond properly and timely to notices (Copyright Act, new Article 114). The changes add specific provisional measures to order the suspension, stay down, blocking, or removal of content, and the cessation of acts that are infringing or unauthorized. The new provisions also require ISPs to have repeat infringer policies and counter-notification procedures (requiring rights holders to commence judicial, administrative, or criminal actions within 15 days of notification by an ISP). The new Mexican law compels an ISP receiving a notice of infringement to comply, but it does not require an ISP, even with actual knowledge of an infringement or once aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge), to take down material. There are administrative penalties (fines) for non-compliance with notices.

The package, intended to meet USMCA requirements, is a welcome step. The Mexican legal system includes general liability principles contained in the Civil and Criminal Codes, but it does not include explicit secondary liability for copyright infringement for ISPs and similar parties in the Civil Code. The USMCA (Article 20.88) requires Mexico to implement “legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of infringing materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials.” While notice and takedown and related provisions are a strong first step, ISPs need further encouragement to meaningfully cooperate with all rights holders (large and small) to deter the unauthorized storage, transmission, or making available of copyrighted materials.

In addition, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer's

personal information to rights holders seeking civil recourse against alleged infringers (although Article 189 of the Telecommunications Law, as amended in 2014, does allow an ISP to cooperate with an order from any competent authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit termination of service contracts if subscribers infringe IP rights. ISP contractual practices thus compound the difficulties of obtaining access to information necessary for seeking civil remedies. For file sharing, the two major ISPs (Telmex Infinitum, which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions.

In general, Mexico's three-tiered civil procedure system makes civil litigation very complicated, time consuming, and costly for rights holders, even against obvious infringers. The Copyright Law allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued (or becomes final), but the law does not provide for statutory damages (e.g., additional or pre-established damages), and the USMCA-related amendments implemented in 2020 did not address this deficiency. Rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. There are other problematic procedural formalities to commencing cases in Mexico, including burdensome steps to prove copyright ownership in lieu of presumptions of ownership (which, as noted, is an unfulfilled USMCA obligation). Mexican law grants full validity to electronic documents and discovery, although some judges are unfamiliar with these rules. The Civil Code also provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented.

One recent (2018) legal reform was the adoption of an amendment to the Copyright Law of Mexico (amending Articles 213 and 215) to provide for preliminary injunctions ("precautionary measures") in civil cases. This remedy is especially useful to address pre-release piracy. The 2018 amendment also permitted *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours' written notice before the order goes into effect.

Border Enforcement

In 2020, the video game industry brought seven suits with IMPI regarding border measures. Approximately 40,030 miscellaneous infringing items have been seized, most of which are illegal gaming consoles. Although the Customs Code was amended in 2018, the changes did not provide the necessary *ex officio* authority for customs officials to conduct independent seizures of infringing goods and components—a USMCA obligation. Under the current code, Customs' authority is unclear regarding seizures and retention of infringing materials. There are formal and onerous requirements to initiate border actions. For example, absent an official order from IMPI, Customs authorities will not seize infringing product entering the country or detain it for more than a few hours, even where the material is clearly infringing. Because IMPI does not issue expedited authorizations to seize products identified by customs as infringing, suspect merchandise is usually allowed to enter Mexico. IIPA recommends greater cooperation between these two agencies to improve piracy-related border enforcement and to expedite the procedures by which customs may make independent seizures of clearly infringing products.

One challenge for rights holders to pursue recidivist importers is the false information provided to customs by importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers and to work with customs officials on these cases. Customs chain-of-custody procedures are another hurdle, especially for criminal enforcement. Under existing procedures, customs must first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors order the police to inspect the packages. However, police and prosecutors are reluctant to commence criminal cases unless customs officials have taken care to open the packages in the presence of police, who must witness the opening of each package, as required by the FGR office responsible for the Mexico City International Airport. This interpretation—that the chain of custody is "broken" if customs officials have not opened each package in the presence of police—has forced rights holders in the video game industry to appeal decisions, incurring additional legal expenses. FGR should develop clear, unified rules on chain of custody procedures and shift the burden to prosecutors to prove that there has been an alteration of evidence.

COPYRIGHT AND RELATED LAWS IN MEXICO

Mexico was a signatory and, in 2002, acceded to the WIPO Internet Treaties (although it did not publish its ratification of those treaties with the Agreed Statements) but did not adopt laws implementing its treaty obligations until 2020.

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law was significantly revised by the 2020 amendments. It was last amended in 2018 with the addition of preliminary injunctive relief, and before that, was amended in 2003. The full list of legal reforms adopted in 2020 has improvements, including the notice and takedown, safe harbor, and related provisions already noted in detail above. Other positive reforms include:

- First, the reforms added protection for TPMs, with copy and access controls, and for RMIs. The new provisions make clear that circumvention is actionable independent of copyright infringement and closed the existing loophole for circumvention devices to cover the making or distributing of such devices.
- The Copyright Code (Article 232 etc.) and Criminal Code (Article 427 etc.) include appropriate civil and criminal sanctions, respectively, and neither require proof of “willful” actions to be sanctioned.
- The Copyright Code (Article 232 etc.) and Criminal Code (Article 427 etc.) include appropriate civil and criminal sanctions, respectively, and neither require proof of “willful” actions to be sanctioned.
- The reforms explicitly provide a making available right and right of communication to the public for works and recordings (Articles 27 and 131 of the Copyright Law).
- The Federal Protection of Industrial Property Act amendments broadened IMPI enforcement authority, including allowing provisional measures to suspend the transit of goods (imports or exports), even if by digital means, and added new calculations for the recovery of damages for rights holders (fines up to US\$1 million).
- The new laws added sanctions for camcording, as well as against satellite and cable signal theft.

However, more revisions are needed:

- Article 232bis limits liability and excludes certain activities relating to the manufacturing of, or trafficking in, circumvention devices or technologies (including so-called “no mandate” language), and additionally, provides many exceptions and limitations that are problematic, including those to-be-determined by INDAUTOR.
- The TPM sanctions (Article 232bis) regarding manufacturing or trafficking do not include the “promotion, advertising or otherwise marketing” of circumvention devices or services; these activities should be included in future amendments.
- Further, Article 232qua refers to RMI infractions only that remove RMIs, and not to altering or modifying RMIs; this article should be revised to cover these activities.
- While the reforms explicitly provide a making available right and right of communication to the public for works and recordings (see above), the Copyright Act should be amended to the extent Article 131, applicable to sound recordings, does not currently cover electronic reproductions of copies (i.e., phonograms) of sound recordings. The Copyright Law should also be amended to provide a reproduction right for performances.

For all the laws that were enacted, INDAUTOR is now preparing draft implementing regulations; unfortunately, this process is proceeding slowly for these much-needed new changes. This delay is very troubling considering the constitutional challenges underway, as well as the vocal opposition from many copyright opponents already seeking to weaken amendments to laws not yet implemented, all of which are meant to undermine the new reforms.

Some of the other key reforms that are needed, but were not achieved through the 2020 changes include:

- Establish third-party liability;
- Raise civil penalties to deterrent levels—and including statutory, pre-established, or “additional” damages and

the recovery of costs and attorney's fees;

- Amend the Criminal Code to delete the “for profit” provisions (with the exception of the fix adopted for camcording), and replacing them with “acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders”;
- Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates;
- Amend the Administrative Code, Tax Code, and Criminal Code to (i) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (ii) increase administrative sanctions;
- Create presumptions of copyright ownership in civil, administrative, and criminal cases; and
- Add criminal provisions to enforce against the production or distribution of piracy devices;
- Severely restrict or eliminate exceptions to infringement for certain public performances where retransmission is not “for profit-making purposes” (Article 150, transmissions of works) and “no direct economic benefit is sought” (Article 151, neighboring rights). These exceptions are too broad, exceeding what treaties permit.

Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (Cultural Heritage Law): On January 17, the “Federal Law of Protection to the Indigenous and Afro-Mexican People Cultural Heritage” (the Law) was published in the Federal Official Gazette. The Law entered into force on January 18, 2022, and its regulations must be issued within the following 180 days, according to its first transitory article.⁵ The Law aims to register, classify, and document the traditional cultural expressions (TCEs) of indigenous communities, while also broadening their scope of protection, acknowledging their economic rights, and introducing an enforcement scheme. Although some of its objectives are aligned with WIPO's stance on the protection of indigenous peoples' traditional knowledge and traditional cultural expressions, the way the Law is drafted creates legal uncertainty for a range of creative industries, given the absence of guidelines for the granting of authorization, the lack of clarity as to which communities are associated with a particular expression, and the fact that some expressions could be removed from the public domain.

The law also lists a catalog of administrative infringements that are unclear and ambiguous and establishes fines that range from US\$2,240.00 to US\$224,000.00. The law also establishes criminal penalties for the improper use and exploitation of the elements of cultural heritage of indigenous and Afro-Mexican communities or peoples, and for the cultural appropriation of elements of the cultural heritage of indigenous communities or peoples. Criminal penalties range from two to 10 years of imprisonment (double if the conduct results in “cultural ethnocide”). The U.S. government should encourage Mexico to implement this initiative with transparency, broad stakeholder engagement, and adherence to good regulatory practices and USMCA commitments.

General Law of Libraries: On June 1, 2021, the General Law of Libraries (GLL)⁶ was published in the Federal Official Gazette. The law establishes the Legal Deposit of Publications and mandates that copies of works (including audiovisual works) and phonograms need to be deposited with the Library of Congress, the Library of Mexico, and the National Library, in the case of materials other than press works (audio and audiovisual) and delivered to the Library of Mexico. The General Directorate of the Library of Mexico may allocate them to specialized institutions for their conservation and use, as is the case of the “*Fonoteca Nacional*” (the National Archive of Recorded Sound) and the “*Cineteca Nacional*” (the National Cinematographic and Audio-visual Archive). The provisions of the GLL state that works delivered to the Legal Deposit of Publications shall be made available in public libraries and through electronic means; nonetheless, the regulations of such making available of works are still pending and generate uncertainty to rights holders. The GLL violates the authors' and rights holders' right to receive compensation from the exploitation of their works. The GLL is also unconstitutional and contrary to multiple IP and trade agreements. Even when the law appears to be limited to those works produced in national territory, it also includes the works “edited” in national territory, which could include subtitling or dubbing. The term “editing” may be broadly defined as “publishing through any means or procedures a work” or as the reproduction and distribution of a work's material

⁵Ley Federal de Protección al Patrimonio Cultural de los Pueblos Indígenas y Afromexicanos, January 17, 2022, available at http://www.dof.gob.mx/nota_detalle.php?codigo=5640770&fecha=17/01/2022#:~:text=Tiene%20por%20objeto%20reconocer%20y,de%20la%20Constituci%C3%B3n%20Pol%C3%ADtica%20de.

⁶General Law of Libraries (*Ley General de Bibliotecas*), June 1, 2021, available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LGB_010621.pdf.

form, according to the Federal Copyright Act (Article 42).

Furthermore, the GLL contradicts several sections of the Mexican Copyright Law, including the exclusive right of rights holders to determine when their production will be made public and how it should be exploited and distributed. Although the intention of the GLL is to provide access to culture throughout public libraries in Mexico, it should observe and comply with the Mexican Copyright Law and avoid infringement in lieu of licensing.

Case Law

Constitutional Challenges to Copyright Act Reform: Soon after the Copyright Act reform passed, two constitutional challenges were filed seeking to repeal key provisions of the amendments. The first challenge was filed by the National Commission of Human Rights, seeking to repeal provisions related to notice and stay down and protection for TPMs. The second challenge was filed by a group of around 30 senators from opposition parties in Congress and based on similar grounds as the first challenge. In both cases, AMPROFON, IFPI's national affiliate in Mexico, filed *amicus curiae* defending the amendments. Numerous support letters from industry bodies in many countries were also delivered to the Supreme Court in support of the notice and stay down provisions adopted in 2020.

At the same time, two additional challenges were filed in lower courts, seeking judicial protection for individual plaintiffs. One of these lawsuits was filed by Televisa (the biggest broadcasting conglomerate in the country). A second challenge seeking individual protection from the amendments was filed by the Authors and Composers Society (SACM), arguing that the 2020 copyright amendments equalized the protection of neighboring rights with that of copyright, and that itself constitutes a serious threat to the rights of authors and composers. In both cases, industry bodies in Mexico (AMPROFON and SOMEXFON) filed motions to be recognized as interested parties in the proceedings, so far without success.

Lysa v. Varham Hotels: On November 18, 2019, the Supreme Court ruled in favor of the plaintiff in *Lysa v. Varham Hotels*.⁷ The plaintiff was a private entity operating in Mexico as a representative of MPA members in the licensing of audio-visual works for communication to the public in hotels and transportation companies. The decision has the value of affirming the obligation of hoteliers to pay performance rights for the communication to the public of audiovisual works in hotel rooms in Mexico. The decision is the first constitutional court level decision on the matter and clarifies the scope of the communication to the public right in Mexican copyright law. The issue of performance rights for music and movies played in hotel rooms has been a very contentious one in Mexican courts and in many countries in Latin America for many years.

MARKET ACCESS ISSUES

Two market access issues impact motion picture and television program producers. Pay television is an important outlet for foreign programmers and continues to be subject to more stringent advertising restrictions than free-to-air broadcast television, which is supplied by domestic operators. Pay television programmers have long been allowed to follow the industry practice of inserting up to 12 minutes per hour for advertising without exceeding 144 minutes per day, a practice upheld by Mexico's court in 2015 as consistent with Mexico's statutes. In February 2020, the industry regulator abruptly reversed course, stating that pay-TV channels must adhere to a strict 6-minute per hour advertising limit, including during primetime. This change significantly reduces advertising revenue for foreign (e.g., U.S.) film and television program producers and raises concerns about the non-discriminatory provisions and principles in the USMCA. A second market access concern is the 49% limit placed on foreign ownership of broadcast networks, which is further reduced to the share permitted for Mexican broadcasting investment in the company's

⁷*Lysa v. Varham Hotels* (File: 4040/ 2019 "Amparo Directo en Revisión").

country of origin. However, this reciprocity does not extend to countries with a higher permissible foreign investment share, including the United States, where the Federal Communications Commission permits foreign entities to own 100% of broadcast networks (subject to case-by-case reviews), creating another instance of discriminatory treatment.

A February 2021 bill aimed to repeal the Federal Cinematographic Law and create the Federal Cinematographic and Audiovisual Law. This bill would have imposed a local content quota on streaming/OTT services and installed a range of theatrical restrictions intended to limit U.S. film exports and grant market-distorting preferences to local films. Such policies, if implemented, would unfairly restrict U.S. exports that support hundreds of thousands of U.S. jobs, in violation of Mexico's USMCA commitments. While this particular bill has lost viability, there remains significant local pressure to install protectionist policies in the audiovisual sector. Instead, Mexican policymakers should encourage open markets, investments, and collaborations that would result in job creation, knowledge transfer, and the internationalization of the local industry for the benefit of both the U.S. and Mexican industries.

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2022.¹

Executive Summary: The nature and scope of piracy in Russia has not changed in 2021, because of a lack of significant changes in legislation to deter infringement and a lack of enforcement by Russian authorities. However, in 2021, after several extensions of the anti-piracy Memorandum of Understanding (MOU) between key Russian Internet companies and rights holders, the regulatory bodies finalized the draft law that would work to convert this voluntary procedure into law. It is expected that the State Duma will adopt the bill in the spring session (January 2022 – July 2022). The draft has a high probability of adoption and will improve the legal framework to protect copyright online.

The bill provides for the obligation of search engines to remove links to pirated content at the request of copyright holders. Copyright holders will create special databases containing links to pirated content, which search engines must access to exclude links to pirated content from search results. Content owners will need to choose a model for the implementation of the law after its adoption.

In addition, at a meeting in Roskomnadzor² held on December 7, 2021, with the participation of parties to the MOU, an agreement was reached to sign a new version of the MOU—the MOU 2.0. The new version, which is subject to the adoption of the bill, provides for a number of new measures to stop search engines from providing easy access to infringing services. New measures in the updated version include removal of repeat offender sites from search results, removal of sites displaying over one hundred links to infringing content from search results, and measures to defeat “domain gluing.”³ The deadlines for the removal of pirated links from search results by search engine operators will also be reduced.

This reform follows a recent trend in Russia to address online piracy with civil, not criminal, enforcement measures and streamlined processes to require websites, and now apps, with infringing content to comply with rights holders’ takedown notices. The reforms allow Russian courts (in particular, the Moscow City Court), to preclude access to infringing material, including clone, proxy, and mirror websites containing infringing content. The current laws and procedures also require online search services to exclude infringing websites identified in the court orders from search results.

Overall, the earlier civil and procedural reforms have precluded or slowed access to some major infringing sites and services. Unfortunately, American rights holders continue to report that these procedures are being directed predominantly against infringing activities of users in Russia and are not used against Russian sites and services catering to users outside the country and undermining foreign markets. The result is a substantial and persistent online piracy problem with no borders, as users in major markets outside of Russia access infringing content from Russian sites and services. Even the most effective takedown procedures and processes to disable access to infringing content on these websites can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at operators and owners of sites engaging in infringing content. One recommended legal reform is for Russia to clarify its Civil Code on the legal liability of Internet service providers (ISPs), including that any safe harbors apply to only passive and neutral intermediaries that do not contribute to infringing activities.

¹For more details on Russia’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Russia’s Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²The Federal Service for Supervision in the Sphere of Telecom, Information Technologies (IT) and Mass Communications.

³“Domain gluing” is process used by operators of infringing services allowing them to return to the same search ranking from which they were removed by “gluing” pages together.



Two other industry-specific problems persist in Russia. One is the need to address the long-standing problems with collective management of music rights in Russia that have caused revenues to be a fraction of what they should be for a market the size of Russia. The state accredited Russian collecting societies are not currently operating with transparency or good governance rules consistent with international norms. The other enforcement priority is to address the camcording of motion pictures that results in many American feature films being illegally copied in theaters and migrating online worldwide.

PRIORITY ACTIONS REQUESTED IN 2022

- Increase the number and effectiveness of criminal copyright digital piracy cases, especially deterrent criminal actions directed against organized criminal syndicates. Criminal actions should target those parties involved in piracy retail chains that continue to sell pirated entertainment software, music, and movies.
- Implement regulations on the operation of collective management organizations (CMOs) that confirm that rights holders have the legal and practical ability to determine how to exercise their rights, including whether to choose to entrust licensing to any CMO, and if so, which one, as well as to delineate the rights for such collections.
- Amend the Civil Code, Part IV, to:
 - clarify the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights or that facilitate infringement and do not take reasonable steps to prevent such activities to prevent knowing facilitators from enjoying these safe harbor benefits; and
 - clarify the definition of the activities that qualify intermediaries to benefit from the safe harbors, to include only passive and neutral intermediaries that do not contribute to infringing activities.
- Enact the draft legislation to convert the MOU into law, making it applicable to all copyrighted works and all rights holders, with legally mandated obligations for ISPs and appropriate sanctions for non-compliance.
- Adopt a new text of the MOU that will regulate issues not included in the first memorandum and the bill.
- Amend the Civil Code in Article 1299 to provide civil liability for commercial trafficking in circumvention devices (including circumvention software), as well as for acts of circumvention.
- Amend the Civil Code, the Copyright Law, or other relevant law to address the issue of “domain hopping” that occurs after the Moscow City Court issues an initial content-removal order to expedite applications for additional relief against repeated copyright infringement.
- Amend the Criminal Code to establish criminal liability: (i) for the unauthorized camcording of motion pictures; and (ii) for the importation of and commercial trafficking (by distribution, making available, etc.) in circumvention devices (including circumvention software), as well as for acts of circumvention. Also, amend the Administrative Code to sanction camcording.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offenses), raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals, and increase enforcement under this provision.

THE COPYRIGHT MARKETPLACE IN RUSSIA

Internet Use and Piracy: The overall situation with online piracy remains the same when compared to last year. Russia remains host to several illicit sites that cater to English-speaking audiences, negatively impacting markets worldwide. Many pirate sites have moved to foreign hosting locations after several legal reforms that allow rights holders to seek injunctions through the Moscow City Court. However, the lack of explicit liability provisions for hosting providers creates a supportive environment for infringing services to use the infrastructure in Russia. Infringement on Russian social media and hosting platforms such as *VK*, *OK*, *Telegram*, and *DDoS-Guard* remains a significant concern for rights holders.

Internet access, including mobile phone access, has grown exponentially in Russia in recent years. Despite the civil law reforms intended to mitigate digital piracy, Russia remains home to many of the most popular illegal services in the world. These include commercial-scale infringing websites, such as web-based peer-to-peer (P2P) downloading and streaming sites, stream-ripping sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books, and journal articles. The other problem is significant moving of pirated content to mobile apps, such as

Telegram. Russia remains first globally when it comes to P2P piracy for the video game industry. Many of these sites cater to English-speaking and other non-Russian users, resulting in financial harm to markets outside of Russia. Some BitTorrent and other pirate sites have reportedly moved their sites to foreign hosting locations in response to the new enforcement measures or court-ordered injunctions directed at sites within Russia. The development of technologically advanced pirate cloud systems (e.g., platforms as a service, often consisting of content delivery network based video providers that are accessible to only pirate streaming website operators), which provide Russian streaming websites with pirate video content, continues to grow.

Although the civil law reforms have improved enforcement by the courts, absent these court orders, most ISPs and website operators do not comply with takedown notices, instead merely forwarding notices to users without taking down material. Often, as a delaying tactic, the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. The advertising agencies and payment processors that financially support infringing sites continue to resist cooperation with the copyright industries. The only alternative has been the voluntary MOU between some ISPs and certain local rights holders regarding delisting of infringing sites from search engines, which is why converting the MOU into legislation will help to improve the situation for rights holders, provided it is not limited to certain rights holders. The legislation should provide sanctions for non-compliance with takedown notices and should be applicable to all platforms and search engines and all copyrighted works.

Examples of the types of large-scale online piracy problems that persist are evident in the annual Notorious Markets List, and in the IIPA's past filings with the U.S. government. Many commercial-scale sites in Russia operate without deterrence, including those sites on the Notorious Markets List, offering free films, TV programs, music, books and journal articles, and video games. In January 2021, the U.S. government included six Russian online sites on its Notorious Markets List.⁴ USTR retained *Sci-hub* (and its related sites), *VK.com* (*vkontakte*), and *MP3juices* on its list of Notorious Markets.

The motion picture and television industry is particularly concerned about *VK.com*, which is one of the most popular sites in the world and the most popular social network in Russia, along with *OK*, which is also an infringement hub. On these social media platforms, users illegally distribute thousands of unlicensed motion picture files (even though *VK.com* negotiated licenses a few years ago with some of the music companies for its use of music). *VK.com* limits access to third-party apps, making it more difficult for users to download content directly. It now blocks infringing sites from accessing videos stored on its site, but third-party pirate sites can still stream illegal content from another service operated by the same parent company. This means that *VK.com* is still a major infringement hub for illegal film materials. The publishing industry (particularly trade book publishing) is similarly affected by e-book piracy on the site. Although the site responds to notifications of infringement, piracy remains unabated given the ease with which the site's users can continuously upload and make available pirated e-books and audiobooks. In 2021, *VK.com* is still one of the main platforms for promoting video game pirate sites and marketplaces. Social networks have improved their responsiveness to take-down notices from the video game industry. These sites promptly remove any infringing material, including cheats and other unauthorized digital goods (UDGs).⁵ However, video game piracy remains a significant problem in Russia and fuels piracy in other markets.

The video game industry reported that P2P websites remain the main search request and method of content distribution for video games for PCs and consoles. Mobile games are distributed mainly through forums, cyberlockers, and direct download sites. Since the 2018 anti-piracy MOU does not include the video game industry, links to pages with infringing content are available without the option of delisting, except through direct takedown notices. The video

⁴See

[https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf). The January 2021 report also included three physical markets in Russia, two of which are on the list for the prevalence of counterfeit (but not copyright- pirated) materials.

⁵Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats," or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

game industry reports overall very weak compliance with takedown notices from these sites, and the very quick reposting of materials that are taken down. This industry further reports that in general, BitTorrent sites remain the main sources for downloading illegal copies of video games. However, action by the courts and injunctive relief related to mirror sites has reduced the traffic to these sites by at least 40%. In 2021, direct download sites, cyberlockers, and legitimate cloud storage services (such as *cloud.mail.ru* or *yadi.sk*) continue to be actively used primarily by pirate sites with a narrow audience. For example, pirate server sites use third-party sites for hosting their game and patch files. Wider audiences have direct download sites with mobile games, cheats, and other small gaming files. In 2021, more than 350 pirate video game sites were blocked, which consists of more video game sites blocked since the enactment of the anti-piracy law in 2013. One of the main drivers of piracy in Russia is the continued lack of a culture of legal video game consumption and an awareness regarding the threats of distributing unauthorized content, such as malware and phishing. In 2021, the compliance rate of hosting providers to takedown notices from video game providers is only approximately 41 percent.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a September 2021 industry report, the per capita spending on music in Russia is only US\$4.51 per year, compared with US\$23.91 per capita in the United States.⁶ The most prominent forms of music piracy in Russia are the use of BitTorrent sites and stream ripping. The most popular BitTorrent site in Russia is *rutracker.org* (having received over 44 million visits from Russia in the three months between June and August 2021). Visits to the site remain high as Russian users are circumventing the permanent block imposed on the site to access the large amounts of both English and Russian content available on it. The continued popularity of the site is demonstrated in its position as the 123rd most visited site of any kind in Russia. The most popular stream-ripping sites in Russia are *savefrom.net* and *Y2Mate.com* (with the sites having received over 27.3 million and 6.9 million visits from Russia respectively during in the three months to August 2021, according to SimilarWeb.com). Russia remains home to many services supporting large-scale infringing websites, including web-based and P2P downloading and streaming sites, linking sites, stream-ripping sites, BitTorrent sites, and cyberlockers that operate globally. For example, *Newalbumreleases.net* is a popular linking site that has a large library of newly released popular music available, and *Music.Bazaar.com* and *mp3va.com* are sites that have the look and feel of legal music sites like Amazon or iTunes but sell downloads at a considerable discount. These sites undermine the sale of licensed music on legitimate platforms and remain targets for action.

Book and journal publishers report low compliance rates in response to rights holder notifications for links to infringing content, with many sites ignoring notices altogether. Most concerning to publishers is the prevalence of online book and journal piracy in Russia, particularly on hosted-content websites that are operated by Russian residents. The most egregious actor is the search engine/locker site *Sci-Hub.io* (formerly *Sci-Hub.org*), which appears to collaborate with a group of sites known as the “Library Genesis Project” (now *Libgen.is*). As of November 2021, *Sci-Hub* claimed its servers hold nearly 88 million copyright-protected journal articles, as well as millions of books found on *Libgen* and its mirror sites.⁷ To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases typically through compromised user credentials likely obtained through phishing schemes and uses the compromised credentials to illegally obtain copies of copyrighted journal articles, which it hosts on its own server network and cross-posts to *Libgen.io*.⁸ Notwithstanding two injunctions against the site, *Sci-Hub* unfortunately remains accessible in the United States. The *Libgen* site encourages the creation of mirror sites of its content, and multiples of these mirror sites remain active.⁹ In October 2018, publishers successfully sought an injunction to block the sites’ primary domain in Russia. In 2019, a permanent block issued against *Libgen.org*, while a permanent injunction against

⁶International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 101, 158.

⁷*Sci-Hub* provides access to nearly all scholarly literature. See <https://www.insidehighered.com/news/2020/01/17/universities-ignore-growing-concern-over-sci-hub-cyber-risk>.

⁸*Id.*

⁹As of September 2021, there appear to be some 108 mirror sites associated with the Library Genesis Project. Of the active 108 mirror sites, the sites with the highest numbers in terms of global site traffic are: *book4you.org*; *1lib.us*; *1lib.domains*; *b-ok.cc*; *b-ok.africa*; *1lib.in*; *booksc.org*; *3lib.net*; *b-ok.asia*; and *b-ok.lat*. In a 2015 case brought by an AAP member company, *Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operators were found to have engaged in infringing activity by a court of the Southern District of New York, for the unauthorized reproduction and distribution of journal articles and to have violated the Computer Fraud and Abuse Act for *Sci-Hub*'s intrusions into publisher databases. Damages in the amount of \$15 million were awarded, and a permanent injunction issued. In November 2017, following another case brought by another AAP member company, a district court in Virginia issued a second default judgment against *Sci-Hub* (then at *Sci-Hub.io*) of \$4.8 million, enjoining *Sci-Hub* and “those in active concert or participation with them” from infringing the publisher’s copyright, and also ordered “any person or entity in privity with *Sci-Hub* and with notice of the injunction, including Internet search engines, web hosting and Internet service providers (ISPs), domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which *Sci-Hub* engages in unlawful access to, use, reproduction, and distribution” of the publisher’s trademarks or copyrighted works.

several Sci-Hub mirrors in Russia took effect in 2020.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for small- to medium-sized businesses that cannot engage in lengthy and expensive civil enforcement. Independent producers partner exclusively with authorized local distributors to finance and distribute films and television programming. As a result of the piracy, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees that are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide. Because Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

The motion picture, music, video game, and book and journal publishing industries want Russia to take steps to keep infringing content on sites permanently down. Effective enforcement means focusing criminal enforcement actions against the owners and operators of sites engaged in large-scale infringing content, which is causing significant economic harm to all rights holders. The Government of Russia has outstanding commitments to take such action against digital piracy. In the 2006 U.S.-Russia Bilateral WTO Market Access Agreement Side Letter on Intellectual Property Rights (IPR) (2006 IPR Side Letter), Russia agreed to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites registered in Russia’s .ru domain name, or whose servers are situated in Russia), and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” When Russia joined the WTO in 2012, as part of its WTO accession, Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings), and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”¹⁰ Also in 2012, Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*:

Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content Take actions against the creators and administrators of websites through which intellectual property crimes are committed.....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.¹¹

The Government of Russia should fully and properly implement these obligations.

Civil Enforcement Against Online Piracy: As noted, civil judicial remedies have improved in recent years (with legal reforms in 2013, 2014, 2017, and 2020), along with administrative remedies. Although the civil injunctive relief mechanism continues to allow rights holders to enjoin notoriously infringing sites, enforcement issues still exist in Russia. The critical gap is the lack of relevant laws targeted at online piracy, “domain hopping” of pirate sites that occurs after the Moscow City Court issues an initial content-removal order, as well as the liability of hosting providers. Current regulations were designed in the offline environment, and some provisions are difficult to apply to diversified online piracy, specifically in terms of timelines, evidence fixation, and damages calculation.

The 2013 legal reforms included two key civil law changes and procedures directed at online piracy. The first change amended the Civil Code, Part IV—in theory, to provide for third-party liability, as well as safe harbors from such liability for “information brokers” (i.e. ISPs) that comply with all the requirements for those safe harbors. The changes did not provide clarity regarding the liability of online infringing websites and services, including that those safe harbors should apply to only passive and neutral intermediaries that do not contribute to infringing activities. Reforms in 2013 and 2014 included a set of amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration

¹⁰WTO Working Party Report (paragraph 1339).

¹¹U.S.-Russia IPR Action Plan (2012).

Procedure Code and the Federal Law on Information and Information Technologies (2006)) authorizing judicial injunctions after notice and takedown to enjoin access to infringing materials or websites.

The 2017 reform (Federal Law No. 157, in force October 1, 2017) addressed the problems of clone, proxy, and mirror sites by broadening the scope of court-ordered, civil injunctions to cover these sites, as well as the infringing site subject to the original order. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to the Ministry of Digital Development, Communications and Mass Media (Ministry of DDCMM) identifying a mirror (or clone or proxy) site, and, after review by the Ministry, the administrative body sends notice to the hosting provider that it has enjoined the mirror site. The Ministry of DDCMM's decisions, which must be made within 24 hours of receipt of a rights holder's request, can be appealed to the courts. The 2017 legislation also required that search engines remove links to infringing content on sites that have been the subject of an order from the courts or the Ministry of DDCMM. An additional change was adopted in April 2019 in a Resolution of the Plenum of the Supreme Court (revising Chapter IV of the Civil Code), which amended existing practices to permit the use of screenshots of websites with unauthorized material on them to be treated as sufficient evidence to obtain a court order. In 2020, the law was further amended (Federal Law No. 177, in force October 1, 2020) to apply the same civil injunctive relief procedures to mobile apps.

The pirates have found tools to navigate around these content protection tools. Part of the problem lies in how Yandex, the major search engine in Russia, indexes sites. Neither internal Yandex policy nor laws oblige Yandex to improve search and retrieval algorithms to reduce the number of pirate sites and links to infringing content. Yandex algorithms instantly or even automatically include updated mirror sites. Another tactic is to use an empty site with a relevant domain name for search engine results, which redirects to a site with infringing content. Significant changes and improvements in the piracy situation will require adoption of anti-piracy laws and policies that are relevant to the current issues affecting the creative industries.

Moreover, court practice related to title-specific civil injunctions has worsened. The Moscow City Court, under the influence of the first appellate court, changed its approach to decisions in title-specific civil injunction cases. Previously, the court prohibited a site from using the title on the site in general. Now, the court prohibits the use of the title on only the page on which it was captured. Any change of the URL allows the site to avoid enforcement under the court decision.

In June 2021, legislation was proposed in the Duma to convert the MOU with rights holders into legislation. The draft does not limit types of protected content as the MOU does. Therefore, the music and video game industries would receive the same benefits as all other rights holders, which is an improvement to the system. It is expected that the legislation likely will be adopted in 2022.

Overall, the results of the civil laws and procedures have been positive. Some sites have seen dramatic decreases in traffic right after such court orders, and some sites have even moved out of the country. Unfortunately, without the deterrence of criminal prosecutions against the owners and operators of notoriously infringing sites and services, many simply resurface in new guises. As noted, the MOU expires on January 31, 2021, and a legislative substitute is under consideration.

Criminal Enforcement Against Online Piracy: Russia needs to increase its enforcement activity beyond current levels to provide adequate and effective enforcement against IPR violations, including deterrent criminal penalties. A critical element of the 2006 U.S.-Russia IPR Side Letter is Russia's obligation to provide effective enforcement of IPR online. Currently, criminal cases for online piracy do not reach courts due to outdated provisions of the Criminal Code that are hard to enforce for online infringements, specifically, the definition of the "value of the crime" that sets the threshold for liability. The copyright industries continue to report high levels of piracy and declining levels of criminal enforcement, continuing a trend of the past several years. The criminal enforcement the Government of Russia has undertaken still is not focused enough on digital piracy.

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia and have had little deterrent effect. A coordinated

nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial enterprises, improving investigations and digital tracking, as well as strengthening administrative penalties that to date have been largely ineffective. These steps would allow legitimate markets to develop and would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

The agencies that can commence criminal cases—including the Investigative Committee of Russia, the Investigative Department of the Ministry of Internal Affairs (MVD), the Federal Security Service of the Russian Federation (FSB), and Customs—should coordinate their efforts with the police. Because the General Prosecutor's Office has supervisory authority over investigations and prosecutions, it should work with the Investigative Committee of Russia and the Investigative Department of MVD to develop an updated and detailed methodology for investigations of digital copyright infringements. Such coordination would help to increase the quality, effectiveness, and consistency of IPR enforcement activities. Work on a draft methodology was suspended years ago.

IIPA continues to recommend that the Government of Russia create a dedicated digital IPR enforcement unit to focus on online piracy. For example, combatting copyright violations on the Internet, such as the dissemination of music through illegal pay-per-download sites and illegal P2P or streaming services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally acted on such cases in the past. Department K's authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be adequately staffed, equipped, and resourced, and other such units within the MVD should be formed to deal exclusively with intellectual property(P) Internet cases and to train officers on how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, even where the enterprise does not charge a direct fee.

Changes to criminal procedure that placed copyright infringement cases into the category of serious crimes have enabled Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations, at least in theory. However, deterrent criminal penalties have rarely, if ever, been imposed against operators or owners of commercial Internet operations. In recent years, police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes and especially have had difficulty proving intent or in identifying the individuals responsible for criminal activities. As a result, few such cases are ever brought and even fewer are tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. An intensification of criminal investigations and criminal convictions against principals of organized commercial pirate syndicates is sorely needed. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

For the past several years, the quality and quantity of criminal raids and police activity against IP infringers in general has declined, especially against large-scale online infringers. The decline in police activity in general is the lingering result of the major reorganization of the police force in 2011 and the consequent drop in resources, as well as changes in government priorities and an unwillingness to pursue large-scale online infringers. Though rare, Russian courts have imposed some deterrent sentences, including a handful aimed at serious repeat offenders.

The Government of Russia should also examine and redress the lengthy criminal investigative process, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining, and prosecuting IP violations, it should take measures to increase the number of experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of seized products take months. The video game industry continues to report delays in examination reports from government experts, because of a lack of technical expertise. For the video game industry, enforcement efforts are also complicated by other issues, including new legislation, changes in jurisdiction, or new law enforcement personnel. Enforcement is also hampered and trials delayed by the requirement that exemplars be collected only with the participation of state officials and by a statutory reliance on government expert reports. Delays also result from a lack of subject-matter expertise in some

cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The Government of Russia should modernize the rules so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this integration would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. Some courts reportedly will accept private expert testimony, but a uniform rule would be more effective.

Improvements should also be made with respect to court procedure. The criminal procedures generally permit a rights holder to request the destruction of the seized goods or to move for recovery of damages in a separate proceeding before the Arbitration Court (a court of general jurisdiction). However, the criminal courts are reluctant to order these remedies and instead, treat these cases as civil law matters. The copyright industries recommend that the Supreme Court clarify guidelines on the destruction of goods and the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the revised Article 146 of the Criminal Code, which increased such thresholds.

Another recommended measure to increase the efficiency of IP criminal investigations is the appointment of IP special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia continue to work with IIPA members on future training programs and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to aid in bringing more effective criminal investigations and trials leading to a successful conclusion. This cooperation would also help to improve criminal enforcement nationwide, since expertise and enforcement practices vary widely throughout the country, especially with respect to digital piracy. A similar step to improve this problem would be to establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement. In 2013, a specialized IP court in Skolkovo (an innovation center) was launched with 30 trained judges. This development was a positive step in IP enforcement but is limited to patent cases. These courts should be created in other cities and regions across Russia and the jurisdiction broadened to handle copyright, as well as patent cases.

Finally, Russia's Criminal Code should be amended to allow for corporate entities to be held criminally liable for infringement. At present, only a natural person (usually a corporate director) can be found criminally liable and only upon a showing that he or she had a direct intent to commit the infringement. It is extremely difficult to meet this burden of proof, so many cases are suspended without any penalty.

Civil Enforcement in General: While civil measures are not capable of providing the requisite level of deterrence against large-scale digital piracy, they can be a useful tool for some industries or in some instances. For independent creators, however, such as independent film and television producers, civil lawsuits are not viable because they are too time consuming and too costly to pursue. For those creators or producers who are able to pursue civil enforcement, many inadequacies remain. The list includes: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) failure to award preliminary injunctions (although 2013 changes made some improvements) or to freeze assets and evidence; (iii) low damages awards, which, like all awards, are also very difficult to enforce; (iv) burdensome evidentiary requirements, including rights ownership information; (v) the absence of personal liability for the directors of infringing companies or enterprises (the only way to bring proceedings in cases where bogus companies operate); (vi) the absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements; and (vii) the absence of judicial guidelines on civil search practices, including provisional measures consistent with the WTO TRIPS requirements.

There is a troubling, long-pending proposal to lower fines (i.e., statutory damages) from their current levels, below the minimum levels set in the Civil Code (approximately US\$140 per infringement). Awards imposed by the courts are already too low; further lowering the permissible levels would not be a deterrent. This proposal, which had a first reading in the Duma in 2017 and a second reading in 2018, remains under consideration for final passage to amend Article 1252 of the Civil Code. It should not be adopted, and instead, damage awards should be increased.

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines for infringement by natural persons (1,500 to 2000 rubles, US\$20 to US\$27), the owners or managers of legal entities (10,000 to 20,000

rubles, US\$133 to US\$266), and legal entities themselves (30,000 to 40,000 rubles, US\$400 to US\$533) and permits the confiscation and destruction of pirated products. The police or agencies file administrative cases, but the courts of general jurisdiction levy fines for natural persons and juridical entities, and arbitration courts levy fines for legal entities. Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed, as well as the inability to reach commercial enterprises that distribute infringing content. Moreover, it has been an ineffective measure due to the lack of enforcement actions. In 2020, there were 711 cases under this article, in which only 429 cases included fines for a total of 4,520,000 rubles (approx. US\$63,163.95).

Camcord Piracy: A long-standing problem in Russia is the camcording of motion pictures, with many feature films being illegally copied in theaters and migrating online. To correct the camcording problem properly requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement. Russia remains the home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet, as well as sell illegal hard copies.

Russia continues to be a significant source of illicit camcording. The total number of sourced audiovisual camcord copies from Russia decreased very slightly in 2019 to 45 (down from 48 in 2018). Numbers from 2020 are anomalous owing to COVID-19 cinema closures. However, once the theaters started to re-open, camcords started to appear immediately. The illicit camcords that are sourced from Russia are of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear online within a few days of theatrical release, damaging revenues worldwide and across the economic lifecycle of the film. The police are not interested in investigating such incidents because of the complex burden of proof procedure that current laws suggest. Further, enforcement action against unauthorized camcorders is complicated by the law's broad rules on evidence fixation that are impossible to implement. Separate provisions addressing illegal recording in theaters and tailored to that specific form of infringement, could enhance enforcement.

In August 2021, the Government adopted a Decree establishing the rules for film exhibition in theatres that cover the rights and obligations of both exhibitors and viewers. The Decree replaces the older document from 1994 and extends the exhibitors' rights to remove viewers who disregard the exhibition rules from the screening room, including attempting to record the film illicitly. In general, it improves the position of the exhibitors who now have a more explicit framework to interact with the viewers who attempt to record a film in the theater illicitly. However, this Decree does not resolve the issue of lack of liability for camcording. To adequately address the camcord problem, the Government of Russia should amend the Administrative Code to add liability for camcording to the general liability provisions on copyright infringements (Article 7.12) and to provide criminal law penalties as well. In 2020, the Government of Russia prepared changes to a new Administrative Code to address camcording; the Code will reportedly be completely overhauled, but the timing is unclear. The new rules, if adopted, would explicitly prohibit video or audio recordings of films in theaters and would allow theater owners to act to stop any such recordings, including removing the offending party from a theater. The proposed new law would also add administrative sanctions for camcording. While this is a step in the right direction, unfortunately, no proposals exist to amend the Criminal Code or to add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations. In addition to the legal reforms, IIPA recommends that the Government of Russia properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

Collective Management of Rights: The long-standing problems concerning the collective management of music rights in Russia needs to be addressed properly. The ability to exercise one's rights through proper collective management is a WTO TRIPS obligation, and Russia made specific commitments on these issues as part of its accession to the WTO. In the Working Party Report, Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect," to bring the management societies in line with international standards on governance, transparency, and accountability.¹² That commitment had a deadline of 2013. The 2006 IPR Side Letter

¹²WTO Working Party Report (Paragraph 1218).

had similar obligations to correct this problem.

After years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018), that instead of fixing the collective management system in Russia, did not address key relevant issues and created even more problems. The new collective management system denies transparency to rights holders and good governance consistent with international norms, as well as best practices for CMOs as required by Russia's WTO accession obligations. The 2017 law amended the Civil Code and the Administrative Code to revise the make-up and activities of collective rights management organizations (RMOs). One obvious failure of the 2017 law regarding transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members. Moreover, in terms of a lack of good governance, the law does not allow rights holders to control their RMOs.

The so-called "fiscal control improvements" in the new law, including regular audit reports, will not improve accountability, because the audit obligations are for reports only to the government for taxation purposes, not to rights holders. The new law creates "supervisory boards" for each of the various authors' CMOs (the Russian Authors Society, the Russian Union of Right Holders, and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and "user" group representatives. This structure does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO and would include international rights holders with local representatives on the board. Instead, partial control of RMOs by the Government of Russia deprives rights holders of their ability to control the licensing and collection of monies for their works and recordings and is resulting in less, not more, money flowing to authors and producers and certainly less money than should be collected for a market the size of Russia.

To develop properly functioning music broadcasting and public performance payment systems via collective management, the Government of Russia should re-visit the 2017 law to ensure that rights holders are able to control and manage their own RMOs or can effectively opt out of collective management. This change would result in fair representation characterized by direct representation of rights holders on the board in a manner that is proportionate to relevant market share and reflects commercial realities, with no conflicts of interest in the governance structures. Many models for proper governance of RMOs exist, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union (EU) existing practices. Instead, the existing regulations and state accreditations have institutionalized a system that is neither transparent, nor well governed with accountability for authors, record labels, and performers, who have no other option except for the state CMOs.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Russia has made progress on legal reforms, but gaps remain, especially regarding effective Internet enforcement and implementation of the WIPO Internet treaties. IIPA and its members continue to note three major overarching concerns in the Civil Code, as amended: (a) a lack of clarity on numerous provisions, especially on exceptions and limitations; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement, as well as the applicability of safe harbors for such services. Even after the recent amendments, the law does not define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy. Lastly, it does not define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement or that directly infringe. Further, it is critical that Russia amend its regime to allow for civil injunctive relief that is quick and effective and applicable to all works.

Article 1299 of the Civil Code prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). The law should be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices (including software) and services. In addition, commercial trafficking in circumvention devices, including by importation, should be criminalized. IIPA also recommends

improving Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

MARKET ACCESS ISSUES

In addition to the issues noted on copyright law and enforcement, significant market access issues exist in Russia that impact the motion picture and television industries. Russia imposes customs duties on the royalty value of some imported audiovisual materials (which include video games), rather than solely on the value of the physical carrier medium, contrary to standard international practice. Although modern-day digital transmissions mitigate the impact on film and audiovisual content, such assessments are a form of double taxation, because royalties are also subject to withholding, income, value-added, and remittance taxes.

The 1996 Law on State Support of Cinematography provided a VAT exemption for films granted a national film certificate. The government issued national film certificates only to Russian-made films. Therefore, any legal entity distributing a domestic film is exempt from VAT provided that such entity is a cinematography organization. As part of its accession to the WTO, Russia obligated itself to provide national treatment for taxes on similar products. The Government of Russia appears to violate this obligation as it is currently applying a VAT to non-Russian films and not to domestic films. Russia raised its VAT from 18 to 20 percent starting on January 1, 2019.

The Mass Media Law, as amended, prohibits non-Russians (including legal entities with foreign participants) from engaging in certain mass media activities, including broadcasting. The law limits foreign ownership to 20% of the capital of a covered entity, thus denying film producers and distributors access to the Russian market absent a joint venture partner. In 2020, a bill was submitted to the State Duma extending such requirements to online film websites, streaming platforms, and audiovisual services (AVS). The bill is now being discussed between online video services and the government as the bill reduces consumer choice and unreasonably favors domestic investors. In mid-2021, there was a suggestion (not yet formal legislation) to amend the Mass Media Law, replacing the 20% foreign ownership cap with restrictions on “foreign control” over AVS. A key concept is that foreign AVS would be allowed to “exercise ownership of a VOD service in Russia” through the special “international funds” established in “special administrative territories” in Russia. However, after the first draft was published, it received strong pushback from the market and was returned to the sponsors for rework. Further developments are expected on these draft amendments by the end of 2021.

Similar restrictions apply to over-the-top (OTT) services. Under the Law on Information, as amended on May 1, 2017, foreign ownership of audiovisual services shall be limited to 20 percent, provided that the number of Russian subscribers is less than 50 percent of that service’s total audience (i.e., the rule targets services with mostly non-Russian audiences). Foreign participation above the 20-percent threshold is subject to review and approval by the Government Commission on the coordination of ownership, management, or control concerning the audiovisual service owners.

In 2021, the Russian government began actively developing and implementing regulations for video-on-demand (VOD) services, including establishing audience measurement requirements. Although the initial reasoning behind the framework was audience research and creating an equal environment for linear and online distribution channels, the suggested amount of collected data exceeds the stated purposes. Moreover, the envisioned regulation includes a burdensome obligation to transmit said data on a twice-daily basis. In addition, some data items raise questions and concerns regarding data protection and privacy. Domestic VOD companies share these concerns and oppose implementation. Unfortunately, the government has not been responsive to expressed concerns.

In 2015, a law went into force banning advertisements on pay cable and encrypted satellite channels. The law does not affect state-owned television channels, because they do not rely on advertising revenue, and it exempts terrestrial broadcasters who are heavily dependent on ad revenue. As a result, the law significantly impacts the market for cable and on-demand services, including those services operated by foreign companies, and has hindered the growth of the pay-TV industry in Russia.

Finally, market access issues in Russia affect the video game industry. As stated previously, the customs duties on the royalty value of some imported audiovisual materials rather than solely on the value of the physical

carrier medium applies to some video games. Moreover, on June 17, 2021, the State Duma adopted a law mandating foreign Information Technology (IT) companies with a daily audience over 500 thousand users to open a branch, a representative office, or an authorized legal entity in Russia, which could potentially affect the video game industry.

SOUTH AFRICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place South Africa on the Priority Watch List in 2022.¹ IIPA further recommends that through the ongoing Generalized System of Preferences (GSP) review, the U.S. government continue to send a clear message that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) as they currently stand are fatally flawed and work with the South African government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed below and in IIPA's previous submissions. If, at the conclusion of the review, South Africa has not made requisite improvements, the U.S. government should suspend or withdraw GSP benefits to South Africa, in whole or in part.

Executive Summary: South Africa's current copyright protection and enforcement framework fails to meet the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately, South Africa's inadequate response to persistent piracy enabled by these same technologies threatens to impede increased access to creative content. As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. At a time when South Africa's economy must rebound from the economic impacts of the global pandemic, it is more important than ever to maintain and expand proper incentives for investment in the creation of original material—motion pictures, music, video games, books and journals in all formats—by ensuring: (i) that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their content and develop new legitimate services; (ii) that these rights are not subjected to unjustifiable exceptions and limitations; and (iii) that rights holders are able to transfer, license, and otherwise exploit their rights freely and without regulatory interference.

IIPA is encouraged that South Africa's government has stated its commitment to protecting intellectual property (IP) and its desire to bring its laws into compliance with international treaties and commitments. However, IIPA remains seriously concerned about two bills, currently under reconsideration by Parliament. The bills are inconsistent with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and, if enacted, would also violate South Africa's obligations under the TRIPS Agreement, potentially violate South Africa's Constitution, and move South Africa even further away from international norms. In June 2020, South Africa's President referred the CAB and the PPAB back to the National Assembly for reconsideration. These bills raise many concerns, including that they undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on regulatory restraints on the ability of rights holders to freely transfer, license, and otherwise exploit their rights, rather than on laying a foundation for a vibrant free market in creative content. Moreover, the bills' inadequate protections for copyrighted works and sound recordings in the digital environment would render South Africa's law incompatible with the very standards the government has stated an intention to implement.

Considerable work remains to make the bills acceptable and implementable in practice, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act and Performers' Protection Act go beyond those raised in this report. The bills require redrafting, not only to

¹For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. As currently drafted, the bills would put South African creators and artists at a serious disadvantage relative to their counterparts in other countries. Considering the importance of the task of modernizing South Africa's Copyright Act and Performers' Protection Act, and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. government continue to send a clear message that the proposed bills are fundamentally flawed and that the National Assembly should not rush its reconsideration and make only minor revisions; instead, consistent with the President's directives, South Africa's Parliament should redraft the bills to address the concerns expressed by *all* stakeholders and ensure the provisions comply with international agreements and standards. As it stands, the bills fail to meet these standards and threaten the health of the local creative sector. IIPA is hopeful the process of reconsideration by the National Assembly and National Council of Provinces will provide an opportunity to remedy these deficiencies.

PRIORITY ACTIONS REQUESTED IN 2022

- In consultation with stakeholders and independent IP law experts, redraft the CAB and the PPAB to ensure compatibility with international agreements, commitments, and other practices, and avoid undermining the existing commercial practices of the creative industries.
- Engage in effective enforcement against online piracy, including by providing effective mechanisms to address services that infringe domestic and foreign content, such as *Fazaka.com*, appointing cybercrime investigators, and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WIPO Internet Treaties.
- Improve education and increase enforcement commensurate to the increased threat of online piracy.

COPYRIGHT LAW IN SOUTH AFRICA

Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act to bring the country's laws into compliance with international agreements, including the WTO TRIPS Agreement, and the WIPO Internet Treaties.² As previously reported, in late 2018, the South African Parliament adopted the first major revision of the country's copyright and related laws in decades.³ While the intent of South Africa's copyright reform process was to bring the country's laws into compliance with international agreements, the bills that ultimately passed fell far short of international norms for the protection of copyrighted works in the digital era. Moreover, the copyright reform process failed to consider whether the proposed changes would be compliant with South Africa's constitution and international treaty obligations. Further, as part of its required Socio-Economic Impact Assessment System (SEIAS) process, the government did not publish a SEIAS report to adequately measure the economic impact of the bills on South Africa's creative sector.

In June 2020, South Africa's President referred the CAB and the PPAB back to the National Assembly based on "a number of reservations as to the Constitutionality of the Bills." The National Assembly concurred with the President's assessment that the bills were processed incorrectly under the Constitution and recommended that the bills be referred to the Joint Tagging Mechanism Committee to re-tag the bills for processing under the proper constitutional provision (Section 76), which requires the provincial governments to consider the bills as well. The Portfolio Committee on Trade and Industry (Portfolio Committee) held public hearings in August 2021, and in November 2021, it opened a further call for public participation through written submissions to consult with stakeholders and the public on certain provisions that were amended during the initial deliberations of the Portfolio Committee. During the hearings, the South Africa Institute of Intellectual Property Lawyers (SAIPL) observed that the Institute's Copyright Committee identified at least nineteen sets of provisions in the CAB that raised treaty and constitutional compliance concerns. SAIPL and other stakeholders also requested release of the economic impact

²South Africa's Cabinet has approved the country's accession to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the "WIPO Internet Treaties"), and the Beijing Treaty.

³See IIPA's 2020 Special 301 Report on South Africa, <https://www.iipa.org/files/uploads/2020/02/2020SPEC301SOUTHAFRICA.pdf> at 76.

assessment study on the CAB. The Portfolio Committee subsequently resolved to amend the CAB and PPAB. Unfortunately, none of the proposed amendments, open for public comment in December 2021, address the core problems plaguing the bills.

Once the Portfolio Committee completes deliberations on the bills in 2022, the Committee is expected to make further revisions to the text of the bills and return the bills to the National Assembly for re-adoption. The revised or amended bills would then be considered by the National Council of Provinces and the governments of the nine provinces, starting a process by which each province would arrange separate public consultations on the bills in their entirety. The majority of provinces must approve for the bills to advance back to the President for his assent. At that point, the President would have the option to refer the bills to the Constitutional Court to adjudicate any remaining constitutional concerns.

Enactment of the bills in their current form would place South Africa out of compliance with international norms, its obligations under the TRIPS Agreement, as well as the eligibility criteria of both the GSP and the African Growth and Opportunity Act (AGOA) regarding IP.⁴ It is critical that the National Assembly not rush this process and make only cosmetic revisions; instead, consistent with the President's directives, South Africa's Parliament, in full consultation with stakeholders and independent IP law experts, should redraft the bills to address the concerns of *all* stakeholders and ensure the provisions comply with South Africa's constitution and with international agreements.

At a time when South Africa's economy must rebound from the economic impacts of the global pandemic, the stakes are extremely high for the Parliament to redraft these bills to avoid destabilizing the creative industries and to support a thriving copyright sector, which contributes so significantly to economic and job growth in the country, and which has potential for substantial growth under the proper conditions.⁵

The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, and pose significant harm to the creators they purport to protect. Major issues of immediate and primary concern to the copyright industries, which are maintained in the most recently published drafts, despite numerous submissions from local stakeholders, are the following:

- The bills would severely restrict the contractual freedom of authors, performers, and other rights holders, which is a key factor for the healthy growth of the entire creative sector. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability to freely license and otherwise derive value from their copyrighted works, performances, and sound recordings. For example, both the CAB and the PPAB limit certain assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- The bills would create an overbroad amalgamation of copyright exceptions that includes an expansive "fair use" rubric (not in line with the U.S. doctrine) appended to a proliferation of extremely open-ended new exceptions and limitations to copyright protection (on top of "fair dealing" provisions), resulting in an unclear thicket of exceptions and limitations.

⁴See IIPA's comments and post-hearing brief on South Africa's Generalized System of Preferences (GSP) eligibility in the 2019 annual GSP review, available at <http://www.iipa.org/files/uploads/2020/01/2020-01-17-IIPA-South-Africa-GSP-Review-Written-Comments-and-Notice-of-Intent-to-Testify.pdf> and <https://www.iipa.org/files/uploads/2020/03/SOUTH-AFRICA-IIPA-GSP-Post-Hearing-Brief.pdf>, and IIPA's comments on the 2021 African Growth and Opportunity Act (AGOA) Eligibility Review, available at <https://www.iipa.org/files/uploads/2021/09/IIPA-Written-Comments-on-2021-AGOA-Eligibility-Review-1.pdf>.

⁵According to a study conducted by the Department of Trade and Industry (the DTI) and the World Intellectual Property Organization (WIPO) in 2010 using data from 2008, the South African copyright-based industries contributed 4.11% to gross domestic product (GDP) and 4.08% to employment. See WIPO, Economic Contributions of Copyright Based Industries in South Africa, available at https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf.

- The bills would overly regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers (requiring payment of royalties), which is not compatible with existing economics, and would undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings, rather than providing a flexible and robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- The bills would not provide adequate criminal or civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills' provisions on technological protection measures (TPMs) are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the over broad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to further develop. While amendments proposed in 2021 made some improvements, they ultimately failed to address these concerns.

These provisions are inconsistent with South Africa's international obligations, for example, by far exceeding the scope of exceptions and limitations permitted under the TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The provisions are also inconsistent with other established international legal norms and commercial practices, posing a significant risk to investments in South Africa.

2018 COPYRIGHT AMENDMENT BILL (CAB) AND PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes, nor correction through implementing regulations.⁶ Without a fundamental course correction of its copyright reform process, South Africa will be taking a step backward in its effort to strengthen copyright incentives and align its laws with international standards and practices. South Africa would be better served by providing clear and unencumbered rights (subject only to targeted and clearly delineated exceptions and limitations that are justified by a clear evidentiary basis and comply with the three-step test), without unreasonable restrictions on contractual freedoms, to allow the creative communities to increase investment in the South African economy to meet the growing demand for creative works of all kinds, in all formats, at all price points. This is particularly important in light of the President's clear objective to improve levels of domestic and foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa's own artists and creators.

It is important to note that the CAB and PPAB are extremely broad-reaching legislation. IIPA's comments in this filing are not comprehensive, but instead highlight some of the major concerns for the U.S. copyright industries. It should also be noted that the bills, when read together, are incoherent. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which is already enumerated in the Copyright Act, as amended by the CAB. Thus, in addition to the very significant flaws in the bills described below, from a technical perspective, the bills are inadequate and risk introducing widespread uncertainty into South African law.

⁶Regulations cannot cure fundamental problems with the bills because a basic legal principle adhered to in South Africa is that regulations must be confined to the limits of the law itself and cannot fundamentally alter primary legislation. See Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) (holding by the South Africa Constitutional Court that while "detailed provisions" are necessary to implement laws, "[t]here is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . ."). Furthermore, the number of provisions in the bills that require future regulation are very limited, and do not relate to the vast majority of the problematic issues raised by IIPA in this and previous submissions.

1. Severe Intrusions into Contractual Freedom

Several provisions in the CAB and the PPAB constitute severe intrusions into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public's access to copyrighted works, threatening well-established market practices that underpin domestic and foreign investment in artists and creative content, including books, films, sound recordings, musical works, music videos, and video games.

A. Limitation on term of assignments: Sections 22(3) of the CAB and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers' rights in sound recordings, respectively, to a maximum term of 25 years from the date of agreement, and in the case of performers' rights in sound recordings, provide for automatic reversion of rights to the performer after that period. These provisions raise serious concerns by proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, which would detrimentally disrupt the well-established practices of the recording industry in South Africa for the creation and use of sound recordings. These provisions also would risk serious harm to the recording industry, performers, and other creators in South Africa, because a major incentive for investment would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.⁷

In effect, these provisions would make it impossible to clear rights in many works and sound recordings after 25 years, rendering this content unusable, with no one able to receive any revenues from such works and sound recordings. For example, sound recordings typically involve performances from a large number of performers. The copyright owner of a sound recording (i.e., the record company) will often have a long-term relationship with the featured artist but is far less likely to have such a relationship with, for example, a performer who entered into a one-off agreement to provide the backing vocals or other musical performances in the sound recording. Under the PPAB, each such performer would have rights that, according to Section 3A, would be transferred to the copyright owner (the record company in most cases) to enable the copyright owner to license the use of the sound recording by third parties. Yet Section 3A provides that the record company would cease to have those rights after 25 years, meaning that the record company would need to seek out thousands of performers (with whom, in the case of session or "backing" musicians, the company often has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would render the sound recording unusable, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intent of this legislation.

The 25-year limitation is described in the CAB's memorandum of objects as a "right of reversion," but a reversion right is substantially different from a fixed time limit on all assignments of copyright in literary and musical works. Section 22(3) of the CAB is therefore fundamentally flawed. While the Copyright Review Commission in 2011 proposed a right of reversion to be considered in certain special cases in the music industry, highly sophisticated legal mechanisms are required to address bespoke situations where such reversions may be needed to address highly specific market failures. Without any economic impact assessment, legal study, or other assessment of the perceived industry problem that Section 22(3) seeks to address in the first place, the enactment of a general limitation of all assignment terms would certainly result in a series of negative, unintended, and completely avoidable consequences.

⁷While there is a provision in U.S. law on termination of transfers, that provision contains key differences that mitigate these harms. First, the South African provision broadly applies to all literary and musical works and sound recordings and is automatic. Under U.S. law, by contrast, termination rights do not apply to works made for hire; as a result, many works, including most audiovisual works (with potentially dozens or hundreds of contributing "authors"), or similar multiple-contributor works (sound recordings, video games, etc.) cannot be terminated. This gives certainty to the producers of those works of their ability to exploit the works without clearances from the numerous contributors. Second, termination under U.S. law is subject to notice (up to ten years prior to termination) and exceptions, allowing derivative works to continue to be exploited. The South African bill has neither of these provisions. Third, the U.S. termination right applies only where the grant was made by the original author, not by successors or assignees. The South African proposal includes no such limitation; it is broadly applicable to all literary and musical works and sound recordings.

Section 3A would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers require large upfront investment from record companies, with no certainty of when, if ever, the investment will be recouped. Limiting the term of agreements between record companies and artists would increase the economic risk even further and would likely reduce the revenues available to invest in new talent. The provision should be removed to avoid the serious harm that it risks causing to all participants in the South African music industry. While audiovisual works are specifically excluded from the CAB provision limiting assignments to 25 years, they are arguably not excluded from the ambit of Section 3A of the PPAB, which states that any performer whose performance is fixed in a sound recording will benefit from the reversion of performers' rights. Accordingly, performers who "make an audible sound" in an audiovisual work or contribute to a voice-over in an animated work may be able to claim that they should also benefit from the reversion of rights under Section 3A of the PPAB. This provision would increase legal uncertainty and introduce a disincentive to the acquisition of literary and musical properties by film companies for adaptation into film and TV shows. This would ultimately inhibit financing of film projects and would jeopardize film production in South Africa.

B. Sweeping ministerial powers to set contractual terms: Section 39 of the CAB and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe "compulsory and standard contractual terms," including setting royalty rates regarding "uses" of copyrighted works and across any form of agreement covering authors' and performers' rights. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners. These provisions are not only unjustified but are seemingly premised on a lack of understanding of the myriad of contractual relationships that underpin the creation of copyright content, which often comprises many different rights from various parties, and which are licensed for use by third parties in a variety of ways. Empowering ministers to impose contractual terms risks imposing a degree of rigidity into the South African creative economy that will stifle investment and innovation. It would also introduce the unnecessary legal risk of impermissibly delegating executive legislative authority to the Minister by permitting the Minister to unilaterally determine the manner in which trade and investment in South Africa's creative sectors can occur, without the required Parliamentary oversight if future legislative amendments are deemed necessary to address any properly assessed and clearly determined market failure.

For example, these provisions would unfortunately restrict the flexibility in transfer agreements between sound recording performers and producers. That flexibility is needed to address the varying relationships between performers and copyright owners. The relationship and contractual agreement between the featured artist and the copyright owner will differ substantially from that between a performer appearing as a one-off session musician and the copyright owner. Neither performers nor copyright owners would benefit from prescribed contracts, which would inevitably fail to meet the differing needs of performers depending on their respective roles in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations.

C. Mandating the mode of remuneration for audiovisual performers: The CAB includes a proposal (Section 8A) to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Even though it proposes a significant interference into private contractual arrangements, to the particular detriment of certain performers, the substantive provisions of Section 8A were never published for public consultation, rendering it constitutionally flawed.⁸ Only Sections 8A(4) and (5) of the version of the CAB that was current at the end of May 2018 were opened for public consultation. Section 8A(5) has since been found to bring about arbitrary deprivations of property rights and the Portfolio Committee recently resolved to remove it. The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works. While Section 8A may be intended to provide appropriate remuneration to performers, in practice, the proposal would undermine the feasibility of productions and cause substantial harm to performers.

⁸Section 8A was not included in the text of the first draft of the CAB that was the subject of the August 2017 public hearings. Instead, it was written into the text of the bill after the public hearings by the Portfolio Committee under the previous Parliament, without being subjected to an economic impact assessment or full public consultation, which has constitutional implications. This fundamental procedural irregularity was raised by numerous stakeholders during the August 2021 public hearings.

Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead or featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a lump-sum basis. Extra/non-featured performers, in particular, are remunerated by way of lump-sum payments given their minor roles.

Unfortunately, Section 8A, combined with the contract override provision in Section 39B(1) discussed below, prescribes a compulsory statutory royalty remuneration mode that practically removes the possibility of lump-sum payments.⁹ Rather than benefitting performers, this provision would in fact result in many performers, who otherwise would receive remuneration from performing in an audiovisual work, receiving little or nothing from the exploitations of the work. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, performers would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would happen only if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying extra/non-featured performers on a lump sum basis, irrespective of whether the works in which they perform succeed. This provision also risks a direct negative impact on investments in South African productions and a reduction in the number of South African “background” performers engaged to perform in audiovisual works. Furthermore, for certain modes of distribution such as subscription video-on-demand (VOD), where revenue is received in return for access to an entire catalogue of works, it is not possible to allocate specific revenue to specific works. Therefore, the possibility of paying a share of any such revenue to any stakeholders in individual works (performers or otherwise) is not feasible.

The penalty clauses introduced by Sections 8A(7) and 9A(4) of the CAB may also have constitutional implications due to the disproportionate nature of the penalties prescribed for the failure of rights holders and licensed users of audiovisual works and sound recordings to submit timely reports to all performers featured in such works and sound recordings regarding each commercial activity relating to the use of such works. Criminal liability and fines of up to 10% of a company’s annual turn-over are prescribed for a failure to comply with the new reporting obligations. These penalties could discourage investment in new content production projects in South Africa, as it unnecessarily raises the legal risk of doing business in South Africa. The manner of reporting to all performers is not prescribed in the CAB, and no impact assessment was performed to determine whether this proposal would be even practically feasible or capable of being operationalized without undue risk of liability arising for parties who make legitimate and licensed commercial uses of audiovisual works and sound recordings in South Africa.

D. Prohibition on contractual override: The risks posed by the CAB are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill or waive any rights provided by the bill, thereby removing the possibility for parties to determine their own contractual arrangements in a manner that avoids the harm caused by certain provisions of the bill. The provision also presents a significant risk of compelling contractual parties to follow rigid standardized contractual terms, thereby inhibiting a competitive and innovative marketplace, and requiring terms that may be overly onerous and disadvantageous to the contractual parties in light of the specific circumstances.

2. Inadequate Protection of Performers’ Rights

South Africa’s intention to ratify the WIPO Internet Treaties is welcome, and full implementation would represent a significant step towards establishing an appropriate legal framework. Regrettably, several provisions in the bills, including the level of protection afforded to certain performers’ rights, are incompatible with the treaties.

Section 5 of the PPAB sets out the rights granted to performers. In the PPAB, performers’ rights are also

⁹Section 8A, on its face, states that performers have a statutory right to royalties. Combined with the contractual override provision of Section 39B(1), this statutory right to royalties is not waivable, even in instances in which the performers concerned might prefer an alternative remuneration model.

enumerated under Section 3. The amendments to Section 5 are therefore, in part, duplicative of Section 3. More importantly, though, Section 5(1)(b) downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights, a proposal that would be incompatible with WPPT (and the WIPO Beijing Treaty), which do not permit these rights to be diminished to the level of mere remuneration rights. Furthermore, providing mere remuneration rights with respect to distribution and rental, subject to rate setting by the Tribunal (Section 5(3)(b)), would prejudicially devalue these performers' rights. Experience in South Africa, and internationally, shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works, because one set of rights would be subject to private negotiation (the producers' rights), and the performers' rights would ultimately be subject to Tribunal rate setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

3. Fair Use

The CAB drastically expands the exceptions and limitations to copyright protection in South Africa's law. The broad exceptions, which are duplicated in the PPAB, will create a disproportionate imbalance against creators and producers of copyright-protected works and undermine the predictability needed to support a robust marketplace for copyrighted works. Additionally, they appear to far exceed the scope of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO Internet Treaties).

While the proposed "fair use" provision may resemble certain aspects of the fair use statute in U.S. law, it is inaccurate to contend, as some have suggested, that South Africa is proposing to adopt the U.S. fair use doctrine. South Africa's proposed broader fair use provision, along with the other proposed exceptions and limitations to copyright protection, and supported and entrenched further by the contract override provision (Section 39B(1)), are blatantly inconsistent with the three-step test, which is the internationally recognized standard that confines the scope of copyright exceptions and limitations,¹⁰ for the following reasons:

- First, South Africa lacks a deep and rich body of case law that, in the United States, helps to mitigate the inherent uncertainty of the scope or applicability of the fair use exception. Without the foundation of a well-developed body of case law, South Africa's untested, broad fair use provision would result only in uncertainty for both rights holders and users on the parameters of permissible uses (since U.S. fair use is determined on a fact-intensive, case-by-case basis). Compounding this shortcoming is that high legal fees and protracted timeframes for cases in South Africa will deter and undermine efforts by rights holders to access the courts in hopes of more clearly establishing the parameters of this broad exception.¹¹ The International Center for Law & Economics, analyzing whether the United States should require trading partners to adopt U.S.-style fair use, concluded that "the wholesale importation of 'fair use' into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles that exist in the U.S., but rather, something completely different, possibly even a system untethered from economics and established legal precedents."¹²

¹⁰See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

¹¹While some have suggested that South Africa could look to case law in the United States, or elsewhere, South African judges are not bound by the decisions of U.S. courts, and such decisions carry virtually no legal weight in South Africa. It is very unlikely that South African courts would, or even could, wholesale adopt U.S. precedents, especially considering South Africa's very different and unique legal history. In addition, while a handful of countries have recently enacted fair use provisions, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of these countries. South Africa's existing jurisprudence on fair dealing will also not be helpful because the fair use proposal is much broader than the fair dealing provisions in the current law and, therefore, whatever case law exists interpreting the existing, narrower fair dealing provisions would have very little relevance.

¹²See International Center for Law & Economics *Dangerous Exception: The Detrimental Effects of Including 'Fair Use' Copyright Exceptions in Free Trade Agreements*, 15 (2015), http://laweconcenter.org/images/articles/dangerous_exception_final.pdf.

- Second, the South African proposal includes language broader than the U.S. fair use statute, which further heightens the uncertainty discussed above, and the risk that an unacceptably wide range of uses in South Africa will be considered “fair” and non-infringing. For example, the proposal includes several additional access and use purposes that are absent from the U.S. fair use statute. These include: “personal use, including the use of a lawful copy of the work at a different time or with a different device;” “illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;” “preservation of and access to the collections of libraries, archives and museums;” and “ensuring proper performance of public administration.” Extending fair use to such undefined access and use purposes that are not included in the U.S. statute adds to the uncertainty of how South Africa’s judges will apply fair use, and the risk that they will apply the fair use doctrine well beyond the scope of its application in the United States.¹³ In addition, unlike the U.S. fair use statute, the South Africa proposal states that the “the purpose and character of the use” should include consideration of whether “such use serves a purpose different from that of the work affected.”¹⁴ The South Africa proposal also includes an affirmative requirement to consider “all relevant factors” that is not in the U.S. statute. It is unknown how South African judges would interpret these provisions, which heightens the risk that a broader range of uses in South Africa will be considered “fair” than those permitted under U.S. law. Therefore, rather than proposing to adopt a U.S.-style “fair use,” South Africa has proposed a new copyright exception, borrowing certain statutory language from the United States, while adding new and broader language, and without the corpus of U.S. jurisprudence that is integral to defining the scope of U.S. fair use and its interpretation.
- Third, in addition to the new expansive “fair use” exception, the legislation also retains South Africa’s existing “fair dealing” system, while expanding the impact of fair dealing exceptions by effectively removing the limiting standard of “fair practice.” It also introduces several extremely broad, new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, locally distributed works, and online works in general. A 2017 study by PricewaterhouseCoopers looked at the impact of these broad exceptions on the South African publishing industry and predicted “significant negative consequences” would result from the adoption of the proposed fair use provision and the other broad exceptions.¹⁵ Taken alone, the “fair use” and the “fair dealing” aspects of the proposed bill are each too broad. Taken together, the proposed “hybrid” model creates an unprecedented mash-up of exceptions and limitations that will deny copyright owners the exclusive rights and fundamental protections that enable licensing of their copyrighted works and sound recordings, and, because the provision is drafted so unclearly, will also deny users certainty regarding what works and what uses are permissible without a license.

As detailed above, the proposed fair use provision is overly broad (significantly broader than the U.S. fair use doctrine), and its scope and application are uncertain due to the lack of supporting case law, new and broader language, and the “hybrid” combination with the existing fair dealing system. As a result, the proposed provision is not limited to “certain special cases,” and there is a substantial risk that it would be applied in a manner that conflicts

¹³Many of these additional access and use purposes in the South African proposal are in fact broader than exceptions permitted under U.S. law. For example, regarding the “personal use” language, there is no general “personal use” exception in U.S. law and “format shifting” is not always held to be a fair use. In addition, the “preservation of and access to the collections of libraries, archives and museums” is not a fair use in the United States. Rather, Section 108 of the Copyright Act establishes specific instances and limits pursuant to which libraries and archives may make copies of works for preservation purposes. It is unclear what “ensuring proper performance of public administration” encompasses, but nothing in the Copyright Act or U.S. case law establishes such use to be a fair use.

¹⁴Requiring South African judges to consider whether “such use serves a purpose different from that of the work affected” would broaden the U.S. judge-made notion of “transformative use.” The Supreme Court has defined “transformative use” as one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). South Africa’s provision would establish a lower bar for the permissibility of a use than U.S. law because it appears to require that a use merely serve a “different” rather than a “transformative” purpose. See *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (“difference in purpose is not quite the same thing as transformation, and Campbell instructs that transformativeness is the critical inquiry under this factor.”)

¹⁵See *The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, available at <https://publishsa.co.za/pwc-report-the-expected-impact-of-the-fair-use-provisions-and-exceptions-for-education-in-the-copyright-amendment-bill-on-the-south-african-publishing-industry/>. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP and VAT and corporate tax revenue collections. Some 89% of publishers surveyed noted that the CAB, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the right holder. Thus, the provision clearly falls outside the limits of the three-step test. If the proposed legislation is enacted, South Africa's legal framework for exceptions and limitations to copyright protection would clearly violate South Africa's international obligations, would be inconsistent with international treaties it has stated an intent to join, and would further erode the already inadequate level of copyright protection in the country.

In addition, the uncertainty that will be caused by the proposed hybrid model is particularly problematic in South Africa, because its legal system lacks statutory and punitive damages, which rights holders in the United States rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate.¹⁶ In South Africa, civil damages may be claimed for copyright infringement only after a rights holder meets a statutory requirement to first prove that an infringer had "guilty knowledge" of infringement. As a result, in most instances damages would be claimable for infringing acts committed by a defendant only after a court has determined that the defendant cannot rely on the fair use defense. As a result, bad actors in South Africa would be undeterred from taking advantage of the uncertainty created by these exceptions to infringe copyrights. A copyright system that consists of open-ended and unclear exceptions, weak affirmative rights, and non-deterrent enforcement is the archetype for inadequate and ineffective protection of intellectual property rights.

Finally, the risks posed by the fair-use provision, and the other unclear and very broad exceptions discussed below, are further compounded by the prohibition on contractual override in Section 39B(1) (discussed above), which renders unenforceable any contractual term that prevents or restricts a use of a work or sound recording that would not infringe copyright under the Copyright Act (as amended by the CAB).

4. Exceptions and Limitations

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the CAB are likewise of concern, and many clearly exceed the bounds of the longstanding international standard confining exceptions and limitations to copyright, the three-step test:

A. Sections 12B(1)(i) and 12B(2) allow individuals to make copies for "personal uses." These broad exceptions in effect allow for private copying without any remuneration for rights holders, which is out of step with international norms (a similar proposal was challenged successfully in the UK where the High Court quashed a private copying exception that did not compensate rights holders for the harm the exception would cause). Such private copying exceptions are typically accompanied by a remuneration (or "levy") system by which rights holders are compensated for the private copying of their works. The proposed exception also permits copying in an "electronic storage medium," which is highly unusual and risks undermining existing licensing practices for digital content services. This exception violates the three-step test, because it is not limited to "certain special cases" and does not include any requirement to consider whether such copying would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder.

B. Section 12B(1)(f) grants an exception for making translations for the purpose of "giving or receiving instruction." The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the bill attempts to limit the scope by

¹⁶Section 24(3) of South Africa's Copyright Law, which states that courts may "award such additional damages as the court may deem fit," does not provide for statutory or punitive damages. Statutory damages allow plaintiffs to recover damages without showing proof of harm to the rights holder or gain to the infringer. In contrast, the "additional damages" provision of 24(3) permits a judge to take into account the flagrancy of the infringement and the benefit to the infringer, but rights holders must still prove the harm and the gain to the infringer. Regarding punitive damages, IIPA is not aware of a case in which these "additional damages" have been actually quantified and awarded, and there is nothing in South Africa's law or practice to suggest that the purpose of the "additional damages" provision is to punish or deter infringement. In addition, criminal damages in South Africa are ineffective for deterring infringement due to limited criminal prosecutions, the high burden of proving and collecting damages, and the higher burden of proof in criminal cases (which would be exacerbated by the new vague and open-ended exceptions in the copyright reform proposal).

defining its purpose, it would undermine the author's translation rights, which warrant just compensation and which South Africa is required to protect under the Berne Convention and the TRIPS Agreement.¹⁷ Enactment of this exception would therefore disrupt the significant market for authors' and publishers' translation rights. As a result, this exception falls outside the bounds of the three-step test, because it fails to account for the need to avoid conflict with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rights holder.

C. Section 12C provides an exception for temporary reproduction of a work "to enable a transmission of a work in a network between third parties by an intermediary or any other lawful use of work; or . . . to adapt the work to allow use on different technological devices . . . as long as there is no independent, economic significance." This provision also allows copying for *reformatting*, where such copies are an integral and essential part of a technical process if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to stop piracy. If any such exception is to be included, IIPA recommends that the word "lawful" be replaced by "authorized," so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the "incidental" reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

D. Section 12B(1)(a) provides a broad and circular exception for quotation, permitting use of any quotation provided that "the extent thereof shall not exceed the extent reasonably justified by the purpose," but without enumerating the permitted purposes such as, for example, criticism and review. The result is an exception that appears to permit quotations for any purpose whatsoever, which risks causing substantial harm to rights holders and renders the proposed exception incompatible with the internationally recognized three-step test for copyright exceptions and limitations. The exception allows quotation in all instances, which fails to meet the three-step test limitation of "certain special cases." The exception also violates the three-step test because the absence of clear limits to the extent and purpose of a quotation would also potentially lead to a conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interest of the rights holder.

E. Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D(7)(a) on open access for "scientific or other contributions" is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Subsection 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even textbooks that are available for authorized purchase or licensing, if the price is deemed not to be "reasonably related to that normally charged in the Republic for comparable works." The likely impact of these provisions on normal exploitation of works for educational markets would far exceed what is permitted under international standards. Permitting copying of entire textbooks that are available for authorized purchase or licensing clearly is not confined to certain special cases. Such unauthorized uses would also clearly conflict with publishers' normal exploitation of the work and unreasonably prejudice their legitimate interest.

F. Section 19D provides an exception for persons with disabilities, which is defined as, essentially, disabilities that relate to the ability to read books. This provision would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring provisions designed to facilitate access for visually impaired persons in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

G. Section 12B(1)(c) introduces an unreasonably broad so-called "ephemeral exception" for the reproduction of sound recordings by a broadcaster. To ensure that this exception is properly confined by the three-step test, reasonable limits should be introduced including: (i) the time limit must be such that it limits the copies made to truly "ephemeral" copies (e.g., copies may not be kept for longer than thirty (30) days); (ii) copies must not be used

¹⁷See Berne Convention Article 8, and TRIPS Article 9, incorporating the Berne Convention, Article 8.

for transmission more than three (3) times; and (iii) the exception should not allow broadcasters to use it to create permanent databases of copyright works for use in their broadcast activities.

5. Exclusive Rights of “Communication to the Public” and “Making Available”

The CAB would add Section 9(f) to the Copyright Act, confirming that sound recording producers have the exclusive making available right set out in WPPT, Article 14. This provision is a positive clarification, as this right underpins the digital music industry. However, the wording of proposed Section 9(e) regarding sound recording producers’ exclusive right of communication to the public omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,” which explicitly “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid ambiguity in the legal framework, IIPA submits that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public.)

Furthermore, the meaning of proposed Section 9A(aA) (and equivalent provisions in relation to exploitation of other categories of works, and in the PPAB with respect to performers’ rights) is not clear. While it is understood that these provisions are intended to ensure accurate reporting of authorized uses of works, to the extent they could be interpreted as providing a legal license for such uses, they would be wholly incompatible with the WIPO Internet Treaties, while undermining the economic feasibility of South African creative industries. These provisions should therefore be clarified to avoid any such confusion.

6. Technological Protection Measures (TPMs)

TPMs are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new sectors opened up by current and emerging technologies. It is welcome that the CAB introduces provisions (and the PPAB incorporates them by reference) on TPMs. Unfortunately, these provisions are completely inadequate, and therefore fall short of the requirement of Article 18 of WPPT and Article 11 of the WCT that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on TPMs is therefore essential to protect against piracy and enable the development of new business models. Moreover, many film and television producers are seeking to respond to consumer demand by establishing online platforms to provide content to consumers or licensing film and television programming to online services. TPMs are essential to the functionality of these platforms and to the licensing of this high-value content.

First, the definition of “technological protection measure” in Section 1(i) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. The provision should be clarified to ensure that a protected TPM is one that effectively protects a right of a copyright owner in a work, or effectively controls access to a work. Furthermore, paragraph (b) of the definition should be removed; that a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. This provision is furthermore inconsistent with the proposed exception of Section 28P(2)(a), which is intended to enable the user to seek assistance from the rights holder in gaining access to the work for a permitted use. As it stands, paragraph (b) of the definition would be open to abuse and would provide a charter for hacking TPMs. In this respect, see also IIPA’s comments below with respect to Section 28P(1)(a).

Second, we also recommend that the definition of “technological protection measure circumvention device” be amended to include devices that (a) are manufactured, promoted, advertised, marketed, or sold for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition encompasses a broader range of harmful TPM circumvention devices, consistent with best international practices. While amendments proposed in 2021 included some improvements to the definitions of “technological protection measure” and “technological protection measure circumvention device,” additional improvements are necessary to ensure the definitions meet the standards of the WIPO Internet Treaties.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with international norms and substantially reducing the effectiveness of the protections afforded by Section 28O. Under Section 28P(1)(a), it would be extremely burdensome, if not impossible, for rights holders to establish that the use of a TPM circumvention device by a user was not to perform an act permitted by an exception.¹⁸ Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim it is acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of Section 28P(2)(b), which permits assisting a user to circumvent TPMs after a “reasonable time.”

7. Penalties for Infringement

The CAB lacks appropriate remedies for infringement. The criminal fines provided will not assist copyright owners in recovering their losses from infringement, as the money does not go to them. Additionally, the bill does not provide copyright owners any additional civil remedies in cases of online infringement. Online piracy remains a persistent and growing threat to the creative industries. Given the scope and scale of the problem, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the digital age and protect the online marketplace, such as: (1) ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms; (2) preventing the unauthorized distribution of electronic formats of copyrighted works; (3) alleviating the burden of proof on claimants with respect to technical allegations in claims that are not in dispute; and (4) providing for appropriate and adequate damages for online infringement.

8. Intellectual Property Tribunal

Proposed amended Sections 29 through 29H would establish an Intellectual Property Tribunal to replace the existing Copyright Tribunal. The Tribunal’s purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed “fair use” and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things is required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal’s scope. Indeed, the CAB adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including a broadcast, or to reproduce and publish out of print editions for “instructional activities,” with few limitations. To the extent that a revitalized Tribunal is to be considered, it would best serve the South African market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is

¹⁸In this regard, see the discussion above regarding the proposed “fair use” and other unclear and overly broad exceptions proposed in the bills, which would compound this problem.

imperative that the legislation set out that rates should be determined with reference to the economic value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect the price that would be agreed in a free-market transaction based on a willing buyer and a willing seller standard. If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

9. *Collective Management of Rights*

IIPA is concerned by proposed Section 22B, which may be understood to preclude a Collective Management Organization (CMO) representing, for example, both copyright owners and performers. Such an interpretation could prohibit the existing collaboration between performers and producers in the SAMPRA CMO, which administers “needletime” rights on behalf of both recording artists and record labels. This interpretation would be inconsistent with industry standards and contrary to the interests of those rights holders, the users (licensees), and the public at large. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers’ and producers’ rights. The provision should be clarified.

As a general point, and as referred to in section 8 above, it is also vital that any rates set by the Tribunal for performance rights (including needletime) reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice (i.e., the “willing buyer willing seller” standard applied by the U.S. Copyright Royalty Board), which seeks to ensure that rights holders are remunerated adequately for the high value of recorded music.

10. *State Intervention in Private Investments and the Public Domain*

The CAB contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works “funded by” or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development. Section 5 also empowers the Minister to designate “local organizations” to be vested with all rights of copyright in works made under the direction or control of such organizations. This could result in designated local organizations being vested with full rights of copyright in works of South African authors without agreement between the parties to this effect. This departure of the standard rules of engagement as established for copyright transfers in the Copyright Act may have constitutional implications and result in arbitrary and unjustifiable deprivations of property rights and unwarranted restrictions on the freedom to trade.

11. *Term of Protection*

At present, sound recordings receive a term of protection of only 50 years from the year in which the recording was first published, and for literary, musical, and artistic works, the term of protection is 50 years from the author’s death or 50 years from publication if first published after the author’s death. The CAB should be revised to extend the term of protection for copyrighted works and sound recordings to 70 years. This will provide greater incentives for the production of copyrighted works and sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues, and enabling producers to continue offering works and recordings to local consumers in updated and restored formats as those formats are developed.

12. *Certain Definitions Incompatible with International Treaties*

The definitions of “broadcast,” “producer,” “reproduction,” and “sound recording” in Section 1 of the PPAB

are inconsistent with corresponding definitions in the international treaties including the WPPT.

- The definition of “broadcast” is extended beyond wireless transmissions to include transmissions “by wire,” which is incompatible with the definition of “broadcast” in international treaties including the WPPT (as well as Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations). “Broadcast” is defined in the WPPT as limited to “transmission by wireless means.”
- The definition of “producer” should be clarified to ensure that it covers both natural and legal persons as provided for in Article 2(d) of the WPPT.
- The definition of “reproduction” should be clarified to confirm that it means the copying of the whole or a part of an audiovisual fixation or sound recording, consistent with Article 11 of the WPPT.

MARKET ACCESS ISSUES IN SOUTH AFRICA

Broadcast Quota: In 2014, the Independent Communications Authority of South Africa (ICASA) began the “Review of Regulation on South African Local Content: Television and Radio” and published local program quotas for licensed broadcasters of television content in March 2016. In May 2020, ICASA published a new regulation, fully exempting “television broadcasting service licensees” from compliance with the local television content quotas during the National State of Disaster (NSD) and allowing a three-month grace period from the end of the NSD. Non-domestic media service providers licensing content to local broadcasters are exempt from the program quotas and, in 2018, ICASA clarified that this exemption also applies to non-domestic over-the-top (OTT) services. IIPA recommends that businesses should have the freedom to determine content programming according to their business models and relevant consumer demands.

Online Value-Added Tax: In May 2014, South Africa published regulations relating to registration and payment of value-added tax (VAT) on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, this onerous tax includes online selling of content such as films, TV series, games, and e-books. Furthermore, since April 2019, income on business-to-business services provided by foreign providers to South African businesses is also subject to VAT.

“Must Provide” Requirements: In April 2019, ICASA published its draft findings on the “Inquiry into Subscription Television Broadcasting Services” and proposed a new licensing regime that would severely impact the contractual freedoms of rights holders to license their content in South Africa, thereby undermining their exclusive rights. Unfortunately, the report’s methodology, and therefore its conclusions, are flawed because ICASA failed to consider the impact of OTT media services on the market, nor did it consult with rights holders on who the proposed measures would affect. IIPA encourages the U.S. government to engage with the South African government to ensure that any regulatory interventions into the pay-tv market are informed by international best practices and current market realities and preserve the contractual freedoms of all parties concerned, while developing a legislative and regulatory framework that promotes investment and growth.

Video-on-Demand (VOD) Quotas: In October 2020, The Department of Communications and Digital Technologies (DCDT) published a Draft White Paper, “Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020,” which seeks to adapt South Africa’s content regulatory framework to the online marketplace and unfortunately recommends the imposition of a 30 percent local content quota. IIPA understands that the DCDT will publish a Second Draft White Paper after its deliberations conclude.

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA

Creative sectors in South Africa are growing but face the challenge of illegal services competition. Improved infrastructure and accessibility to broadband Internet has changed the landscape of copyright piracy in South Africa over the last decade. Physical piracy (e.g., sale of pirated CDs and DVDs) is not as prevalent as it used to be. The dominant concern in South Africa is increasing piracy in the digital environment.

Internet Piracy: Although South African consumers have increasing options available to stream legitimate creative content, online piracy continues to grow in South Africa and has worsened since the outbreak of the COVID-19 pandemic. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. South Africa has one of the highest rates of music piracy worldwide. According to a 2021 music consumer study, more than half of all Internet users admitted downloading pirated music, a piracy rate below only India and China.¹⁹ Stream-ripping is the major music piracy issue in the country, with 54% of all users and 66% of 25-34 year-olds saying they had downloaded illegally via stream-ripping.²⁰ Fifteen percent of users stated they had downloaded pirated music from BitTorrent in the prior month from sites such as *ThePirateBay* and *1337x*, and 14% had downloaded from cyberlockers using sites such as *Mega* and *Zippyshare*.²¹ Local piracy sites are also popular. MP3 download sites such as *Fakaza.com* (used by 22.2% of all Internet users) and *Zamusic* (used by 8.6% of users) deliver pirated copies of South African and wider African music to many visitors from South Africa.

Easy access to pre-released film and television content through international torrent, linking, and cyberlocker sites also fuels online piracy in the country. As South Africa lacks effective injunctive relief for rights holders, especially against foreign defendants who do not own assets in South Africa against which judgements can be executed and South African courts' jurisdiction can be confirmed to hear infringement matters, consumer access to these infringing sites continues unabated.²² To combat online piracy, South Africa needs a legal framework that enables rights holders to address unauthorized use in all ways, and, as discussed below, the Government of South Africa should increase consumer education and awareness programs and improve enforcement.

Piracy Devices (PDs) and Apps: Set-top boxes and memory sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series, or sporting events. These devices are most commonly sold to South African consumers online. Some companies develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns. In January 2018, the Durban Commercial Crime Unit executed a search and seizure warrant for Internet Protocol television (IPTV) boxes and PlayStation® peripherals after it received a filed complaint. Actions like this are helpful, but much more is needed to effectively combat the growing problem. Many examples of enforcement and consumer education programs that are effective in other markets could be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with experts from the applicable creative industry sectors to localize and implement similar programs.

¹⁹See IFPI, "Engaging with Music 2021," available at <https://www.ifpi.org/wp-content/uploads/2021/10/IFPI-Engaging-with-Music-report.pdf>.

²⁰Major stream-ripping sites include *MP3juices.cc* (visited by 29.3% of all Internet users in South Africa), *Tubidy.mobi* (visited by 18% of users), and *Y2Mate* (visited by 10.5% of users).

²¹Dominant BitTorrent sites according to the number of links detected per week and specific to South Africa's Top 40 streaming titles are *torrentgalaxy.to*, *katcr.to*, *1337x.to*, *torlock.com*, *torrentdownloads.me*, *torrentfunk.com*, *magnetdl.com*, and *cickasstorrents.to*.

²²While South Africa's current law allows for an "interdict" (or injunction) under certain circumstances, in practice, this remedy is limited and extremely difficult to obtain. Lower courts have jurisdiction to grant an interdict, but only if the "value of the relief sought in the matter" does not exceed a limit of ZAR400,000 (~US\$30,000) or if the actual economic harm that the injunction is sought to prevent or restrain can be projected under that limit. It is also often difficult in IP cases to establish the required showings of "urgency" and "irreparable harm resulting if the order is not granted." Compounding this problem, judges in South Africa have little to no experience in IP infringement cases, further diminishing the utility of this remedy. As a result, in practice, the interdict remedy is not effective for rights holders in South Africa. Moreover, the proposed copyright reform legislation will further diminish the utility of this remedy because the ambiguous and overbroad exceptions could make it more difficult to establish a *prima facie* case of infringement on which to base an interdict order.

Parallel Imports: The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. The lack of protection against parallel imports raises concerns and interferes with rights holders' ability to license and protect their IP rights.

Enforcement: South Africa's enforcement framework is not up to the challenge of its counterfeiting and piracy problems. Border enforcement is inadequate because of a lack of manpower and lack of *ex officio* authority, which places a burden on the rights holder to file a complaint and institute costly proceedings to ensure that goods are seized and ultimately destroyed. Civil enforcement is not a practical option, because a High Court application or action currently takes two to three years to be heard, costs are high, and damages are low because, as noted above, South Africa lacks statutory damages or punitive damages and proving actual damages and the amount of economic harm is notoriously difficult in copyright cases. In addition, criminal enforcement suffers from a lack of specialized prosecutors and judges equipped to handle IP cases. A particular problem for South Africa is infringing services that are impossible to locate or are hosted outside of the country, which undermine the legitimate online marketplace. South Africa needs a mechanism for no-fault injunctions that is narrowly tailored with appropriate processes to halt services that are built on, facilitate, and/or encourage infringement. Around 45 jurisdictions around the world have developed approaches to halt illegal services from being accessed from across their borders. For example, the European Union (EU) has addressed this problem through Article 8.3 of the EU Copyright Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content. There are also numerous examples in Asia and Latin America that could be a reference point for South Africa.

South Africa recently set up a specialized unit tasked with financial crimes and counterfeiting (known as the "HAWKS" unit), but it does not appear to be adequately resourced or have a suitable remit to take effective action against digital piracy. There is also a need for ongoing training and education for South Africa's police and customs officials to improve the process for detention and seizure of counterfeit and pirated goods. In particular, law enforcement officials should better understand the arduous procedures and timelines in the Counterfeit Goods Act (which prohibits rights holders from getting involved in many of the required actions), including that non-compliance will result in the release of counterfeit and pirated goods back to the suspected infringer. The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the law that rights holders rely upon for title, site, and link takedowns. The lack of cybercrime inspectors continues to limit the full potential of this law. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

The enactment of the Films and Publications Amendment Act, No. 11 of 2019, which extends application of the Films and Publications Act to online distributors of publications, films, and video games, could be a positive step for enforcement, because it establishes an Enforcement Committee for investigating and adjudicating cases of non-compliance with any provision of the Act. South Africa's government should implement the Act to improve enforcement against online piracy.

IIPA is hopeful that the implementation of the Cybercrimes Act (CBA) No. 19 of 2020 will increase awareness and stricter enforcement of piracy issues. The CBA focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks.

The Interpol Intellectual Property Crime Conference held in 2019 in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In November 2019, USTR opened an investigation, including holding a public hearing in January 2020, to review country practices in South Africa regarding IP rights and market access issues, and to determine whether South Africa still qualifies for beneficiary status under the GSP. Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets . . . of such country.” IIPA requests that through the ongoing GSP review, the U.S. government continue to send a clear message that the proposed CAB and PPAB as they currently stand are fatally flawed, and work with the South African government to remedy the deficiencies in South Africa’s legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed above and in IIPA’s previous submissions. If, at the conclusion of the review, requisite improvements are not made by the Government of South Africa, IIPA requests that the U.S. government suspend or withdraw GSP benefits to South Africa, in whole or in part.

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2022.¹

Executive Summary: Weak criminal, civil, and administrative enforcement remains the most significant obstacle to the growth of the copyright industries in the Ukraine marketplace. The Government of Ukraine, as part of its effort to promote the rule of law, should address its rampant Internet piracy. Both peer-to-peer (P2P) services and illegal streaming sites hosted in Ukraine are still very serious problems. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in enforcement and the law itself.

Enforcement is inadequate in Ukraine because: (i) updates to its antiquated legal regime have not provided the tools necessary to properly address online piracy; (ii) it has a lack of resources; and (iii) it has not engaged in coordinated and effective campaigns against large-scale illegal operations. For the recorded music industry, a separate long-standing problem is the failure to ensure stability of the system for the collective management of music rights. Positive steps were taken in the past with the 2019-2020 accreditations of some music-industry collective management organizations (CMOs). However, problems persist given the low levels of user compliance and continued political attacks on the accreditation system, leading to continued uncertainty. The Government of Ukraine should continue to normalize the CMO landscape, including upholding the accreditations that have occurred since 2019. Instead, one act of parliament has proposed to cancel certain accreditations (for authors/publishers' rights CMOs) and one accreditation (of Ukrainian Music Alliance (UMA), for private copy levies) was cancelled by the courts based on a technicality. In addition, non-accredited CMOs, including UACRR (for musical compositions) have continued to operate during the 2019-2022 period without accreditation, perpetuating the long-standing chaos in the market and problems with the rule of law. Overall, it remains regrettable that administrative accreditation of CMOs, which should serve rights holders, is widely exposed to political risks as opposed to being a strictly non-political issue.

In 2021, a series of criminal cases for piracy, including against websites, applications, Internet service providers (ISPs), and cable TV operators may have captured headlines, but had little effect on the situation with piracy in Ukraine. The Government of Ukraine also has engaged in some positive enforcement actions that included the closure of some large infringing websites and services and led to a few criminal convictions. However, no convictions resulted in deterrent sentencing of those found guilty of intellectual property (IP) crimes. Without deterrent sentencing, rampant piracy in Ukraine is likely to continue unabated.

Separately, 2021 saw continued attempts at a major overhaul of the Copyright Law with five separate bills being filed in Parliament, unfortunately, the majority of them without meaningful input from copyright industry stakeholders. The adoption of certain reforms would greatly improve the regulation, protection, and enforcement of copyrighted content in Ukraine. However, three of the five bills presented (in particular, bills 5552-1, 5552-2, and 5552-3) would roll back recent improvements and would not address remaining issues related to the protection and enforcement of copyright in Ukraine, which is why input from copyright industry stakeholders is so vital. Until relevant legislation is enacted that addresses gaps in the law and stabilizes the system at a high level of protection, the situation with piracy in Ukraine remains at the same level without significant changes.

¹For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2022

Criminal enforcement:

- Focus on criminal enforcement, using the newly adopted and existing laws, for: (i) owners and operators of sites dedicated to pirated music, film, entertainment software, and printed materials; and (ii) the principals and participants of camcording operations.
- Coordinate key agencies, including the National Police and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized Cyber Police Department within the National Police (and a sub-unit dedicated to IP-related crimes); and establish specialized IP prosecutors within the General Prosecutors Office.

Legal reforms:

- Adopt the draft copyright law, especially Bill #5552 or Bill #5552-4 with the changes discussed below and reject competing bills.
- The Criminal Procedure Code should be amended to provide Ukraine's enforcement authorities with *ex officio* authority.
- Amend the Telecommunications Law to provide criminal investigators access to subscriber information in cases of infringement.
- Provide the Ministry of Economy with strong online enforcement authority and resources for more state IP inspectors.
- Amend the Telecommunications Law and E-Commerce Law to reconcile conflicts to provide clear rules of liability for ISPs and other third-party providers of online services that knowingly contribute to infringing activities (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law on Collective Management (CMO Law) to correct 2018 deficiencies (as opposed to worsening the situation as Bill #5572 does), including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations (including the treatment of "expenses"); (ii) adopting rules to identify current and future rates; and (iii) correcting the "cable retransmission" definition, which currently violates international treaty obligations, because it excludes local broadcasts. The 2018 law also repealed an effective enforcement tool that provided pre-established (statutory) damages. The 2018 change should be reversed to allow rights holders to choose between actual or statutory damages.
- Amend the Copyright Law to: (i) fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively the WIPO Internet Treaties), including eliminating the requirement of proof of "intentional" circumvention of technological protection measures (TPMs); (ii) implement no-fault injunctions in Ukrainian law similar to those prescribed under EU law in Article 8(3) of Directive 2001/29/EC; (iii) cover all copyrighted materials under the new notice and takedown procedures; (iv) eliminate the need for attorneys to file such notices (and enforce penalties for non-compliance with such notices); and (v) add clear third-party liability for website owners and ISPs that knowingly contribute to copyright infringing activities.
- Repeal the requirement to manufacture film prints in Ukraine and ensure that amendments to the Media Law are fully consistent with Ukraine's Bilateral Investment Treaty (BIT) obligations.

THE COPYRIGHT MARKETPLACE IN UKRAINE

Despite the flurry of legislative activity with multiple copyright-related bills filed over the recent years, the IP legal regime in Ukraine has lagged far behind the rapid growth of technological advances as access to mobile devices and the demand for online services for copyrighted materials have grown considerably in recent years. Ukraine is

now home to many advanced coders, hackers, and others engaged in highly technical activities that facilitate cybercrimes and non-compliance with copyright is standard (even the State-funded broadcasters operate without all necessary licensing agreements with recorded music rights holders). The failure of Ukraine to pass relevant laws and engage in effective and deterrent enforcement means that legitimate markets cannot develop, and the country remains a major exporter of piracy into both the European Union (EU) and global markets.

Online Piracy: The market for licensed materials in Ukraine is being harmed by stream-ripping and cyberlocker sites, illegal P2P hosting sites, especially BitTorrent sites, as well as by online streaming sites of music and movies. Stream-ripping was also a key music piracy threat: *savefrom.net* was the most visited stream-ripping destination with 7.4 million visits in the third quarter of 2021 according to SimilarWeb. *Y2mate* had 1.9 million visits in the same period. The music industry also reports that Russian BitTorrent trackers were particularly widely used: *rutracker.org* had 12 million visits from Ukraine in the third quarter of 2021 and *rutor.info* reported 9.9 million visits. Ukraine was responsible for the second highest number of visits to both of these sites after Russia. Also, *MP3uk.net*, an MP3 download site, reported 5.1 million visits from Ukraine in the third quarter.

The motion picture and television industry reports that at the end of 2021, at least 20 illegal websites are still hosted in Ukraine, including 10 torrent sites (e.g. *torrents.rus.ua*, *trec.to*, *uraltrec.net*, *pb.wtf*, *piratbit.org*, *rus-media.org*, *rutor.in*, *rutracker.in*, and others). The percentage of sites targeted by the Ukrainian Anti-Piracy Association (UAPA) in the fourth quarter of 2021 is as follows: 89% for streaming sites, 10% for torrent sites, and 1% for linking sites. The low percentage of torrent sites removed is due to the lack of clarity concerning what evidence is needed to ascertain copyright infringement on torrent sites. Consequently, courts and prosecutors often fail to see how torrent sites infringe copyright. The National Intellectual Property Office (NIPO) and the Ministry of Economy should be involved in drafting a methodology that is acceptable for all relevant parties. Online piracy is likewise a problem for the publishing industry.² In December 2021, an AAP member publisher (in collaboration with several authors) secured a default judgment against the ebook pirate site, “Kiss Library,” a site operated by two Ukrainian nationals and whose domains include *kissly.net*, *libly.net*, and *cheap-library.com*.³

Ukraine has several hosting providers, including Virtual Systems LLC and Infium LLC, that are hosting problematic pirate sites. For example, Infium LLC/Infium Ltd (Infium Host) hosts the pirate site *canna.to*, which offers links to unauthorized content, and Virtual Systems LLC was hosting the problematic cyberlocker *dbree.org* for a time. Based on SimilarWeb data, *canna.to* has received over 12.0 million visits globally during the 12 months prior to September 2021.

The video game industry reports that in 2021 (as in 2020 and 2019), Ukraine ranked second in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks. Ukraine is also ranked second in the world for infringement of video games for the PC platform—in both cases behind only Russia. BitTorrent indexing sites, direct download sites, and user-generated content (UGC) sites are the most prevalent in Ukraine (many hosted in Ukraine) with BitTorrent sites (like *monova.org*) being the most popular source of pirated copies of video games in 2021. Direct download sites are the second most popular—from Ukraine or from Russian-based websites, with traffic from Ukraine increasing even as Russian users are blocked from access in Russia. User-generated content sites remain a problem and the notorious *vk.com* remains highly popular in Ukraine.

Online Enforcement: In recent years, the Government of Ukraine has taken some positive steps to improve Internet enforcement. Five years ago, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. The Cyber Police was active in taking down pirate websites in the past but remains underfunded. Most of the Cyber Police activities have been directed at motion picture and music sites. The motion picture industry reported that police actions have resulted in some illegal sites moving out of Ukraine, but that as of

²Physical piracy of literary content continues to be a problem in the Ukraine, with the pirated material entering the market from Russia. See <https://en.interfax.com.ua/news/press-conference/780809.html>.

³See <https://www.authorsguild.org/industry-advocacy/u-s-district-court-grants-win-to-plaintiffs-in-kiss-library-ebook-piracy-suit/>.

early 2021, at least 20 illegal websites were still being hosted from Ukraine. The number of hosted sites in Ukraine has significantly decreased from 355 in 2017 to 20 in 2021.

NIPO was formed in 2019 within the Ministry of Economy (previously the Ministry for Economic Development, Trade, and Agriculture (MEDTA)), but without the proper resources to start operations. In June 2020, Ukraine enacted a new law (Bill No. 2255) to consolidate IP functions, including registrations, within NIPO, but the law did not vest copyright enforcement authority with the agency. The Government of Ukraine needs to provide the Ministry of Economy with strong online enforcement authority. In October 2020, a bill was introduced (Bill No. 4246) to amend the Administrative Offences Code to give clear authority to the Ministry of Economy IP inspectors to issue monetary fines against website owners and ISPs (including for non-compliance with the notice and takedown system per Articles 164-17 and 164-18). The bill was later withdrawn. In 2019, the Ministry of Economy appointed seven officials in the IP Department to serve as IP inspectors, but many more state IP inspectors are needed, along with the statutory enforcement powers, to be effective. The 2017 anti-piracy package also established a High Court on IP Matters for civil cases. It was supposed to start operations in late 2018, but the court is still not in operation. Once operational, it is hoped that the High Court will develop guidelines for judges in other courts to properly handle IP matters and to avoid forum shopping to lenient courts.

In 2010, the Government of Ukraine developed an intellectual property rights (IPR) “Action Plan” in cooperation with the U.S. government to combat and target the digital piracy problem. Over a decade later, key provisions of the 2010 Action Plan still have not been addressed, including: ISP liability and effective administrative remedies. Instead, the 2017 anti-piracy package of laws only partially addressed online piracy by adopting formal notice and takedown provisions; but this alone is not effective enforcement. More recently, in Bill # 5552-4, the government has indicated its intention to align Ukraine’s laws with key aspects of the EU system and adopting these standards would represent a big improvement. Many of the websites offering pirated copyright materials are thriving, in part, because of the support of local ISPs that have no incentive to cooperate with rights holders. The copyright industries report that, without consequences under the law or a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant them total immunity.

Criminal Enforcement: In 2021, as in previous years, enforcement actions in criminal cases mainly targeted administrators of pirate websites and applications. The cases in 2021 are solely related to infringement of audiovisual works, mainly local television channels and their content. The founder and administrator of the site *kinomob.com* was convicted under Article 176, part 3 of the Criminal Code of Ukraine (infringement of copyright and related rights) and was fined in the amount of 34,000 UAH (US\$1,200). The court also convicted a resident who administered an unnamed site of a criminal offense under Part 1, Article 176 of the Criminal Code of Ukraine (infringement of copyright and related rights) and imposed a fine of 8,500 UAH (US\$323). (Article 176 also allows for imprisonment for up to two years in certain cases). In August 2021, Ukrainian cyber police arrested the creator and administrator of a mobile application, *HDVideoBox*, for Android, which provided access to pirated movies. As of October 2021, a pre-trial investigation is ongoing, and no decision has been made. The defendant could be imprisoned for up to six years.

Moreover, in 2021, the Ukrainian courts issued four convictions against pirate site operators, including the operator of the streaming website *kinomob.com*. Two resulted in fines, and another two with a sentence of, respectively, five years in prison and one year probation. In 2021, there also were three convictions for illegal distribution of TV channels. Based on actions against infringing sites hosted in or operated from Ukraine, 62 pirate sites were closed in 2021, 62 in 2020, and 173 in 2019 including *HDVideoBox*, which is an application that illegally streams movies and TV shows. The website of *HDVideoBox* has more than one million users, one of the biggest in Ukraine. The investigation against the operator of *HDVideoBox* is pending.

The Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs (that refuse to

provide information on infringers). Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet criminal investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective criminal enforcement, with existing procedures too complicated to be used effectively. The numbers above demonstrate that more must be done. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

It has been long recommended that the Government of Ukraine create a separate IP unit within the General Prosecutor's Office to focus on criminal prosecutions against online piracy operations and that the unit be properly staffed and trained. Once properly resourced, the sub-unit should be tasked with enforcement actions against owners and operators of infringing websites and services without political interference. Another recommendation is for the Government of Ukraine to form a specialized interagency working group of experts to address IP crimes, with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, the Ministry of Economy representatives, the State Fiscal Service, and other relevant agencies.

The number of actions presented above is only a small percentage of sites and operators engaged in piracy in Ukraine. Even in the cases that resulted in conviction, the sentences are minimal and have no deterrent value or effect. The lack of deterrent sentencing is a lingering problem for both digital and hard copy piracy. The current (January 1, 2022) threshold for criminal prosecution is 24,810 UAH (US\$910) per Article 176 of the Criminal Code. The main concern with the threshold is that it is not accompanied by a unified approach on how to calculate a valuation of seized copyright material, so the threshold acts as a bar to criminal enforcement. This concern is particularly true for online piracy matters (where an official methodology is especially needed). Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material of each rights holder does not exceed the threshold, a criminal case cannot proceed (the losses cannot be combined). The requirement of "material composition of a crime" (causing significant material damage) should be repealed from the Criminal Code (Article 176- 1). Also, the maximum fines for infringement are low—51,100 UAH (US\$1,873)—and thus, not deterrents to subsequent piracy from the defendants who receive them or to other infringers.

Additional criminal procedural problems include: (1) denying the use of rights holder experts (Article 242-6 of the Criminal Procedure Code mandates experts to calculate damages, and there is a scarcity of state experts); (2) delays and case dismissals in pre-trial investigations; (3) the lack of presumptions that rights holders are the infringed (harmed) party; (4) the absence of judicial guidelines to improve IP case proficiency and sentencing; (5) a procedural hurdle requiring a court's permission before an investigator or prosecutor can offer forensic evidence; and (6) a "requirement" that rights holders provide proof of actual damages before cases can proceed. Until recently, indirect evidence was accepted by prosecutors. In addition, prosecutors demand disclosure of business confidential licenses (as examples of damages) in enforcement actions, which is inconsistent with Article 242-6.

Provisions exist in the Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IP offenses, but these provisions have been under-utilized by prosecutors. Other lingering enforcement problems are: (1) burdensome proof of ownership requirements in criminal (and civil) cases, including a complete chain of title; (2) the absence (in the Criminal Code) of clear provisions for the confiscation and destruction of infringing goods, including the materials and equipment used for manufacturing; and (3) the requirement that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

Collective Management: CMOs in the music sector, specifically in connection with broadcasting, public performances, as well as certain other communications to the public (e.g., certain cable retransmissions), can provide cost-effective services to both rights holders and users for licensing, collecting, and paying remuneration. A proper collective management regime allows CMOs to operate with full transparency and accountability, and with fair and balanced governance. It also provides for proper accreditation procedures based on the criterion of the largest representation of domestic and foreign repertoire in active use.

In 2019, MEDTA began to implement the 2018 law and accreditations of all CMOs in all fields of activities followed in 2019-2021. Three industry- and artist-supported organizations were accredited in 2019: (1) the Ukrainian League of Copyright and Related Rights (ULASP), accredited to represent performers and producers of sound recordings (and videograms) for public performances; (2) the UMA accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting and private copying levies, but not including cable retransmissions; and (3) the Coalition of Audiovisual and Music Rights to license cable retransmissions of copyrighted and neighboring rights works. The All-Ukrainian Agency on Authors' Rights was also accredited in 2019 to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. In December 2020, the accreditation commission accredited CMOs for musical works (musical compositions)—OKUASAP (public performances) and A&P (broadcasting). This last round of accreditations were finalized by the Ministry of Economy in September 2021. However, objections and strong resistance (political and legal) from opponents of reform have continued, resulting in Parliament passing Bill #5572, which (if signed into law) would cancel the latest round of CMO accreditations (public performance and broadcasting of musical works). Moreover, accreditation of UMA (for private copy levies) has been cancelled by a court decision based on a technicality, even though the fault was procedural and was made by the Ministry and not the CMO concerned.

The results of the 2019-2020 CMO accreditation process should be maintained. However, as illustrated by the adoption of Bill #5572 in Parliament, which cancels accreditation of the CMOs appointed to collect for authors and music publishers, the system is widely open to political risk and is not stable. If Bill #5572 is signed into law, that would mean the serious roll-back of the CMO reform in Ukraine and create a dangerous precedent for all future accreditations. Moreover, certain groups of users (broadcasters, including state-funded ones, and consumer electronics importers) continue to resist making the required payments to accredited CMOs and one non-paying importer has managed to obtain cancellation of a CMO accreditation by the courts based on a technicality and even though the CMO was not at any fault.

New proposed legislation (Bill No.4537) to change the CMO accreditation requirements, as well as eliminate almost all private copying levies, should be decisively rejected by the Parliament of Ukraine. This bill proposes a significantly reduced list of physical media that would be subject to the levy, which compensates rights holders for the private copying of their works and recordings. Furthermore, the bill removes all recording equipment from the list of objects that are subject to private copying levies, thereby significantly reducing rights holders' compensation. The bill also proposes new criteria for the accreditation of CMOs, thereby making them dependent on specific providers of business software for data processing and distribution.

Camcording: The 2017 package of anti-piracy reforms included the bill “On State Support of Cinematography,” which criminalized camcording (Article 176 of the Criminal Code), as well as the activities of those who finance piratical operations. The new law clarifies that camcording in theaters is illegal for any purpose if done without authorization from the rights holder. However, even with the new law and a reduction in camcording in Ukraine, camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a problem for the motion picture industry. From January to September 2021, two illicit audio or video recordings of MPA member films were traced to Ukrainian theaters,⁴ down from 8 in 2020 or 36 in 2019. While UAPA has had successful engagements (including staff trainings) with theater owners on this issue, lower numbers can in part be attributed to COVID-19 related cinema closures. Camcording activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

⁴The 2020-2021 camcording statistics are anomalous given the extensive theater closures in Ukraine (and worldwide) due to the COVID-19 pandemic and delays in theatrical releases of motion pictures.

Theatrical piracy is also a problem in Ukraine, especially in small theatres where films are screened without a license (a violation of the Administrative Offences Code, Article 164-6). Screening copies of films without a State Certificate has a significant negative influence on the legal market. In 2020, 40 theaters were investigated by law enforcement agencies for screening prints without a license, 28 theaters were shut down, and 5 theaters were sanctioned. In 2021, law enforcement agencies investigated 15 theaters for illegal screening of films, all of which have been shut down, and nine theaters were sanctioned based on the Administrative and Criminal Codes.

Broadcast and Cable Television Piracy: Piracy of content by broadcast and cable television systems, including by the state-owned radio and television networks, continues to be a major problem for the motion picture and recording industries—both by regional and nationwide broadcasters. Many Ukrainian cable operators continue to transmit audiovisual programming without licenses. Also, there are three court verdicts against cable operators that transmitted TV channels without authorization in the period from January to September 2021 in comparison to four verdicts in 2020 and three in 2019. The Government of Ukraine should take actions to ensure that state-funded enterprises pay for the copyrighted content they broadcast. Enforcement authorities should shut down unlicensed operations and use enforcement measures against the operators of these systems. Beginning in January 2020, 23 national television channels started to encrypt their satellite signals, which improved protections. In the music industry, radio broadcasters have refused to pay new (increased) tariffs for the use of music, and state-funded broadcasters in Ukraine are still not paying licensing fees for their use of recorded music.

Administrative Enforcement: Administrative courts should be empowered to hear infringement cases even in the absence of the infringer. Moreover, the Government of Ukraine should correct procedures that introduce unnecessary delays and impose unreasonable deadlines, which lead to case dismissals. One major enforcement hurdle in the Administrative Offences Code (Article 51-2) is the requirement to prove intent of the infringer. While intent is sometimes relevant in criminal proceedings, it has no relevance in administrative sanctions and should be deleted from the Code. The Administrative Offences Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). However, as noted, Ukraine has an insufficient number of state IP inspectors to enforce these (or other) IP violations. The Government of Ukraine should increase the number of administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative actions, as well as, where applicable, criminal actions.

Customs Enforcement: The current Customs Code gives customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the State Customs Service are not sufficiently engaged in enforcement measures and under-utilize their authority. Cooperation with rights holders could be improved as well. IIPA continues to recommend the abolition of the customs registration system altogether, because it impedes effective border enforcement. Another matter of concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IP infringements may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). In practice, customs officials apply this procedure only in cases where rights holders notify officials about alleged infringing material. The destruction is then undertaken at the rights holders' expense, and it releases the infringer of any administrative liability, and thus any deterrence from repeating its infringing activities. The 2019 amendments to the Customs Code (Law No. 202-IX) were aimed at bringing the Ukrainian code closer to European Union customs standards and practices, including for the destruction of infringing goods (but further improvements to simplify procedures are still needed). The 2019 amendments broadened the scope of authority against counterfeit and pirated goods to improve enforcement and provided tax authorities with broader *ex officio* enforcement authority.

LEGAL REFORMS

In 2001, Ukraine acceded to the WIPO Internet Treaties. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective

implementation of the treaty obligations, especially regarding TPMs, by requiring proof of “intentional” circumvention, which is a major impediment to protection. The two 2017 laws—Law of Ukraine #1977-VIII (Cinematography Law) and Law of Ukraine #2147-VIII (procedural amendments)—amended the Copyright Law, the Telecommunications Law, the 2015 E-Commerce Law, the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code, and the Administrative Offences Code. The 2017 legislation aimed at improving copyright enforcement online was a good first step to address online piracy. However, significant additional amendments have been under consideration and are necessary to modernize the Ukrainian IP regime, including for full WIPO Internet Treaty implementation.

Copyright Law: The enactment of a package of anti-piracy legislation in 2017 included a clear requirement for ISPs to respond to takedown notices, although the procedures and timetables for takedown notices and responses are unduly complex. The copyright industries report that currently no effective remedies exist to enforce ISPs’ required responses to infringement, and no incentives are in place for ISPs to cooperate because the current law has no explicit third-party liability. IIPA additionally recommends that the Government of Ukraine appoint more state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions like monetary fines for non-compliance.

The 2017 amendments established a notice and takedown regime. Under the 2017 changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to take down the material; there is also a put-back provision (unless the rights holder commences infringement litigation within 10 days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the Whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity from any (i.e., not just monetary) liability if it complies. The 2017 law included a “repeat infringer” provision, so that if the same material reappears twice within a three-month period on the same website or webpage, the owners of the site or page can be liable. The new laws have no provisions for “blocking” infringing websites, only for taking down infringing materials from sites.

Numerous concerns with the new procedures include that: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with a digital electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) they only require the hosting provider notify a webpage owner (which could be an uploader) to take down material, rather than acting to do so; and (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures, the Copyright Law needs to be amended to broaden the scope of works covered under the notice and takedown procedures so that all copyrighted works are covered (it currently excludes literary works and photographs).

However, important shortcomings should be addressed. Some, but not all, are addressed in one of the new current draft bills. Improvements needed in the law include: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local rights holders; (3) making the non-payment of music rights royalties and of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages or a system of enhanced damages to adequately compensate rights holders and deter further infringement (the 2018 CMO legislation removed pre-established damages provisions from the law); and (5) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage. Important changes for the music industry include: (i) adding exclusive rights for phonogram producers and performers for broadcasting, public performances, and cable retransmissions; (ii) adding definitions of rights compatible with the WPPT; (iii) extending the term of protection for producers and performers from 50 to 70 years; and (iv) including that a non-payment to an accredited CMO is a copyright or related rights violation.

The copyright law reform process is ongoing and became more complicated in 2021, due to five different

bills being introduced to Parliament, all of which propose reform to the current Copyright Law. Two of these bills (Bill #5552 and Bill #5552-4) should be taken as the basis of further drafting work and be reconciled to form a single draft of the copyright reform bill. The others should be rejected.

Bill #5552-4 contains several welcome provisions, including an increase of the term of protection for sound recordings to 70 years (Article 48) and the improvement of certain provisions in the CMO Law of Ukraine № 2415-VIII of 15 May 2018 "On Efficient Management of Property Rights of Right Holders in the Sphere of Copyright and/or Related Rights" (the "CMO Law"). The government also showed intention to adopt Article 17 of the EU Directive on Copyright in the Digital Single Market (Directive 2019/790) ("DSM Directive"), which is welcome, although further engagement on the drafting of this provision is needed to achieve a good outcome. However, Bill #5552-4 would need to be amended to incorporate certain key elements, which could be achieved by merging this Bill with Bill #5552. The notable sections that require further improvements in Bill #5552-4 are outlined below:

- The provision setting out that the remuneration rates (for private copying levies) approved by the Cabinet of Ministers of Ukraine in accordance with the Law of Ukraine "On Copyright and Related Rights" shall be applied until the determination of final tariffs, without which, users will have little incentive to negotiate a suitable tariff with accredited CMOs.
- It should be stipulated that the Ministry has a maximum time limit of 40 days in which to finalize decisions made by the relevant CMO accreditation committee to avoid the delay that happened in 2020, when it took the Ministry more than 9 months and two court cases to sign the accreditation orders.
- Key definitions should be brought in line with Ukraine's international obligations. Clarification is required to ensure that the making available right (interactive granting of public access as defined in Article 1) is defined in accordance with the WPPT definition and EU law, under the EU-UA Deep and Comprehensive Free Trade Agreement (DCFTA). At present, the definition refers to granting access to the "general public," which is not a criterion present in or compatible with WPPT. It should also be noted that the proposed definition of "cable retransmission" has been brought in line with international standards but needs certain technical improvements.
- New exceptions for hyperlinking (Article 41) should be removed. In an apparent attempt to codify certain judgments of the Court of Justice of the European Union (CJEU), the draft Copyright Bill proposes an exception for hyperlinking in certain circumstances (where the linking is not done with the aim of obtaining profit or with the awareness of the illegal nature of the actions of posting a hyperlink). However, important aspects of the CJEU case law have been overlooked and the drafting of the provision is unclear and at times contradictory, resulting in an overly broad exception that is open to abuse (for example, it is not clear what would happen in circumstances where TPMs are circumvented to provide the link). As such, these provisions should be removed.
- Failure to grant phonogram producers exclusive rights for broadcasting and public performance.
- Failure to improve provisions on tariff setting, which is necessary to improve the current situation of "tariff negotiation stalemates" that allow users to delay the approval of tariffs indefinitely.
- Enforcement remedies should be improved to ensure they are adequate and achieve the goals of the DCFTA and to ensure that enforcement remedies are adequate to deter copyright infringements and unlawful uses of copyright works. The Bill should:
 - increase the minimum compensation available for copyright infringement and remove the cap on compensation (Article 57 in the Bill #5552-4). The minimum and maximum amounts currently proposed are incredibly low and would, in effect, mean that the majority of court cases would involve damages of "two living wages" (two subsistence minimums), i.e., 163 euros, thereby removing an important deterrent against copyright infringement. Instead, the minimum amount should be 10 subsistence minimums, i.e., 815 euros;
 - include a provision specifying that non-payment of remuneration to an accredited CMO is a violation of copyright / related rights;
 - remove the confusing and detrimental addition to the bill at Article 57 that suggests "[t]he amount of compensation shall be effective, proportionate and deterrent and shall be applied in such a way as to avoid the creation of obstacles for the legitimate activity and to ensure protection from abuse."

Compensation for infringements cannot, by definition, be an obstacle to legitimate, non-infringing activity; and

- provide a clear provision ensuring that accredited CMOs have the right to bring legal actions to protect the rights of the right holders that have authorized the CMO to do so, including by way of a general authorization in the CMO membership agreement or mandate to bring legal actions.
- Over-broad and complex liability privileges should be simplified to ensure that they are effective, do not promote digital piracy, and apply only to particular service providers (hosting, caching, and mere conduit) who are passive and neutral intermediaries that do not contribute to infringing activities. We welcome the positive proposals in Section VI, Final Provisions of the Bill, which would clarify *inter alia* that the liability privileges in the Law of Ukraine “On E-commerce” apply only in respect of the “technical, automatic and passive” functions of the eligible services. Notwithstanding this positive provision, equivalent and additional clarifications should be included in Articles 57 to 59 of the Copyright Law which also deal with liability limitations. In particular, the draft copyright Bill should be amended further to:
 - clearly define the activities eligible for liability privileges (i.e., caching, hosting and mere conduit activities only). At present, it seems that where infringements are taking place online, a right holder must follow a convoluted, burdensome, and lengthy notice and action procedure, irrespective of the nature of the service on which the infringement is taking place, i.e., in respect of any type of online service. This poses a serious obstacle to effective online enforcement and goes far beyond the ordinary scope of liability privileges, including those in EU law; and
 - introduce measures demonstrated effective in preventing or restraining infringement.
- The increased term of protection for sound recordings should be retained (Article 48). We commend the Ukrainian Government’s decision to propose the increase of the term of protection of sound recordings to the international standard of 70 years in original Bill #5552 and 5552-4, which will support the development of the industry and the creation of new jobs in Ukraine.

The other proposed copyright reform bills (i.e. Bills #5552-1, #5552-2, and #5552-3) should be rejected on the grounds that they contain a number of common problematic provisions, including, among other deficiencies, that they:

- define “reproduction” in a way that would exclude a broad range of electronic devices from private copying levies;
- define the term “cable retransmission” in a way that excludes foreign programs from payment of remuneration;
- seek to overturn the CMO accreditations; and
- fail to extend the term of protection for sound recordings from 50 to 70 years.

On August 25, 2021, the Department of Intellectual Property Development under the Ministry of Economy proposed to supplement Article 137 of the Code of Commercial Procedure of Ukraine about injunctive relief in cases about copyright infringement with the following measure: “to prohibit a person whose services are used by the defendant in order to violate intellectual property rights, to provide the defendant services used by him in violation of intellectual property rights or creating the threat of violation.” This measure is an improvement for enforcement efforts in Ukraine. This procedure would allow cancellation of domain registration and hosting support of the infringing site, but it should be made clear that this provision would also allow for the blocking of illegal sites by an Internet access provider. As injunctive relief, it works during the process. An injunction may remain in effect permanently under a court decision. Introducing no-fault injunctive relief in Ukraine could alleviate the piracy issue because it allows a rights holder to seek a legal order, subject to due process, from an online intermediary that can prevent its service from being used for unlawful purposes. The remedy does not interfere with the legitimate business of online intermediaries, and they can select which enforcement measures to implement provided they are effective and proportionate.

The current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) explicitly states that ISPs “do not bear responsibility for the content of the information transmitted through their

networks.” Further, Article 38 states that ISPs can disable end-users from the Internet or take down infringing websites, only with a court order. Citing this statutory language, the Internet Association of Ukraine (IAU), representing the ISPs, takes the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation. The 2017 amendments to the Copyright Law (as well as amendments to the Telecommunications Law, but not Articles 38 or 40) require only defined “websites” and “hosting providers” to respond to proper takedown notices or be subject to copyright infringement. This only somewhat limits the overbroad exemption from liability for ISPs and hosting service providers, so many ignore takedown notices. The law is presumed to cover ISPs, but it is unclear whether a website that is hosting third-party content (i.e., a “webpage”) is covered, and the 2017 law has not yet been tested in the courts.

Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, the law in Ukraine needs a clear basis for secondary liability (under vicarious, contributory, and inducement theories of law) for sites and services online, and this clear third-party liability should be applicable to website owners and ISPs and extend beyond merely responding to takedown notices. Providing clear third-party liability is critical for effective enforcement and cooperation with rights holders. Under generally accepted standards, such liability should be applicable to parties who “induce” infringement and include obligations on service providers to reasonably gather and retain evidence. The E-Commerce Law should also be amended accordingly. Additionally, the 2017 law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be provided.

Criminal Code and Criminal Procedure Code: The 2017 package of amendments included a change to Article 176 to apply criminal remedies to online piracy of all works and sound recordings (the old law applied only to hard copy piracy), and, as noted, added sanctions for camcording. The codes should be further amended to provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely administrative, prosecution (and, even if each separate infringement is below the criminal infringement threshold); and (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement. Police should be granted (and should use) the authority to initiate IP criminal cases. It should also be clear that the police have the authority to seize all copyright products and equipment for use at trial (they currently do so only in software cases).

Administrative Remedies: The 2017 package of amendments added administrative remedies, including: (1) Article 164-17 remedies for failure to properly respond to takedown procedures; and (2) Article 164-18 sanctions for “knowingly providing false information” for takedown notices.

MARKET ACCESS ISSUES

Compulsory Manufacturing of Film Prints: Ukrainian law requires film prints to be manufactured locally as a prerequisite to the issuance of a state distribution certificate. This requirement to make and transfer prints to the State Film Agency (*Derzhkino*) to get a distribution certificate applies only to owners of television rights and home video rights—as an obligation to provide film copies for audiovisual works created on different media. For theatrical distributors, the obligation is to provide an option to the Ukrainian licensee to obtain a dubbed film copy. The Law on Cinematography should be amended to repeal these requirements.

Local Language Requirement (Dubbing/Quotas/VAT): Another trade barrier is a 2019 law (that entered into force on July 16, 2021) to mandate that foreign films distributed in Ukraine on home entertainment, broadcast television, and video-on-demand (VOD), must be dubbed or voiced in the state language. It exempts theatrical exhibitions that can screen films in their “original” language accompanied by Ukrainian subtitles. The law includes

quotas on foreign film screens (a 10% maximum per theater per month). Last, the law applies a VAT that discriminates against imported foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. Although the VAT provision went into force in 2017, it was suspended “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine. As an incentive to dub in the Ukrainian language, there is a 50% discount on the state distribution certificate fee for films dubbed, voiced, or sub-titled in Ukrainian.

Draft Law of Ukraine on Media No. 2693-D (Draft Media Law): The Rada is considering a bill that would require non-linear services to obtain state certificates for each title prior to distribution, as well as a mandatory registration requirement for both linear and non-linear services. It is imperative that any media legislation is consistent with Ukraine’s international obligations, including those obligations under the U.S.-Ukraine Bilateral Investment Treaty and the Council of European Convention on Transfrontier Television.

Draft Law on Dubbing No. 5772: This draft bill would mandate that 75 percent of the films offered by a VOD service, which were produced and/or distributed for the first time after July 16, 2021, in Ukraine, must be dubbed in Ukrainian. This bill would be highly burdensome and impractical for foreign VOD providers who offer an array of content from around the world and limit consumer choice.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine’s Generalized System of Preferences (GSP) benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413), the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. That partial suspension of GSP benefits entered into force on April 26, 2018, and remains in place, although some benefits were restored in October 2019.

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2022.¹

Executive Summary: Vietnam is an important emerging market in Southeast Asia for the creative industries, but its market for creative works remains severely stunted due to worsening piracy and debilitating market access barriers. Vietnamese operators have been associated with some of the world's most popular piracy websites, which cause significant damage to the local marketplace and make Vietnam a piracy haven. IIPA commends Vietnamese authorities for enforcement actions taken in 2021 against *Phimmoi*; unfortunately, copycat sites have sprung up in its place. IIPA encourages Vietnam to continue to pursue action against the many other piracy sites that continue to pollute the Vietnamese marketplace.

Deterrence against infringement in Vietnam is lacking due to ineffective criminal procedures and penalties. While the Authority of Broadcasting and Electronic Information (ABEI), under the Ministry of Information and Communication (MIC) and the police unit A05 took a step forward and began enforcing a decree to disable access to dozens of infringing websites in Vietnam, disablement in Vietnam does not stop Vietnam-based piracy services and operators from harming overseas markets, including the U.S. market. This should be addressed due to the many globally focused services operating from Vietnam. There also remain procedural difficulties with the system for U.S. rights holders. Other major enforcement deficiencies include: (1) notwithstanding the recent action against *Phimmoi*, the government's unwillingness or inability to follow through on criminal referrals, regardless of how much evidence is provided of blatant copyright piracy (i.e., the lack of objective criteria for the Vietnamese government to prosecute a criminal case); (2) prohibition on foreign investigations; and (3) prohibition on civil suits against unknown defendants.

In joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Government of Vietnam agreed to adopt high standards for criminal enforcement. IIPA is very pleased that the government acceded to the WIPO Copyright Treaty (WCT) on November 17, 2021 (effective February 17, 2022) and urges the government to join the WIPO Performances and Phonograms Treaty (WPPT) without delay. Unfortunately, the latest draft amendments to the IP Code fall short of fully implementing CPTPP, although they include measures to implement the WCT and the WPPT (collectively, WIPO Internet Treaties). IIPA hopes the Government of Vietnam will bring its enforcement norms in line with the CPTPP and evolving global norms, including by adopting a resolution that clearly defines and interprets "commercial scale" in accordance with Vietnam's international obligations. The government should also address deficiencies with the Copyright Office of Vietnam, which has not taken any action to reform the dysfunctional collective management organization for the music industry.

Vietnam's piracy problems would also be reduced if the country removed its restrictive market access barriers. It is past time for Vietnam to make good on its political commitments and international obligations to improve copyright protection in the digital environment, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace.

¹For more details on Vietnam's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Vietnam's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2022

Enforcement:

- Ensure enforcement officials, including the MIC, the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and the Ministry of Public Security (MPS) Intellectual Property Rights (IPR)/High-Tech Police and related police units, increase the number and effectiveness of operations focused on online infringement, including by: taking long-overdue action to prosecute notorious piracy sites like *Phimmoi* or *Chiasenhac*; issuing administrative and criminal penalties for infringement that are sufficient to deter piracy; ensuring administrative orders are properly enforced; and bringing criminal prosecutions through to convictions applying objective criteria against commercial-scale piracy, including flagrant piracy websites.
- Clarify the rules regarding enforcement of a decree to disable access to infringing websites in Vietnam, ensuring that there are no costs associated with such actions.

Legislation:

- Accede to and ratify the WPPT as required under the CPTPP.
- Swiftly enact the draft amendments to the intellectual property (IP) Code, with further changes needed to fully comply with Vietnam's international obligations (as outlined in this report), and make other necessary changes to the Criminal Code and implementing Resolutions, Decrees, and Circulars, including adoption of a Resolution that: (i) clearly defines and interprets "commercial scale" consistent with Vietnam's international obligations; (ii) criminalizes "significant acts not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace;" and (iii) takes into account market data to ensure that the monetary thresholds can realistically be met.
- Further strengthen the legal framework to take effective action against digital infringement, including by: (i) ensuring sound recording producers are provided a full, unrestricted public performance right and exclusive making available right for the digital uses of their sound recordings, consistent with Vietnam's international obligations; (ii) clarifying Internet service provider (ISP) liabilities, including specifying consequences for non-compliance with the Joint Circular, and ensuring that safe harbors under the Law on Information Technology apply to only passive and neutral services; (iii) easing the evidentiary requirements that interfere with the ability to take effective action against piracy websites, illegal theatrical camcording, live-streaming piracy, piracy devices (PDs) and apps, and circumvention devices and software that facilitate access to infringing works; (iv) increasing administrative penalties for copyright infringement to achieve deterrence and ensuring enforcement authorities are able to take action to enforce administrative orders, including shutting down or disabling access to infringing sites that do not comply; (v) developing an effective procedure to promptly respond to rights holders' requests for administrative enforcement, (vi) properly enumerating all sound recording producers' rights in line with WPPT; and (vii) clarifying that provisions relating to technical protection measures (TPMs) are sufficiently broad to cover access controls.

Market Access:

- Ensure that amendments to Decree 06 remove the local presence requirement and do not impose additional barriers to e-commerce.
- Ensure that the draft Cinema Law allows self-classification of content disseminated on the Internet; eliminates foreign investment restrictions, screen quotas, and broadcast quotas; and removes a discriminatory film fund drawn from the box office of imported films
- Eliminate caps on the number of foreign pay-TV channels in pay-TV regulations; requirements for local advertisement production that severely impede the growth of the pay-TV industry; and other entry barriers with respect to the production, importation, and distribution of copyrighted materials.
- Deregister the Recording Industry Association of Vietnam (RIAV) and engage with local and foreign music producers to set up a new collecting society to enable all music producers to effectively manage rights that are subject to collective management in Vietnam. As part of this, elimination of all restrictions and limitations for foreign and joint venture entities and their involvement in collective management organizations (CMOs) is required.

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Growing Online Marketplace Presents Challenges: A significant percentage of the Vietnamese population is online, and a growing number of licensed, legal content providers offer huge potential for the creative industries. However, market access barriers and weak enforcement are preventing this potential from being realized. Online piracy is rampant in Vietnam. Vietnamese piracy operators have been associated with some of the world's most popular piracy websites, like *123movies* (before the original site shut down), *fmovies*, and *Chiasenhac*, which cause significant damage to the local marketplace and make Vietnam a piracy haven.² There is no clear or effective enforcement path available against these sites or their operators. Illegal content generally can be accessed via online and mobile network piracy such as download sites, peer-to-peer (P2P) networks, linking sites, streaming sites, search engines, cyberlockers, apps, and on social media networks. Infringers often take advantage of free platform file hosting resources, including those from Facebook and Google, to store and share pirated contents and stream it via piracy sites and apps. PDs are also gaining popularity in Vietnam, as they are cheap and easy to use, provide a range of unauthorized content through piracy apps, and are available from online retailers, as well as physical stores.

Stream-ripping was the most popular form of music piracy in Vietnam, with more than 26.7 million visits during Q3 2021, according to data from SimilarWeb. Sites like *Y2Mate* (12.3 million visits from Vietnam in Q3 2021 and the most popular single piracy site of any kind), *savefrom.net* (3.7 million visits from Vietnam during that period), and *y2meta.com* (1.6 million visits from Vietnam during that period) offer the ability to illegally download music from YouTube as an MP3. Six of the top ten music piracy sites in Vietnam were stream-ripping destinations. Cyberlockers were also a widely used method of piracy, with 13.7 million visits in Q3 2021. *Mega.nz* (6.5 million visits from Vietnam in Q3 2021) and *zippyshare.com* (0.75 million visits from Vietnam during that period) were key sources of pirated music content. Long-standing domestic Vietnamese language websites focused on pirated music content were also major threats. For example, *chiasenhac.vn* had 3.9 million visits in Q3 2021 and was the third most popular piracy site of any kind in Vietnam.

One of the operators of the notorious streaming piracy site *Fmovies* (also known as *Bmovies* or *Bflix*, among other names), which provides unauthorized access to popular movies and TV series is believed to be located in Vietnam.³ In a positive development, in August 2021, according to press reports, the founder and two employees of the notorious piracy site *Phimmoi* were identified and called in for questioning by the Vietnamese police.⁴ The domains of the website have been taken offline; however, *Phimmoi* has simply moved to alternate domains, some of which have become very popular in a short period of time.⁵ Hopefully, the action against *Phimmoi* will lead to Vietnam's criminal enforcement authorities taking effective enforcement actions against other popular piracy sites, such as *Bilutvs.net*,⁶ *Motchill.net*,⁷ and *Dongphymtv.com*.⁸

Vietnam is the home of notorious markets *BIPTV.best* and *BestBuyIPTV.store*, which are very popular

²In addition, several stream-ripping sites are operated from Vietnam, including *Y2mate.com*. Enforcement efforts in Vietnam by the music industry against *Y2mate* proved futile.

³The site's Alexa rank is 1,156 globally and 1,028 in the U.S., with 80.08 million global visits from 6 million unique visitors in August 2021, according to SimilarWeb. The site has been blocked in many countries, some due to MPA action, including India (which drove down its popularity ranking significantly), Australia, Denmark, Malaysia, and Singapore. The former domain, *Fmovies.se*, was blocked in nine countries.

⁴The *Phimmoi* website, which offered thousands of unauthorized feature films and television series from the United States and all over the world, was one of the most popular pirate websites in Vietnam. At its peak of popularity between June 2019 and June 2020, *Phimmoi* was the 22nd most popular website in Vietnam and averaged over 69 million visitors per month from 10.69 million unique visitors, according to SimilarWeb.

⁵Alternative domains include *Phimmoiplus.net*, *Phimmoi.online*, *Phimmoi247.com*, *Phimmoi.be* and, most recently, *iphimmoi.net*, which has been identified by local media and uses similar domain names, website designs, and a logo to appear to be associated with the original *Phimmoi* and thus attract users who are unable to find it. *iphimmoi.net* is ranked as the 453rd most popular site in Vietnam after just a month, according to SimilarWeb data in October 2021.

⁶*Bilutvs.net* is a Vietnamese streaming site with 3.8 million monthly visits in August 2021, according to SimilarWeb. The site which has been redirected to *biluu.tv*, which had 1.5 million monthly visits in December 2021.

⁷*Motchill.net* is a Vietnamese site with rank in Vietnam of 130 and 8.3 million visits in August 2021, according to SimilarWeb data for former domain *Motphim.net*

⁸*Dongphymtv.com* is a Vietnamese site with 21.7 million visits in August 2021, according to SimilarWeb data for former domain *Dongphim.ne*.

Internet protocol television (IPTV) piracy services in Europe.⁹ Vietnam also hosts emerging “piracy as a service” (PAAS) businesses like *Abyss.to* (formerly *HydraX.net*), which offers a “Google pass through,” i.e., a service that allows users to upload videos via Google Drive or dragging and dropping files onto the site’s page.¹⁰ The service then obfuscates the location of the hosted content to prevent enforcement and shield the identity of the website’s operator. *Abyss.to* also provides the ability to embed videos with the Abyss media player on separate sites for free, although viewers are served ads by *Abyss.to*. Many piracy sites including *123movies.fun*, *gostream.site*, *solarmoviez.ru*, and *yesmovies.to* have previously used, or currently use, *Abyss.to*. Another PAAS hosted in Vietnam is *Fembed*, a content management service (CMS) that launched in early 2018 and is commonly used by pirate movie streaming websites.¹¹

Piracy of ebooks, test banks, and solutions manuals continues to pose significant problems for publishers. In addition to infringing sites being hosted in Vietnam, information obtained from recent publisher-initiated lawsuits (in the United States) has revealed that a significant percentage of the sites have operators located in Vietnam (despite efforts by the perpetrators to obscure their actual location). By way of a few examples: (1) *ccbooks.org* is an infringing site operated by a Vietnamese defendant, against whom publisher plaintiffs obtained a \$400,000 default judgment; the site is currently down; (2) *ebookshelf.com* and *itsebooks.com* are infringing sites operated by a Vietnamese defendant, against whom publisher plaintiffs obtained a \$1.8 million default judgment; *ebookshelf.com* is down, but *itsebooks.com* is still active and infringing despite the permanent injunction entered by the court; and (3) *etextworld.com* is a site operated by a group of infringers, including multiple Vietnamese operators, against which publisher plaintiffs obtained a \$3.15 million default judgment; the site is down and currently displays a notice indicating that, pursuant to a court order, plaintiffs have seized the domain.

Ineffective copyright enforcement in Vietnam is a serious concern. Without significant changes, Vietnam’s current criminal enforcement system and legislative framework are unable to deter online piracy. Regardless of extensive evidence of serious infringement provided by rights holders, there has traditionally been a lack of coordination and transparency among related ministries and agencies and a lack of demonstrated government commitment to ensure effective copyright enforcement. Administrative and criminal processes in Vietnam are cumbersome and slow. The police and prosecutors insist that extensive evidence must be produced before any action is taken, creating a very difficult task because the investigation is necessary to uncover the required evidence. Even where the infringement is clear, identification of the infringing website is not enough. There is also no guidance with objective criteria for criminal liability, and Vietnam has a ban against investigations by foreigners. Moreover, the difficulty in identifying infringers makes civil actions nearly impossible because actions cannot be initiated against an unknown infringer, even where the domain name, IP address, and related email addresses are known. It is critical for responsible enforcement authorities, including the relevant police units, the MPS, and the ABEI under the MIC, to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites. While the enforcement action against *Phimmoi* discussed above is a positive step, it remains to be seen whether this action will produce a deterrent result and send a signal that other notorious

⁹*BestBuyIPTV* offers country-specific channel lists, with more than 10,000 channels from 38 countries and 19,000 video-on-demand (VOD) titles in multiple languages and is available on several platforms and operating systems, including iOS, Kodi, and Roku. It uses resellers, which leads to pricing variations, but the main site charges USD\$70 per year for the service. *BestBuyIPTV* advertises that it provides services to over 900,000 users, 12,000 resellers, and 2,000 re-streamers worldwide.

¹⁰“Piracy as a service” (PaaS) offerings constitute a suite of off-the-shelf services that make it easy for would-be pirates to create, operate, and monetize a fully functioning pirate operation. PaaS providers lower the barriers to entry into commercial piracy. They include: (i) website templates that facilitate setup of streaming websites; (ii) content management systems (CMS), which are databases providing access to tens of thousands of infringing movies and TV series, in exchange for the payment of a fee or a cut of the advertising revenue; (iii) dashboards that allow an illegal Internet protocol television (IPTV) operator to oversee the infrastructure of their service (including monetization, content-hosting servers, and user interactions); (iv) hosting providers that provide a safe haven for pirates because they do not respond to DMCA notices of copyright infringement; (v) video hosting services that obscure links to infringing content (i.e., instead of providing a single weblink for each piece of content, a PaaS video host may break up the content and host it across dozens of random links to inhibit its takedown, without inhibiting its access via a streaming site that pieces the content back together); and (vi) decentralized streaming software that acts as a third-party tool between a streaming site and a cyberlocker or video host, allowing for quicker upload of content with a large variety of cyberlockers and video hosting services. PaaS is a subset of the larger threat of Cybercrime-as-a-Service identified by Europol, and shows the scale, sophistication, and profitability of modern online commercial copyright infringement.

¹¹*Fembed* is popular worldwide with an average of 6 million monthly visitors, according to SimilarWeb (although these SimilarWeb numbers only reflect end-user traffic that comes directly to its site and not to traffic that passes through its CMS customers that operate their own streaming services). *Fembed* generates revenue either from advertising – by inserting ads in *Fembed*’s media players embedded in its customers’ illegal streaming services – or by charging a premium fee that allows its customers to generate revenue by inserting their own ads.

piracy services operating with impunity in Vietnam will not be tolerated.

Authority of Broadcasting and Electronic Information (ABEI) Mechanism to Disable Access to Piracy:

Over the past couple of years, MIC's ABEI worked with several rights holders to help combat online piracy, resulting in sanctions against infringing websites and, most recently, in the first-ever site blocks in Vietnam against egregious websites infringing the rights of Vietnamese television rights holders. There are now more than 70 infringing sites blocked in Vietnam by ABEI and the MCST. While this is a useful step forward, there are many other infringing sites that remain accessible. Moreover, disablement in Vietnam does not stop these Vietnam-based services from harming overseas markets, including the U.S. market. There also remain procedural difficulties for U.S. rightsholders.¹² In particular, the process for submitting sites should be transparent, with documentation setting out the process and explaining how sites will be blocked, and measures are needed to ensure ISPs comply.

Piracy Devices (PDs) and Apps: PDs have emerged as a significant means through which pirated motion picture and television content is accessed around the world, and they are gaining popularity in Vietnam. PDs are cheap and easy to use, provide a range of unauthorized content, and are available from online retailers as well as physical stores. The Government of Vietnam must increase enforcement efforts, including cracking down on PDs and vendors who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for PDs that are being sold and used illegally.

Increase Efforts Against Theatrical Camcording: A great number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during its exhibition in a movie theatre. These illicit copies are then distributed to pirate "dealers" throughout the world and over the Internet. Illegal theatrical camcording can damage the distribution of audiovisual works, harming the U.S. film industry and the local cinema business. More needs to be done in Vietnam to address this problem, including stronger cinema procedures for curtailing such activity and corresponding criminal enforcement mechanisms.

Collective Management: Due to barriers against foreign music producers and distributors (discussed below), the local music industry is very small. As a result, the collective management entity accredited for representing record producers, RIAV, is made up of just a handful of local producers and is not able to function effectively and professionally. Furthermore, the restrictions and limitations on foreign and joint venture entities and their membership in CMOs established as associations needs to be removed (found in Decree No. 45/2010/ND-CP). The Copyright Office of Vietnam should engage with foreign music producers to enable reform of collective management to establish an entity that represents all producers, foreign and local, and has the relevant expertise and technical capability to effectively perform collective management functions to the benefit of right holders and users alike in line with international best practices.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection and enforcement in Vietnam is governed by the IP Code (last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative Violations Decree (No. 131) (as amended in 2017). The Civil Code of 2015 remains as a vestigial parallel law. Following the signing of the Regional Comprehensive Economic Partnership (RCEP) Agreement on November 15, 2020, the Vietnamese government released draft amendments to the IP Code for public consultation in early December 2020. As IIPA noted last year, the amendments would make several changes to the IP Code, including adding important protections required by the WIPO Internet Treaties. IIPA is very pleased that the government acceded to the WCT on November 17, 2021,

¹²As reported last year, in 2019, the music industry petitioned the Authority of Broadcasting and Electronic Information (ABEI) to block two sites, *saigonoclean.com* and *chiasenhac.vn*. The ABEI only agreed to consider the petition against *chiasenhac.vn*. After significant delays, the Ministry of Information and Communication (MIC) finally notified the music industry that Yeu Ca Hat Entertainment Joint Stock Company, owner of *chiasenhac.vn*, had, per request by MIC, monitored the accounts of those who uploaded copyright infringing works, removed over 6,000 works from the company's system, sent warnings and blocked 41 infringing accounts, and simultaneously provided information to MIC relating to the 41 accounts that had been blocked. Despite this action by ABEI, *Chiasenhac* is back to being the principal source of unlicensed music in Vietnam, with both local and international repertoire easily accessible via the site.

effective February 17, 2022, and urges the government to accede to the WPPT, as required under the CPTPP and Vietnam's Free Trade Agreement with the EU, without delay.¹³ In addition, IIPA encourages Vietnam to take the necessary steps to fully implement these treaties.

Implementation of the Criminal Code is Critical and Should Be Consistent with International Commitments: Vietnam's Criminal Code became effective in January 2018. The Criminal Code criminalizes piracy "on a commercial scale," although the meaning of "on a commercial scale" is not defined in the Criminal Code. Vietnam should implement its new Criminal Code consistent with Vietnam's obligations under the WTO TRIPS Agreement and the Bilateral Trade Agreement (BTA) with the United States, which require Vietnam to criminalize copyright piracy "on a commercial scale" (there are also detailed obligations on point in the CPTPP). The Supreme People's Court has indicated it is working on a draft Resolution to provide guidelines for interpreting "commercial scale" and how to calculate the monetary thresholds, but those efforts appear to have stalled.¹⁴ A Supreme People's Court Resolution should be issued without delay. In addition, further modernization of the Criminal Code would be helpful to ensure that there is congruity between acts considered copyright infringements (under Article 28 and 35 of the IP Code as proposed to be amended) and the Criminal Code (in other words, acts considered infringements, when carried out on a commercial scale, should be criminalized under the Criminal Code).¹⁵ Unfortunately, to date, the government has not followed through on these important changes and has not set in motion a more deterrent approach to rampant local piracy.

Intellectual Property (IP) Code Draft Amendments Leave Some Issues Unresolved: While the draft IP Code amendments would result in some improvements to the law, they leave some issues and questions unresolved, including regarding Vietnam's compliance with the BTA, TRIPS, and other international obligations. The issues that should be resolved in the current IP Code (or the draft Code) include the following:

- **Term of Protection:** The current IP Code does not provide for a term of protection for all copyrighted works, including sound recordings, in line with the international trend of 70 years after the death of the author, or, when the term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.
- **Right of Producers of Sound Recordings:** The exclusive reproduction right of producers of sound recordings is not comprehensively set out under Article 30(1)(a), and the distribution, rental, and making available rights are all set out under Article 30(1)(b) rather than being individually enumerated, which creates confusion. The IP Code should be amended so that it expressly and individually enumerates phonogram producers' exclusive rights in a manner that reflects the WPPT. To ensure consistency and clarity, acts that constitute infringement of phonogram producers' rights under Article 35 should be aligned with the exclusive rights of sound recording producers provided under Article 30.
- **Technological Protection Measures (TPMs):** Several issues relating to TPMs need to be addressed, including:
 - (i) it is not clear whether the TPM provisions in the IP Code are sufficiently broad to cover access controls, which are important for effective TPM protection; (ii) Article 28.14 of the IP Code imposes a knowledge (or constructive knowledge) requirement that is too limiting and should be removed; and (iii) the IP Code includes an apparent inadvertent gap; namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to "works") was not made applicable to neighboring rights (i.e., sound recordings).
- **Denial of Protection for Certain Works:** Articles 7(2), 7(3), and 8 of the current IP Code appear to give the state

¹³Vietnam formally ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in October 2018, and it entered into force in January 2019. Vietnam entered into a Free Trade Agreement (FTA) with the EU in August 2020. Vietnam's obligation to accede to the WIPO Performances and Phonograms Treaty (WPPT) (and the WIPO Copyright Treaty (WCT)) became effective upon entry into force of the CPTPP. Vietnam has three years to meet its obligation under the FTA with the EU.

¹⁴A Resolution should: (i) clearly define and interpret "commercial scale" consistent with Vietnam's international obligations; (ii) criminalize "significant acts not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace;" and (iii) take into account market data to ensure that the monetary thresholds can realistically be met. It should also take notice of the CPTPP language that "the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace."

¹⁵This would include, for example, criminalizing commercial scale infringements involving unauthorized making available or communication to the public of works or objects of related rights, as well as the act of circumvention of technical protection measures (TPMs) or trafficking in circumvention devices/services.

power to restrict the ability of rights holders to exercise lawful rights in broad circumstances and remove copyright protection in ways similar to provisions in China's Copyright Law that were found by a WTO panel to violate China's WTO obligations.

- **Hierarchy of Rights:** Article 17(4) of the current IP Code creates an unacceptable hierarchy of the rights of authors versus neighboring rights owners. This is inconsistent with Vietnam's obligations to provide certain exclusive rights to neighboring rights holders, including producers, performers, and broadcasters, under international agreements, including the WTO TRIPS Agreement. Article 17(4) should be repealed.
- **Broad Exceptions and Limitations:** Certain exceptions and limitations in the current IP Code may be overly broad and call into question Vietnam's compliance with its international obligations, including Article 13 of the WTO TRIPS Agreement and Article 4.8 of the BTA. For instance, exceptions for "public information and education purposes," as well as importation of copies of others' works for personal use, are overbroad. Further, a broad compulsory license applicable to all works except cinematographic works is not in line with international norms. Further still, the draft IP Code introduces exceptions in draft Article 25 (as to works) and 32 (as to related rights) that must be examined for the compatibility with the three-step test (e.g., TRIPS Article 13, and BTA Article 4.8).
- **Ownership of Copyright:** Ensure that the current IP Code's proviso that organizations and individuals who invest in, or finance, the physical and technical facilities involved in the making of cinematographic works and dramatic works are the owners of the copyrights thereto remains the law, which is in line with the international best practices in determining ownership of such works. 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 under WTO TRIPS (Article 9(1)) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing a presumption of ownership for an author whose name appears on the work in the usual manner).
- **Overbreadth of Draft Private Copy Exception:** Ensure that draft Article 25(1)(a) (private copy exception) expressly does not apply to cinematographic works and is limited to one physical copy to keep it in alignment with international standards.
- **Recirculation of Seized Good/Tools into Channels of Commerce:** 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.

Decree No. 22/2018 Could Undermine Rights of Sound Recording Producers: Decree No. 22/2018, issued in April 2018, provides guidelines for implementing certain provisions of the IP Code. Article 32(3) of this Decree is problematic because it appears to provide an exhaustive list of the types of venues where sound recordings can be used for public performance pursuant to Article 33 of the IP Code. Thus, this provision could be interpreted to mean that the public performance right applies only to this list of venues, and no others, which would unacceptably limit the scope of the public performance right. Some of the most typical and heavy commercial users of recorded music (e.g., night clubs, discos, concert halls, exhibition galleries, parks, fitness gyms, and hair salons) are not on the list, and the omission of these businesses unfairly and unjustifiably allows them to exploit and free-ride on the backs of rights holders. Furthermore, the list of venues includes "establishments providing . . . digital environment services." While this appears to refer to venues providing Internet services, such as an Internet cafe, it could be misinterpreted to refer to the use of sound recordings online. As such, the provision is not sufficiently clear and, if misinterpreted, would raise uncertainty regarding the exclusive rights of phonogram producers for the digital uses of their sound recordings. This provision is not compatible with the three-step test.

Amend Internet Service Provider (ISP) Liability Framework to Meet Modern Challenges: Joint Circular 07/2012/TTLT- BTTTT – BVHTTDL on stipulating the duties of enterprises providing intermediary service in protection of copyright and related rights on the Internet and in the telecommunication networks environment ("Circular 07") merely requires intermediaries to take down infringing content and terminate services under certain circumstances. Moreover, this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing.

The draft IP Code would introduce new Article 198b, which maintains the spirit of the existing laws regarding ISP liability and does not resolve the current difficulties faced by rights holders in preventing copyright infringements on the Internet.¹⁶ The draft IP Code would not enable copyright holders to cooperate with ISPs directly to take down infringing content. Rather, like Circular 07, the draft IP Code would only require ISPs to take down infringing content upon requests by the authorities.¹⁷ To improve online copyright protection and meet international best practices, Vietnam should introduce a mechanism to allow an immediate takedown of infringing content upon request of copyright holders. In addition, Vietnam's legal framework does not include secondary liability. The IP or Civil Code should identify the criteria for legal liability of ISPs to foster cooperation between ISPs and rights holders.

In addition to permitting rights holders to request removal of infringing content, Circular 07 should be clarified in other ways to improve its effectiveness. Article 5.5 provides a few cases in which ISPs will be held directly responsible for damages because of copyright violations, including: making available; transmitting or distributing digital content without permission of the rights holder; modifying, truncating, or reproducing content without permission of the right holder; willfully circumventing or bypassing TPMs; and operating as a secondary distributing source of infringing content. Article 5.5 should ensure that an ISP is liable for copyright infringement by its users if the ISP has actual or constructive knowledge of the infringement and fails to act expeditiously to terminate the infringement and take other measures demonstrated effective in preventing or restraining infringement (including if the ISP does not comply with government's or right holders' requests to remove or block access to infringing content), knowingly facilitates the infringement, or enables users to commit infringement. Circular 07 should also expressly provide penalties for non-compliance. Furthermore, it is not clear whether the authority under Circular 07 to take down (or block) infringing content applies only to websites that use the "internet services of a Vietnam company" (i.e., a Vietnamese hosting company, registrar, or IP address manager). If that is the case, the effectiveness of this measure will be undermined because domain names can be registered, and websites can be hosted, anywhere while still targeting users in Vietnam. Circular 07 should not be limited to infringing websites that are hosted locally.

Another piece of legislation relevant to determining ISP liability is the Law on Information Technology (No. 67/2006) (the "IT Law"). Articles 16 and 18 of the IT Law require services that transmit digital information or lease information storage space to promptly take necessary measures to stop illegal access to, or illegal deletion of, digital information at the request of competent state agencies. Articles 18 and 19 of the IT Law also require services that lease information storage space or provide information search tools to cease leasing storage space for illegal information or supplying tools for searching illegal information sources when they detect or are informed by competent state agencies of the infringement. These articles should be revised so that the services are also required to act upon the requests of right holders. Articles 16 and 17 of the IT Law provide safe harbors to organizations and individuals that transmit or temporarily store digital information of other organizations and individuals on certain conditions. These articles should be amended to clarify that the safe harbors only apply to passive and neutral services, and that the services relying on the safe harbors have the obligations to cease access to or remove infringing content upon request by right holders or upon actual or constructive knowledge of infringement. They should also require adoption of a repeat infringer policy and other measures demonstrated effective in preventing or restraining infringement.

Court Reform Needed: IIPA understands that, in addition to the Supreme People's Court working on a Resolution related to criminal liability, it was also drafting an "IP Manual for Vietnamese Judges." Unfortunately, it appears that this effort has stalled. Once re-commenced, the U.S. government should, and IIPA members would hope to, weigh in on that process, which would presumably include procedural and evidentiary guidance as well as sentencing guidelines to create an appropriate level of deterrence in copyright cases. In addition, building IP expertise should be part of the overall judicial reform effort. The U.S. government has stayed involved in training not only for the judges, but also for police and prosecutors, who will ultimately play an important role in bringing criminal cases before the courts.

¹⁶Article 198b of the draft IP Code appears to incorporate Articles 4, 5 and 6 of Circular 07.

¹⁷Under Article 5.3 of the Circular 07, only the MIC or the Ministry of Culture, Sports, and Tourism (MCST) or other Competent State Authorities may request Internet service providers (ISPs) to remove infringing content or suspend the access to it.

MARKET ACCESS BARRIERS IN VIETNAM

Vietnam continues to generally restrict foreign companies from setting up subsidiaries to produce or distribute “cultural products.” Restrictions via foreign investment quotas, and other entry barriers regarding production, importation, and distribution of copyrighted materials (whether in the physical, online, or mobile marketplaces) persist. The Vietnamese government has publicly indicated that it prioritizes preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products. Unfortunately, Vietnam’s restrictions on foreign investment in cultural production undermine this objective, severely limiting the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials.

The restrictions also fuel demand for pirated products. Vietnam’s virulent piracy problems would be reduced if the country removed its highly restrictive market access barriers. By limiting access to legitimate content, these barriers push Vietnamese consumers toward illegal alternatives. The restrictions instigate a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam’s cultural sector and the development of a potentially very significant digital content market, 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.

Pay-TV Regulation: In March 2016, Vietnam enacted pay-TV regulations (Decree 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 30% of the total number of channels any such service carries. These regulations also require operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. Additionally, these regulations essentially expand censorship requirements to all channels, while such regulations had previously applied solely to “sensitive” channels. This mandate also appears to impose new “editing fees” on international channels. These measures are unduly restrictive and severely impede the growth and development of Vietnam’s pay-TV industry.

Decree Regulating Over-the-Top (OTT) Services: In August 2018, MIC issued draft amendments to Decree 06 with the intent to expand the scope of existing pay-TV regulations to encompass over-the-top (OTT) services. Several provisions of the draft Decree would create significant barriers to foreign investment, stunt the growth of Vietnam’s e-commerce market, and limit consumer choice and access to information. Of most concern is a licensing scheme that would require a local presence through forced joint ventures and onerous censorship provisions. In August 2021, the latest draft was submitted for finalization by the Office of Government. While this draft removes an earlier-proposed content quota and provides an option for self-classification, the remaining licensing proposal and continued uncertainty around some censorship requirements fall short of industry expectations.

Draft Amendments to Cinema Law: Under Cinema Law/Decree 54, Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. In recent years, domestic films have accounted for a growing share of the market and greater investment. Vietnam is in the process of amending its Cinema Law, with the latest draft of proposed amendments issued in October 2021. Vietnam should ensure the draft amendments to the Cinema Law, and subsequent implementing decree, maintain the positive changes: 1) allow self-classification for films disseminated online (including video-on-demand (VOD) content), 2) allow a grace period for content that has yet to display ratings, 3) remove a discriminatory film fund sourced from the box office of imported films, and 4) remove screen quota and local presence requirements. Foreign investment restrictions, which remain in the draft, should also be removed before the Law is passed in mid-2022.

Foreign Investment Restrictions: Foreign companies may invest in cinema construction and film production

and distribution through joint ventures with local Vietnamese partners, but these undertakings are subject to government approval and a 51% ownership ceiling. Such restrictions are an unnecessary market access barrier for U.S. film producers and should be eliminated.

Law on Cybersecurity: In June 2018, the National Assembly passed a cybersecurity law, which took effect in January 2019. Unfortunately, this law did not include any provisions to improve copyright enforcement, which would have assisted in the law's goal of improving the health and security of Vietnam's online environment. In September 2020, the MPS released a revised decree that would implement the 2018 Cybersecurity Law. This revised decree, which contains onerous data localization requirements, is intended to be the final version and will be promulgated soon. Overly strict data localization requirements could negatively impact U.S. exports of audiovisual content. Vietnam should remove such a requirement to facilitate a dynamic and market-driven responsiveness to cybersecurity threats.

Decree No. 72 Restricts Video Game Rights 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, there remains 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." For some games, the Decree establishes the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: censorship of the content of video games in order for them to be approved; outright prohibition of certain content within video games data collection; age of users; and license duration limits. The implementation of this Decree should not create structures that unduly impede the ability of foreign rights holders to access the Vietnamese market or that discriminate against them. IIPA urges Vietnam to work towards commitments agreed to in previous trade negotiations to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

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 industries to conduct investigations in Vietnam, hinders anti-piracy efforts. These restrictions effectively mean the Vietnamese government must enforce IPRs related to U.S. content largely on its own, a task at which it has not succeeded thus far. To enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam, and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam. Under the applicable Decree today, circulation permits for tapes and discs are granted by provincial-level MCST Departments. However, restrictions placed on foreign companies limiting their ability to establish subsidiaries to produce and distribute "cultural products" in Vietnam, in turn, makes it difficult for foreign companies to obtain circulation permits, as the applications must be submitted by local companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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

- All infringements on a commercial scale may not be subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- Several copyright exceptions may be overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;
- 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 with prosecutors or to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials all are 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; and
- Presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2, although Article 198a of the draft IP Code amendments provides for the first time a presumption of ownership in Vietnamese law.

WATCH LIST

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2022.¹

Executive Summary: While IIPA members commend Brazil's excellent progress with a number of enforcement actions against online piracy, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. For the creative industries, Brazil is a top priority market in Latin America. As such, the country's long overdue adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) is a major concern for IIPA members. More than two years ago, the Government of Brazil announced that the country would ratify the WIPO Internet Treaties. Unfortunately, no executive action has been taken in that regard. It is essential for Brazil to join and implement the WIPO Internet Treaties to ensure that its legal framework is consistent with global standards.

Notwithstanding setbacks related to the COVID-19 pandemic, Brazil continued to provide positive anti-piracy enforcement developments in 2021. For instance, enforcement authorities initiated a third wave of Operation 404 that took down online piracy platforms in nine different Brazilian states through site-blocking criminal injunctions, in addition to leading search and seizure raids against major pirate targets. *CyberGaeco*, São Paulo's Public Prosecutor cybercrime unit, developed and implemented a consistent judicial site-blocking framework, which has already successfully addressed 39 major stream-ripping sites. These domains were accessed more than 620 million times. The Brazilian Regulatory Agency for Telecommunications (ANATEL), the Brazilian Audio-Visual Agency (ANCINE), and Brazilian customs inspected and seized more than 1.5 million illicit streaming devices (ISDs) entering Brazilian ports.

On the legislative and policy fronts, the National Intellectual Property Strategy (ENPI) has been approved and serves as general guidance for all public initiatives concerning intellectual property (IP). Additionally, the National Council Against Piracy passed a New Plan to Combat Piracy, in the end of 2021, as part of the above-mentioned ENPI. IIPA urges Brazil to focus on WIPO Internet Treaties ratification and the implementation of a site-blocking system. Both ANATEL and ANCINE should fast-track discussions to implement an effective system to tackle online piracy.

Also, a new Copyright Act, if one is to be developed, should provide strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test. Similarly, other legislation, such as the pending artificial intelligence (AI) bill for example, should not be used to create new exceptions to copyright.

Regarding market access barriers, IIPA commends the Government of Brazil's August 2021 reduction of the industrial product tax (IPI) for video game consoles and accessories. However, the tax burden on these products remains significant, and we encourage Brazil to further reduce or eliminate IPI and other taxes. IIPA continues to be deeply concerned over film, streaming, and television quotas. Discussions about over-the-top (OTT) regulation and taxation, as well as digital services taxes (DSTs), are also of great concern. IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies, and practices that enable a sustainable and thriving creative sector.

¹For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2022

Enforcement

- Establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves, *CyberGaeco's* actions, and similar operations. Ensure that law enforcement agents and prosecutors all over the country are properly trained and coordinated to conduct complex online investigations and have access to the necessary legal tools to launch effective criminal prosecutions against major online piracy operators, including technical training on technological protection measures (TPMs) and anti-circumvention.
- Ensure ANATEL, ANCINE, and Brazilian Customs continue to have the resources and political backing to block the flow of ISDs into Brazil, as well as to have ANATEL as a consenting body at the Brazilian Foreign Trade System (SISCOMEX).
- Ensure that ANCINE and ANATEL continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Ensure that the *Conselho Nacional de Combate à Pirataria* (CNCP) continues to have the resources and political support to engage in cross-industry efforts against online piracy and develop its proposed New Plan to Combat Piracy. Considering the growing success of the CNCP, it needs to have more human resources and structure to address the increasing volume of projects and cases.
- Implement a long-term national program to train judges and prosecutors on IP law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions as well as technical training on TPMs and anti-circumvention; adopt judicial policies that expedite criminal copyright investigations across state jurisdictions; and reform sentencing practices to achieve deterrent impact.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices.
- Ensure the Brazilian Financial Intelligence Unit (COAF) will investigate suspicious financial transactions resulting from piracy commercialization and report its intelligence to competent enforcement authorities tasked with initiating actions against money laundering and organized crime.

Legislation and Regulation

- Accede to, ratify, and implement the WIPO Internet Treaties.
- Ensure the Copyright Law, currently under review, and/or any legislation on copyright: (i) implements the WIPO Internet Treaties, in particular, the exclusive making available right, without conflating it with communication to the public right ("public performance" right as it is described in current Brazilian law) and clarifying that interactive streaming services are outside of the Central Bureau for Collection and Distribution's (ECAD's) statutory default mandate; the anticircumvention of TPMs; and penalties for trafficking in circumvention devices and software; (ii) provides express legal basis and a streamlined process for civil and criminal courts to continue issuing orders to Internet service providers (ISPs) to block access to websites dedicated to copyright infringement; (iii) covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites; (iv) provides criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizes signal theft in the pay-tv and OTT sectors; (v) implements special cybercrime courts and prosecution units; (vi) penalizes repeat infringers, including those identified on online platforms and Internet applications, and have ISPs define clear and effective policies to deal with such matters; (vii) ensures that any exceptions and limitations comply with the three-step test; and (viii) ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Approve draft legislation aimed at criminalizing camcording activity in movie theaters.
- Approve draft bills intending to implement a judicial site-blocking system.
- Ensure that implementation of the Internet Civil Act, related decrees, such as the one on content moderation,

and legislation does not interfere with voluntary notice and takedown efforts or other cooperative agreements to combat online piracy.

- Ensure that the proposal to introduce an overbroad exception for the use of certain copyright material for training AI systems without adequate delineations to limit its scope (which is contained in a bill on AI currently progressing through the Brazilian legislature (PL 21/2021)) is withdrawn to avoid serious harm to right holders.

Market Access

- Enable industry growth by further reducing high tariffs and taxes placed on video game products, as well as on general on-demand content.
- Mitigate imposition of the “video-on-demand (VOD) tax,” DST, or similar tax, on movies and TV programming delivered either on demand or on a non-linear basis; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt OTT services from compliance with the existing Pay-TV Law; refrain from increasing tax and regulatory burdens towards either service to correct perceived asymmetries.
- Reject attempts by Collective Management Organizations (CMO) to collect royalties (already collected and paid) derived from audiovisual works’ public performance.
- Extend discussion on the technological and financial feasibility of mandating OTT platforms to offer accessibility functionalities. (Continue to engage private sector stakeholders and refrain from passing any mandates until a best practice is established.)
- Ensure that any accessibility-related mandate—deployed in both movie theaters and OTT space—is implemented with a technological solution that is secure, efficient, ensures fair competition, and is consistent with global best practices.

THE COPYRIGHT MARKETPLACE IN BRAZIL

Online marketplace: Internet access and demand for online content continue to grow in Brazil. At least 80 online platforms offer legal viewing options to Brazilian television and film audiences. Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. According to music industry research, Brazil added US\$20.1 million in revenue from ad-supported audio streaming in 2020 after growth of 92.8% versus the previous year² and had US\$164.7 million in revenue from subscription audio streams in 2020³ for a total increase in streaming, including subscription streaming, ad-supported streaming, and video streaming, of 37.1% over 2019.⁴

Despite this abundance of legal offerings, the ubiquity, variety, and adaptability of piracy distribution channels—including infringing sites, devices, hard goods, and camcording—continue to inhibit the development of a healthy legitimate online marketplace in Brazil. Studies carried out in 2019 indicate that 73 million people aged 11+ in Brazil have used pirate sources to access audiovisual content, consuming 1.7 billion pirated full-length movies and TV show episodes in a given three-month period. The infringing marketplace in Brazil offers different price points, from low-cost hard media to sophisticated devices that can cost up to US\$200. The music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world’s sixth largest music market. Since then, per capita music revenue in Brazil has fallen from US\$8.50 in 1997 to US\$1.44 in 2020 in large part due to the rise of online piracy.⁵ For 2021, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

²International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 104.

³*Id.*

⁴*Id.*

⁵*Id.* at 156.

Infringing Linking Sites, Stream-Ripping Sites, Stream-Manipulation Sites, Cyberlockers, and BitTorrent: The four most popular types of online distribution channels for infringing materials in Brazil are: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites); (ii) file sharing via illicit peer-to-peer (P2P)⁶ networks and indexing sites for torrent files; (iii) stream-ripping sites that circumvent TPMs on licensed streaming sites, such as YouTube; and (iv) ISDs, which use some of the previously listed pirate technologies to deliver non-authorized content to households where they are set up.

Online piracy based on linking sites remains dominant. Infringing sites dedicated to one specific type of content, such as those sites solely dedicated to video games, tend to attract audiences faster and remain popular. This includes the highly popular Portuguese site, *yuzuroms.ml*, for infringing Nintendo Switch titles. These websites rely on magnet torrent links and “sister domains” (sites that have the same look and feel as the original target site and are registered to the same operator but have no illegal content). “Sister domains” are increasingly used exclusively for payments that allow purveyors of illegal content to protect their revenue stream. Overall, the infringement ecosystem is now fragmented with multiple small new infringing sites competing for the Brazilian audience. In particular, the number of infringing video games linking sites increased over 30% in 2020. Online piracy likewise continues to plague the publishing industry. Among the several sites trafficking in infringing copies of books, *MercadoLivre* (*mercadolivre.com.br*) remains the most problematic for publishers.

While most cyberlockers and linking websites are hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many rely on social media profiles in Portuguese to promote user engagement and appear to have local operators and intermediaries (such as advertising providers and payment processors) for monetization channels. Special mentions to video games on social media sites, such as on YouTube channels and Twitch, are very popular. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

According to the International Federation of the Phonographic Industry’s (IFPI) 2021 Music Consumer Study, the music piracy rate in Brazil stood at 50% of all internet users in 2021—one of the highest in the world. Forty-six percent of users engaged in stream-ripping use websites or mobile apps (60% of 16- to 24-year-olds) while 23% used cyberlockers or BitTorrent sites to download pirated music. As the survey data demonstrates, the most prominent form of piracy in Brazil is stream-ripping. The most popular stream-ripping site is *snappea.com*, which received more than 50 million visits from Brazil alone in July 2021, according to SimilarWeb. Other widely used sites in Brazil include *savefrom.net* (9.4 million visits from Brazil in July 2021), *yt1s.com* (5.9 million visits), and *yout.com* (1.6 million visits).

Based on IFPI’s 2021 Music Consumer Study, BitTorrent also remains popular in Brazil. Brazilian site *viatorrents.com* had 4.5 million visits from Brazil in the second quarter of 2021 while *The Pirate Bay* received 5.2 million visits. Cyberlockers such as *4Shared* and *Zippyshare* (5.4 and 5.5 million visits from Brazil respectively in the second quarter of 2021) are also well-known destinations in Brazil for pirated music.

Stream manipulation services create online or offline plays on audio and audio-visual streaming services where those plays do not represent genuine listening. Stream manipulation may be undertaken in respect of individual or groups of recordings to artificially improve chart positioning, increase market share, increase royalty payments, or for other dishonest purposes. Stream manipulation is a serious and increasing problem because it can undermine the accuracy of charts and, ultimately, the accuracy of royalty payments from streaming services to music creators. It has the potential not only to cause economic harm to streaming service providers, rights holders, artists, and advertisers, but also to distort the media’s and fans’ impressions and understanding of the popularity of particular recordings and harm consumers’ use and enjoyment of streaming services by influencing algorithmic playback results.

⁶See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”), documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

The video game industry reports that Brazil ranks 3rd globally in P2P piracy. One problem the industry faces is unauthorized digital goods⁷ (infringing versions of digital assets available within a video game environment, such as virtual currencies, digital accounts, or “skins”). Although some ESA members continued to see an increase in BitTorrent network activity when it comes to certain popular game titles over the past year, BitTorrent network activity for video games declined by 20% in the past two years and visits to cyberlockers declined by 27%. As the piracy landscape in Brazil continues to evolve with new technologies, however, these declines are likely the result of an increase in the popularity of specialized linking sites, apps, and other services.

Circumvention Devices: An increasing number of Brazilian sites and online marketplaces, such as MercadoLivre, offer video game copiers, controllers, and other circumvention devices aimed at nullifying access control technologies used by copyright owners. ESA members identify Brazil as having the highest number of listings of circumvention devices and modified consoles via *mercadolivre.com.br* when compared to other Latin American countries. The positive news is that compliance has improved, and since January 1, 2021, the video game industry has had an approximate 93% successful removal rate of infringing video games from *mercadolivre.com.br* and a 70% compliance rate for *Shopee.com.br*, another top site for infringing game products. However, there is a continued need for platforms to place more pressure on repeat sellers of infringing listings. These devices enable the play of pirate videogames—often supplied by infringing torrent link sites—on modified consoles, which are the great majority of game consoles in Brazil.

Piracy Devices (PDs) and Signal Theft: Brazil continued to see an increase of online piracy, piracy apps, and ISD piracy hurting the local audiovisual market during 2021. Signal theft remains an issue in Brazil and is used as a source of premium live content for online piracy and ISDs’ businesses. Brazilian enforcement authorities deployed robust efforts to properly tackle these issues in 2021, but the high level of audiovisual piracy in the country is an obstacle to these actions resulting in a substantial impact in the number of infractions. A significant amount of piracy devices are sold on the Internet, mainly in online marketplaces such as MercadoLivre. Brazil’s economic crisis of recent years combined with the increased broadband availability across the country and the COVID-19 pandemic have set the stage for a likely spike in Internet protocol television (IPTV) rogue devices and pirate live-streaming of news and sports in coming years. The enforcement against ISDs increased during 2021, including multiple actions led by ANATEL, ANCINE, and Brazilian Customs, which interrupted the contraband of more than 1 million ISD units entering Brazil. In 2021 ANATEL also raided MercadoLivre’s warehouses in Brazil aiming at identifying non-certified telecom devices in transit to final customers—these actions had grounds on a recent legal opinion issued by ANATEL’s Attorney General who understands that intermediaries can be jointly liable for the trade of telecom equipment that does not comply with the Agency’s regulations (ISDs included). This raid resulted in several equipment seizures, including ISDs.

Hard Goods Piracy: Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies that can be accessed and enjoyed offline. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly but remains significant. The HTV box and other piracy devices have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) pre-loaded devices (e.g., hard drives), discs, and memory cards that are locally burned and assembled with illegal copies of video games; (ii) circumvention devices as mentioned above; and (iii) modified consoles. While some of this infringing product enters the Brazilian market through the nation’s relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities,

⁷Unauthorized Digital Goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as “cheat software”) that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and “cheats,” or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of UDGs and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual “arms race” to update their products and security technology before the sellers can update theirs.

often located in private homes. The lack of criminal investigations and effective action for seizures of modified consoles or circumvention devices or against repeat infringers enable these businesses to continue to thrive.

Camcording: Theatrical camcording piracy, while a persistent problem in Brazil, is trending in the right direction. In 2019, 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. The COVID-19 pandemic, which caused the widespread closure of cinemas in Brazil, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume and probably increase, given potential new releases models.

Piracy Challenges During the COVID-19 Pandemic

The COVID-19 pandemic has exacerbated and created new forms of infringing activity in Brazil. For instance, the mandated lockdowns have led to an across-the-board increase in the consumption of illegal online content. The pandemic emergency also had a significant impact on law enforcement actions against online targets once the judiciary was shut down for a few weeks' time and then transitioned to remote and limited activity.

While movie theaters had been closed for some time because of the social distancing measures, which restricted the use of camcording as a means of piracy, a surge of drive-in movie theaters was seen across Brazil. In many cases, these theaters were connected to illegal activities, such as the showing of movies not previously licensed for public performance. Enforcement actions against these unauthorized operations were left to the rights holders because of government authorities' lack of engagement.

Influenced by the COVID-19 pandemic shutdown in Brazil, circumvention devices and unauthorized digital goods (UDGs) increased significantly. In the case of circumvention devices, the online marketplaces have now become an alternative to local street market vendors and booths. The fragmentation trend noted in the previous year remained during 2021 and resulted in an increase of 70% more entertainment software targets being monitored for online game infringements in Brazil. For linking sites dedicated to the unauthorized download of game titles, there was an overall increase of 64% in the number of illegal sites while there was a 78% increase in targets for e-shops selling UDGs. According to SimilarWeb, during that same period, the combined audience for those sites increased year-on-year by 35%, with the most significant increase noted for the infringing linking sites, with 50% growth.

This type of commercial online game piracy on multiple online marketplaces in the country also increased during the past year, with new platforms arriving in the local market with a fast-growing audience, such as Shoppe, with a 330% increase in the last 12 months. The volume of infringing game title and product listings available on marketplaces has also increased. Data gathered from SimilarWeb and Google searches indicate that at least 14% of all searches related to these marketplaces and platforms are related to video game products, and the volume of sellers (users of online marketplaces posting listings) offering game products on the major platforms increased by 15% in the last year. However, the volume of infringing game-related listings (UDGs) per user/seller has decreased, indicating a fragmentation on the part of repeat infringers to protect their illegal businesses from take-down policies applied by platforms and rights holders. The cyberlocker and BitTorrent audiences in Brazil are declining, 18% and 44% respectively, in a year-on-year comparison, according to SimilarWeb and IKnowWhatYouDownload.com data. Video game titles are the second most popular type of content among torrent downloads and the top 10 most popular titles are from ESA member companies.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Against Online Piracy:

The Brazilian campaign against online piracy performed very well at both federal and state levels during 2021. The following operations deserve special mention:

Operation 404 and Operation Brick: The third wave of Operation 404 against online content piracy was executed by the Brazilian Ministry of Justice and Public Safety (with the support of enforcement authorities from ANCINE and the Integrated Operations Secretariat) in July 2021. Search and seizure warrants were served in nine Brazilian states, and 334 websites and 94 illegal music apps were blocked pursuant to a criminal court order. Social media accounts, pages, and search results related to the targets were also delisted.

In November 2021, the Ministry of Justice and Public Security, through its Integrated Operations' Secretariat (SEOPI) and its cybercrime team (CIBERLAB), initiated Operation Brick, an extension of Operation 404, to tackle online video game piracy with 50 marketplace users dedicated to the sale and distribution of UDGs, selling over 1,350 illegal products, 35 infringing e-shops also dedicated to UDG sales, and two major resellers of circumvention devices. Five raids were conducted against site operators and 31 domain names related to these infringing game sites were seized by police. Another phase of Operation 404 successfully took place earlier in the year to target piracy in the audiovisual and music sectors.

Operation Final Boss: In March 2021, *CyberGaeco*, the cybercrime unit within the District Attorney's Office of São Paulo, led a criminal investigation against eight major infringing linking sites and several mirror sites dedicated to video game piracy in Brazil. All eight sites were disrupted and a total of 11 domains were shut down after their operators and owners were notified and brought to hearings by the public prosecutor. These sites had over 3.2 million combined monthly visits and 35 million visits in the last year.

Enforcement by Federal Regulatory Agencies: In 2021, federal regulatory agencies ANATEL and ANCINE together with Brazilian Customs inspected and seized more than 1.5 million ISDs at multiple entry ports throughout the country. In October, ANATEL also raided warehouses from *MercadoLivre*, the largest e-commerce platform in Latin America, and seized more than 10,000 units of non-certified telecommunications equipment (ISDs among them) in transit to final users.

Shutdown of Various Streaming Manipulation Services: Following a coordinated approach from Pro-Musica Brasil, Brazilian anti-piracy body APDIF, and the Brazilian police, the operator of *turbosocial.com.br* and six affiliated sites ceased offering streaming manipulation services. A further coordinated action by APDIF and Pro-Musica Brasil, by way of cease-and-desist letters, resulted in seven additional websites ceasing to offer music streaming manipulation services. In addition, IFPI, Pro-Musica Brasil, and APDIF worked with *CyberGaeco* (the cybercrime unit of the State of São Paulo's Prosecutor's Office) on an action that resulted in 18 websites and five users of *MercadoLivre* (a popular online marketplace) ceasing to offer stream manipulation services. An additional 12 websites voluntarily stopped offering streaming manipulation services as a result of this action. In total, more than 65 streaming manipulation services have been affected by this coordinated action in Brazil and an additional 35 listings for music streaming manipulation services have been removed from *MercadoLivre*.

Stream-Ripping Sites Blocking: In October 2020, the Criminal Justice Tribunal of the State of São Paulo (following an application filed by *CyberGaeco*, the Prosecutor's Office of the State of São Paulo (MPSP), and APDIF DO BRASIL (the recording industry anti-piracy association)), ordered all ISPs in Brazil to block access to 14 very popular foreign stream-ripping sites for 180 days. The court found that the sites were infringing copyright, and blocking was an effective and necessary measure to curb the criminal conduct and safeguard the rights of the victims. The sites had received 384.4 million visits from Brazil in the year ending in September 2020, according to SimilarWeb. In August 2021, the Criminal Justice Tribunal of the State of São Paulo ordered ISPs to permanently block access to the 14 sites. In October 2021 the Criminal Justice Tribunal of the State of São Paulo also accepted public prosecutor criminal charges issued against the administrator and owner of the popular stream-ripping site *yout.com* and as an additional measure the site was blocked with a renewed court order. Further, in December 2021, the Criminal Justice Tribunal of the State of São Paulo also issued a preliminary order requiring ISPs to block access to 24 stream-ripping targets for a period of 180 days following an application by APDIF and *CyberGaeco*.

These enforcement actions speak to Brazil's improvement. However, too much of Brazil's judicial system

continues to lack adequate understanding of IP matters, though some exceptions exist, such as the specialized commercial and criminal courts in São Paulo (see above) and Rio de Janeiro. IIPA urges Brazil to commit sufficient resources and political will to train its police, judges, and prosecutors in best practices to effectively address the country's rampant piracy problem, as well as technical training for complex video game piracy.

In addition to these enforcement operations, the National Strategy serves as general guidance for all public initiatives concerning IP. Brazil's CNCP facilitated promising public-private agreements to tackle online piracy and the release of two best practices guidelines on e-commerce and payment services providers. Moreover, an MOU regarding online advertising was signed in February 2021 by the Administration and several third parties (including IIPA member MPA and associations representing advertisers). In this agreement, ANCINE committed to representing the audiovisual sector to provide information about infringing websites to the World Intellectual Property Organization (WIPO) Building Respect for IP (BRIP) Database Project, a "follow the money" initiative to combat online piracy whereby WIPO Member States identify sites known to be infringers of copyrighted material to stem the flow of their advertising revenue. On the e-commerce front, one set of guidelines aims to prevent the availability of non-certified devices (including rogue IPTV and key-sharing devices) in popular online marketplaces. The second set of guidelines aims to stifle the cash income of pirate sites through Payment Service Processors (PSPs).

We encourage CNCP to build on its 2021 work, develop a strategic plan to give top priority to combating widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.) to develop better standards and effective voluntary agreements to fight online piracy. To do all this, IIPA urges the Brazilian government to adequately fund the CNCP and increase the CNCP capability to operate with more human resources and infrastructure.

Case Developments

IIPA continues to closely monitor the Brazilian Federation of Associations for Information Technology Companies' constitutional challenge of Federal Decree 3.810/01, which requires U.S.-based companies that maintain user communications data abroad to comply with Brazilian authorities' orders to release this data pursuant to the *Marco Civil da Internet*. The case, *Ação Direta de Constitucionalidade Número 51* (ADC-51), is currently pending before the Supreme Court (*Supremo Tribunal Federal*, STF) and had little development during the last year. If the constitutional challenge succeeds, investigations of online crimes, including IP violations, from local servers and sites may be blocked or delayed, resulting in a severe weakening of IP protections online and potentially on the notice-and-takedown procedures for repeat infringers.

On August 10, 2021, the Tribunal of Justice of the State of São Paulo, issued a permanent blocking order against 14 stream-ripping sites in a criminal case initiated by the industry's anti-piracy body, *APDIF do Brasil* (APDIF). The decision is the first of its kind in Brazil against music piracy services and confirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by APDIF and *CyberGaeco*.

Enforcement Cooperation

The copyright industries continue to enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. Given the COVID-19 social distancing measures, ESA provided one virtual training session to the São Paulo State Prosecutors Office in September to share investigative best practices and provide detailed insight into industry issues related to digital piracy. The training aimed to help agents better identify and investigate infringing sites, online marketplaces, and UDGs, and to foster discussion of effective strategies to address each case scenario.

Enforcement Training

State law enforcement authorities held a series of five events dedicated to providing a continued training program covering investigations of IP-related crimes to highlight best practices adopted by *CyberGaeco*, and *Cyberlab-SEOPI* (the national cybercrime unit in the Ministry of Justice) on the current operations in place. The events are hybrid (online and in person) and are held in several Brazilian states.

LEGISLATION AND REGULATION IN BRAZIL

National Intellectual Property (IP) Strategy: In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input on their proposal for a National Intellectual Property Strategy (NIPS), which was developed by the Inter-ministerial IP Group (GIPI) (overseen by the Economy Ministry). In late 2021, the National Intellectual Property Strategy (ENPI) was approved and made official by Presidential Decree, and Brazil's Ministry of Justice and Public Security launched the official National Plan Against Piracy (PNCP), as part of the aforementioned ENPI.

IIPA supports many of the strategy's goals, such as promoting the creation and strengthening of specialized IP public agency units and personnel, ranging from the judiciary to the police and customs; strengthening the structures of public policies against piracy that are already in place within the Ministry of Justice and Public Safety and other public agencies; reassurance of the authority of the administrative sphere to guarantee IP rights, including the opening of investigation procedures and the interruption of websites and other services used primarily to violate IP rights; and in terms of the ENPI's general guidelines, increasing society's awareness not only on the benefits of IP rights, but also on the losses caused by the violation of IP rights, among others.

One of the strategy's goals is to draft a bill to reform the Copyright Law (LDA) taking into account new technologies and business models on the Internet. IIPA urges Brazil to implement both policies, primarily focusing on Copyright Act reform and the implementation of a site-blocking system. Moreover, discussions on site-blocking at both ANATEL and ANCINE should be fast-tracked to implement an effective system to tackle online piracy.

As mentioned above, it is essential for Brazil to join and implement the WCT and WPPT to ensure a forward-looking legal framework that fosters a vibrant legitimate market for Brazilian and foreign content. Although Brazil announced over two years ago it would join the WIPO Internet Treaties, no executive action has been taken to complete the ratification process. The creative sector in Brazil and around the world is waiting for the Government of Brazil to fulfill its promise.

In addition to ratifying the WIPO Internet Treaties, IIPA makes the following recommendations for the potential new law:

- Amend Article 105 to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs, and dealing in circumvention devices, circumvention software and/or components including installation and modification; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- Amend Article 107, which covers TPMs, to encompass all forms of access and copy control technologies as well as dealing in circumvention devices.
- Clarify the provisions on damages to ensure that deterrent-level damages and a choice of method to calculate damages are available in respect of copyright infringement and circumvention of TPMs. Article 103 of the Copyright Law should be amended to expressly allow rights holders to choose the method of calculation of damages and include damage/losses suffered, an account of the infringer's profits, and a reasonable royalty as methods of the calculation of damages.
- Amend Articles 98 and 99, which govern Brazil's collective management of broadcast and public performance

rights for authors, performers, and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine whether to license their rights individually or collectively, which should be a voluntary decision; and (2) if they so choose, become direct members of the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella CMO, and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to reconsider ECAD's use of a single fee for the licensing of uses of multiple rights of different categories or rights holders—this practice dramatically impacts the financial return for producers on their investments. For example, music producers receive only 13.8% of total distributions despite their significant investments.

- Clarify that interactive streaming involves acts that fall within producers' exclusive distribution right, including the making available right arising from the WCT and WPPT. As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi.FM* where the Superior Tribunal Court (STJ, *Superior Tribunal de Justiça*) erroneously ruled that both interactive and non-interactive streaming involved the public performance right and therefore, fell under ECAD's collective management mandate. The new law should include sound recording producers' separate, exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right. Finally, the exclusive right of making available should be enshrined in Brazil's copyright law, for both sound recordings and audiovisual works, consistent with obligations under both WCT and WPPT.

Adopted Legislation: On August 14, 2018, a comprehensive data protection law was passed (Law # 13.709), containing several statutory provisions on acquisition, processing, storage, deletion, and personal consent related to personal data. Following a Presidential veto, a subsequent amendment was introduced (Law # 13.853). The new statute created a series of requirements for private companies and government entities when collecting, using, and storing individuals' personal information. On the positive side, the law does not approach the issue from a property right perspective and instead, provisions allow for the access and use of personal data by controllers as part of a normal course of business and include situations where the provision of personal data is a requirement to render services or provide a specific product. The Law also allows for the regulation of access to personal data via contractual arrangements.

Artificial Intelligence (AI) Bill: A bill on AI currently progressing through the Brazilian legislature (PL 21/2021) contains a provision that would lead to a presumption that the use of certain copyright material in training AI is not an infringement (without adequate delineations to limit its scope, as seen, for instance, with the scoping of the text and data mining exception in other jurisdictions to ensure that it is compatible with the three-step-test). This proposal must be withdrawn to avoid serious harm to rights holders.

MARKET ACCESS AND RELATED ISSUES IN BRAZIL

High Tariffs, Taxes, and Barriers on Entertainment Software: Brazil's high tariffs and taxes on video game products and entertainment software are a long-standing concern, and while some progress has been made, more progress is needed. They act as a significant barrier to legitimate market entry, as an incentive for the proliferation of infringing games, and as an obstacle to the growth of a legitimate video game industry. A legitimate market could, if allowed to develop, deliver innovative content to Brazilian consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement.

Under a 2013 interpretation of the law that considered customized software a service, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium, which continued to be applied to off-the-shelf, physical software. However, the taxation of off-the-shelf software, such as video games, is widespread, including the federal IPI, import tariff (II), federal social contributions (PIS and COFINS), and the municipal services tax (ISS). The overall heavy tax burden on such software therefore marginalizes the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these

fees). IIPA urges the reconsideration of this problematic interpretation from 2013. While the overall tax burden for video game products remains high, IIPA commends Brazil's recent reductions of the federal IPI for video game consoles, accessories, and portables. IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, import taxes, as well as the state-level (ICMS) and ISS taxes on video game consoles and accessories (the IPI on portables was fully eliminated in 2021).

Condecine Tax: Condecine tax applies to films, advertising, pay-TV, and "other segments," which some officials would assert that includes VOD content. The extension of Condecine tax to the VOD segment would be burdensome, especially when charged on a per-title basis, as intended by ANCINE across several years, and would curb consumer choice. Helpfully, in September 2021, the National Congress of Brazil voted against the levy of Condecine tax over VOD content on a per-title basis, overriding an executive branch veto in the process. In any event, there are parallel discussions, under the Executive and Legislative Branches, about the creation of a singular tax to be applied over both linear and non-linear content, in addition to regulatory burdens. Accordingly, notwithstanding recent positive developments in this area, industry stakeholders committed to the growth of Brazil's OTT market remain concerned about the future.

Several draft bills seeking to establish DSTs, if approved, would increase streaming platforms' already heavy fiscal burden, which could discourage investment, as well as hamper the local industry's growth. It remains unclear how the local administration and legislature will stand in regard to the global minimum corporate tax, in that it could conflate with discussions concerning overall digital taxation.

Accessibility Regulation in Both Theatrical and Over-the-Top (OTT) Windows: In Brazil, movie theaters are obliged to screen accessible films to disabled patrons using (audio description, closed captioning, and sign language). In May 2021, Brazil's National Congress approved Executive Order 1025/2020, which extended until January 1, 2023, the deadline for cinemas to offer these accessibility resources to people with visual and hearing impairment. The U.S. film industry supports measures to broaden access to its productions and to better serve patrons with disabilities. The U.S. film industry is working closely with regulatory bodies and other stakeholders to ensure that accessibility features are implemented with a technological solution that is secure, efficient, and ensures fair competition and global best practices.

Although both policymakers and lawmakers continue to discuss the OTT platforms' obligation to adopt these accessibility measures, the technology to meet these functionalities is still fairly nascent, in terms of the OTT window. Rushed implementation of such measures could impede platforms' ability to expand their catalogues, impacting consumers' access to diverse stories and potentially worsening piracy.

Collective Management Organizations (CMOs): In late 2018, prior to its abolition, Brazil's then Ministry of Culture granted the accreditation of three CMOs that represent directors, screenwriters, and performers in audiovisual works. These entities sought to collect royalties on their behalf for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV, and digital distribution. Nevertheless, the CMOs have not taken a position as to whether they are entitled to collect royalties only if the rights that originate such collection have not been assigned to the audiovisual work's producer, which means the CMOs may still try to collect for previously assigned rights. This is patently incorrect because Brazil's copyright law establishes a voluntary collective rights management regime, which means CMOs must affirmatively prove representation of the rights holders they claim to represent rather than act based on a presumption of representation. IIPA urges the Brazilian government to constantly and officially reaffirm that CMOs can assert rights only to collect royalties for acts of communication to the public where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works. This continuous clarification is necessary to ensure that the CMOs assert only properly authorized claims and to protect rights of freedom of contract for all stakeholders.

Draft bill #3203/2021: This draft bill aims to eliminate the fiscal incentives applied to the audiovisual industry,

which is a problem because foreign audiovisual distributors, the major financiers of the local industry, rely upon these fiscal incentives to offset their costs. Thus, if passed, this effort would largely stall the local industry's growth.

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Watch List in 2022.¹

Executive Summary: Canada's legitimate digital marketplace remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming and download offerings; subscription piracy services (infringing paid Internet Protocol Television (IPTV) and video-on-demand (VOD) services) and the ever-increasing Canadian re-sellers of these services; streaming sites and other online sources for unauthorized movies and TV shows; Piracy Devices (PDs) and apps, readily available both online and in the retail market that suppress demand for legitimate digital streaming and VOD services; and the sale of devices and software for circumventing access controls on video game consoles. Canadian upstream piracy providers are also actively engaged in the theft of telecommunication signals that provide content to other subscription piracy services. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, and inter-industry cooperation remains insufficient. Government at all levels continues to allocate insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers continue to impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act should have been a vehicle for addressing many of these problems, as many of the recommendations of the Parliament's Standing Committees on Canadian Heritage (Heritage Committee) and Industry, Science, and Technology (Industry Committee) would have improved copyright protection and enforcement in the country. However, since the dissolution of Parliament in advance of the October 2019 federal election and through yet another federal election in September 2021, the Government of Canada has not acted upon these recommendations, including the recommendation by the Heritage Committee to amend the Copyright Act to clarify that the fair dealing exception for education should not apply to educational institutions when the work is commercially available. Instead, the government initiated further consultations on copyright reform on a discrete set of issues. Meanwhile, the shortcomings in Canada's current copyright regime remain unaddressed.

IIPA hopes that the government's stated priority in mandate letters to the Heritage and Industry Ministers following the September 2020 election to "amend the Copyright Act to further protect artists, creators and copyright holders" will produce concrete action. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market as a result of an overbroad interpretation of the education as fair dealing exception, lack of effective remedies and legal incentives to combat growing online piracy, an unjustified radio royalty exemption, a wholly ineffective "notice-and-notice" system, a globally anomalous exception for user-generated content (UGC), inadequate duration of copyright protection, and weak enforcement. Many of the parliamentary committee recommendations address these concerns, and IIPA urges the Government of Canada to swiftly implement those recommendations to improve both the law and enforcement.

IIPA is encouraged that despite the absence of legislation, some Canadian courts have issued and upheld injunctive relief against intermediaries whose services are used to infringe copyright. In addition, IIPA is hopeful that the reforms to Canada's Copyright Board will bring Canada's tariff-setting process into closer alignment with international norms, including by setting tariffs that reflect the economic value of the use of the rights concerned (i.e., willing buyer/willing seller standard). While Canada adopted U.S.-Mexico-Canada Agreement (USMCA) implementing

¹For more details on Canada's Special 301 history, see previous years' reports, at <https://www.iipa.org/reports/special-301-reports/>. For the history of Canada's Special301 placement, see <https://www.iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



legislation in March 2020, the legislation did not fulfill Canada's obligation to extend the general term of protection for works, because Canada continues to rely on a 30-month window from the date of entry into force to meet this specific obligation (i.e., until December 31, 2022). As a result, a Copyright Act amendment remains required for Canada to meet this outstanding USMCA obligation. The Government of Canada initiated a consultation on February 11, 2021, on copyright term extension implementation under the USMCA. Canada should ensure any such amendments or legislation extend the term of protection for copyrighted works in a manner that has a direct benefit to creators and consumers and encourage investment in new creative works. In addition, Canada should meet its USMCA commitments and address pressing concerns, including remedying its deficient online copyright liability regime, which lags behind global norms. IIPA asks the U.S. government to remain extensively engaged with Canada on these and other issues in 2022.

PRIORITY ACTIONS REQUESTED IN 2022

- Amend the Copyright Act to fully implement Canada's obligations under the USMCA by extending the general term of protection for works from life of the author plus 50 years to life of the author plus 70 years *without* additional impediments, such as a registration requirement on the additional 20-year period or other limitations.
- Address the crisis in the educational publishing market, by clarifying that the fair dealing exception for "education" does not apply to educational institutions when the work is commercially available.
- Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.
- Counter online piracy in Canada by strengthening legal incentives for Internet service providers (ISPs), hosting providers, and other intermediaries to cooperate with copyright owners, in accordance with international norms, including by: clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content, including removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder; introducing measures that have been demonstrated effective in preventing or restraining infringement; and following through on parliamentary recommendations to provide injunctive relief for deliberate online copyright infringement.
- Avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.
- Ensure that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by elimination of the radio royalty exemption.
- Eliminate or at least clarify the UGC exception, in accordance with parliamentary recommendations and Canada's international obligations.
- Ensure that the making available right is fully implemented in Canada in line with its international counterparts and treaty obligations.
- Prioritize enforcement against online piracy (including stream-ripping), the operation and sale of subscription piracy services, and the trafficking in PDs and apps and other circumvention software tools and modification services.
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement the resources and training required to implement the foregoing priority.
- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.

THE DIGITAL MARKETPLACE IN CANADA TODAY

Canada remains one of the leading markets for online commerce of U.S. copyrighted works. The Canadian Internet Registration Authority (CIRA) reports that 72% of Canadians say they spend at least one hour per day watching TV or movies or listening to audio online. About four in 10 Canadians spend more than three hours per day

watching TV or movies or listening to audio online.² A 2021 study found that two-thirds of the time that Internet users in Canada listen to music is spent listening online through streaming services.³ Canadian recorded music revenues grew by 8.1% in 2020.⁴ Streaming was the key to growth, and revenues rose by 17.8% with subscription streaming income up by 18.2% from US\$249.5 million in 2019 to US\$294.8 in 2020.⁵ Streaming's share of total music industry revenues continues to grow, increasing from 69.1% in 2019 to 74.3% in 2020, and digital consumption methods overall are now nearly 81% of all recorded industry revenues.⁶ The legitimate online video market is growing in Canada, with studios and other producers continuing to work with multiple partners and platforms. In 2020, Canadians subscribed to a wide variety of services offering movies, TV programming, or both, online, with 37% of Canadians subscribing to Amazon Prime Video and 60% of all Canadians reporting that they subscribe to Netflix.⁷ In 2021, 937 active video game companies were identified in Canada, a 35% increase since 2019.⁸ In 2021, video game companies in Canada generated an estimated CAD\$4.3 billion in revenue from all sources, demonstrating a growth of 20% since 2019.⁹ The video game industry in Canada spent an estimated CAD\$3.7 billion in 2021, an increase of 17% in the last two years.¹⁰

Evidence persists, however, that the digital marketplace for copyrighted content in Canada continues to face challenges in realizing its full potential due to competition from illicit online sources. Stream-ripping services, now the leading form of music piracy in Canada, are a major contributor to this problem.¹¹ Stream-ripping enables users of licensed streaming services, like YouTube, to convert streams into unauthorized audio downloads that can be stored and replayed at will, with no royalty payment to rights holders.¹² According to International Federation of the Phonographic Industry's (IFPI) Music Consumer Study 2021, 17% of Canadian respondents reported downloading music from YouTube or other sites using stream-ripping websites, browser extensions, or apps, a figure that rose to 32% for 16-to-19 year olds. By circumventing the technological protection measures (TPMs) employed by most legitimate music streaming services to prevent copying and redistribution of streamed recordings, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. Canadian operated stream-ripping services include *Loudtronix.co*, *Anything2mp3.cc*, and *YTMP3.net*. *Ytmp3.cc* was a major stream-ripping target with 47 million visits from Canada in 2021. Five percent of Canadian respondents to IFPI's 2021 Music Consumer Study said they had used *Ytmp3.cc* in the last month to download music. Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada. Use of peer-to-peer (P2P) sites remains high, with BitTorrent indexing sites including *Rarbg*, *The Pirate Bay*, and *1337x* popular in Canada.¹³ Cyberlocker sites, such as *Mega*, *Uptobox*, *Mixdrop*, and *Rapidgator*, are also a common way to access recorded music.¹⁴

In recent years, Canada has made progress rectifying its long-standing reputation as a safe haven for some of the world's most massive and flagrant Internet sites dedicated to the online theft of copyrighted material. However, Canada remains home to various intermediaries that are popular with unlicensed services. As with music piracy, online movie and television piracy remains a formidable challenge in Canada, inflicting major financial harm. Research by Carnegie Mellon University found that if pre-release piracy could be eliminated from the theatrical window, U.S.

²CIRA Internet Factbook 2021, available at <https://www.cira.ca/resources/factbook/canadas-internet-factbook-2021>.

³International Federation of the Phonographic Industry (IFPI), *Music Consumer Study 2021*.

⁴IFPI Global Music Report 2021 at 106.

⁵*Id.*

⁶*Id.*

⁷CIRA Internet Factbook 2021, *supra* note 2.

⁸Entertainment Software Association of Canada, *Essential Facts*, p. 9, available at <https://theesa.ca/resources/essential-facts/>.

⁹*Id.* at p. 3.

¹⁰*Id.* at p. 5.

¹¹Stream-ripping provided the special "Issue Focus" for the 2016 USTR Notorious Markets Report, which called it "an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services." USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) ("2016 USTR NM"), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

¹²The music industry reports that some 93% of Canadians who visited YouTube used the site to access music in 2021.

¹³During 2021, according to SimilarWeb, *Rarbg* received over 78.5 million visits from Canada, *1337x* received 36.7 million visits, and *The Pirate Bay* received 28.3 million visits.

¹⁴During 2021, according to SimilarWeb, *Mega* received over 35.2m visits from Canada, *Mixdrop* received over 15.2 million visits, *Uptobox* received 9.8 million visits, and *Rapidgator* received 8.2 million visits.

and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).¹⁵ It is nearly impossible to overstate the magnitude of the piracy problem in Canada. According to the Government of Canada's own study published in May 2018, more than one-quarter (26%) of content consumers reported having "consumed" (downloaded or streamed or accessed) pirated content online in the previous three-months, and movies (36%) and television shows (34%) were among the forms of content most likely to be illegally "consumed."¹⁶ Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.¹⁷ In 2020, 76% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.¹⁸ Mimicking the look and feel of legitimate streaming services, infringing streaming websites continue to overtake P2P sites as a highly popular destination for Canadians seeking premium content in both English and French.

Additionally, the subscription piracy ecosystem has continued to grow in Canada, where widely marketed sellers and resellers of subscription piracy services enable Canadians, as well as global audiences, to obtain unauthorized access to high-quality digital streaming and VOD content. Many of these illegal services in Canada have generated millions of dollars in revenue, oftentimes laundering the money through seemingly legitimate businesses set up solely for this purpose. The lucrative financial return of an infringing business model encourages a large ecosystem of players, including the operator of the service itself, individuals supplying the infringing content, and resellers of the service, supported by payment processors, and advertisers. The subscription piracy services offer various forms of subscriptions, ranging from CAD \$10 per month to over CAD \$130 per year, and are accessible through numerous devices, such as computers, mobile devices, and smart televisions. Canadian upstream piracy services are also actively involved in the circumvention of TPMs and other means of stealing legitimate signals for the purposes of: (i) making available unauthorized streaming of live television and motion pictures on their own for-profit subscription Internet protocol television (IPTV) service, or (ii) selling the content to other infringing subscription IPTV services available inside and outside of Canada. Sandvine reported in April 2018 that: (1) 10% of Canadian households now have at least one set-top box (STB), computer, smartphone, or tablet running Kodi software, a higher proportion than in the United States in 2018 (6%); (2) 71% of these households with devices running Kodi software have unofficial add-ons configured to access unlicensed content; and (3) 8% of Canadian households are using known subscription piracy services.¹⁹

Both online and offline, the legitimate market is challenged by trafficking in PDs or STBs, sold pre-loaded with infringing applications or as part of illegal IPTV subscription packages. Easily and widely available, STBs are sold online on dedicated Canadian-owned-and-operated websites, on third-party marketplace sites, and in traditional retail locations throughout Canada. The prices of these pre-loaded STBs range from CAD \$100-CAD \$600. The sale of paid subscription piracy services and STBs in otherwise legitimate retail spaces, combined with the deceptive marketing and high-quality promotional materials produced by those selling these products and services, has led to consumer confusion regarding their legality. Canadian piracy operators remain involved in the coding and development of infringing add-ons and Android application packages (APKs) that enable subscription piracy services and mass-market STBs to access streaming services without authorization. As discussed below, enforcement actions against these abuses are beginning to bear fruit, but the problem remains serious and widespread.

Sites dedicated to distributing tools to circumvent access or copy controls used by copyright owners remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, as well as subsequent court decisions enforcing these statutes. The video game industry reports that sites operated and

¹⁵Carnegie Mellon University, *The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion*, February 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

¹⁶Shifting Paradigms Report of the Standing Committee on Canadian Heritage" ("Heritage Report"), available at https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67.

¹⁷*Id.*

¹⁸MPA, *2020 Movie & TV Piracy Trends in Canada*, p. 1, available at https://www.mpa-canada.org/wp-content/uploads/2021/08/Canada-WDVK-2020_ENG.pdf.

¹⁹Sandvine, *Video Piracy in Canada*, April 2018, available at <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>.

hosted in Canada, such as *gamersection.ca* continue to offer circumvention devices and game copiers for sale. eBay Canada also provides for modded and hacked games for sale. Computer software that effects a “soft modification” of the security technology of game consoles and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada, such as *kijiji.ca*. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the United States, such as *Digimartzs.com*, rely on Canadian ISPs for hosting, thus evading enforcement action under U.S. law. Many of these Canadian ISPs continue to ignore the multiple notices regarding these websites, which are violating the ISPs’ own policies and terms of service.²⁰ This trend breathes new life into Canada’s problematic piracy “safe haven” reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. Even those sites that have been terminated from payment processing services can generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing video game products sold via e-commerce sites that are managed through Canadian e-commerce service providers like *Shopify.com* or *Browse.com*, as well as growth in the use of paid social media ads to target specific demographics to market and sell counterfeit products online. Video game companies see many local sites registered and created with Shopify, but through cooperation with Shopify are able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces, such as *askijiji.ca* and eBay Canada, continue to rise.

KEY TOPICS FOR COPYRIGHT REFORM LEGISLATION

In December 2017, Canada’s Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).²¹ The review provided an invaluable opportunity for Canada to assess whether the Copyright Act has kept pace with rapid technological and market changes and to upgrade, improve, or correct the Copyright Act where it falls short in today’s digital environment, including correcting deficiencies in the CMA. As IIPA previously reported, the review concluded with the May 2019 release of the Heritage Committee Report called “Shifting Paradigms” (Heritage Report)²² and the June 2019 Industry Committee Report (Industry Report).²³

The Heritage Report recognized the negative impact the 2012 amendments, which introduced an undefined “education” as fair-dealing exception, have had on the publishing industry, as well as the “disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries” (known as the “value gap”). The Heritage Report included several positive recommendations intended to address these concerns, as well as other significant shortcomings of Canada’s legal framework. Among other things, the Heritage Report recommended that the Government of Canada:

- clarify that fair dealing should not apply to educational institutions when the work is commercially available;
- increase efforts to combat piracy and enforce copyright;
- review the safe harbor exceptions and laws to ensure that ISPs are accountable for their role in the distribution of infringing content;
- harmonize remedies for collecting societies under the Copyright Act;
- narrow the radio royalty exemption so that it applies only to “independent and/or community-based radio stations”;
- extend the term of copyright for works;
- increase support for creators and creative industries in adapting to new digital markets;
- create educational materials to raise awareness of copyright provisions and artist remuneration for consumers;
- review, clarify and/or remove exceptions contained in the Copyright Act, ensuring that any exception respects

²⁰The video game industry reports that in 2021, Canada was 29th for all game-related P2P piracy, 12th for console game piracy, 13th for mobile game piracy, and 30th for PC/Mac game piracy.

²¹The Copyright Modernization Act (CMA), adopted in 2012, was fully brought into force in January 2015. Section 92 of the Copyright Act mandated that a parliamentary review of Canadian copyright law begin in 2017.

²²See Heritage Report, *supra* note 16.

²³See Statutory Review of the Copyright Act (“Industry Report”), available at <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

Section 9 of the Berne Convention for the Protection of Literary and Artistic Works;

- ensure that the Copyright Board reviews tariffs for online music services to ensure that royalty payments provide fair compensation for artists; and
- meet international treaty obligations (including Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement, and World Intellectual Property Organization Copyright Treaty).

The Industry Report also included some notable recommendations, including that the Government of Canada should: consider evaluating tools to provide injunctive relief against intermediaries in a court of law for deliberate online copyright infringement; monitor the implementation, in other jurisdictions, of legislation making safe harbor exceptions available to online service providers conditional on measures taken against copyright infringement on their platforms; and narrow the radio royalty exemption so it is available to only “small, independent broadcasters.” Unfortunately, in preparing its report, the Industry Committee did not consult the Heritage Committee, which was tasked with examining the specific issue of artist and creative sector remuneration. This lack of consultation created inconsistencies with the Industry Committee’s analysis, resulting in certain recommendations (often on those overlapping issues) that lack an evidentiary basis.

IIPA urges the Government of Canada to swiftly take up the recommendations identified above and adopt needed reforms. Consideration of copyright reform legislation has been delayed since the dissolution of Parliament in advance of the October 2019 federal election through yet another federal election in September 2021. Moreover, any amendments to the Copyright Act should not diminish the extended term of copyright protection agreed to under the USMCA, such as subjecting the additional 20-year period to a registration requirement or imposing other limitations. To the extent that the Government of Canada considers reform pertaining to the issues raised in the consultation on “online intermediaries,” amendments to the Copyright Act should: (1) expressly allow rights holders to obtain injunctive relief, including site-blocking and delisting orders, against intermediaries whose services are used to infringe copyright when the intermediary has actual or constructive knowledge of infringing content or links on their services or networks; (2) clarify that safe harbors should apply only to passive and neutral intermediaries that do not contribute to infringing activities; and (3) avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.

Consultations on Copyright Reform: In 2021, the Government of Canada issued three consultations on copyright reform: (1) a consultation on how to implement copyright term extension under the USMCA, including whether accompanying measures should be adopted; (2) a consultation on potential options for copyright reform related to intermediaries’ protections against liability for copyright infringement, rights holder remuneration models, transparency obligations, and the effective enforcement of copyright; and (3) a consultation on a modern copyright framework for artificial intelligence (AI) and the Internet of Things (IoT), including text and data mining, authorship and ownership of works created by AI, infringement and liability regarding AI, and repair and interoperability issues related to TPMs. While consultations are an important component of the legislative process, they should not distract from the importance of implementing reforms agreed to by the government, such as Canada’s obligation to implement copyright term extension for works.

1. Strengths of the Canadian Regime—Recent Positive Developments

Several Canadian court decisions reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the CMA. In addition, in 2020, Canada took important steps to provide full national treatment for U.S. sound recordings, and IIPA remains hopeful that reforms of the Copyright Board will bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

A. Injunctions Against Distributors of STBs and Enabling Apps

Several recent decisions provide effective remedies against subscription piracy services and STBs and their enabling apps. In August 2019, the Federal Court issued a final judgement and permanent injunction against an operator of the Vader Streams IPTV service.²⁴ In February 2018, the Federal Court of Appeal upheld orders to shut down and seize piracy websites that made available illegal add-ons enabling STBs to access streaming video without authorization.²⁵ In March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of “plug and play” STBs pre-loaded with applications that allow consumers to access TV programs and movies without authorization or subscription.²⁶

The Heritage and Industry Reports recommend that the Government of Canada “increase its efforts to combat piracy and enforce copyright,” provide injunctive relief for deliberate online copyright infringement, and narrow the scope of safe harbor exceptions available to online service providers. Such legislative enhancements are needed to disrupt this growing illicit marketplace, especially in light of the alarming growth of Subscription Piracy services.

B. Injunctions Against Intermediaries to Block Access to and De-Index Sites Dedicated to Intellectual Property Infringement

On May 26, 2021, the Federal Court of Appeal (FCA) in *Teksavvy Solutions Inc. v. Bell Media Inc.* unanimously upheld the interlocutory order issued in the underlying copyright infringement action that required several Canadian ISPs, including the appellant, Teksavvy Solutions Inc. (Teksavvy), to block subscriber access to certain websites (i.e., a site-blocking order). The FCA held: (1) the Federal Court was correct in finding that it had the power to grant the site-blocking order, including on the basis of the remedial provisions in the Copyright Act, the net neutrality provisions in the Telecommunications Act, and on the basis of the 2017 decision of the Supreme Court of Canada (SCC) in *Google Inc. v. Equustek Solutions Inc.*; (2) a detailed constitutional analysis concerning whether freedom of expression is engaged by a site-blocking order that is separate from the analysis conducted under the test for injunctive relief is not necessary; and (3) in applying the injunctive relief test and considering international jurisprudence, the FCA noted: “it was entirely appropriate for the Judge to look abroad for inspiration when faced with a motion for an order that was unprecedented in Canada.” The SCC is currently considering Teksavvy’s leave to appeal application. If the SCC dismisses the application for leave to appeal or upholds the decision of the FCA in *Teksavvy Solutions Inc. v. Bell Media Inc.*, the continued ability of rights holders to be able to obtain injunctive relief, including site-blocking and delisting orders, against intermediaries whose services are used to infringe copyright, would be a welcome development that could lead to improvements in enforcement efforts. Regardless of the outcome of the SCC’s decision, the Copyright Act should be amended to add measures demonstrated effective in preventing or restraining infringement in other jurisdictions (e.g. the EU, United Kingdom, Australia, etc.), which would help clarify and strengthen the online enforcement tools available to rights holders in Canada while protecting consumers from the harms associated with infringing sites, including serious privacy, hacking, identity theft, and malware risks.

C. Copyright Board Reform

Amendments to the Copyright Board took effect in April 2019.²⁷ The amendments introduced statutory rate-

²⁴*Disney Enterprises, Inc. et al v. Vader Streams*, Federal Court File No. T-329-19.

²⁵*Bell Canada v. Lackman*, 2018 FCA 42. The Court noted that the add-ons were “clearly designed to facilitate access to infringing material” and that the exception to infringement “where one merely serves as a ‘conduit’” should not apply.

²⁶*Wesley dba MTLFreeTV.com v. Bell Canada*, 2017 FCA 55, affirming *Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net*, 2016 FC 612. The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes.

²⁷These reforms included: an overhaul of the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings; substantial revisions to the timelines for proposing and objecting to the tariffs, which allow tariffs to be filed earlier and remain effective longer, that should help to avoid the extreme delays that have made economic forecasting nearly impossible for stakeholders (both users and rights holders) and have made it very difficult for Collective Management Organizations (CMOs) to collect and distribute license fees by forcing them to apply tariffs retrospectively; and streamlined procedures and formalized case management to allow the Board to operate more efficiently, and to focus its

setting criteria that require the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the Board may consider other factors, including “any other criterion that the Board considers appropriate,” if implemented properly, the new criteria should be a welcome improvement.²⁸ It will be very important to ensure that the Board applies the willing buyer/willing seller criterion properly, and that it is not undermined by other amorphous and undefined criteria, such as the “public interest.” The “public interest” criterion, which the Industry Report notes could cause unpredictable results prompting costly, lengthy appeals and significant effects or other tariffs, is unclear and does not have a basis in economics.

The amendments also broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to users who have paid or offered to pay tariffs that have been approved. It is critical that, in implementation, this broadened enforcement prohibition does not delay or undermine the ability of CMOs to collect royalties from active users. Unfortunately, as discussed below, the July 2021 SCC decision upheld the April 2020 decision by the FCA in *York University v. Access Copyright* that the approved tariff issued by Access Copyright is not mandatory and, therefore, not enforceable against York University or other non-licensees.²⁹ This presents a significant obstacle to a well-functioning market for the collective management of rights. To operate in that market, CMOs require the ability to enforce the rights they represent, in accordance with their mandates from rights holders.

IIPA applauds Canada’s commitment to reforming its tariff-setting process and is hopeful that the implementing measures bring Canada’s system into closer alignment with comparable rate-setting and dispute resolution entities in major developed markets by improving timeliness, ensuring greater predictability, and yielding tariffs that more accurately reflect the economic value of the rights.

D. Full National Treatment for Sound Recordings

Canada committed in the USMCA to provide full national treatment for U.S. sound recordings. IIPA applauds the steps Canada has taken to extend full national treatment to all U.S. repertoire on July 1, 2020, without exceptions, limitations, or reservations. In addition, in response to the United States’ adoption of the Music Modernization Act on April 29, 2020, Canada amended the Ministerial Statement of Limitations, removing restrictions on eligibility, making pre-1972 U.S. recordings immediately eligible for Canadian royalties.

2. How Canada’s Legal Regime Falls Short

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime and unintended adverse consequences from the adoption of the CMA. The main goal of any amendments to the Copyright Act should be to correct these issues.

A. The Education Publishing Crisis, and Other Fallout of New/Expanded Copyright Exceptions

The bulk of the 2012 CMA consisted of a number of new or significantly expanded exceptions to copyright protection. None has had a more concrete and negative impact than the addition of “education,” undefined and unlimited in application, to the list of purposes (such as research and private study) that qualify for the fair-dealing exception.³⁰ Previous IIPA submissions have analyzed extensively how the CMA amendments, in combination with broad judicial interpretations of the pre-CMA fair dealing provisions, led to the weakening of the well-established collective licensing regime to license and administer permissions to copy excerpts of books and other textual works

resources on contested tariffs in cases in which negotiated agreements are not possible. The government has also implemented regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

²⁸Under the old framework, the Board’s assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

²⁹*York v. Access Copyright*, 2020 FCA 77.

³⁰See USTR, 2021 Special 301 Report at 66, available at [https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf). (USTR’s 2020 Special 301 Report noted the U.S. government’s continuing concerns with “the ambiguous education-related exception added to the copyright law in 2012, which has significantly damaged the market for educational publishers and authors.”)

for educational uses, both at the K-12 and post-secondary levels across Canada.³¹ This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.–Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled the development of new content and innovative means to deliver that content to consumers. Unfortunately, there has been little progress in rectifying the current situation, despite the CMA review.

The sense of impunity from copyright responsibility that Canada’s educational establishment displays not only has significantly reduced copyright owners’ licensing revenue for copying, but also has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. In 2017, it was revealed that Concordia University’s Center for Expanded Poetics was creating high-quality scans of entire books by at least a dozen contemporary Canadian and U.S. poets and making them available for free download, rather than purchasing them for use by students.³² Although Canadian publishers and authors are the most profoundly impacted, the fallout has reverberated in the U.S. creative sector, because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector.

The Heritage Report made recommendations to address this problem, most importantly that the Government of Canada should clarify that the fair dealing exception should not apply to educational institutions when the work is commercially available.³³ This would bring needed clarity to Canada’s law regarding the circumstances under which the use of certain works may not require a license. Until the legal framework is clarified, the crisis in the educational publishing sector will continue. Because “education” is not defined in the statute and given the expansive interpretation of fair dealing articulated by Canadian courts, the exception continues to present a risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Unfortunately, with the 2021 SCC decision in the *York University v. Canadian Copyright Licensing Agency (Access Copyright)*,³⁴ the problematic environment for education publishers can now be remedied only through action by parliament. The SCC ruled that certified tariffs are not mandatory, and as such, “not enforceable against York.” Importantly, the SCC did not opine on the fair dealing question, stating there was no “genuine dispute between the proper parties” about the (fair dealing) Guidelines.

Nor is the educational fair-dealing amendment the only problematic CMA provision for educational publishers. The broad exception in Section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a TPM.

Canada’s government is aware of the dire state of its educational publishing market. Even the flawed Industry Report acknowledged a problem, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach. Canadian federal authorities, and its Parliament, should be encouraged to address this crisis by expeditiously implementing the recommendations in the Heritage Report intended to address this crisis, including clarifying the scope of the education as fair dealing exception. In addition, to prevent educational institutions from circumventing the tariff system, the Copyright Act should be amended to confirm that an approved tariff by the Copyright Board is mandatory in nature, and its enforceability is not dependent upon a person’s assent to, or agreement

³¹See IIPA’s 2017 Special 301 country survey on Canada (“IIPA 2017”), pp. 97-100, available at <http://www.iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf>.

³²Kate Taylor, “Concordia University caught on the wrong side of copyright,” The Globe and Mail, available at <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

³³Other helpful recommendations in the Heritage Report include that the Government of Canada: review Canada’s exceptions to ensure they meet its international obligations; promote a return to licensing through collecting societies; review, harmonize and improve the enforcement of statutory damages for infringement for non-commercial use in section 38.1(1) of the Copyright Act; and harmonize remedies for collective societies under the Copyright Act.

³⁴*York University v. Canadian Copyright Licensing Agency*, 2021 SCC 32 (July 30, 2021), available at <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>. On July 30, 2021, the Supreme Court of Canada (SCC) issued its decision in *York University v. Canadian Copyright Licensing Agency (Access Copyright)* that: (1) upheld the decision of the FCA that York University is entitled to opt out of Access Copyright’s certified reproduction tariff and that the tariff is not mandatory on users who did not wish it to apply; (2) the FCA decision should not have ruled on the “fair dealing” point as the matter was moot given its mandatory tariff ruling; and (3) expressly disavowed certain approaches to “fair dealing” applied by the FCA while stating more appropriate approaches to be followed in the future. See also the history of this case in IIPA’s 2020 Special 301 country survey on Canada (“IIPA 2020”), pp. 135-36, available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT.pdf>.

with, its terms. The goal must be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially published educational materials.

B. Non-Commercial User-Generated Content Exception

The copyright exception for “non-commercial user-generated content,”³⁵ also merits close scrutiny. This provision allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (commercial or otherwise), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is “solely for non-commercial purposes” and does not have a “substantial adverse effect” on the market for the underlying work. The provision could substantially undermine exclusive rights that Canada is obligated to provide under international agreements and treaties, including the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.³⁶ Although the exception has no precedent in global norms, it has spawned would-be imitators, such as a similar proposed exception to the Hong Kong Copyright Ordinance. This underscores the importance of removing, or at least clarifying, the UGC exception, in accordance with recommendations in the Heritage Report.³⁷

C. Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement

Canada’s Copyright Act fails to respond adequately to the broader challenge of online infringement.³⁸ The statute lacks important standard tools that leading copyright regimes now routinely provide to incentivize intermediaries to address copyright infringement, and the tools it does provide fall demonstrably short. On the whole, Canadian law lacks incentives for cooperation among a range of essential legitimate players, such as advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services. As described above, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision in Section 27(2.3) establishing civil liability for providing online services primarily for the purposes of enabling acts of copyright infringement was an important step forward, but it is unduly limited. For example, because it applies only to the provision of services, it is a far less optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in STBs pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even trafficking in such software tools, may fall outside the scope of the provision. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision’s significant gaps should be corrected to address all actors that enable acts of infringement.

Beyond enablement, the Canadian online enforcement regime relies heavily on the “notice-and-notice” system, in effect since January 2015. No evidence exists that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so. The system was intended merely as an educational tool aimed at end-users, but no evidence exists that it contributes to mitigation of infringing activity by consumers. Simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving such notices lacks any meaningful consequences under the Canadian system.

³⁵The Canadian Copyright Act, s. 29.21.

³⁶See, e.g., Article 13 of the WTO TRIPS Agreement. In the U.S.-Mexico-Canada Agreement (USMCA), Canada reinforced its commitment to confine copyright exceptions and limitations to the three-step test. See USMCA Article 20.64.

³⁷A key recommendation in the Heritage Report is that the Canadian government review, clarify, and/or remove broad exceptions to ensure that exceptions in Canada’s law are consistent with its obligations under the TRIPS Agreement and the Berne Convention.

³⁸The shortcomings of the legislation are detailed in past more extensive analyses of the CMA by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 (“IIPA 2013”), available at https://www.iipa.org/files/uploads/2018/01/2013_Special_301.pdf, at 127-131, and other sources referenced therein.

Furthermore, it creates little meaningful incentive for service providers to attempt to rid their services of illicit material, in effect providing free rein to build services on the back of unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.³⁹ ISPs have insufficient incentive to respect the legislated “notice-and-notice” system, because their failure to forward notices from rights holders is without significant consequence.⁴⁰

Moreover, the law lacks incentives necessary for legitimate Internet intermediaries to cooperate with rights holders to combat online infringement. For example, the law’s conditioning of liability for hosting infringing material on obtaining a judgment against an end user⁴¹ is unworkable in practice, particularly regarding valuable, time-sensitive pre-release content, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of content they know or ought to know is infringing. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Canada should revise its law to introduce incentives for intermediary cooperation by clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content. Effective action should include removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder, and without the requirement for rights holders to first sue and obtain a successful judgement against the infringer; other measures that have been demonstrated effective in preventing or restraining infringement; and maintaining and effectively implementing a policy that provides for termination of accounts of repeat infringers in appropriate circumstances. Canada’s 2020 USMCA implementation legislation did not address these deficiencies.⁴² The amendments of Bill C-86 were another missed opportunity. While they further clarified the information to be included in notices of claimed infringement issued to ISPs, the amendments failed to include any meaningful incentives for intermediaries to cooperate with rights holders.

Taken as a whole, the deficiencies in Canada’s online liability regime significantly disadvantage licensed services and continue to send the wrong signals to consumers about whether infringing activities are tolerated. The Heritage and Industry Reports recommend that Canada’s government review the current law to ensure ISPs are accountable for their role in the distribution of infringing content, and that the government monitor the implementation of safe harbor legislation in other jurisdictions as well as other international developments, a clear acknowledgement of Canada’s status as a global outlier on this issue. Canada should follow through on these parliamentary recommendations and look for ways to make its current regime more effective and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

D. Injunctive Relief Needed Against Online Infringement

In accordance with recent case law, Canada should provide tools to effectively address the problem of infringing online content, particularly content hosted outside of Canada, including providing effective injunctive relief against intermediaries whose services are used in connection with infringements of copyright to disable access to such infringing content. A growing list of countries around the world have adopted such a framework to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. As previously noted, in response to a 2018 proposal to create a website-blocking mechanism, the Canadian Radio-Television and Telecommunications Commission (CRTC) acknowledged the harm caused by piracy, but declined to consider the merits of the proposal, holding that copyright enforcement falls solely within the statutory scheme of the Copyright Act.

³⁹See IIPA 2017, supra note 33 at p. 96 for a summary of concerns.

⁴⁰See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

⁴¹See Section 31.1 of the Copyright Act.

⁴²It is unfortunate that the USMCA exempted Canada’s flawed system and does not even obligate Canada, at an absolute minimum, to require takedown of infringing content in response to a proper notice (or upon the service having knowledge or awareness of the infringement).

In granting the website blocking order, the Court in *Bell Media* (discussed above) cited this decision to reject the argument that disabling access to infringing websites will interfere with the CRTC's regulatory role. The Industry Report recommended that the Government of Canada evaluate tools to expressly provide injunctive relief in a court of law for deliberate online copyright infringement. In accordance with the recommendation, the Canadian government should revise the Copyright Act to provide express injunctive relief to effectively disable access to infringing content in line with recent case law.

E. Discrimination and Duration

Other deficiencies in Canada's legal framework that should be addressed:

i. The Radio Royalty Exemption Should be Removed

A key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada.⁴³ The Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."⁴⁴ This royalty exemption applies only to sound recordings; musical works are fully protected. Furthermore, this exemption discriminates against other Canadian businesses that publicly perform or communicate recorded music (such as online music services, satellite radio, restaurants, or background music suppliers), none of which are subject to such an exemption from paying royalties to sound recording producers and performers. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of over C\$160 million (US\$121 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the "equitable" remuneration that Canada is obligated to provide by Article 15 of the WPPT and that Canada committed to provide under the USMCA.⁴⁵ Unfortunately, the 2020 USMCA implementation legislation did not address this problem. Both the Heritage Report and the Industry Report called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. The C\$1.25 million commercial radio royalty exemption should be eliminated.

ii. Provide Full Rights for Communication to the Public of Sound Recordings, Including Retransmissions

The Copyright Act should be amended to provide full rights for communication to the public of sound recordings, which includes the retransmission of sound recordings. This is a major gap in protection for sound recording producers.

iii. Provide Full Rights for Public Performance of Sound Recordings, Including Indirect Uses

Although Article 15 of the WPPT is clear that the right to remuneration for public performances encompasses both direct and indirect uses of phonograms, the Canadian Copyright Act (s.72.1) prohibits rights holders from directly licensing "indirect" uses, where commercial businesses like shops or bars play music as part of their business operations/ambiance, but the music comes from the radio rather than from a CD player or a background music provider service (for example). By prohibiting rights holders from licensing the users who actually use and benefit from their music, this provision fundamentally undervalues the right. Canada should amend the Copyright Act to ensure that the right allows the direct licensing of such uses in accordance with Article 15 of the WPPT.

⁴³See Section 68.1(1) of the Copyright Act. As previously reported, each of Canada's nearly 700 commercial radio stations, regardless of its size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on its first C\$1.25 million (US\$951,000) of annual advertising revenue.

⁴⁴See Copyright Board, *Public Performance of Music Works 2003-2007* and *Public Performance of Sound Recordings 2003-2007*, October 14, 2005, p. 32, 37-38.

⁴⁵See USMCA Article 20.62.

iv. Term of Protection

A needed modernization of Canadian copyright law not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the United States), and indeed, most Organisation for Economic Co-operation and Development (OECD) economies. Although Canada extended the term of protection for sound recordings in 2015, Canada should join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. It is commendable that Canada made this commitment in the USMCA, but it negotiated a 30-month window to implement this extension. While the 2020 USMCA implementation legislation extended copyright term of protection to USMCA-required minimums for sound recordings and certain other works for an extra five years to 75 years, it did not extend the term of protection for all works measured by the life of the author, as Canada is obligated to do under USMCA Art. 20.62(a). Canada should not delay bringing its law into line with this global norm, particularly considering the Heritage Report's recommendation to do so. Bringing its term of protection in line with evolving global norms is long overdue. Furthermore, any extension of the term of copyright protection should not be accompanied by Berne-prohibited formalities, such as by requiring registration for the additional period of protection or other provisions that undermine term extension and contractual certainty.

GOVERNMENT ACTIONS ON COPYRIGHT ENFORCEMENT

The 2015 entry into force of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).⁴⁶ Unfortunately, Bill C-8 did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to prioritize addressing the problem. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the RCMP, intellectual property (IP) crimes are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not able to deal effectively with organized copyright piracy, and thus, increasingly fail to pursue even well-documented referrals from industry. However, there has been some recent progress. For example, recently, local law enforcement has engaged positively with rights holders in two separate cases involving infringing subscription IPTV services, including a Nova Scotia case with multiple criminal charges. As both matters are ongoing, the ultimate outcome—and the resulting deterrent impact—remain to be determined. The non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged because Canadian law enforcement remains under-resourced, and too few agencies consider it a priority. Given the widespread availability of hundreds of subscription piracy services, more resources are needed to address this growing problem.⁴⁷

Similar problems arise with Canadian prosecutors and courts. Historically, Crown Prosecutors have been reluctant to seek the breadth of remedies for IP crimes. This issue often arises due to a knowledge gap concerning the prosecution of IP crimes, a problem that is amplified when dealing with emerging piracy models, such as infringing IPTV or VOD services. While there have been some recent prosecutions, ongoing education of Crown Prosecutors

⁴⁶In practice, however, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 72 times in the first two years under the legislation, and in only 59 such cases were rights holders even contacted to assist in interdicting the infringing imports. IIPA is encouraged, however, that Canada has committed in the USMCA to provide *ex officio* authority for its customs authorities, including regarding goods in transit. See USMCA Article 20.84(5).

⁴⁷For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level. See https://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <https://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/ secur10/ secur10-e.pdf>.

is key to ensuring Canada stays ahead of emerging piracy business models.

While IIPA has seen positive engagement by law enforcement, a lack of law enforcement resources and Crown counsel awareness of the applicable laws remain significant challenges for rights holders. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. In addition, Canadian customs procedures place a legal compliance burden on rights holders (who must file a claim and track down importers of counterfeit goods) rather than on importers. The Canadian government should change these procedures so that this burden falls on the importer, as is the case in the United States.

It is more important than ever for the U.S. government to press Canada to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including specialized training regarding subscription piracy services, PDs, and other devices and software that enable circumvention of TPMs, particularly in light of the Heritage Report's recommendation to increase enforcement efforts. IIPA encourages RCMP, which is a member of the National Intellectual Property Rights Coordination Center (IPR Center), to work collaboratively with U.S. enforcement officials on online piracy cases. Since the availability of pirated products (and of PDs or other circumvention tools) will not be reduced without criminal prosecutions against traffickers and the imposition of deterrent sentences, particularly jail time, Crown Counsel must take on and fully prosecute more copyright infringement and TPMs circumvention cases and should be provided with the training and other support that is needed. Rights holders remain at the ready to assist and have extended offers to provide such training. In addition, Canadian courts should more consistently issue deterrent sentences, including jail time for piracy cases.

MARKET ACCESS

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. Unfortunately, Canada has not made progress on certain long-standing market access issues as part of its USMCA implementation efforts, and as noted below, is considering additional measures that would discriminate against foreign online digital service providers. In accordance with its market access commitments in the USMCA, Canada should change course and eliminate the following measures that restrict access by U.S. film and TV producers to Canada's market:⁴⁸

Television Content Quotas: The CRTC imposes two types of quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming. First, large English-language private broadcaster groups have a CPE obligation equal to 30 percent of the group's previous year's gross revenues from their conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. CPE obligations have also been assigned to independent signals and to independent discretionary services that have over 200,000 subscribers upon renewal of their licenses and are based on historical levels of actual expenditures on Canadian programming. Second, per the Exhibition Quota, private conventional broadcasters must exhibit no less than 50 percent Canadian programming from 6 p.m. to midnight. Private English-language discretionary services (specialty and pay-TV) must exhibit no less than 35 percent Canadian programming overall.

Non-Canadian Signal and Service Restrictions: Canadian broadcasting distribution undertakings (BDUs), such as cable, IPTV, and direct-to-home satellite, must offer more Canadian than non-Canadian services. These

⁴⁸IIPA expects that if Canada resorts to the "cultural carve out" under Article 32.6 to avoid implementing any of its obligations under the USMCA, USTR will use the robust retaliation provision under that provision to ensure that Canada meets its commitments.

protectionist measures inhibit the export of U.S. media and entertainment services. BDUs must offer a “skinny basic” tier for not more than CAD\$25 per month that may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) from the same time zone as the BDU’s headend, where available, if not, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may offer a second set of U.S. 4+1 signals to its subscribers only if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.

Except as permitted in a BDU’s license from the CRTC, all other non-Canadian signals and services may be carried on only a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. Further, a service may be removed from the Authorized List if it changes formats and thereby becomes competitive with a Canadian pay or specialty service, if it solicits advertising in Canada, or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code.” A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.

Broadcasting Investment Limitations: The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay, and specialty television) and distribution undertakings (cable and IPTV operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) a licensee’s CEO must be Canadian; (2) at least 80 percent of a licensee’s Directors must be Canadian; and, (3) at least 80 percent of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the parent must be beneficially owned and controlled by Canadians. The parent corporation or its directors cannot exercise control or influence over the programming decisions of its licensee subsidiary where Canadians own and control less than 80 percent of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80 percent of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on such independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

Québec Distribution Restrictions: The Québec Cinema Act severely restricts the ability of non-Québec-based film distributors to do business directly in Québec. Since 1986, grandfathered MPA member companies may apply for a Special License for any film produced in English that meets the less restrictive requirements set out in an Agreement between the MPA and the Québec Minister of Culture and Communications. The Agreement was revisited in 2021 and was extended for seven years.

Proposed Obligations on Non-Canadian Digital Services: Non-Canadian digital services delivered over the Internet are currently exempt from most requirements under the Broadcasting Act. However, Parliament is considering legislation that would provide the CRTC with the explicit power to regulate non-Canadian digital media services, including regarding financial, discoverability, and reporting obligations to support the Canadian broadcasting system and contribute to the creation and promotion of Canadian culture. Parliament will likely pick up this effort again in 2022.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada’s international agreements with the United States most relevant to copyright obligations include

TRIPS and the USMCA.⁴⁹ As noted above, some aspects of Canada's current copyright regime may raise significant issues of compliance with these agreements (for example, whether Canada's copyright exceptions, as applied, comply with the well-established "three-step test"),⁵⁰ and Canada's market access restrictions raise issues regarding its commitments under the USMCA.

⁴⁹United States-Mexico-Canada Free Trade Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

⁵⁰See TRIPS Article 13 and USMCA Article 20.64.

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2022.¹

Executive Summary: After more than a year of struggle, the Colombian economy is showing signs of recovery and the country's governmental agenda is getting back on track. However, as most commercial and industrial activities in the country have resumed, there is now a renewed need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPRs). No national anti-piracy efforts have been conducted by National Police or the Attorney General's Office. The Copyright Office (DNDA) took one recent action against an online platform providing illegally broadcasted pay-tv signals, but more coordinated and significant action to design and implement an anti-piracy national campaign is needed. This enforcement component is the missing part of President Duque's plan to support the "Orange Economy," or creative economy, that was central to his campaign² and that still remains a priority of his administration. IIPA urges Colombia, through the National Council for Economic and Social Policy (CONPES)'s implementation of a new National Intellectual Property Policy, to continue to move towards increased enforcement and a legal framework that fosters the growth of a vibrant creative economy.

Legal reforms of the past several years in Colombia failed to introduce adequate protection and enforcement mechanisms to counter the country's significant online piracy problem. The current National Planning Council, responsible for evaluating the progress of implementation of the National Development Plan, failed to mention in its updated report for 2021 any new recommendations to promote IPR protection and development, indicating the low priority it holds for intellectual property (IP) enforcement in the country.³ The lack of coordination and expertise among the country's judicial and law enforcement personnel is a major obstacle for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the DNDA to coordinate and train all relevant actors on copyright and enforcement best practices. IIPA also urges Colombia to bring its regime for the protection of technological protection measures (TPMs) into compliance with the provisions of the U.S.-Colombia Trade Promotion Agreement (TPA). Colombia should reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties, and should avoid legislation that would require DNDA's authorization for the operation of digital music platforms in the country.

PRIORITY ACTIONS REQUESTED IN 2022

Enforcement

- Implement a specialized program for judges and law enforcement on copyright protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross-industry cooperation against online piracy, based on MOUs and industry best practices.
- Design and implement a coordinated strategy of the National Tax and Customs Directorate, the General Prosecutor's Office (*Fiscalía General de la Nación*), the DNDA, and the Superintendence of Industry and Commerce for the ongoing training of customs officials at the border to identify and seize copyright infringement

¹For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²The President's plan is available at <https://idm.presidencia.gov.co/prensa/unesco-resalta-labor-de-colombia-en-la-economia-naranja-201117>.

³See <https://www.cnp.gov.co/Documents/Informe-PND.pdf>.



and circumvention devices.

- Encourage the DNDA to act expeditiously on pending filings against notorious stream-ripping sites.

Legislation and Regulation

- Ratify international agreements relevant to copyright protection, including the Beijing Treaty on Audiovisual Performances.
- Clarify, via regulation from the Ministry of Information Technologies and Communications and through DNDA's implementation of Law 1915 of 2018, that TPM circumvention is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia TPA.
- Reconsider Law 1915 of 2018's annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress.
- Amend Article 181 of Law 1955-2019, Colombia's National Development Plan, to preserve contractual freedom for future forms of commercialization.
- Amend the final paragraph of Article 3 of Law 23 of 1982 (Copyright Law) to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. The so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia's obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.⁴
- Provide adequate comment periods of at least 30 days to facilitate stakeholder input on public policy consultations.

THE COPYRIGHT MARKETPLACE IN COLOMBIA

Online piracy is a significant and largely unaddressed problem in Colombia, showing no improvement in the past year. According to government figures, Colombia had 7.65 million Internet subscriptions by the end of the first half of 2020.⁵ Internet usage and data traffic during the last year in Colombia increased by 30% in March 2020 and 51% in April 2020, according to local ISP's data.⁶ The Internet penetration increased to 68% of the population (from 65% in the previous year). Piracy in Colombia comes in many forms, and the number of visitors to infringing websites and online marketplaces for creative content continues to increase.

Online piracy in Colombia greatly increased due to the COVID-19 pandemic, as consumers gravitated to the online environment for video game content, including illegal e-commerce dedicated to video game products. The term "juegos" (games in Spanish) was the 14th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. The audience for Spanish language infringing video game download/link sites in Colombia increased by 13% during the last year. An important piracy channel for digital video games remains the online marketplaces in Colombia, which are responsible for providing powerful commercial platforms to infringers and had an increase during the pandemic, with some platforms reporting a 26% increase in the volume of listings (products announced by users) and an increase of more than 60% in local revenue in Colombia. Online markets have become the most concerning environment for illegal activities given their replacement of physical markets and their broader coverage in the country, popularizing the purchasing of illegal products in the video game community. At the same time, the proportion of the total video game content traffic on the BitTorrent network in Colombia increased over the year, from 11% to 14%, despite a decrease in the number of users of the major torrent sites dedicated to infringing

⁴U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipt.pdf>.

⁵Ministerio de Tecnologías de la Información y las Comunicaciones de Colombia, Internet Dedicado, <https://colombiatic.mintic.gov.co/679/w3-propertyvalue-47271.html> (last visited Jan 19, 2021).

⁶More information available at: <http://www.scielo.org.co/pdf/ecei/v14n28/1909-8367-ecei-14-28-26.pdf>.

video games. Additionally, the illegal video game cyberlocker landscape is much more fragmented, with major platforms and services losing audience numbers to multiple smaller services gaining traction due to their agility in evading enforcement. Colombian National Police report that online crime overall has increased by 89% since January 2021. Concurrently, in the past year, online video game piracy has increased in Colombia as the methods for accessing and commercializing illegal game products and titles become more diversified, and the lack of coordinated law enforcement efforts persists.

There are more than one million illegal pay-television connections, which amount to operator industry losses of more than US\$247 million and government losses due to tax evasion of US\$197 million per year. According to studies from Ether City⁷, Colombia represented 4% of Latin America's searches for pirate websites, and almost one in every four online offers for movie and television titles directed the user to illegal content and services in 2020. Piracy involving illegal streaming services for audiovisual content (TV shows and movies) is more frequent than piracy regarding live events (such as sports and news content) or torrent files. It is estimated that there are over 4 million users of illegal subscription services in Colombia.⁸

For music, the predominant forms of piracy in Colombia are stream-ripping sites and cyberlocker downloads. The most popular stream-ripping sites in Colombia are *y2mate.com* and *savefrom.net*, with each site receiving over 17.0 million visits and 8.9 million visits from Colombia, respectively, during the third quarter of 2021. (*Snapea.com* was popular during Q3 2021 but has since disabled the 'ripping' functionality on the site itself and instead encourages users to download their app). The most popular cyberlockers in Colombia are *Mega.nz*, *1fichier.com*, and *zippyshare.com*, with each site having received over 11.5 million visits, 3.4 million visits, and 1.3 million visits from Colombia, respectively, during the same period.

COPYRIGHT LAW IN COLOMBIA

Recent changes in Colombia's legal regime fall short of the tools needed to adequately protect and enforce IPRs in the face of the country's significant online piracy problem, but there is some movement in a positive direction for overall coordination. Several copyright law revisions are needed to bring Colombia into compliance with its TPA obligations. Proposed legislation in 2021 raises serious concerns for effective collection and distribution of performance rights, compounded by limitations under the Copyright Law that discriminate against holders of neighboring or related rights. IIPA encourages USTR to closely monitor proposed amendments to the Consumer Protection Act for development of useful online enforcement tools, as well as Colombia's implementation of the newly approved National Policy on Intellectual Property, which shows some promise as a possible vehicle to coordinate needed law enforcement resources.

Compliance With U.S.-Colombia TPA Obligations: To fully comply with the U.S.-Colombia TPA, some of Colombia's 2018 copyright amendments need clarification and reconsideration. IIPA urges Colombia to clarify that (1) the new permanent exemptions to TPMs are subject to review, requiring proponents to offer substantial evidence of actual or likely adverse impact on non-infringing uses; and (2) a TPM may not be circumvented to exercise any exception or limitation, because the TPA establishes that circumvention of TPMs "is a separate civil or criminal offense, independent of any infringement that might occur under the Party's law on copyright and related rights."

In addition, IIPA urges Colombia to reconsider (1) the profit requirement for the crime of retransmission or reception of illegally decrypted satellite signals; and (2) the annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress because such revision creates uncertainty for both enforcement and private investment. Colombia also still must adopt statutory damages for copyright infringement as a key TPA obligation, which was the subject of a draft Bill from the DNDA in 2019 but shows no signs of progress.

⁷More information available at: <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latina/>.

⁸More information available at: <https://www.rcnradio.com/colombia/mas-de-cuatro-millones-de-colombianos-usan-ilegalmente-servicios-de-tv>

Regulation of performance rights and Copyright Management Organizations (CMOs): In July 2021, Bill # 153/2021 was submitted to the House of Representatives with a series of problematic provisions regarding performance rights and Copyright Management Organizations (CMOs):

- Article 40 establishes mandatory recognition by the Copyright Office of all “parallel” CMOs operating in Colombia. For many years the Colombian performance rights market has been plagued by multiple organizations acting with no transparency and no real representation of right holders, who compete unfairly in the licensing market with fully authorized CMOs. These “parallel” organizations have created confusion and misinformation in the market. In many cases, these informal organizations mislead users into making payments for the use of repertoire that is not represented.
- Article 44 prevents CMOs from setting their own tariffs and their own distribution rules and, instead, proposes to empower the Minister of Interior and Minister of Culture to conduct such fundamental tasks. This proposal is detrimental to the collective management system and to the exercise of rights by right holders that decide to become members of a collective management organization.
- Article 44(5) empowers the Government to determine collection policies and “parameters and mechanisms” for collection and distribution of rights. In practical terms, this proposal will transfer total control of CMOs to the Government, depriving rights holders of the ability to govern their own organizations.

It is imperative that the Colombian Government set a clear position against this initiative which has the potential to create significant obstacles for the development of a healthy music market in the country.

In August 2021, the Constitutional Court agreed to hear the case filed by Pro Musica Colombia (on behalf of the recording industry) against Article 3 of the Copyright Law. This provision imposes a mandatory 60-40 rule for the distribution of performance rights, limiting remunerations to 40% for owners of neighboring rights in the communication to the public of works and phonograms, while 60% of remunerations go to copyright holders for the same use. The lawsuit received a great number of supportive submissions, including submissions from the International Federation of the Phonographic Industry (IFPI), performers organizations, and the Attorney General, all of whom generally agree that the provision is not found in any other copyright law in the region and is clearly discriminatory against artists, performers, and phonogram producers without justification. IIPA also asks Colombia to amend the last paragraph in Article 3 of the Copyright Law to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. This so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia’s obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.⁹

National Intellectual Property Policy Consultation: In October 2020, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed National Policy on Intellectual Property (*Política Nacional de Propiedad Intelectual*). The proposal acknowledges the insufficiency of Colombia’s institutional capacity to effectively manage, protect, and exploit IP rights. Colombia’s Copyright Office (DNDA) needs to improve its technological and data generation capacities to enable public policymaking that is in tune with rapidly changing market and cultural trends. The CONPES proposal also acknowledges that Colombia has limited mechanisms to address the country’s high levels of infringement, and includes proposals for amendments for Colombia’s copyright law, enforcement actions and new functions for DNDA. The National Planning Department approved the final document in December 2021 and it is now in force. Rights

⁹U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

holders expect the Colombian government to begin to implement its recommendations in 2022, and to carry out implementation over the next ten years. Rights holders expect a significant impact on the Colombian online piracy landscape, ranging from anti-circumvention of TPMs to specialized IPR training programs for judges and legal operators.

Proposed Amendments to the Consumer Protection Act. Colombian lawmakers are considering a draft legal reform, number 284 of 2020,¹⁰ intended to update the Consumer Protection Act from 2011 (law n.1480) to extend the existing consumer protections and regulations for e-commerce. The draft legal reform does not mention any specific market but would provide general rules for consumer right protections that already exist but would be applied to the online environment, such as the right to accurate publicity and clear product and service information; the right to consumer privacy protection established by article 5 of the bill; and the “right to be forgotten” established by article 3 and 4 of the bill, which allows for the withdrawal from a contract within seven days and receipt of a full refund of any payments made. These reforms might help to level the playing field for legitimate content providers against certain illegal services, by providing additional legal enforcement resources to authorities. For example, consumer protection regulations would apply to the e-commerce environment in order to tackle illegal sites and marketplace users, by targeting absent or incorrect information about sellers’ identification and tax ID numbers, products’ security standards, as well as the “right to be forgotten.” Additionally, the reform would require consumer protection authority contact information on each transaction and e-commerce site, another administrative tool with the potential to expose illegal activities.

Constitutional Challenge to National Development Plan Article 181: In May 2019, Colombia adopted law No. 1955-2019, which created the National Development Plan. Article 181 created a set of regulations for copyright and neighboring rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties. For instance, in the absence of a specified term, agreements will last five years; in the absence of specification of a territory, the agreement is limited to the territory in which the contract was signed, and all contracts are limited to the uses specified by parties. In addition, contracts for forms of commercialization unknown at the time a contract is signed are void which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their businesses and produce new local talent. The Colombian Supreme Court dismissed the 2020 lawsuit filed by Pro Musica Colombia challenging this obstacle to the free assignment of copyright rights and neighboring rights. A similar challenge by the audiovisual industry is still pending.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Lack of coordination and expertise: To date, Colombia’s law enforcement authorities have not developed methods to stop the widespread availability of illegal content to Colombian Internet users and ensure compliance with copyright laws and regulations. Despite the available rights and remedies in the law, enforcement levels remain low, demonstrating a tolerance for the continued operation of an illegal online market. The lack of coordination among a multiplicity of investigative and judicial proceedings with competing jurisdictions, including civil and administrative authorities, leads to inefficiencies in Colombia’s enforcement of copyright. The National Police and prosecutors need increased dedicated resources. The special cybercrime unit, DIJIN (Department of Criminal Investigations and Interpol/*Dirección de Investigación Criminla e Interpol*), focuses its enforcement actions mostly on areas such as online fraud (ransomware and phishing) without pursuing further coordination to promote greater protections for the digital economy or IPR. The police and its dedicated cybercrime department, *Centro Cibernetico Virtual / CAI Virtual*¹¹, should have a specific channel to provide assistance to businesses affected by cybercrimes and to coordinate efforts. The DIJIN and CAI Virtual have an appropriate structure and skill set to handle such cases and achieve a deterrent impact in the illegal online ecosystem.

¹⁰See <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2020-2021/2065-proyecto-de-ley-284-de-2020>.

¹¹See <https://caivirtual.policia.gov.co>.

Unfortunately, Colombia's Copyright Office (DNDA), the department that is most competent in copyright-related issues, is not legally empowered to coordinate or conduct enforcement actions. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector. IIPA is encouraged by the March 2020 decision to expand DNDA's jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is still unclear how this authority will be applied in practice, and the jurisdictional panel inside DNDA has very limited resources, causing serious delays. IIPA urges the Colombian government to increase DNDA's capacity through its implementation of the National IP Policy, which recommends a better organization of government authorities to fight piracy and enforce Colombia's IP laws.

In March 2021, DNDA blocked the Internet signal from IPTV Colombia Premium,¹² which illegally broadcasted pay-tv signals. It was the first precautionary measure imposed against online piracy in DNDA's history. The government's "Orange Economy" (or creative economy) initiative through the National Development Plan needs to have a powerful component to engage authorities to more actively protect IP and the digital economy in Colombia, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

The proposed National IP Policy identified the lack of knowledge and training in IPRs among its judicial and law enforcement personnel as one of the obstacles for effective copyright enforcement. It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement at the local and regional levels, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

Internet Service Provider (ISP) Cooperation: While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited and there is no cross-industry MOU or government pressure on ISPs to cooperate more. We urge Colombia to hold public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on industry best practices and facilitate a cross-industry agreement. Colombia must follow through with legal reform to incentivize and urge cooperation by all intermediaries, including marketplaces and social media platforms, to effectively address online piracy. Specifically, the law should require intermediaries to take action against copyright-infringing websites.

Video Game Industry Cooperation with Online Marketplace *MercadoLibre.com.co*: Through the company's headquarters in Buenos Aires, Argentina, the video game industry is able to remove some infringing or illegal content from Mercado Libre Colombia, the most relevant e-commerce platform in the country.

MARKET ACCESS

Proposed Tax on Digital Services and Platforms. The DIAN – *Dirección de Impuestos y Aduanas Nacionales* (National Tax and Customs Directorate) – recently presented to congress Bill 594/2022C, a new tax reform measure¹³ that may directly affect the digital economy ecosystem by raising taxes over digital services, including game platforms. The tax reform is currently under discussion in congress but it is expected to be finalized before end of 2021 and implemented in 2022, as a recovery measure and an aid to sustain social programs provided by the government after the COVID-19 pandemic.

¹²More information available at: <https://www.asuntoslegales.com.co/actualidad/se-impuso-primer-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271>.

¹³More information available at: <http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/proyectos%20de%20ley/2020%20-%202021/PL%20439-21S%20-%20594-21C%20Reforma.pdf>.

Implementation of VAT on Digital Services: Colombia Law 1819 applied 19% VAT to digital services. The law entered into force in October 2018 with a retroactive effect to July 2018. To compensate for the effects of the pandemic on the Colombian economy, the government published several executive decrees in 2020. Executive Decree # 818 of June 4, 2020 established a temporary tax relief for the music sector whereby VAT is reduced from 19% to 4% for one year for the production of phonograms, the reproduction of sound recordings, and live shows. Colombia's actions regarding the cultural sector and the music industry have been among the best structured in Latin America and should be extended to other industries of the creative sector through the "Orange Economy" in order to generate appropriate and proportional relief effect for the local market stakeholders.

POLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland be placed on the Watch List in 2022.¹

Executive Summary: Internet piracy is a significant problem in Poland, severely hampering Poland's market for legitimate sales of film and television content, music, books, and entertainment software. In June 2017, Deloitte published a report that found that in 2016 Internet piracy cost Poland over 3 billion PLN (US\$757 million) of lost GDP, 836 million PLN (US\$211 million) of lost tax revenues, and 27,500 lost jobs.² According to the report, in 2016, 51 percent of Internet users in Poland (more than 12 million Poles) used websites offering illegal access to content, and illegal websites in Poland received revenues of 745 million PLN (US\$188 million). Moreover, as discussed below, more recent data, including from the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2021 and APP Global's Piracy Landscape Report from December 2019, demonstrates that the rate of Internet piracy has continued to grow.

Unfortunately, the Government of Poland has failed to provide adequate and effective enforcement mechanisms to combat online piracy. Poland should implement Article 8(3) of the European Union (EU) Copyright Directive (2001/29/EC), which requires Poland to ensure that no-fault injunctive relief is available against intermediaries whose services are used for piracy. Poland also has failed to institute best global practices for Internet service provider (ISP) liability, including failing to properly implement Articles 14 and 15 of the EU E-Commerce Directive (2000/31/EC). Furthermore, Poland's enforcement officials do not take effective actions against online piracy under the existing law and Poland maintains several market access barriers that limit consumers' access to legitimate content. Poland should address the deficiencies in its enforcement framework, including the lack of adequate and effective mechanisms to combat online piracy.

PRIORITY ACTIONS REQUESTED IN 2022

- Ensure adequate and effective enforcement against online piracy, including by correctly implementing Article 8(3) of the EU Copyright Directive.
- Ensure Poland's ISP liability regime is consistent with global best practices, including by fully implementing Articles 14 and 15 of the EU E-Commerce Directive.
- Ensure the faithful implementation of Article 17 of the DSM Copyright Directive.
- In accordance with case law in the EU, take effective enforcement actions against unlicensed services, including sites that link to pirated content.
- Improve criminal enforcement by following through on more criminal investigations and issuing deterrent sentences against infringers.

¹For more details on Poland's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Poland's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²A summary of the 2017 Deloitte report on Internet Piracy is available in English at http://zpvav.pl/pliki/aktualnosci/Deloitte/Broszura_piractwo_EN_Final.pdf.



THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN POLAND

Online piracy is a serious problem in Poland. A recent APP Global report found that operators of known infringing sites, such as *Filman.cc*, operate in the open and enjoy a positive perception by the public.³ Many piracy sites even are permitted to maintain the appearance that they are legal businesses. For example, *cda.pl* is listed on the Warsaw Stock Exchange and *Chomikuj* has filed defamation claims for being referred to as pirates. The piracy landscape is dominated by piracy streaming services that hinder the growth of legitimate streaming services in the country. According to the APP Global report, a selection of 156 websites that provide access to infringing content generated 193 million visits from Poland in December 2019. The majority (90%) of the visits to these sites were to local Polish sites.⁴ Poland also has seen recent growth of pirate IPTV services, which provide bundles of illegal retransmissions of linear channels, often via a dedicated set top box or simply via an app. These services are typically subscription-based and examples include *weeb.tv*, *hejo.tv*, *polbox.tv*, and *siptv.pl*. In addition, according to the video game industry, from the time period of December 2020 – November 2021, Poland ranked ninth globally in peer-to-peer (P2P) piracy.

According to IFPI's 2021 Music Consumer Study, Poland had the highest music piracy rate out of seven EU countries included in the study, with 37.9% of Internet users from Poland (and 50.1% of 25-34-year-olds) having pirated music at least once in the previous month. According to the Study, the most popular piracy destinations in Poland were domestic-run cyberlockers that targeted a Polish audience. For example, *Chomikuj* had been used by 16% of users to download music in the previous month and had 18.4 million visits from Poland in Q3 2021. *Ulub.pl* had been used by 13% of Internet users with 6.4 million visits in Q3. Cyberlocker visits rose by 8.1% between Q2 and Q3 2021. The Study highlights that stream ripping is the key music piracy threat in Poland. 32% of Internet users said they had used stream ripping to illegally download music, while 17% had obtained pirated music from cyberlockers like *Chomikuj* and *Ulub*, and 11% had downloaded from BitTorrent sites like *ThePirateBay* and *1337x*. The most popular stream ripping websites received millions of visits according to data from SimilarWeb, including *2conv* (3.1 million visits from Poland in Q3 2021), *YTMP3.cc* (2.6 million visits from Poland in Q3 2021), *SaveFrom.net* (1.6 million visits from Poland in Q3 2021), and Polish language site *Pobieracz.net*. Stream ripping activity was up 9.1% between Q2 and Q3 2021.

Poland also suffers from other forms of piracy, including instances of illegal camcording and hard goods piracy. Poland is flooded with imports of toys and other goods, illegally bearing trademarks owned by producers of audiovisual content, hindering their ability to exploit these marks in Poland. Despite efforts of the customs administration, illegal goods manufactured in Asia are easily accessible in Poland.

Enforcement against online piracy is extremely inconsistent and wholly inadequate. Most criminal referrals do not proceed and cases that are pursued are often struck or dropped without justification. The operators of websites that post infringing hyperlinks, whether text links or embedding streaming links, try to avoid responsibility by arguing they are merely linking to external content, which has already been made available to the public. In addition, Poland's courts are backlogged and judges issue non-deterrent sentences in copyright infringement cases. The creation of specialized intellectual property (IP) courts has not brought about needed improvements. Moreover, the Polish press recently reported that the IP courts have refused to allow plaintiffs to demand names of physical persons (private individuals) engaged in infringing activities, unless they are engaged in a registered business activity. The practice has been that the names of such individuals could be obtained through a court order. Recently, however, the Circuit Court in Warsaw issued a refusal and the Court of Appeals hearing the case in the second instance directed an official

³See APP Global piracy landscape report, December 2019 <https://mpaa.sharepoint.com/b/s/EMEAlegal/EWddDjdwu49Bky-YdiQH8kQBex8CMRp8vUkVh3Ro8JOrgQ?e=OgREll>.

⁴See id.

judicial question to the Supreme Court, which is to provide an interpretation for this case. Civil actions against pirate services are ineffective due to the slowness of the legal process in Poland. For example, in 2015 Polish film makers obtained a court order against the *Chomikuj.pl* content hosting platform related to the availability of infringing copies of Polish movies, requiring that *Chomikuj* implement various measures to prevent the availability of infringing content. This decision was confirmed by the Krakow appeals court in 2017 but remains on appeal before the Supreme Court. Finally, as discussed below, the Government of Poland has not implemented Article 8(3) of the EU Copyright Directive, which would provide for a key enforcement tool against online piracy, and instead leaves piracy services free to continue operating and growing unencumbered in Poland.

COPYRIGHT LAW AND RELATED ISSUES

Poland's legal framework is inadequate, leaving copyright owners unable to effectively protect and enforce their rights online in the face of devastating, widespread piracy. Poland lacks adequate enforcement mechanisms against online piracy because it has not implemented Article 8(3) of the EU Copyright Directive, which requires Poland to provide for no-fault injunctive relief against intermediaries whose services are used for infringement. In addition, Poland's ISP liability framework falls short of global best practices and the EU Directive. Amending Poland's copyright enforcement laws to provide a legal basis for injunctive relief and to improve its ISP liability framework were among the recommended conclusions of the 2017 Deloitte report on Internet piracy.⁵ To address its escalating Internet piracy problem, Poland should enact enforcement mechanisms that are adequate and effective to combat online piracy, including by implementing Article 8(3) of the EU Copyright Directive and Articles 14 and 15 of the EU E-Commerce Directive. In addition, Poland should ensure that its implementation of Article 17 of the DSM Copyright Directive is done faithfully.

Lack of Injunctive Relief: Article 8(3) of the EU Copyright Directive requires Member States to ensure that injunctive relief is available “against intermediaries whose services are used by a third party to infringe a copyright or related right.” Unfortunately, Poland has not implemented this provision. Since accession to the EU, the Government of Poland has claimed that its existing legal tools are sufficient to achieve the goals set by the Directive and, therefore, implementation of this Article is unnecessary. Yet, as discussed above, piracy remains a significant problem in Poland and existing tools are inadequate for rights holders to effectively enforce their rights online. The lack of injunctive relief remedies is particularly problematic given the popularity of local, Polish language pirate sites.

Due to the refusal of the Government of Poland to enact effective online enforcement mechanisms, domestic and international rights holders lodged complaints against Poland with the European Commission (EC) for failure to implement Article 8(3) of the Copyright Directive (complaint reference CHAP(2015)02644). In response, the Government of Poland asserted that there is no evidence that its legal system is not in line with Article 8(3) and that its current legal regime has achieved the Article's objective, pointing to Articles 422 and 439 of the Civil Code and Article 11 of the Enforcement Directive. Among other things, rights holders responded that while the Civil Code provisions regulate aspects of civil enforcement, the provisions do not provide a legal basis for no-fault injunctive relief against third parties. A 2017 Warsaw Court of Appeals decision explicitly confirmed that Article 8(3) was not implemented into Poland's legal system, although the court dismissed the application to disable access to an infringing service (*Chomikuj.pl*) on other grounds— that the application did not properly name the parties against whom injunctive relief was sought—and the part of the decision relating to the implementation of Article 8(3) was not central to the holding.

In sum, there is confusion because the Polish government and the Courts disagree on the state of the law. The Government of Poland can easily clarify the situation by taking the necessary steps to implement Article 8(3) in

⁵See supra fn. 2.

order to provide rights holders with a mechanism for adequate and effective enforcement against online piracy, which continues to grow unabated.

Internet Service Provider (ISP) Liability Framework Fails to Meet Global Best Practices: Poland's ISP liability framework is inadequate because it does not meet global best practices for notice and takedown and does not provide for other measures demonstrated to be effective in preventing or restraining infringement. Poland has incorrectly implemented Articles 14 and 15 of the EU E-Commerce Directive, which provide the minimum requirements for the ISP liability framework in the EU. Poland's Act on Providing Services by Electronic Means (E-Services Act), which implements Articles 14 and 15 of the EU E-Commerce Directive, has various shortcomings that have made it extremely difficult for rights holders to effectively enforce their rights. In a complaint to the EC (case EU-Pilot 8165/15/CNCT), rights holders raised these shortcomings, including the following: (i) a service provider is required to take action only if it has actual knowledge of the infringement, not if there is "awareness of facts or circumstances from which the illegal activity or information is apparent," as required by the E-Commerce Directive; (ii) the law only requires "disabling access to infringing content" as opposed to "removing" it, as required under the Directive; and (iii) there is no legal basis to seek injunctions against service providers, as required in Article 14(3) of the Directive. The Polish government responded to the allegations by, in effect, arguing that these shortcomings were to some extent already addressed and remedied by case law. However, the situation remains unclear and, to avoid commercial and legal uncertainty, the law should be changed to comply with international and EU standards.

Draft legislation to amend Poland's e-commerce legislation to address these deficiencies has been pending since April 2012, but no progress has been made since then. In June 2016, the Council for Digitalization, an advisory body to the Minister of Administration and Digitization, proposed a resolution to resume work on the amendments to the e-commerce legislation under the current government. However, the advisory body is no longer active, and the matter currently rests with the Ministry of Digitization, with no discussions currently pending regarding the amendment of Poland's e-commerce legislation, despite continued encouragement by rights holders.

Implementation of Article 17 of the DSM Copyright Directive: Although Poland did not meet its obligation to implement the DSM Copyright Directive by June 2021, transposition legislation is expected to move forward soon and should be completed in the second quarter of 2022. In the meantime, the Ministry of Culture has issued a motion document (a formal approval to begin drafting a legislative proposal) that describes the key elements of the transposition. Overall, the motion document indicates that Poland intends to implement Article 17 of the DSM Directive faithfully. That being said, according to recent reports, the government is considering to implement Article 17 together with an extended collective licensing mechanism, which would weaken exclusivity of copyright in Poland.

The Government of Poland has also separately challenged aspects of Article 17 with the Court of Justice of the EU (CJEU). So far, only the Advocate General Opinion has been released, which advised rejection of the challenge of Poland's government. The CJEU judgement in this case is expected early in 2022.

MARKET ACCESS

Foreign ownership restrictions: Pursuant to Article 35 of the 1992 Radio and Television Law, Poland limits ownership in broadcasting companies to 49 percent. Poland's Parliament is currently discussing a draft law that, if enacted, would further complicate the ability of U.S. companies to invest or support Polish broadcasting companies.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The deficiencies in Poland's enforcement framework, including the lack of effective remedies to combat pervasive online piracy, are inconsistent with Poland's obligations under the TRIPS enforcement provisions, including Articles 41 and 61.

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland be placed on the Watch List in 2022.¹

Executive Summary: For more than a decade, rights holders in Switzerland have been deprived of the ability to enforce their copyrights in civil and criminal cases involving the online environment. In 2013, the Government of Switzerland embarked upon a legislative process to revise the Copyright Act, ostensibly to provide more effective enforcement mechanisms and bring Swiss copyright law closer in line with international norms. That process resulted in the enactment of an amended Copyright Act that largely maintains the status quo and does not address the most glaring enforcement problems in Switzerland. IIPA is grateful that the Legal Committee of the Council of States recently rejected a problematic proposal to expand the exception for “personal uses” of audiovisual works and sound recordings to cover exploitations in private areas of hotels, holiday homes, hospitals, and prisons, but continued vigilance is needed to ensure the proposal does not move forward again.

IIPA urges the U.S. government to convey to the Government of Switzerland that the amended Copyright Act does not sufficiently comply with Switzerland’s obligations to provide for effective and deterrent remedies against any act of copyright infringement, especially with respect to civil claims. The enforcement deficit remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship with Switzerland. IIPA further urges the Government of Switzerland to consider additional amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe, and international norms.

PRIORITY ACTIONS REQUESTED IN 2022

- Amend the Copyright Act to provide sufficient tools to combat all types of piracy, regardless of technical details and including cross-border piracy. This should include the ability of rights holders to use Internet Protocol (IP) address evidence in connection with civil claims, and effective remedies regarding intermediaries or Internet service providers (ISPs), including no-fault injunctions against ISPs whose services are used by third parties for copyright infringement.
- Amend the Copyright Act to affirm that Switzerland’s private use exception permits single copies for private use only if they derive from a legal (authorized) source. Further, limit catch-up TV services that are not authorized by content owners, a problem resulting from an overly-broad interpretation of the private use exception, or do away with the remuneration caps for catch-up TV.
- Stop the extended collective licensing (ECL) regime from moving forward. However, should the ECL regime move forward, ensure that it is clearly delineated, applies only to acts of exploitation that are onerous to license on an individual basis, and provides for clear and practically effective opt-out mechanisms that can be exercised by rights holders at any time.
- Require data centers and ISPs to implement better “know-your-business-customer” protocols and enforce that requirement.
- Permit effective enforcement against ISPs based in Switzerland and hosting infringing services and introduce a legal framework for combating copyright infringements, both via civil and criminal means.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audiovisual works in

¹For more details on Switzerland’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland’s Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



Switzerland to apply only to distributors or platforms located in Switzerland, including limiting the requirement (under Article 19 par. 2) that rights holders must exclusively control all language versions exploited in Switzerland (and the accompanying reporting obligations).

- End the unfair treatment of neighboring rights under collective rights management by modifying the 3% cap in Article 60(2) of the Copyright Act, which remains below other European countries and substantially below the cap of 10% for authors.
- Improve the ordinances of the Telecommunications Act (TCA) to facilitate rights holders' access to information about domain name registrants and operators of infringing websites.

THE NATURE OF PIRACY IN SWITZERLAND

Switzerland suffers from high domestic piracy rates for music, film, and video games. Moreover, the country is becoming an attractive base of operations for some ISPs dedicated to piracy on a global scale. In particular, there is a serious problem with host and data centers based in Switzerland that provide hosting services to other ISPs, including pirate services, often without checking the identities or businesses of their customers. As discussed below, the uncertainties of the recent Copyright Act amendments will likely further worsen the situation.

Piracy continues to undermine and disrupt the growth of the legitimate digital content market and leads to less willingness to pay for legitimate offerings. Although the Swiss music market has been growing for the last three years, it still accounts for less than one-third of the revenue it generated 20 years ago. Thus, it is as important as ever that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of the legitimate market. The main methods of music piracy remain cyberlockers, stream-ripping, and BitTorrent indexing sites.

Cyberlocker services for storage and sharing of illegal files continue to be a concern. The notorious cyberlockers *rapidgator.net* and *uptobox.com* attract a significant number of visits from Switzerland, with *rapidgator.net* receiving nearly 900,000 visits and *uptobox.com* receiving over 1.1 million visits during the second quarter of 2021, according to SimilarWeb. A newer site, *Ddownload.com*, also received over 900,000 visits during that same period, according to SimilarWeb. *Uploaded.net*, a very popular cyberlocker, which was recently found liable for copyright infringement by the Court of Justice of the European Union, is still run by a Swiss company (Cyando AG).² In a very concerning decision, it was reported in January 2021 that the operators of the cyberlocker, *Rapidshare*, together with the site's lawyer, have all been acquitted of facilitating mass copyright infringement.³

The music and motion picture industries report several host and data centers based in Switzerland that provide hosting services to other ISPs, often without any review to ensure their customers do not include pirate services. *Panama Connection*, a Switzerland-based "bulletproof" ISP, offered "no questions asked" hosting services and was also involved in other criminality, before it was removed by RIPE, an entity that controls the allocation of IP addresses in Europe. Following the removal action by RIPE, the company dissolved. Some ISPs that purport to be based for example in the Seychelles, in fact, have data centers in Switzerland. *Private Layer*, which provides hosting services for numerous copyright infringing sites, is routinely used by both pirate sites and users that operate virtual private networks (VPNs) to mask their identities. Despite being apparently based in Panama with no known operation in Switzerland, *Private Layer* offers dedicated servers in Switzerland and also appears to use Swiss telephone numbers. These distributors of pirated content rely on and refer to Switzerland's legislation that places high value on privacy protection. Swiss authorities should act to ensure that these ISPs and data centers operate meaningful "know-your-customer" policies and take action to have these policies enforced.

Stream-ripping sites and applications, which permit users to create an unauthorized local copy of streamed content, are still widely used, and there is currently no effective solution in Switzerland. For example, *YTMP3.cc* is

²Following the Court of Justice of the European Union's (EU) decision in the joined cases YouTube and Cyando (C-682/18), the case against Cyando will proceed before the German national court, which will decide Cyando's liability for copyright infringement under German law.

³See <https://torrentfreak.com/former-rapidshare-operators-lawyer-acquitted-of-copyright-infringement-210111/>.

the most popular stream-ripping service in Switzerland with over 1.5 million visits from Switzerland during the second quarter of 2021, based on SimilarWeb data. Following the closure of the stream-ripping site *Convert2mp3.net*, due to legal action coordinated by rights holder representatives, other stream-ripping services, including *ytmp3.cc*, *flvto.biz*, *savefrom.net*, *2conv.com*, *y2mate.com* and *mp3juices.cc*, saw an increase in traffic from Switzerland.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland and carry copyrighted material that undermines the legitimate market. This is facilitated by the notion that private use of copyrighted works from illegal sources is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for sharing infringing material remains popular. Downloading and streaming of unauthorized content for private use are likewise viewed by many as legal in Switzerland as long as no uploading occurs. A number of BitTorrent indexing sites, including *yggtorrent.si*, *thepiratebay.org* and *1337x.to* are very popular in Switzerland. According to SimilarWeb data gathered in the second quarter of 2021, *Yggtorrent.si* is the most popular pirate site in Switzerland receiving over 1.2 million visits. *Thepiratebay.org* received over 840,000 visits from Switzerland and *1337x.to* received over 1.2 million visits during this same period.

While the Government of Switzerland has demonstrated a willingness to pursue pirate sites on the *.ch* domain (the Swiss country code top-level domain (ccTLD)), numerous copyright infringing sites that have been adjudicated as illegal in other countries rely on the *.ch* domain, such as *yggtorrent.ch*, *kickass2.ch*, *wootly.ch*, *movierulz.ch*, *project-free-tv.ch*, and *torrentdownload.ch*. IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a *.ch* domain in Switzerland.

COPYRIGHT ENFORCEMENT IN SWITZERLAND

Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, and implementation of the Copyright Act, as adopted, may well cement a low level of protection. Copyright industries in Switzerland have made efforts to resume criminal and civil actions against online infringement under Swiss law, which had almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—who voiced their own frustration with the situation—interpreted the *Logistep* precedent as a *de facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases. The Copyright Act confirmed that IP address data is now available in connection with criminal claims, but not civil claims, creating a *de jure* ban on the use of such evidence in civil actions. Prosecutors have historically tended to consider copyright enforcement cases as low priority, and the extent to which they take advantage of this development remains to be seen. It took the legislature ten years to remedy this enforcement gap and yet it only provided a partial solution. The use of IP addresses in civil procedure (e.g., to obtain injunctions) remains unlawful in many cases.

Two major copyright cases that concluded in 2019 do not engender confidence in the government's ability or will to engage in effective copyright enforcement. A criminal trial against the notorious cyberlocker, *Cyando/Uploaded*, which facilitates rampant infringement, ended in March 2019 with the government's announcement that it found "no real ties" to Switzerland, despite the parent company Cyando AG's apparently blatant ties to Switzerland. And, in February 2019, the Swiss Federal Supreme Court found, in a case that had been pending since 2015, that Swisscom, a major ISP, could not be required to block access to copyright infringing websites because of the absence of any provision of law specifically dealing with access providers' responsibilities. According to the court, the pirate site operators were the only parties that it could hold liable under the law because users who downloaded infringing content using these services could rely on the broad private use exception.

Unfortunately, rights holders in Switzerland often have very little recourse against piracy sites, particularly those operated or hosted outside Switzerland. Therefore, better cooperation from intermediaries is crucial to effectively tackle the problem of illegal content in Switzerland. Such cooperation should include providing for no-fault injunctions against ISPs whose services are used by third parties for copyright infringement, as required under the European Union (EU) Copyright Directive, and the law should be changed to reflect that. Further, while the amended

Copyright Act permits collection of IP address data for criminal copyright cases, as noted above the amendments did not change the status of IP address collection for civil cases. Barring any further amendments, rights holders therefore remain proscribed from collecting and analyzing the IP addresses of suspected infringers (individuals or website operators) for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

The practice of mandatory collective licensing of rights implicated in catch-up TV recording and making available services, in place for nearly a decade, has been reconfirmed again by approval of a new tariff for remuneration regarding these services. These catch-up services offer 24-hours per day, 365 days per year full recordings of TV programs from several hundred channels, making several tens of thousands of hours of televised content available to the public. The new tariff provided for improved conditions in favor of broadcasters, and litigation proceedings previously brought by them have been settled. The mandatory tariff effectively eliminates exclusive rights implicated by these services, offering only *de minimus* remuneration for these audiovisual exploitation rights and precluding direct licensing by rights holders. This undermines the opportunity for rights holders to secure fair market value for works, including in licenses to broadcasters and platforms. In addition, the extension of the private copy exceptions to these catch-up TV and other making available services (such as a network Personal Video Recorder (nPVR)) compromises the exclusive making available right, and thus, is inconsistent with Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT). Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV services (see discussion below on the private copy exception), and the parliament expressed strong support for this practice during its debates.

As explained in more detail below, the Copyright Act includes a “stay down” provision for certain hosting providers that create a “particular danger” of copyright infringement (Article 39d). For the past several years, hosting providers have purported to take down infringing content, subject to notification, while “sharehosters,” such as sites like *Uploaded.net*, practiced takedown, but have not prevented (and have even supported) the re-upload of the infringing content. It remains to be seen how these new provisions in the Copyright Act will be implemented and enforced.

Switzerland also has never introduced reliable rules for considering ISP liability and has not adopted practices that have become standard elsewhere in Europe. “Know your business customer” policies for ISP hosting services are needed to prevent ISPs from providing hosting services to online platforms that facilitate infringing activity. The government should amend the Copyright Act or pass other implementing legislation to require or encourage host and data centers to adopt and enforce such policies, which reflect the basic duty of care applicable to businesses operating in this area. Swiss law also still allows circumvention of technological protection measures (TPMs) for purposes of uses permitted by law, including the wide scope of the private use exception. In combination, these protection deficits leave the Swiss marketplace largely unprotected against cross-border piracy services.

It remains critical that the Swiss government come into compliance with the Berne Convention, WTO TRIPS Agreement, WIPO Internet Treaties (WCT and WIPO Performances and Phonograms Treaty (WPPT)), and internationally acceptable enforcement standards. Necessary minimum changes include: (1) ensuring broader liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; (2) engaging ISPs, including access providers, in the fight against online piracy; (3) affirming that current law does not permit copying from unauthorized sources; and (4) implementing adequate civil and criminal enforcement tools.

COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND

Proposed Exception for “Personal Uses” in Certain Places

Initially proposed in 2016, a proposal to expand the copyright exception for “personal uses” of audiovisual works and sound recordings to cover exploitations in private areas of hotels, holiday homes, hospitals, and prisons was re-entered into the parliamentary process in the spring of 2021. While the National Council adopted the proposal,

it was recently rejected by the Legal Commission of the Council of States. The proposed exception would deprive rights holders of substantial revenue, and it is clearly inconsistent with Switzerland's obligations under the WIPO Internet Treaties. The proposal would undermine rights holders' right of communication to the public and would clearly exceed the scope of the three-step test because it is not limited to special cases, conflicts with a normal exploitation of the work or sound recording, and unreasonably prejudices the legitimate interests of the rights holder. IIPA is grateful that the Legal Commission of the Council of States rejected this problematic proposal, but continued vigilance is needed to ensure it does not move forward again.

Copyright Act Amendments

The 2020 Copyright Act amendments unfortunately fell short of implementing the full Working Group on Copyright (AGUR12) compromise recommendations agreed to by rights holders.⁴ As discussed below, further amendments or other legislation are needed to adequately address rights holders' concerns and to ensure adequate and effective copyright protection and enforcement. Most importantly, the law's affirmation that private use of illegal sources is permitted is a blow to rights holders, inconsistent with Switzerland's international obligations, and impairs cooperation with intermediaries.

Revisions to Article 77i were meant to address the *de facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, the amended law did not solve the problem *Logistep* created and in many ways puts rights holders in a worse position than they were in following the *Logistep* decision. While the Copyright Act may allow rights holders to use personal information (including IP addresses) to file criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. This needlessly limits rights holders' ability to enforce their rights and essentially forces rights holders to rely exclusively on criminal enforcement. However, criminal enforcement alone is grossly inadequate because prosecutors rarely bring criminal cases against piracy due to resource constraints and a general reluctance. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to only limit data collection to that which is reasonably necessary for the pursuit of violations of law (this would mirror the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC), as well as the recommendation of the AGUR12).⁵

The Copyright Act provides a limited "stay down" obligation that applies to certain hosting providers that create a "particular danger" for copyright infringement, such as those that incentivize illicit uploads and undermine take down efforts (Article 39d). Unfortunately, the legal requirements remain unclear, particularly the required evidence for showing that a hosting provider created a "particular danger" for copyright infringement through its technical features or its business model. This provision will require potentially intricate and lengthy pilot proceedings to become enforceable.

The Copyright Act includes a compulsory collective right to remuneration for authors and performers for exploitation of their audiovisual works on video-on-demand (VOD) online platforms. This mandatory collective remuneration scheme applies only if a film is of Swiss origin or produced in a country that provides a similar collectively enforced right of remuneration.⁶ While the provision excludes certain rights holders from claiming remuneration, it is not clear whether audiovisual works from countries that do not offer a comparable remuneration scheme could nevertheless be subject to remuneration demands from Swiss collective management organizations (CMOs). It should therefore be clarified in the law that works from countries whose rights holders cannot claim remuneration will not be

⁴The copyright amendment legislation was prepared by the Working Group on Copyright (AGUR12) in 2013. For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

⁵A standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision—even as it stood by the Federal Court's opinion—underscored, in the context of online piracy cases, that "we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing."

⁶The Memorandum accompanying the adopted Copyright Act states that the Government of Switzerland anticipates to "grant" reciprocal rights to foreign authors of audiovisual works from: Argentina, Belgium, Bulgaria, France, French-speaking Canada, Italy, Luxembourg, Monaco, Poland, and Spain.

subject to CMO payment demands.

Other potentially problematic provisions in the Copyright Act as adopted include:

- (i) **Extended collective licensing (ECL), i.e., collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the provision was purportedly motivated by the desire to make difficult-to-license content, such as large archive stock, more accessible, the provision's scope is overbroad. This creates a risk that extended collective licenses could be applied in areas where they undermine the enforcement of exclusive and individual licensing. The opt-out provision does not render an ECL voluntary, and the language of the provision suggests that opting out must be declared for each individual license. There is, therefore, substantial risk that ECLs applied in the online space devalues the market value of the work, setting a tariff "norm" that could undermine exclusivity and licensing terms for rights holders who choose to opt out and exercise their exclusive rights. An initial tariff has been agreed and will most likely become effective in 2022 (and possibly retroactive for 2021). In addition, requiring a rights holder to opt out to exercise exclusive rights could constitute a formality prohibited by international law, including the Berne Convention and the TRIPS Agreement. In short, ECLs, even with opt-out rights, are wholly inappropriate with respect to services that are already licensed directly around the world.

- (ii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered "orphan" after "research performed with appropriate thoroughness." The dispatch on this article produced during the legislative process troublingly noted that "this responsibility is considered fulfilled if [the users] have consulted the relevant databanks for the corresponding work category." A better standard would be the requirement for a "diligent search" set out in the EU Orphan Works Directive. A recordation requirement for rights holders to protect their works could constitute a formality prohibited by international law, including the Berne Convention and the TRIPS Agreement.

Also, the provision does not specify that the institution (such as a public or publicly accessible library, school, museum, collection, archive, or broadcaster) possessing the orphan work copy must be domiciled in Switzerland; it requires only that the copy is created, copied, or made available in Switzerland, including, potentially, copies made available from foreign sources. As a result, the provision could be applied to content hosted outside of Switzerland.

- (iii) **A free reproduction license for scientific research (Article 24d), meant to cover "text-and-data mining."** There is a potential for this license to exceed its intended purpose. For example, it is possible this provision could be combined with other exceptions such as the existing, unusually broad private use exception, which can apply to commercial organizations.

- (iv) **Protection of photographs regardless of their "individual character" or level of creativity (Article 2, paragraph 3bis).** In keeping with international norms, all types of photographs should be protected under the same standard generally applicable to other copyrightable works (e.g., music, film, literature). Under Swiss law, photographs that "do not necessarily have an individual character" are protected for just 50 years after their publication (or production). This dual standard for photographs should be eliminated and the term of protection for all copyrighted photographs should be 70 years.

One positive change in the Act is the extension of the term of protection for performances and recordings, including audiovisual content, from 50 years to 70 years, bringing Switzerland in line with the EU term of protection. This provides greater incentives for the production of (*inter alia*) audiovisual and recorded content and will provide a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues.

On June 4, 2019, the Council of States requested the Federal Council, following the implementation of the revision of the copyright law, to present in a report, developments in the areas affected by copyright. The purpose of the study is to examine the effectiveness of the revision in light of the development of the relevant law at the European level. The report will focus on the situation of publishers and media professionals. The Federal Council is now expected to present this report in 2022 or 2023.

Additional Concerns Under the Copyright Act and Related Laws

IIPA continues to have other long-standing concerns with certain aspects of Swiss laws related to copyright, which are further detailed below.

Private Copy Exception: Another long-standing priority of the creative industries is to narrow the private copying exception, which is over broad and exceeds the limits of the three-step test. The exception has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. This broad private copying exception, together with the inadequate protection accorded to TPMs (see below), constitute significant hurdles for protection against stream-ripping services that dominate the list of top pirate services, as well as other infringing services. Moreover, the Swiss Federal Arbitration Commission relies on the private copy exception to permit cable and over-the-top (OTT) providers, including major telecom corporations, to offer seven-day “catch-up” services on integral recordings of hundreds of TV programs, imposing a government-approved collective remuneration tariff in these services. This system abolishes exclusivity of audiovisual works and precludes direct licensing by rights holders, which limits their right to maximize and exclusively control these significant primary rights, including the use by the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to these catch-up TV services undermines the exclusive making available right, and thus, is inconsistent with Switzerland’s international obligations, including under the WCT.

Circumvention of Technological Protection Measures (TPMs): Swiss law allows acts of circumvention of TPMs “for the purposes of a use permitted by law” (Article 39(a)(4)). This exception is far too broad and inconsistent with Switzerland’s obligations under the WIPO Internet Treaties, which require “adequate legal protection and effective legal remedies” against circumvention of TPMs.⁷ Moreover, given the inappropriately wide scope of the private copy exception (discussed above), this exception to the circumvention of TPMs could be interpreted to permit individuals to circumvent access or copy controls that protect copyrighted content and disseminate that content widely. As a result, circumvention devices and software are widely available in Switzerland. Furthermore, the country’s Monitoring Office for Technological Measures is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.⁸ This appears to be in service of assessing the possibility of legislating the portability of audiovisual content, similar to and inspired by the EU’s Portability Regulation.⁹ This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, currently underway.¹⁰

Provide Neighboring Rights More Fair Treatment: The Swiss Copyright Act continues to cap the remuneration payable to rights owners at 10% of the licensees’ income for authors and 3% for owners of related rights. In 2010, Swissperform, the Swiss CMO for performers and producers, initiated arbitration proceedings against this cap, but in 2014 the Federal Supreme Court upheld the cap. The Court acknowledged that the remunerations for performing rights are, in fact, higher in other European countries, but decided not to intervene on the merits. Instead, the Court ruled that it is up to the Swiss legislature to set these caps based on a political assessment. Unfortunately, the legislature declined to address this issue in the recent Copyright Act amendments.

⁷See Article 11 of the WCT and Article 18 of the WPPT.

⁸See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm>.

⁹Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

¹⁰See <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80379.html>.

This unusual and unjustified discrimination against neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.¹¹ IIPA notes that there are no independent broadcasting and public performance rights for sound recording producers under current Swiss law, as producers merely have an entitlement to receive a share of artists' remuneration.

Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right: Article 12 Section 1*bis* of the Copyright Act states that copies of audiovisual works may not be distributed or rented if the distribution or rental prejudices the rights holder's public performance right—e.g., if a motion picture audiovisual work is still in the theaters. An explicit criminal sanction for the violation of this principle is needed to deal effectively with an influx of French-language DVDs imported from Canada and freely distributed while those motion pictures are still playing in Swiss cinemas.

Amendments to the Telecommunications Act (TCA): The Federal Council enacted amendments to the ordinances of the TCA that entered into force in January 2021. The ordinances may create a further obstacle for anti-piracy activities because they will make it harder for rights holders to gather information about the domain name registrants and operators of infringing websites. While registrars will have to identify "holders" (i.e., registrants), (i) publication of such domain registrant's identification and contact details in WHOIS is banned for individuals and is not an obligation even where the registrant is a legal entity; and (ii) there is no obligation for registrants to provide and update all information, which is needed for enforcement purposes. While free-of-cost access for rights holders to non-public domain registrant data is provided in principle, its quickness and effectiveness will depend on the access proceedings and the required level of substantiation, unilaterally defined by the registrar.

SWITZERLAND'S COMPLIANCE WITH EXISTING INTERNATIONAL OBLIGATIONS

Switzerland is a member of the Berne Convention, TRIPS Agreement, WCT, and WPPT. Switzerland is thereby obligated under these international agreements to provide "effective" remedies to prevent and deter infringement. For example, under Article 41(1) of the TRIPS Agreement (and similarly WCT Article 14(2) and WPPT Article 23(2)), it is required to "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." Switzerland is not currently doing so, and as explained in this report, the newly-adopted Copyright Act does not bring Switzerland in line with its existing obligations. In addition, as noted above, Switzerland is not presently providing "adequate legal protection and effective legal remedies" against the circumvention of TPMs, as it is required to do under Article 11 of the WCT and Article 18 of the WPPT.

MARKET ACCESS BARRIERS IN SWITZERLAND

Film Act Amendment: Effective since 2016, a Film Act provision known as the "unique distributor clause" has been extended to all forms of exploitation, including DVD/physical home entertainment and all forms of VOD/online distribution, with the exception only of linear television (broadcasters' ancillary on-demand rights are excepted only for seven-day catch-up). Exploitation of a film in any media in Switzerland now requires exclusive control over all language versions in Switzerland, to the extent actually exploited, in the hands of a single distributor. This is accompanied by laborious registration and reporting duties, which address foreign entities owning and exploiting rights in Switzerland.

¹¹Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without first addressing the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the important U.S. policy of not establishing a hierarchy of rights and should be ended by modifying the cap.

Despite a revised guideline published by the Federal Office in 2020, the provision still lacks clarity regarding the extent of “grandfathering” protection for existing contractual fragmentation of film rights: output deals made prior to 2016 lost “grandfathering” treatment as of 2019. In sum, this amendment interferes with internationally established licensing practices.

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Taiwan be placed on the Special 301 Watch List.¹

Executive Summary: Taiwan has recently taken some positive steps to improve its digital marketplace for legitimate audiovisual content, including outlawing Piracy Devices (PDs) and software applications in 2019 and then taking enforcement actions over the past two years against certain notorious piracy sites, such as *8maple.ru* (and related domains), as well as advancing legacy cases against the PDs ChuangYi TV box and QBox (or Chien Hsun TV Box), although, unfortunately, in both cases prison sentences were commuted to non-deterrent fines. However, continuing online piracy, legal framework deficiencies, and other barriers continue to stifle the potential of the Taiwanese market and limit market access for the U.S. creative industries. To further its stated interest in negotiating a bilateral trade agreement with the United States, Taiwan's government should address the copyright protection, enforcement, and market access concerns discussed in this report.

Piracy websites and software applications (apps), especially those operated or based outside of Taiwan, continue to be problematic for rights holders, by facilitating unauthorized streaming, and stream-ripping and driving the proliferation of PDs. Illegal theatrical camcording remains a concern. E-book piracy and the making available of copyrighted teaching materials without authorization on university digital platforms likewise remain problematic.

Enactment of the 2019 amendments providing a clear legal basis to combat the proliferation of piracy apps and devices was a positive development, but sentences against pirate operators are too low to deter piracy. Taiwan's government should further improve the legal framework for copyright protection and enforcement to combat remaining and growing online piracy problems. For example, Taiwan should provide an effective remedy such as no-fault injunctions against foreign-hosted piracy sites, preferably through the Copyright Act amendment process. Data suggests that the public in Taiwan would support more effective protection of creative content online. Unfortunately, two separate sets of draft amendments to the Copyright Act under consideration not only fail to address deficiencies in Taiwan's legal framework but would further damage local and worldwide investment in the production and legitimate distribution of copyrighted content and raise questions regarding Taiwan's existing international obligations.

The Government of Taiwan should move swiftly to remove market access barriers negatively impacting the audiovisual sector, and Taiwan should refrain from imposing any new barriers, including those in the proposed regulations of over-the-top (OTT) services and in the proposed regulations on intermediary platforms. IIPA urges the government to take the steps necessary to address the persistent threats to the creative industries, which contribute so significantly to Taiwan's economy and culture.

PRIORITY ACTIONS REQUESTED IN 2022

Enforcement:

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should continue to investigate and prosecute more online piracy cases (including those involving PDs and piracy apps under the amended Copyright Act), with the goal of seeking deterrent level punishment against commercial piracy operations.

¹For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Increase training and awareness for judges and prosecutors of global best practices for online copyright enforcement, and the application of procedural requirements to the online environment.
- Take action against infringement of reading materials at educational institutions, including the making available of on-demand printouts of pirated e-books or teacher resource materials, and against digital infringement occurring on online education platforms.
- Take effective action to deter unauthorized theatrical camcording incidents, including issuing deterrent penalties.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to all websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

Legislative:

- Enact legislation to:
 - provide for a clear legal basis for rights holders to obtain no-fault injunctions to order Internet service providers (ISPs) to disable access to infringing content on websites, including foreign websites (including, as necessary, amending the Civil Procedure Code and the Intellectual Property (IP) Adjudication Act to overcome potential civil procedure restrictions);
 - make all criminal copyright infringement, including Internet piracy, “public crimes” to permit *ex officio* action against infringement;
 - clarify the ISP liability framework (in the Copyright Act or the Digital Communications Act) to ensure that all intermediaries are properly incentivized to act against online piracy and that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement;
 - further amend Article 87 of the Copyright Act to: 1) clarify that the list of acts setting out “an infringement of copyright” is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping; and 2) remove the pre-condition for liability that infringers “receive benefit” from the infringement;
 - extend term of protection in line with international best practices (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years);
 - make unauthorized camcording of motion pictures in theaters or of live musical performances a criminal offense;
 - correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a fair-market based royalty rate and eliminate delays in fixing the rate in dispute settlement cases;
 - enhance Article 88 of the Copyright Act by removing restrictive language on calculating damages and the NTD1,000,000 limit; and
 - ensure sound recordings are treated the same as literary, musical, and dramatic or choreographic works, including but not limited to providing exclusive rights for public performance and retransmissions of sound recordings.
- Ensure amendments to the Copyright Act do not reduce criminal liability standards, and do not extend exceptions beyond what is permissible under Taiwan’s WTO TRIPS and Berne obligations (i.e., that exceptions to and limitations on copyright are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Eliminate market access barriers that discriminate against U.S. audiovisual content (including investment restrictions in the Cable Radio and Television law, the rate cap for basic cable TV service, local discriminatory content quotas on television content, and television program classification regulations that require display of Taiwanese ratings and warning messages); and ensure that any new OTT regulations (e.g., the Internet

Audiovisual Service Management Act) or any regulations on intermediary platforms (e.g., the Digital Communications Act) do not disincentivize foreign investment by, for example, requiring foreign OTT service providers to register, set up local permanent establishments, disclose sensitive commercial information, and comply with a rating system that is potentially inconsistent with international standards, or mandating local content obligations.

TAIWAN'S DIGITAL MARKETPLACE AND PIRACY AND ENFORCEMENT UPDATES

The creative industries make significant contributions to Taiwan's economy. A 2016 Oxford Economics study shows local film and television sectors directly contribute US\$5.9 billion to Taiwan's GDP, support 104,200 jobs, and generate approximately US\$490 million in tax revenues.² Moreover, Taiwan, the 25th largest music market in the world in 2020 by revenue, is a hub of music production for the Chinese speaking world and a major exporter of "C-pop." Unfortunately, Taiwan's online marketplace permits unhampered access to unlicensed services, which compete with and undermine legitimate digital services. Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those prior reports and should not be considered an exhaustive review of all concerns.³

Piracy Continues to Grow, Especially Online: Online and mobile device piracy in Taiwan continued in 2021. Foreign websites that provide illegal content remain a significant problem and undermine the ability of legitimate rights holders and services to survive commercially in Taiwan. Examples of such websites include *gimyvod.cc*⁴ and *99kubo.tv*, which offer access to thousands of infringing movie and television series titles and make money through advertising. Particularly popular are streaming, forum,⁵ blog, deeplinking, peer-to-peer (P2P) (e.g., *Rarbg*), BitTorrent, and cyberlocker sites (e.g., *Katfile*),⁶ which are used to infringe or facilitate infringement of copyright in movies and television content, music, video games, and books and journals. There is still no effective means to combat foreign-hosted infringing services. This has left Taiwan unable to stop online video piracy syndicates and their products and services, which have expanded from China into Taiwan. Notorious piracy sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* allegedly have their servers located in Taiwan.⁷ While these sites remain under investigation, Taiwan should take effective action by imposing deterrent level punishments against the operators of these sites and services, as discussed below.

Based on a criminal referral, in early 2021, Taiwan's enforcement authorities raided the operators of a highly popular Chinese language *Gimy* pirate website family. While this action, positively, resulted in the removal of certain domains, *Gimy* has redirected to new domains, including *gimy.app*, *gimytv.com*, *gimy.pro*, *jumi.co*, *dogevod.com*, and *gimy.one*. The *Gimy* domains had an aggregate of 23 million monthly visits in August 2021 according to SimilarWeb. The case continues to be investigated by Taiwanese prosecutors. As reported last year, the CIB successfully took action against a major streaming website, *8maple.ru*, responsible for 32.5 million piracy visits per month. In March

²See Oxford Economics, *The Economic Contribution of the Film and TV Industry in Taiwan in 2016*, 5, available at https://www.mpa-apac.org/wp-content/uploads/2018/03/MCAA_Taiwan_2016_WEB.pdf.

³See, e.g., IIPA, *Taiwan, 2021 Special 301 Report*, (January 28, 2021), available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301TAIWAN.pdf>.

⁴*Gimyvod.cc* offers a vast library of motion picture, television, anime content, and Asian dramas. It is believed to be operated by an individual in China, but the site is not accessible in China. The site uses a U.S.-based reverse proxy service to mask its IP location, limiting rights holders' ability to identify the site's precise host and the location of the website's server. The site was previously at *gimyvod.com* and was one of the most popular streaming Chinese language websites in the Asia region.

⁵Forums are a serious problem, including, for example, *eyny.com*, one of the most popular infringing websites with 54.6 million visits from Taiwan in Q3 2021 (according to SimilarWeb) and *JKForum.net*, which received 14 million visits in Q3 2021 from Taiwan. Users can easily share unlicensed content (including movies, TV dramas, and music) in these forums. In addition, *eyny* has a sub-streaming service, *video.eyny.com*, which receives 9.43 million monthly visits and 73.54% of traffic from Taiwan, where users can share unauthorized content (including movies, TV dramas, and music videos) directly with each other.

⁶Forum sites often link to downloads hosted on cyberlockers and these sites were also widely used in Taiwan. For example, there were 4.6 million visits to *Katfile.com*, and 1.2 million visits to *Rapidgator.net*

⁷USTR identified *Dytt8.net* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) ("2020 Notorious Markets Report"). The related sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* are consistently high ranking with 12.89 million visits in mainland China in August 2021 according to SimilarWeb. With a very user-friendly interface and the provision of direct links to third party storage providers, this website remains a particular threat to legitimate services in greater China. These sites are under investigation.

2020, the CIB seized the primary and related domain names (*8maple.com*, *8drama.com*, *8drama.ru*, *8duck.ru*, *8video.tv*, *eyny.is*, and *eyny.tv*), arrested two suspects, and seized computer equipment, property and approximately US\$1.9 million in illegal funds.⁸ Lastly, an IP Court criminal verdict against the operator of a piracy linking site called *ishowfile* is still in progress.⁹ Overall, notwithstanding the excellent work of Taiwan's enforcement authorities in tracking down some major pirate operators, sentences and fines remain non-deterrent.

"Stream-ripping," where users of legitimate online platforms use tools, such as an app or a website, to illegally "rip" the streamed content (which can be audio or video), is a growing problem, which at first impacted primarily the music industry, but is beginning to impact other creative industries as well.¹⁰ The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator). In other jurisdictions, courts have found such services to infringe the reproduction and/or making available rights, and/or to unlawfully circumvent technological protection measures (TPMs), but in Taiwan no such cases have been brought, in part because operators are located outside Taiwan. As discussed below, Article 87 should be further amended to expressly confirm that it can be used against foreign-based services and clarify that the list of acts setting out "an infringement of copyright" is non-exhaustive, which would ensure that the provision is applied to other acts of infringement, such as stream-ripping.

A newer form of piracy involves a mobile app for use with karaoke machines that allows consumers to access and download content from a cloud database located overseas. The app provides access to a vast amount of unauthorized karaoke audiovisual content. In a recent case in Taiwan, the owner of a karaoke audiovisual content cloud database provided an app for download by Taiwanese consumers that permitted them to access and use database content licensed only for mainland China. Rights holders of the karaoke audiovisual content in Taiwan suffer significant losses from this form of piracy. The distributor of the machine has been indicted under Article 87(1)-(7) and (8) and Article 93, and the case is now pending in court for review. The judgement in this case will be very important for tackling similar infringements in the future, but more effective enforcement measures are clearly needed.

Social media platforms have also become a popular way to share pirated content. Apps for PDs and mobile devices, such as *Mixerbox 3*,¹¹ have become a significant platform for disseminating illegal content. Illegal camcording continues to be a problem, with ten videos forensically matched to Taiwan cinema locations (including in Kaohsiung) during 2019 (up from five in 2018), and six audio matches. Data for 2020 and 2021 is anomalous due to cinema closures during the COVID-19 pandemic. In addition to improving the legal framework (discussed below), the government should take actions under current law, and work with industry to persuade exhibitors to provide staff with more training and to take proactive security measures.¹²

While unauthorized photocopying remains a concern, the availability of unauthorized copies of textbooks on online sites has overtaken this problem. Online shopping forums, such as *www.shopee.com* and *www.ruten.com/tw* host numerous vendor accounts that sell or re-sell unauthorized copies of textbooks, test banks, and solutions manuals in both pdf and print form.¹³ The *shopee.com* platform has become increasingly problematic, with reports of infringing content, i.e., counterfeit versions of textbooks and unauthorized ebooks, on the site having increased over the past

⁸The case has been transferred to the Taoyuan District Prosecutor's office for further investigation. See <https://www.taipeitimes.com/News/taiwan/archives/2020/04/09/2003734279>.

⁹In September 2019, The Taiwan Shilin District Court sentenced the defendant to 22 months imprisonment. While the sentence was encouraging, the length of the proceedings (4 years and 4 months) is far too long to have a significant deterrence in the marketplace. The defendant's appeal to the appellate court was dismissed, and the Supreme Court dismissed his appeal on December 16, 2020. The guilty verdict and the sentence of 1 year and 10 months, therefore, remains. The defendant is applying for a retrial.

¹⁰Popular websites that enable stream-ripping include *Y2Mate*, which received 3.7 million visits from Taiwan in Q3 2021; *YT1s.com*, which received 1.9 million visits in that same period; and *Yout.com*, which received more than 1 million visits from Taiwan in that same period.

¹¹*Mixerbox.com* is a website that allows users to watch embedded YouTube clips stripped of advertisements, providing a service similar to a streaming service like Spotify or KKBOX, except with unlicensed content. *Mixerbox.com*, which has seriously disrupted the local music streaming market, has 623 thousand monthly visits, with 91.71% of its traffic from Taiwan. The website also disseminates the popular mobile app *Mixerbox 3*, which also provides unauthorized music video content streamed from YouTube, stripped of advertisements.

¹²It has been reported that actions against camcording as "unauthorized duplication" have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording.

¹³Vendors on these online forums purchase DVD-ROMs containing pirated content from vendors on *Taobao* (China) or download infringing copies from other high traffic piracy sites (such as *Libgen* or *ThePiratebay*) and upload the infringing copies to their seller accounts.

year. Unfortunately, exacerbating the problem, the process for reporting infringing content is cumbersome and responses to takedown notifications have been inconsistent. Copy shops on and around university campuses may be equipped with computers and multi-function printers to allow students to select the desired textbook to be printed on demand (from pirated digital files stored on in-store computers),¹⁴ while computer labs at universities also appear to be venues for downloading and printing infringing materials by students.

The “Teaching Excellence Program” encouraged teachers to make available teaching materials they created on a university digital platform freely accessible to students. Unfortunately, in addition to original content generated by the instructors themselves, publishers remain concerned that a significant amount of the materials—textbook content, PowerPoint slides, exercises, or test banks and the like—available on these platforms may be unauthorized copies of copyrighted content created and owned by publishers. The full extent of the infringement remains unknown, as publishers are unable to assess the content made available because access to the university platforms is not permitted.

Piracy Devices (PDs): Notwithstanding specific legislative reforms, the proliferation of PDs remains a problem in Taiwan, and enforcement against operators of PDs to effectively deter them has been insufficient.¹⁵ In February 2021, a Taiwan court delivered its verdict in a criminal case involving the Chuang Yi TV box, finding the defendant guilty of violating Article 92 of the Copyright Act for public transmission of a copyrighted work without authorization. Unfortunately, the penalty was less than deterrent because, while the defendant initially received a sentence of six months imprisonment, it was commuted to a fine. Another criminal case was pursued against the Qbox and nine defendants. In December 2021, a Taiwanese court delivered its verdict against one defendant, finding him guilty of violating Article 92 of the Copyright Act. Unfortunately, as with other recent criminal cases in Taiwan, the defendant received a prison sentence of only five months, which was then commuted to a non-deterrent fine. In February 2021, Taiwan police took actions against servers feeding mostly local content to popular infringing Internet protocol television (IPTV) services like UnblockTech and EVPAD. Additionally, in August 2021, Taiwan police took action against individuals who stole the video signal source files of the Olympics and illegally provided them to users of UnblockTech.

The 2019 amendments to Articles 87 and 93 of the Copyright Act provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs and apps. To ensure the law accomplishes its goal of deterring the sale of PDs in the marketplace, we are hopeful that recent enforcement actions will result in increased deterrence against the manufacturers and distributors of PDs and apps, as well as against resellers of devices that do not have piracy software or apps pre-loaded (but who are well equipped by the manufacturer or by middleware providers to install illicit software or apps). In light of the amended law, local associations, including the Taiwan OTT Media Services Association, are asking the government to set up a specialized enforcement unit to handle cases involving unlawful PDs. The local audiovisual industry has recently worked well with enforcement authorities (including CIB, TPB, and CIBr) on PD cases, and IIPA is hopeful enforcement authorities continue to pursue such cases, using the amended law to its maximum extent.

Pirated USBs: USB devices loaded with thousands of pirated songs (with each USB storing 1,000-3,000 songs) are becoming more popular in Taiwan. Investigations indicate that these USBs, which are sold online via e-commerce platforms (e.g., *Shopee.tw* and *PChome/eBay*) at a very cheap price (NT\$200–NT\$800, or ~US\$7–US\$27), are being manufactured in mainland China and delivered by local couriers in Taiwan, with the money going into Taiwanese bank accounts. The music industry initiated a few criminal cases against sellers of USBs in previous years, but each case ended with defendants receiving short prison sentences that they were allowed to convert into

¹⁴Copy shops store unauthorized pdf files of textbooks on in-house computers, which are available for students to search and select files for printing and binding by the shop.

¹⁵Piracy Devices (PDs) refer to media boxes, set-top boxes, or other devices and their corresponding apps and services. Mostly originating from China, PDs are available openly throughout Taiwan, including at so-called “3C” shops, and via online retailers, and facilitate unauthorized streaming of motion pictures and television content through apps that direct users to pirated content. These devices often contain, or can connect to, a hard disk to store the downloaded content, and may have an SD card slot, which helps novices connect to foreign piracy sites. More than 30 different brands of such devices are now available in the marketplaces in Taiwan. Manufacturers of popular PDs in Taiwan include Unblock Tech, EVPAD, and SVI Cloud.

low fines.¹⁶ Because the pirate USBs were imported and delivered from China to consumers in Taiwan directly, raids initiated by the Taiwanese police resulted in finding and seizing only small amounts of pirate products, discouraging law enforcement from pursuing aggressive actions against this form of physical piracy. Taiwan's notice-and-takedown mechanism is inapplicable to this kind of infringement because these are physical products and there is no list of infringing content available to identify in a notice.

Online Piracy Enforcement, Particularly Originating Outside Taiwan, Hampered by Inadequate Legal Framework: While the takedown rate remains extremely high for domestically hosted content, Taiwan's Internet users obtain unauthorized content primarily from websites located overseas. Cooperation with ISPs is generally good for domestically hosted infringement, but Taiwan's legal framework to address overseas infringements remains inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites does not appear available under current law, although a recent unpublished Taipei District Court case, as well as last year's *Gimy* criminal action, may pave the way for an approach by Taiwan Network Information Center (TWNIC) to disable access to sites engaged in illegal activity.¹⁷ Taiwanese government officials and stakeholders have had discussions with ISPs about the severe problem of online piracy. While ISPs are generally sympathetic, they require the government to direct them or courts to order them to act. Meanwhile massive online piracy continues to cause significant damage to American creators and businesses, which have invested in production, distribution, and exportation of copyrighted content.

Taiwan has a mechanism to report and ensure permanent removal or blocking of content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Government involvement and support is essential to expand this cooperation to content that infringes copyrights. Without such a remedy, Taiwan is becoming an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem.

Furthermore, civil remedies are inadequate. Article 88 of the Copyright Act includes restrictive language on calculating damages, and limits damages in most cases in which actual damages cannot be determined to NTD1,000,000. Article 88 should be enhanced by removing these impediments. Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. The music industry reports that CIBr actions against music piracy have been significantly reduced, in part because domestic takedown notice recipients have become more responsive, but also because most piracy websites are hosted outside Taiwan, where CIBr does not have jurisdiction.

Improvements Needed in Court Adjudication of Intellectual Property (IP) Matters: Many reports from copyright and other IP rights holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal prosecutions are drawn out and do not result in deterrence. In the criminal context, prosecutors have settled for "suspension of indictment" in digital piracy cases and judges have commuted prison sentences to a fine or suspended punishment altogether. The Judicial Yuan would benefit from and may be receptive to trainings for judges and prosecutors on specific issues related to IP infringements, focusing on the following: 1) technical particularities of Internet and new technology-based copyright infringement cases; 2) aspects of the civil and criminal system that are not operating smoothly for rights holders; and 3) ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

COPYRIGHT LAW AND RELATED ISSUES

Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan: As noted, while many of the online services built on infringing activities or facilitating infringement are located outside of Taiwan, a significant amount of infringing activity occurs within Taiwan

¹⁶One defendant settled for "suspension of indictment" and seven were sentenced to two-to-three months imprisonment, but each one was allowed to convert it into a fine of USD\$1,000-3,000.

¹⁷Industry is awaiting the text of draft amendments to the Internet Audiovisual Services Management Act that could include no-fault injunctive relief to disable access to flagrantly infringing websites. However, it does not appear such a provision will be included in the initial draft amendment, which has not yet emerged or been introduced in the Legislative Yuan.

and should create a nexus for action. ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, but the current inadequate legal framework inhibits them from doing so. Several dozen jurisdictions around the world have remedies in place to halt copyright infringing websites from being accessed by users. IIPA believes the Taiwanese government should propose legislation to provide an appropriate remedy that is narrowly tailored with appropriate processes to halt services that are built on, facilitate, or encourage infringement. It is unfortunate that no such proposals have been included as part of the copyright reform process. Governments in the region, including Australia, South Korea, Singapore, India, Indonesia, Malaysia, Thailand, and Vietnam have adopted or refined approaches that provide a remedy requiring ISPs to disable access to infringing sites.¹⁸

Proposed Copyright Amendments Inconsistent with International Norms: In April 2021, TIPO proposed another draft bill amending the Copyright Act (Draft Bill), which was passed from the Executive Yuan to the Legislative Yuan for review in May 2021. The Draft Bill is largely based on earlier proposals. Unfortunately, the Draft Bill does not address many of the criticisms IIPA raised in comments on the previous drafts that TIPO had released for public comment. Prior IIPA submissions have detailed the flaws in the draft amendments.¹⁹ These include failing to address several deficiencies in Taiwan's existing legal regime, including the need to:

- provide a clear mechanism to address the problem of foreign hosted piracy websites that target users in Taiwan through the availability of no-fault injunctions to disable access to pirated content;²⁰
- clarify the ISP liability framework to ensure that all intermediaries are properly incentivized to act against online piracy and that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement;
- deem all criminal copyright infringement, including Internet piracy, “public crimes” (as was so successfully done regarding optical disc piracy), which would be an effective deterrent and would benefit all rights holders, including those who cannot afford to pursue civil enforcement actions;
- extend the term of protection for copyrighted works, including sound recordings, in line with the international trend;²¹
- make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;²²
- correct problematic TIPO practices regarding collective management;²³ and
- ensure sound recordings are treated the same as literary, musical, and dramatic or choreographic works, including but not limited to providing producers and performers exclusive (rather than mere remuneration) rights for public performance and retransmissions of sound recordings.

In addition, like earlier proposals, the Draft Bill contains several provisions that are inconsistent with evolving

¹⁸IIPA also encourages Taiwan to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

¹⁹See prior IIPA Taiwan country reports (e.g., IIPA 2019 at 83-84).

²⁰To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property (IP) Case Adjudication Act.

²¹Term should be extended to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years.

²²The music industry reports that infringement through camcording live concerts is increasing.

²³Corrections should include allowing the setting of fair-market based rates for collectively managed rights (instead of tariffs determined by the Taiwan IP Office (TIPO)); establishing judicial dispute resolution mechanisms in lieu of the requirement to have Collective Management Organizations (CMOs) tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a “joint royalty rate” and appointing a “single window” for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings and allow for delays in fixing the rate, thus interfering with the ability of rights holders to collect royalties. A detailed discussion of the shortcomings of the Act appears in previous IIPA filings.

international norms and raise questions regarding compliance with Taiwan's existing international obligations, including the following:

- numerous broad exceptions and limitations to protection, including education²⁴ and fair use,²⁵ which would call into question Taiwan's compliance with its TRIPS obligations;²⁶
- a reduction of criminal liability standards (e.g., requiring participation in collective management organizations (CMOs) as a prerequisite for criminal enforcement, exempting a broad range of uses of copyright works from criminal liability, and removing the minimum prison sentence of six months for making and distributing infringing copies);²⁷ and
- requiring rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement.

As previously reported, to further its stated ambition to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which requires compliance with the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), Taiwan is considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards.²⁸ There is no timeline for passage at this stage, and if passed it would not enter into force until Taiwan joined the CPTPP. While the draft includes some positive aspects, such as establishing digital piracy as a public crime,²⁹ it does not address most of the deficiencies in Taiwan's legal framework outlined above, including the lack of an effective remedy against flagrantly infringing websites and an inadequate term of protection.³⁰ Furthermore, an early draft would have weakened enforcement against pirated optical discs.³¹

Amendments to Address Piracy Devices (PDs) and Apps: As previously reported, in 2019 Taiwan enacted amendments to Articles 87 and 93 of the Copyright Act.³² This legislation followed 2018 guidance from TIPO that streaming devices are prohibited under the Copyright Act and an August 2018 IP Court decision confirming this interpretation.³³ Revised Article 87 maintains the condition that violators must "receive benefit" from their actions. This requirement should be removed, since in some cases the "benefit" may be indirect and difficult to prove. It should be clarified that the list of acts setting out "an infringement of copyright" is non-exhaustive to allow the provision to be applied to other acts of infringement, such as stream-ripping. IIPA hopes that Taiwan's enforcement authorities

²⁴These include a broad exception for distance learning and compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts."

²⁵Article 65(1) of the draft states that all of the enumerated exceptions (Articles 44-63) are subject to fair use without any requirement that they be confined to the fair use factors outlined in Article 65(2). Article 65(2) instead appears to function as an additional "catch all" fair use exception. As a result, the draft sets out a sweeping exception regime that is largely exempt from the safeguards set out in Article 65(2), which was originally intended to confine the enumerated exceptions to the three-step test. All of these exceptions should be expressly confined to the three-step test (e.g., WTO TRIPS Article 13) to ensure compliance with Taiwan's international obligations.

²⁶Other problematic exceptions include an exception for using "common domestic reception appliances" to retransmit works publicly that have been publicly broadcast, and a broad exception for public performance of works for "nonprofit" activities. To ensure compliance, the three-step test should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

²⁷The draft mandates that rights holders participate in a CMO to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. Parallel imports should not be decriminalized, because the government needs appropriate means to address the fact that many piratical imports are labeled as legitimate goods, which undermines Taiwan's legitimate marketplace. And the exemptions from criminal liability set forth in Article 37 are too broad, covering, for example, exploitation of digitized karaoke machines or jukeboxes, which contain reproductions of musical works for public performance and re-transmission.

²⁸See, e.g., IIPA 2019 at 84-85.

²⁹Unfortunately, to qualify as a public crime, the "whole" work must be exploited "for consideration" and the infringement value must exceed NT\$1M (about US\$32,000). These are unnecessary obstacles that should be removed, particularly the high threshold, because calculating the value of infringement is fraught with uncertainty and the high bar does little to deter online infringement and may actually encourage it.

³⁰The obligation for term of protection in the Trans-Pacific Partnership (TPP) has been suspended in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

³¹The provision would eliminate minimum penalties regarding pirated optical discs (Article 91*bis*) and eliminate the legal basis for confiscating pirated optical discs seized (Articles 98 and 98*bis*).

³²These amendments impose criminal penalties on individuals or entities who: 1) provide software, such as peer-to-peer (P2P) software, or apps that enable members of the public to access unauthorized copies of films and television programs on the Internet; 2) assist members of the public to access such unauthorized copies of films and television programs; or 3) manufacture or import devices with such pre-loaded software or apps. The penalties that may be imposed by a court are a sentence of up to two years imprisonment and/or a maximum fine of NT\$500,000 (~US\$16,600).

³³See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (second accused)*, Taiwan IP Court, 2018, Case Number 7 (29 August 2018). Significantly, this case held that Article 87(7) is not restricted to P2P technology and can be applied to other technologies that enabled access to unlicensed programs and copying of copyrighted works through apps installed on the PD.

vigorously use these new tools to better address piracy in Taiwan.

Notwithstanding this recent legislative achievement, other longstanding draft copyright amendments, which unfortunately propose many changes that would weaken rather than strengthen the scope of substantive copyright protection, continue to languish before the Legislative Yuan. As discussed above, Taiwan should prioritize copyright reform to improve its marketplace for rights holders and advance legislation to address the serious deficiencies in its copyright law and enforcement regimes.

MARKET ACCESS UPDATES AND RELATED ISSUES

Local Content Quotas: In January 2017, the National Communications Commission (NCC) issued regulations that included significant local content requirements that limit the broadcasting of U.S. audiovisual content on terrestrial and satellite television.³⁴ These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports.

Content Ratings: In 2016, NCC issued regulations on Television Program Classification that require all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages regardless of the content being broadcast. This onerous requirement, which entered into force in 2017, is a significant barrier for non-Taiwanese content. In response to objections from international channels, Taiwan has indicated it will consider requests for waivers; but such requests are discretionary, on a case-by-case basis, and are not always granted.

Additional Barriers Against Audiovisual Content: Taiwan maintains several other discriminatory barriers against U.S. audiovisual content. The Cable Radio and Television law limits foreign direct investment in a domestic cable television service to 20% of the operator's total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50%. In 1990, Taiwan set a rate cap for cable TV service of NT600 (US\$20) per month per household, which has never been adjusted to keep up with inflation. Other restrictions on television services include a mandatory carriage requirement of 90-100 channels in the basic cable package and, for all IPTV offerings above the basic level cable TV services, only a la carte pricing is allowed. Such investment restrictions and rigid regulations of retail cable rates by the central and local government have hindered the development of the cable TV industry, satellite operators, and content providers.

Over-the-Top (OTT) Regulations: The Ministry of Culture (MOC) and NCC are considering OTT regulations (e.g., the Internet Audiovisual Service Management Act) that would require foreign OTT service providers to set up local permanent establishments and potentially mandate local content obligations. In addition, the proposed regulations would require foreign OTT service providers to register with the NCC, comply with a rating system that is potentially inconsistent with international standards, and disclose sensitive commercial information. Although these agencies state they are primarily concerned with regulating OTT services and streaming content originating from China, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry. In addition to the OTT regulations, NCC is also drafting a regulation on intermediary platforms (e.g., the Digital Communications Act) that could include similar market entry barriers and slow down foreign investments.

Unfortunately, some local stakeholders have pointed to the significant problem of piracy originating outside of Taiwan (as discussed above) to advocate for local registration requirements. While local registration requirements would discriminate against legitimate services, such requirements would be ineffective against the problem of illicit piracy services located outside of Taiwan that target the Taiwanese market. As noted above, Taiwan needs effective remedies to address this problem such as no-fault injunctions to block access to foreign-hosted piracy services.

³⁴The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Production Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production Programs require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm and local satellite TV channels to broadcast at least 25% of locally produced children's programs between 5 pm and 7 pm and at least 25% of locally produced drama, documentaries, and variety programs between 8 pm and 10 pm. 40% of these locally produced programs must be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

TRAINING AND OUTREACH

The COVID-19 global pandemic unfortunately hampered efforts at physical or in-person training or outreach opportunities. That said, rights holders continue to work with the Government of Taiwan, providing assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from outside Taiwan, e.g., mainland China). Industry also supports raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors. Industry provides publicly available data (including the recording industry's website in Taiwan) with important information about anti-piracy actions and copyright protection campaigns. Industry remains available and interested in providing more of the same in 2022, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The deficiencies in Taiwan's enforcement framework outlined above—including inadequate civil procedures that do not result in deterrence and a judicial system that does not take piracy cases seriously, resulting in non-deterrent criminal sentences—are inconsistent with Taiwan's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt the proposed draft amendments to the Copyright Act without significant revisions, Taiwan's copyright laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Thailand remain on the Watch List in 2022.¹

Executive Summary: Thailand continues to struggle with the fight against piracy. Though amendments to the Computer Crime Act (CCA) establishing a no-fault judicial remedy to disable access to infringing content gave rights holders hope of improving efforts to combat rampant online piracy in Thailand, the mechanism has faced difficulties and has had spotty results. Enforcement remains largely non-deterrent, although cooperation with the Department of Special Investigations (DSI) has been good, resulting in effective enforcement actions against several piracy sites in the past few years, including a February 2021 enforcement action against *fwiptv.com*. Unfortunately, these enforcement actions and CCA actions have not resulted in significant reductions in piracy or needed deterrence, and Thai-language piracy sites and services continue to dominate the online ecosystem, unfairly competing with legitimate rights holders. In addition, the unauthorized camcording of motion pictures continues to damage the market for audiovisual works.

Since 2018, the Royal Thai government has been working on amending the Copyright Act to comply with the obligations in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties). Unfortunately, the most recent draft amendments to the Copyright Act currently under consideration by the Senate, do not address certain deficiencies in Thailand's legal framework. IIPA urges the Government of Thailand to improve the legislation by addressing shortfalls regarding provisions on intermediary liability and protections of technological protection measures (TPMs), ensuring that other important provisions, such as term of protection of copyright, align with current international standards and best practices, and adding a no-fault remedy to disable access to infringing content to better address copyright piracy.

Moreover, certain 2019 amendments to the copyright law in the name of Marrakesh Treaty implementation created new problems because of the erroneous inclusion of sound recordings in the scope of certain exceptions. To address the continued operation of rogue collective management organizations (CMOs) that undermine music rights holders and users, the Royal Thai government should also promulgate legislation to bring order to music collecting societies that are distorting the market, including measures addressing the establishment and governance of CMOs.

The Royal Thai government should also remove market access barriers, including screen quotas in the amendments to the Motion Picture and Video Act, and refrain from imposing any new barriers in over-the-top (OTT) regulations. IIPA welcomes recent stakeholder engagement by the Royal Thai government, particularly the Department of Intellectual Property (DIP), and looks forward to continued close coordination.

PRIORITY ACTIONS REQUESTED IN 2022

Enforcement

- Bring effective enforcement actions against: illegal distribution of copyright materials, including live-streaming; piracy streaming devices and applications (apps) that are a threat to this still-developing legitimate market; illegal camcording activities; and large-scale pirate operators in Thailand, ensuring that these services stay offline and the operators receive appropriate punishment under the law that will carry a deterrent message through the

¹For more details on Thailand's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



broader community.

- Take action against rogue CMOs and combine this enforcement action with regulatory reforms to change the criteria for CMO registration.
- Ensure proper implementation and application of a no-fault judicial remedy to disable access to infringing content regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures, and full and fast compliance by the Internet service providers (ISPs) in Thailand.

Legislative

- Address shortfalls on intermediary liability and protection of TPMs in the proposed amendments to the Copyright Act through promulgation of effective legislative amendments that: (i) provide adequate incentives for passive and neutral online intermediaries to cooperate with rights holders and implement international best practices to combat infringement, such as establishing a clear legal basis for secondary liability of ISPs and appropriately delineating the proposed safe harbor liability privilege regime, while imposing adequate conditions for eligibility thereto; and (ii) ensure that exceptions to TPMs protections are not overly broad by requiring that any proposed exception must be subject to a full legislative process, rather than merely issued by the government or by ministers.
- Introduce further amendments to the Copyright Act to: (i) ensure that measures addressing camcording effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work, in whole or in part, and provide that exhibition facilities have standing to bring complaints; (ii) ensure copyright offenses are non-compoundable; (iii) extend the term of copyright protection consistent with international best practices to 70 years from the death of the author, or for sound recordings (and performances) or other subject matter calculated from publication, at least 70 years from publication; and (iv) add a remedy to enable courts to order online service providers to disable access to infringing websites.
- Promulgate legislation that reduces the number of, and brings order to, the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including measures addressing the establishment and governance of CMOs.

Market Access

- Formally remove market access barriers impacting foreign audiovisual content, including:
 - Remove foreign ownership restrictions like the National Broadcasting and Telecommunications Commission (NBTC) rules restricting media mergers, acquisitions, and cross-media ownership.
 - Delete Section 9(5) (and the related Section 68) of the 2008 Motion Picture and Video Act (MPVA) which, on paper, allows the Film Board to establish ratios and quotas against foreign films, and amend the MPVA to avoid onerous film censorship and classification provisions.
 - Remove the NBTC approved “must carry” provisions, since they could, if improperly interpreted or misunderstood, restrict the companies’ contractual freedom to license.
 - Avoid onerous OTT regulations, e.g., that could require streaming operators to set up a local presence or to require foreign e-commerce services to register for VAT payments.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain a more detailed discussion of piracy and enforcement issues. This report serves only as an update to those reports and is not to be considered an exhaustive review of issues.² Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2021. Although rights holders continued to have good cooperation with Thai authorities, who were proactive in rights protection, enforcement actions to disable access to flagrantly infringing sites have not significantly reduced piracy or

²See, e.g., IIPA, *Thailand*, 2021 Special 301 Report, January 28, 2021, at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301THAILAND.pdf>.

provided needed deterrence.

Online Piracy: Notwithstanding the expanding availability of legitimate services for music and audiovisual materials,³ increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, motion pictures and television content, video games, published materials, and broadcasts. Legitimate services find it difficult or impossible to compete with pirate offerings, and some longtime licensed operators have been driven out of business due to intractable piracy. While law enforcement authorities may investigate intellectual property (IP) related crimes, enforcement against piracy operators remains very challenging given the scale of the problem, lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection.

Both U.S. producers and distributors, as well as local Thai producers and services, are profoundly harmed by Internet pirate platforms, which specifically target Thai users with Thai-language sites. Streaming unauthorized content is the most popular form of piracy, whether through streaming websites, apps, Piracy Devices, circumvention devices or software, or even through social media. Many websites serve as portals that allow users to download apps that provide access to pirated content, including the latest theatrical run motion pictures, television content, sporting events, and live streamed pay-per-view events and concerts. BitTorrent indexing and tracker sites, cyberlockers, and BBS/forums also remain problematic. The popularity of peer-to-peer (P2P) networks remains. Three of the top five piracy sites in Thailand were domestic BitTorrent sites: *Siambit.me* (15.3 million visits from Thailand in Q3 2021 according to SimilarWeb), *dedbit.com* (4 million visits during the same period), and *tt-torrent.com* (5.9 million visits in the same period). Stream-ripping services are also now a significant problem for the music industry in Thailand. Popular stream-ripping services include *ytmp3.cc* (over 4.1 million visits from Thailand in Q3 2021 according to SimilarWeb), *y2mate.com* (2.9 million visits in the same period), and *savefrom.net* (3.1 million visits in the same period). Some of these services have been subject to website blocking orders or other litigation in some jurisdictions, yet no action has been taken in Thailand. Cyberlockers that egregiously or primarily facilitate access to infringing materials also remain a problem in Thailand.

Piracy continues to take its toll on the market for legitimate creative content. Illegal apps on smartphones, readily available from Apple and the Google Play stores, are popular among Thai users seeking to access vast amounts of pirated content either for free or at a very low cost. Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult.

The motion picture industry has reported that many of the top 500 most accessed sites in Thailand are piracy sites, according to Alexa and SimilarWeb rankings. These sites specifically target Thai Internet users, and include Thai, as well as foreign, motion picture and television content. These include *doomovie-hd.com*, *037hdmovie.com*, *123-hd.com*, *Siambit.me*, *newmovie-hd.org*, *TT-Torrent.com*, and *Nanamovies.com*. In March 2017, the local motion picture industry succeeded in securing the first-ever site blocking order under the CCA against a site called *nungmovies* and succeeded in getting the first variant blocked.

Industry has worked well with the DSI, resulting in several notable enforcement actions. As detailed in last year's IIPA Thailand country report, DSI has taken action to disrupt several key Thai piracy sites in recent years, including in 2018 against *Doo4K*, in 2019 against *movie2free.com*, and in 2020 against *sakkarinsai8*, *Skyhdbox.com*, *Kingiptv.info*, and *Hdlive.site*.⁴ While IIPA is encouraged by these enforcement actions, criminal investigations have been slow. In order to improve deterrence, the government should promptly bring criminal cases against the operators of these piracy sites. Illustrating the hope for better enforcement, as well as the ongoing challenges, in February 2021, DSI took down the popular website *fwiptv.cc* and related sites, which were portals that allowed users to subscribe to an "Internet Protocol Television (IPTV) package" and download apps. The apps allowed users to illegally access the latest movies, television content, sporting events, and live streamed on-demand or pay-per-view events, while the

³Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

⁴See IIPA 2021 at 169-170.

websites enabled users to download and install the app. These sites were extremely popular in Thailand. The *fwiptv.cc* site ranked 729th in Thailand and averaged around 700,000 visitors a month. Unfortunately, soon after its takedown, another infringing IPTV service called *inwitpv.com*, believed to be operated by the same operators, emerged.

The provision of the amended CCA that enables disabling of access to infringing websites has been a promising reform, although results have been mixed. Implementation has been spotty, in part, because ISPs claim to have technical hurdles that prevent proper compliance with orders, and infringers “hop” to alternate domains to evade the orders. Cases decided at the Criminal Court also often direct blocking orders towards specific URL links, which can be easily changed, as opposed to the more effective method of disabling access to the entire infringing domain. In August 2020, the DIP announced the introduction of a new site blocking process. The previous administrative procedure, which was sanctioned by court, was largely ineffective. In October 2020, after the announcement of the Ministry of Digital Economy & Society (MDES) with the support of DIP, ten more sites were blocked. An additional infringing site was blocked in November 2020, eight more sites were blocked in November 2021, and several actions remain pending or on hold. Unfortunately, many ISPs have not fully complied with the more recent Criminal Court orders. To further improve effectiveness, orders should be directed to disable access to domains as opposed to specific URLs, and be dynamic to address sites that immediately “hop” to another domain to circumvent the original order. New guidelines provide that blocking applications will be made directly to the Central Intellectual Property and International Trade (IP&IT) Court, but the guidelines have yet to be tested. Dynamic orders should be possible under the existing guidelines because the same court can order the ISP to block associated sites.

Camcorder Piracy Traced to Thailand Continues to Harm Motion Picture Market: Thailand continues to represent a risk for illicit camcording in the region, particularly in relation to illegal Thai audio tracks. Although 2020 and 2021 numbers were anomalous due to COVID-19-related theater closures, in 2019, 18 audio files and three video files of MPA member titles were forensically traced to theater locations in Thailand. The camcording problem is driven by criminal piracy release groups and the rise of live streaming over the Internet. If effectively implemented, the Copyright Act provision that deems camcording an infringement of copyright could help, but as discussed below, this provision should be strengthened to adequately address the problem.

Retail and Hard Goods Piracy Still Prevalent: Physical piracy is decreasing, mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy remains a concern, harming local and foreign creators alike. The Royal Thai government has designated many of the pirate markets “Red Zones” and “Yellow Zones” to alert the public that these markets are vulnerable to piracy activities. Pirated music, video games, and published materials remain available.

Piracy Devices (PDs) and Apps Represent a Growing Problem: Piracy Devices (PDs) include media boxes, set-top boxes or other devices that allow users, through the use of installed piracy apps and software, 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, and they have become an increasing problem in Thailand. China is a hub for the manufacture of these devices and the deployment of middleware and apps used to access infringing materials. PDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. PDs are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users to connect to a supporting online infrastructure, including foreign piracy sites and services that provide users with instant access to infringing audiovisual content. PDs are sold on e-commerce websites such as *Lazada.co.th*, but are also made available through traditional retailers found in popular malls, and are often promoted and/or advertised to enable infringement of copyright or other illegal activities.

Royal Thai authorities should increase enforcement efforts, including cracking down on PD vendors that market piracy apps or pre-load the PDs with apps that facilitate infringement or offer the installation of piracy apps or software as an aftersale service, and take action against key distribution points for devices and apps that are being used illegally. Thailand should also amend its legal framework to specifically address this problem. The Royal Thai

government has taken some action against an IPTV/PD service called *ThaiExpat.tv*, and in December 2019, the IP&IT Court ordered damages of THB 15 million (US \$480,000) and suspended sentences against two key operators in Thailand.

Reforming the Market for the Collective Management of Rights: The music industry is concerned that many operators of restaurants, bars, shops and other commercial establishments have been harassed by “rogue” entities, despite having obtained licenses from legitimate CMOs and paid royalties for the use of sound recordings played on their premises. A proliferation of these “rogue” entities has caused serious market disruption, directly harming music rights holders, legitimate CMOs, as well as users in Thailand.

COPYRIGHT LAW AND RELATED LEGISLATIVE UPDATES

CCA Amendment: In a significant development, the 2016 Amendment to the CCA B.E. 2550 (2007) added IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment entered into force in July 2017. Since then, there have been many requests for blocking or disabling access to intellectual property rights (IPR) infringing content or activities. However, in only a dozen or so cases have the Courts issued full website blocking orders, and in the majority of other cases, the orders were to disable access to specific content identified in the URLs. IIPA encourages clarity on IP&IT Court jurisdiction (there is a guideline that provides for this) to ensure that the Court is prepared to address structurally infringing websites.

Copyright Act Amendments: In June 2021, the extraordinary committee of the Parliament and the DIP released the latest draft Copyright Act amendments for public comment. The amendments are aimed at improving Thailand’s copyright laws and focus mainly on ISP liability and protection of TPMs. The Senate is currently reviewing the draft amendments, which are expected to be effective on October 9, 2022. Thailand’s National Assembly has already approved WCT accession, which now depends on appropriate Copyright Act amendments also being enacted, and accession to the WPPT is planned thereafter within the next five years. The following are critical issues with the Copyright Act and the draft amendments that should be addressed to ensure that the Royal Thai government achieves its stated goals of modernizing its copyright law, complying with its international obligations, and implementing and adhering to the WCT and WPPT.

- **Infringement a Non-Compoundable Offense:** IIPA urges the Royal Thai government to amend the Copyright Act to ensure that IP infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative without any requirement of a formal complaint from rights holders. In the age of online piracy, this ability for authorities to take ownership of investigations and cases is critically important.
- **Service Provider Liability Amendments:** While the latest draft amendments provide for a notice and takedown procedure, the amendments remain deficient. First, the draft does not clearly establish a basis for liability of online service providers for infringements carried out by third parties using their services. This secondary liability provides legal incentives for online service providers to cooperate with rights holders to deter the unauthorized storage and transmission of copyrighted materials on their services. Without a clear basis for secondary liability, safe harbors are unnecessary. Second, the eligibility criteria should be clarified to ensure only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors. Under Section 43/1, safe harbor eligibility is limited to intermediaries that are of “mere technical, automatic, and passive nature,” and that do not have knowledge or control over the information transmitted or stored, if the intermediary also announces a policy that it will terminate its service to users who repeatedly infringe copyright (i.e., a repeat infringer policy). This provision should be clarified to ensure that the repeat infringer policy is an *additional* condition for safe harbor eligibility, rather than a separate condition that alone gives rise to an exemption from liability. Furthermore, Sections 43/2, 43/2/1, 43/2/2, and 43/2/3 provide additional conditions for mere conduits, caching service providers, hosting service providers, and search engines, but it should be clarified that the

conditions provided in Section 43/1 also apply to each of these provisions to ensure only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors. Finally, although the draft amendments outline notice and takedown procedures, the legislation should also incorporate other measures demonstrated effective in preventing or restraining infringement.

- **Technological Protection Measures (TPMs):** TPMs are critical for the success of services that are providing legal content to users in Thailand today, and they need to be protected. Proposed sections 53/4 and 53/6 would make several improvements to TPMs protections in Thailand, including prohibiting acts of circumvention of TPMs and trafficking in circumvention technologies, devices, components, and services (e.g., enabling actions against stream-ripping websites or other such programs). However, the amendments should be revised to ensure exceptions to TPMs protections are subject to a full legislative process, rather than merely issued by the government or by ministers without proper consideration and input from stakeholders.
- **Rights Management Information:** Exceptions to protections for rights management information are overly broad and should be narrowed in the draft amendments. For example, the blanket exclusion of educational institutions, archives, libraries, and non-profit broadcasting organizations from violating the rights management information protections are inappropriate and unjustified.
- **No-Fault Injunctive Relief:** To improve the effectiveness of enforcement against online copyright piracy, the draft amendments should be amended to provide for no-fault injunctive relief in copyright piracy cases, enabling courts to order online service providers to disable access to copyright infringing websites (analogous to the CCA remedy, which applies to all IP crimes).
- **Camcording Provision Should Be Revised:** Thailand enacted anti-camcording legislation in 2014. However, the anti-camcording provision falls short because it requires a link between the act of camcording and a copyright infringement, instead of criminalizing the camcording act itself. Criminalizing the act of camcording, including audio, without requiring a link to copyright infringement, would empower law enforcement to intercept illegal recordings before they enter the online pirate ecosystem. Preferably, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used and any unlawful copies made, as well as civil and criminal penalties.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. IIPA welcomes indications from DIP that it is keen to resolve this issue. However, the DIP proposal at this stage is only to introduce a voluntary code of conduct for CMOs, which is not a sufficient response to the long-standing challenge in the Thai market. The Copyright Act should therefore be amended to include provisions setting out certain principal conditions for CMOs to operate in Thailand, such as complying with a code of conduct that requires good governance, transparency, fair and accurate distribution, and of course actually representing the rights holders it claims to represent. Regarding the latter point, it is recommended that the Copyright Act be amended to provide that an entity wishing to act as a CMO must be registered with the Ministry of Commerce, must be authorized by rights holders, and must comply with the code of conduct. Registration criteria should be fair, objective, transparent, and reasonable and include the requirement for the CMO to operate in a transparent and non-discriminatory manner and in accordance with principles of good governance. In deciding whether to grant permission to a CMO to operate (i.e., register a CMO), the Ministry should consider the number of members, as well as the size of the catalogue of titles and rights under management, and should be entitled to refuse any application for registration or revoke any registration if the CMO does not satisfy such conditions. However, the Thai Government should resist proposals to create, by government dictate, a single collection body. While

voluntary cooperation between CMOs can be cost-effective and beneficial for participating CMOs and rights holders, experience shows that mandatory single collection bodies lead to inefficient and unaccountable structures.⁵

- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** Copyright Act Number 4 B.E.2561 (2018) was published in November 2018 and entered into force in March 2019. The Act permits persons with disabilities who do not have access to copyrighted work due to impairment in vision, hearing, movement, intellect or learning, or other deficiencies to have equal opportunities to other persons to access, make copies, modify, or distribute the copyrighted work. DIP has issued a Ministerial Regulation on the details of authorized or recognized entities and how such copies may be distributed. The Thai exception goes well beyond the mandate of *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, which creates a limitation and exception for the benefit of the blind, visually impaired, and otherwise print disabled. That exception will be mandatory for individual WIPO members that ratify the Treaty. From the music industry's perspective, in accordance with the Marrakesh Treaty, sound recordings should not be covered by the exception at all, and in the alternative, the exception should be properly defined and restricted in scope to apply solely to specific acts regarding specific works for the benefit of specific individuals, with adequate safeguards, and with equitable remuneration payable to rights holders. This exception should be amended or implemented in such a way that it faithfully implements the Marrakesh Treaty and does not conflict with the “three-step test” of the Berne Convention, WTO TRIPS Agreement, and WIPO Internet Treaties.
- **Inadequate Term of Protection:** Thailand should extend its term of copyright protection to be in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years. Unfortunately, the current draft of proposed amendments does not change the term of protection, which remains at 50 years. There are now 69 countries worldwide providing for a term of protection of 70 years or more. Further, if the term of protection is not extended in time, some Thai classics from the 1970s—including the classics of Soontaraporn, Suraphol Sombatcharom, and Paiboon Buth—will soon fall out of copyright protection, despite the fact that they are still widely consumed by the public. This will have a negative effect on local artists' income, especially those who have retired and rely on the royalties for a living. Further, Thailand should be urged to catch up with the new international standard of protecting sound recordings for at least 70 years because, otherwise, the development of the Thai music market will lag behind a vast number of countries in North America, Europe, and APAC.
- **Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Articles 32(6) and (7) of the Copyright Act, and to ensure administrative guidance on fair use is kept within the legal bounds of existing exceptions and that affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.

MARKET ACCESS UPDATES IN THAILAND

Screen Quota and Film Classification: Section 9(5) of the 2008 MPVA allows the Film Board to establish ratios and quotas against foreign films. If implemented, such restrictions would create new barriers to foreign film distribution, discourage cinema infrastructure investments, and reduce consumer choice. Since 2017, the Ministry of Culture has been considering amendments to the MPVA. The motion picture industry continues to urge the Ministry to delete Section 9(5) and the related Section 68, because such limitations, if implemented, could adversely affect Thai distributors and exhibitors, impede the development of the local film industry, limit the variety of entertainment available to Thai consumers, and exacerbate piracy. The MPVA also imposes onerous classification (ratings) requirements on films, music videos, and live performances, as well as censorship requirements on films, audiovisual

⁵An example of a well-functioning voluntary joint organization is MPC Music Co. in Thailand, which is a joint licensing agency formed by two collective management organizations (CMOs), Phonorights (Thailand) Co., Ltd. (PNR) (for sound recording rights) and Music Copyright (Thailand) Co. Ltd. (MCT) (for musical works rights).

products, and video games. Thailand should remove onerous ratings requirements, including the 15-day period for obtaining ratings and censorship approval, the associated high costs for film ratings, and the severe penalties for failure to comply. As countries today are moving towards self-classification for audiovisual products across all distribution formats, IIPA encourages Thailand to do the same. In a positive development, in 2019 the Film Ratings Office removed the requirement for submissions of Digital Cinema Packages with open encryption keys, which would have otherwise raised significant content security risks.

Must Carry Requirements: In 2012, the NBTC hastily approved “must carry” provisions requiring all platforms to carry public and commercial free-to-air television channels nationally, on an equal basis. The regulations, which have not been clearly drafted, raise important IPR issues, i.e., they call into question the ability of rights holders to enter into exclusive distribution arrangements in Thailand.

Over-the-top (OTT) Regulations: The NBTC is in the process of considering policies on OTT services, including requiring streaming operators to set up a local presence to respond to government requests around content that the government finds objectionable (a form of mandatory content filtering). Such regulations, if extended to OTT services, would impose burdensome requirements on foreign content providers, stifle innovation, and raise costs, particularly in the absence of a robust enforcement regime to protect digital delivery of content.

Investment/Ownership Restrictions in Media Sector: In January 2015, the NBTC issued rules governing media mergers, acquisitions, and cross-media ownership. The rules require prior NBTC approval when a television license holder seeks to invest more than 25% directly, or more than 50% indirectly, in another licensed company. This rule severely limits investment and creates unnecessary barriers to entry for U.S. companies.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Many of the deficiencies in Thailand’s enforcement framework described above—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—run afoul of Thailand’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, 45, and 61.

UNITED ARAB EMIRATES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the United Arab Emirates (UAE) be placed on the Watch List in 2022.¹

Executive Summary: Despite one of the top-ten highest gross domestic product (GDP) per capita levels worldwide, the copyright sector in UAE struggles because of weak enforcement that allows diverse methods of piracy to persist, sub-par copyright protection in its laws, and crippling market access barriers. The UAE has seen some positive movements in intellectual property (IP) protection education, but it has yet to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) and does not protect copyrighted content for a term consistent with international practices.

It has been 18 years since the UAE passed federal legislation providing for the possibility of collective management of certain rights. The music industry's repeated attempts to establish a market for the collective management of broadcasting and public performance rights have been frustrated by the government's failure to permit rights holders to establish a collective management organization (CMO) and to commence collective licensing activities. The UAE is a major hub for tourism and retail and is a regional hub for legitimate music services and sold-out concerts. Yet, the widespread use of music in shopping malls, hotels, and other public settings with no ability to license it from a CMO, denies American and other foreign rights holders the opportunity to effectively exercise their rights and undermines the rule of law in the country. This inability to license directly and substantially reduces the revenues available to invest in the development of a robust local industry that can advance local talent and increase jobs in the entertainment sector. The government needs to end its delay, immediately work with music rights holders, and allow them to establish a CMO in accordance with international best practices in transparency, accountability, and governance. The government should also issue an operating license to such a CMO to enable music rights holders to start licensing and collecting royalties. The government's inaction constitutes a direct market access barrier for international music rights holders.

One other concern for the copyright industries is the Dubai Department of Economic Development's (DED) requirement for a UAE copyright registration certificate as a prerequisite to initiate a copyright infringement case, applicable to both domestic and foreign authors, in contravention of the treaty prohibitions on formalities.

On a positive note, the UAE has enacted *ex officio* authority for customs officials, implemented many non-legislative reforms dealing with customs practices, and held focused workshops to increase awareness of, and respect for, IP, which is also helping to improve the treatment of unauthorized uses in the country. Additionally, in 2019, the UAE issued a resolution reducing many of the official fees for registering IP rights (IPRs) in the UAE.

Copyright holders do not have the option to challenge rejection decisions of the Copyright Office before a specialized legal committee at the Copyright Office prior to escalating the matter to the courts. As a party to the Berne Convention, the UAE is required to introduce corrective tools and to help copyright holders register their work as quickly as possible instead of pushing them to challenge the decisions before courts, which is a lengthy and costly process.

¹For more details on UAE's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of UAE's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2022

- Take immediate action to enable rights holders to establish a CMO in UAE, in accordance with international best practices of transparency, accountability, and governance, and to permit such CMO to commence operations in the UAE so that music rights holders can finally begin collectively licensing their broadcast and public performance rights under the UAE copyright law.
- Modernize the copyright law to implement the WIPO Internet Treaties and to harmonize the copyright term with the international norm of life of the author plus 70 years and 70 years for sound recordings.
- The Telecommunication and Digital Regulatory Authority (TDRA) should engage with domain name registrars and other intermediaries, such as advertisement providers, payment providers, help desk support services, and dedicated virtual private networks (VPNs), encourage them to cooperate with rights holders, and require them to take effective action to prevent their services from being used by infringers.
- Introduce laws providing for more transparency from enforcement authorities.
- Adopt high standard remedies that support the creative industries' current business models, including remedies that effectively respond to current challenges and reflect international best practices.
- Encourage customs authorities to ban the importation of illegal set-top boxes (STBs).
- Put more restrictions over the services that facilitate the subscription of unauthorized paid TV channels, such as Dish TV, Airtel TV, and TataSky.

COPYRIGHT PIRACY IN UAE

Online and mobile device piracy in the UAE remains a problem, including websites that provide illegal access to music, movies, television content, video games, reference books, online journals, and trade books of top publishers. Piracy of copyrighted content affects not only rights holders, but also harms content creators and owners, cinemas, producers, and other legitimate content providers that invest significant sums to license content and develop business models in the region. These legitimate efforts contribute to the economic development of the country, fund production of local content, create jobs, and generate revenue for advertising and auxiliary industries. Dubai is a commercial hub for the region and may affect legitimate markets in surrounding countries—such as India, Iraq, Iran, and the Gulf Cooperation Countries—by exporting copycat products and digital piracy equipment, like hybrid STBs.

Unlawful Public Performance and Broadcasting of Music: At present, because of the impossibility of licensing public performance and broadcasting by rights holders collectively, most of the music that is used in such a way is *de jure* unlawful in the UAE. This lack of ability to license collectively is due to the government's 18-year hold out in issuing an operating license to a music CMO. IIPA is encouraged by the announcement on December 28, 2021, that the government approved a book publishing CMO titled the Emirates Reprographic Rights Association. The CMO now has three months to establish itself, such as setting up a board. The establishment of a book publishing CMO is welcome, and the music sector also expects progress at long last with the government engagement with the music industry on licensing a truly representative music CMO. The absence of any progress so far, raises questions about the UAE's compliance with the WTO TRIPS Agreement. Simply put, the UAE's regulatory inaction means that the existing law has limited effect, and no remedy exists for the ongoing, country-wide infringement of music public performance and broadcast rights. As such, music rights holders are denied revenues from the widespread use of their works and recordings (see *also* below section "Other copyright law and related issues").

Online Piracy and Social Media: Several notorious online piracy sites are heavily accessed in the UAE, including *cima4u.ws*, a streaming website that embeds popular movies and series content from third-party cyberlockers. SimilarWeb also reports that movie piracy websites *fmovies.to* (streaming) and *tamilyogi.best* (torrents) are within the top 100 most popular websites in the UAE. The motion picture industry noted that in recent years, Telegram has become a full-fledged global piracy hub for films and that the presence of copyrighted content on Telegram acts as a growth driver. While there has been improvement in compliance rates for the removal of infringing links and channels, Telegram's response to takedown notices varies greatly, from almost immediate to none despite

multiple re-notifications. The current manual takedown approach does not facilitate the use of keywords and filtering technology to prevent the easy uploading of films. Furthermore, the motion picture industry reports that discovery of infringing content is facilitated by piracy bots, and Telegram lacks a transparent and appropriate procedure for handling repeat infringers. In 2017, the TDRA reported that it had blocked approximately 473 websites for IP violations. However, the TDRA stopped publishing the number of the blocked websites thereafter. Popular pirate music sites in the UAE include the BitTorrent indexing sites *The Pirate Bay* and *1337x.to*, and stream-ripping sites *savefrom.net*, *y2mate.com*, and *ytmp3.cc*.

Internet Protocol TV (IPTV) Piracy and Hybrid Set-Top Boxes: Recently, the number of mobile applications that enable illegal showings of copyrighted TV programs or exclusive TV has increased. Access to the pirated content on Internet Protocol TV (IPTV) services is generally provided via an application that can be installed on consumer hardware or downloaded directly to a user's device, such as a smartphone or tablet. Pirate IPTV services are extremely difficult to monitor, as they necessitate a subscription to access the service. Thus, substantial resources are required to discover and monitor these services.

The use of illicit streaming devices (ISDs) is increasing in the UAE. STBs can be used either to receive the free-to-air (FTA) channels—which is a legal act—or to receive the pirated TV channels by way of installing certain IPTV applications. These STBs and the channels or content they carry are marketed, promoted, and illegally sold to consumers in high volumes through several sales channels, such as door-to-door, small retailers, Internet sales, or over social media accounts. Because the hardware of an ISD is not necessarily illegal, it is often difficult to prevent the importation and sale of these devices in the UAE. ISD import is subject to approval from TDRA. In practice, offenders often install infringing IPTV applications on devices after importation. However, the TDRA and the customs authorities do not conduct inspections on these devices after importation. Examples of these hybrid STBs are the ones known and used for *UKTV Abroad*, *King-iptv.net*, and *Kingiptv.org*.

Pirate Free-to-Air (FTA) Channels: Pirate FTA channels continue to constitute a problem in the motion picture and television industry. The FTA channels are clear, unencrypted channels that can be received and viewed without requiring a subscription. They are uploaded from many different locations across the region to satellites that have region-wide reach. The MENA Broadcast Satellite Anti-Piracy Coalition, a group of stakeholders in the Middle East satellite television industry, has a goal of preventing FTA channel piracy. Voluntary collaboration among rights holders and satellite operators in this anti-piracy coalition has been effective at helping to control FTA channel piracy in the UAE.

COPYRIGHT ENFORCEMENT ISSUES IN UAE

Raids and Piracy Prevention: Industry sectors report that enforcement has become very slow in the past two years, and the UAE police and economic departments are hesitant to consider serious actions against infringers. Also, the Dubai Police created a dedicated platform on its website to encourage rights holders to file criminal complaints against IP violating websites, and the Criminal Investigation Department (CID) has been working closely with rights holders and licensees to stop sales of hybrid STBs. Unfortunately, such operations require arrangements between different departments, which slows down investigations. For example, the electronic crime unit is not allowed to correspond with organizations outside of the UAE, such as social media service providers, without a court order. Correspondence between the TDRA and CID is also relatively slow, which impedes the collection of information and evidence in piracy investigations. The government needs to encourage the Internet service providers (ISPs) to restrict access to the following: (i) illegal IPTV services and intermediaries that facilitate the operation of such services, such as domain name registrars, (ii) advertisement providers and payment providers; (iii) websites that offer gift cards or redeemable vouchers to buy or refill personal accounts to illegal IPTV services; (iv) helpdesk support numbers for these illegal services; and (v) illegal VPN IP addresses dedicated to streaming content to hybrid set-top boxes. Additionally, ISPs need to be encouraged to act more expeditiously. While the ISPs provide platforms for reporting IP violations, they act slowly on complaints. The ISPs or the TDRA need to publish statistics on the blocked violating websites. Addressing these areas would greatly improve the enforcement environment in the UAE.

Judicial and Case Law Developments: The judicial system has shown some signs of improvement. Prosecutors have been analyzing the facts in IP cases and referring cases to the courts on the grounds of violations of IP or cybercrime-related laws. Also, the Higher Criminal Court in Dubai issued a judgment in a case against an administrator of the torrent website called *arabscene.org*. The court decided to block the website, as it exhibited exclusively licensed TV channels without permission. In addition, the administrator was fined and deported out of the country. The judgment was enforced in 2021. The case is significant as it involved a website that was hosted outside the UAE, setting a strong precedent for other similar offenders. In fact, the criminal courts of Abu Dhabi and Sharjah have found defendants guilty in cases relating to piracy through IPTV apps.

Enforcement in Free Zones and Areas Outside City Limits: Enforcement in Free Zone areas is limited to criminal actions by police based on complaints by the copyright owner. People import a high volume of goods into the Free Zone areas and often use the territory as a regional hub for goods in transit. The administrative authorities in the DED do not have jurisdiction over those areas, and therefore, no one performs regular or random inspections of the facilities therein. The UAE should ramp up its efforts to enforce against pirate and counterfeit traffickers with deterrent enforcement actions and enhanced customs controls.

Customs Piracy Prevention: The Ajman Customs authorities activated their IP department in 2017, and they can now act against copyright and trademark infringers. In 2017, Dubai Customs began to recycle counterfeit products instead of re-exporting such products. Recycling means that the products are sent to a local recycling company that destroys the products, and the raw material is thereafter used in various industries. Previously, Dubai Customs would re-export the counterfeit products to the country of origin instead of destroying or recycling such counterfeit goods, risking that they would end up back in the market. Abu Dhabi Customs also extended the protection for recorded trademarks from one year to ten years, in line with other local customs authorities in the UAE. A continuing challenge, however, has been that customs authorities have not been acting against counterfeit copies of copyrighted works unless they first receive a complaint from a rights holder. The law has recently been amended to provide *ex officio* authority so that customs authorities may take actions even in the absence of complaints by rights holders.²

Training Programs: The IPR Department at Dubai Customs is the first of its kind in the Middle East. It is a federal law enforcement agency that works towards securing the 21 air and sea entry and exit points of the mainland. Apart from operating in a reactive capacity and intercepting the supply of infringing content and goods, the department has also been working in a preventive capacity by employing educational means to limit the demand for infringing content in the first place. The objective is to raise awareness to avoid the direct, and often physical, harm that counterfeit goods cause, as well as to create an anti-infringement culture and to eliminate other issues stemming from IPR infringements. Additionally, Dubai Customs offers customs inspectors training courses to increase their knowledge and understanding of IP. The IPR department has, in cooperation with the communication department at Dubai Customs, held theoretical and practical courses on IP protection in schools. Moreover, seminars have been held in universities, summer camps, and shopping malls, targeting large segments of society. They are also open to representatives from other government ministries and other member states of the Gulf Countries Council.

The past four years, Emirates IP Association and INTERPOL co-hosted an IP awareness session with Dubai Customs, Brand Protection Group, Dubai Police, and Ministry of Economy. The session hosted many speakers from the private and public sectors that shed light on various IP violations. These organizations continue to conduct events combatting IP crime and illicit trade. Due to the COVID-19 pandemic, Dubai Customs began to conduct online training sessions. In addition, the Emirates IP Association is designing paid courses to promote the education of IP in the state, and the Dubai DED has started an IP awareness program for starter companies and IP violators to educate them about IP and the benefits of respecting IPRs. The audience for this program has been reacting positively. Owners of companies are registering their IP, and some IP violators are sharing information about the source of

²Copyright Act, Article 38(1)(“ Subject to the legislation in force in the country, the customs authorities may, on their own or at the request of the Author, the right holder, their successors, or their representatives, may order by a reasoned decision not to clear customs - for a maximum period of twenty (20) days - in respect of any items in violation of the provisions of this Decree-Law.”).

specific counterfeit products.

Ensuring Consistent Enforcement: For some time, enforcement authorities were reluctant to act, but then the Prime Minister called on officials to cooperate as much as possible with companies to encourage investment. This call was misunderstood, however, and the effect was that enforcement authorities waived or reduced fines against IP violators, including the Dubai DED, which reduced fines by up to 50%. IP rights holders would like to see this reduction applied to complainants (the brand owners) instead of infringers. Additionally, the Dubai DED's failure to inspect markets absent a complaint from copyright holders encouraged infringers to trade in illicit products, including STBs containing IPTV apps for pirating paid TV channels.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Prevention of Music Rights Holders' Exercise of Legal Rights: The music industry estimates that the revenue a CMO would collect from broadcasting and public performance of music in the UAE (such as in hotels, restaurants, shops, discos, bars, dance schools, and airlines) would be in the tens of millions of U.S. dollars if the government accredited a CMO and allowed such collection. Such revenue is an essential element in supporting the development of local artists and in developing the UAE as a hub for music production in the region. Yet, due to government inaction to accredit a CMO, no monies are currently being collected, substantially undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. It also means that the U.S. music being exported to the UAE cannot be monetized when broadcast or performed publicly and that various UAE businesses are using music without any payments to rights holders, despite neighboring rights protection recognized in the UAE copyright law.

The UAE copyright law provides the relevant rights in Article 18 of the Federal Law No. 38 of 2021 on Copyrights and Neighbouring Rights, which states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer, or other means or making available to the public via computer or other media) of their phonograms. Article 39 provides that anyone who engages in such exploitation without permission from the rights holder infringes copyright and is subject to criminal penalties and civil remedies. The law also enables the creation of CMOs and allows the collective management of these rights. Additionally, the Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighbouring Rights established the basis on which licenses permitting collective management activities would be granted.

For 18 years, the Government of UAE had not accredited a single CMO, so rights holders had no means to manage their rights collectively. Recently, the government approved a book publishing CMO titled the Emirates Reprographic Rights Association. For certain uses of rights, collective management is the only practicable way to license users. In 2015, music right holders had some optimism for progress when Twofour54—an Abu Dhabi Media Zone entity supported by a rights holder coalition—applied to the Ministry of Economy for an operating license as a music rights CMO. However, the Ministry of Economy never responded. Another application (the most recent) was submitted in 2016, with the same result—no response. Unfortunately, requests by the International Federation of the Phonographic Industry (IFPI) for a government intervention with the UAE Ministry of Economy and the Department of Economic Development have not been answered. The situation is not helped by one entity currently claiming to be a representative music CMO in the UAE, whereas in reality no single entity represents the majority of rights in local and/or international musical works and recordings and could license their performance rights. The UAE should take immediate action to enable rights holders to establish a CMO in the UAE, in accordance with international best practices of transparency, accountability, and governance and to permit that CMO to commence operations in the UAE so that music rights holders can finally begin collectively licensing their broadcast and public performance rights under the UAE copyright law.

Challenges with Internet Service Providers (ISPs): ISPs in the UAE, namely Etisalat and Du, cooperate with rights holders to a limited degree by responding to notice and takedown requests. All ISPs currently have special

platforms on their websites for reporting IP violations, but they do not publish any statistics related to the takedown rates. The ISPs normally ask the rights holders to contact the TDRA (the governmental body that monitors the operations of the ISPs in the UAE) for enforcement actions. The government needs to encourage the ISPs to restrict access to the following: illegal IPTV services; advertisement to pirated TV services; illegal credit card payment gateways and alternative online methods of payment; websites that offer gift cards or redeemable vouchers to buy or refill personal accounts to these services; helpdesk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top boxes. Additionally, the Government of UAE should encourage ISPs to act more expeditiously. While some ISPs provide the above-mentioned platforms for reporting IP violations, they act slowly on complaints.

Amendments to the UAE Copyright Law: UAE recently updated its Copyright Act, but it still has areas in its law that should be improved. Recommended changes include: 1) removal of unreasonable restrictions on the ability to freely contract;³ 2) ensuring compulsory license provisions are in conformity with the Berne Convention (the Appendix);⁴ 3) ensuring WTO TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; and 9) raising minimum and maximum fines for copyright infringement.

Many of the deficiencies in the UAE copyright law identified above may constitute violations of UAE's obligations under the WTO TRIPS Agreement. UAE has also acceded to the WIPO Internet Treaties. The state-sanctioned, non-application of existing legal rights of music rights holders, raise issues of compliance with the UAE's obligations under those treaties.

Cyber Crime Law Should Include IP: The Cyber Crime Law was updated in 2018 to include, among other things, a specific provision on ISP liability. The Cyber Crime Law and its amendments include general rules to criminalize publishing illegal content on the Internet. For example, Articles 34 and 39 impose fines and imprisonment against those who use communication services, audio, or video broadcasting channels without the legal right and against those who own or administer a website or computer network and deliberately make illicit content available. This law should be further updated to include clear criminal offenses relating to copyright infringement. Moreover, the Cyber Crime Law does not include ISP liability for IP infringement carried out through the ISP. The UAE should issue implementing regulations to clarify that the Cyber Crime Law applies in cases of IP infringement.

MARKET ACCESS

Music Licensing: The failure to implement a collective management regime in the country effectively prevents producers and performers from licensing large parts of the market (as noted above), which serves as a market access barrier. This inaction is also protectionist and discriminatory, given that various UAE families, as well as the state, have stakes in most shopping malls, hotels, restaurants, and other such establishments that require licenses to play music. It is imperative that the music licensing problem be solved without any further delay.

UAE Copyright Registration Requirement: Dubai DED requests UAE copyright registration certificates

³For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid "[a]ny disposition an Author makes of his future intellectual opus.") are unreasonable restrictions, and should be left, in general, to marketplace solutions rather than be restricted by statute as they are here.

⁴Article 21 provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See "Berne Convention Members," World Intellectual Property Organization, available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

before allowing rights holders to proceed with any action for copyright infringement. This requirement is a detrimental change from its old policy, in which it allowed a copyright infringement case to be heard if the plaintiff had a copyright registration certificate in any country that is a member of the Berne Convention (and, as applied to Berne member authors and producers, is a violation of Article 5(2) of Berne and equivalent provisions, such as Article 20 of WPPT). Such restrictions limit the power of rights holders to protect themselves from infringement and hinder their ability to thrive in the UAE market.

Administrative Fees: The UAE Ministry of Culture (previously the National Media Council) imposes administrative fees to imported copyrighted works, such as US\$270 for theatrical releases and US\$108 for TV programming. The Economic Departments and Customs authorities imposes administrative fees of US\$7,500 to file complaints against copyright violators.

APPENDIX B

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2021) & IIPA'S 2022 SPECIAL 301 RECOMMENDATIONS

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2021)
AND IIPA 2022 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA RECOMMENDATION JANUARY 2022	USTR 301 PLACEMENT (as of April/May of each year)																																			
		2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989			
ALGERIA		WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL																						
ARGENTINA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL			
ARMENIA																					WL	WL	WL														
AUSTRALIA																								WL	WL	WL	WL			WL	PWL	PWL	PWL				
AUSTRIA																								OO	OO												
AZERBAIJAN																	WL	WL	WL	WL	WL	WL															
BAHAMAS																WL	WL	PWL	PWL	WL + OCR	OCR	OCR															
BAHRAIN																									WL	WL	WL	WL									
BARBADOS		WL	WL	WL	WL	WL	WL	WL	WL	WL																											
BELARUS								WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO												
BELIZ																WL	PWL	WL	WL																		
BOLIVIA		WL	WL	WL	WL	WL	WL			WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO											
BRAZIL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	OO	PFC	PWL	PWL	PWL	PWL			
BRUNEI											WL	WL	WL	WL																							
BULGARIA						WL	WL	WL	WL	WL							WL	WL	WL							PWL	WL	OO	OO								
CANADA	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL			
CHILE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
CHINA (PRC)	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL+306	PWL	PWL+306	PWL	PWL	PWL	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL			
COLOMBIA	WL	WL	WL	PWL	WL+OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
COSTA RICA				WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL									
CROATIA																WL	WL	WL	WL																		
CYPRUS																											OO	OO	OO	WL	WL	WL	WL				
CZECH REPUBLIC												WL	WL	WL	OCR									WL	WL	WL	OO										
DENMARK																																					
DOMINICAN REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO										
ECUADOR	PWL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL						
EGYPT		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL		
EL SALVADOR											OCR																	WL	WL	WL	WL	WL					
ESTONIA																																					
EUROPEAN UNION																	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
FIJI														OCR																							
FINLAND									WL	WL	WL	WL	WL	WL																							
GEORGIA																																					
GERMANY																																					
GREECE				WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL							WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL		
GUATEMALA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
HONDURAS								OCR																		WL	WL	OO	OO	OO							
HONG KONG																																					
HUNGARY														WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO					PWL	PWL	WL				
INDIA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
INDONESIA	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL+GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
IRELAND																																					
ISRAEL											WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL + OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	WL	OO	OO	OO								
ITALY											WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
JAMAICA				WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
JAPAN																																					
JORDAN																																					

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2021)
AND IIPA 2022 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA RECOMMENDATION JANUARY 2022	USTR 301 PLACEMENT (as of April/May of each year)																																			
		2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989			
KAZAKHSTAN																		WL	WL	WL	WL	WL	WL		OO												
KENYA																																					
KUWAIT		WL	WL	PWL	PWL	PWL+OCR	PWL	PWL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO									
KYRGYZ REPUBLIC																						OCR															
LATVIA																	WL + OCR	WL	WL	WL	WL	WL	WL														
LEBANON		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO												
LITHUANIA																WL	WL	WL	WL	WL	WL	WL	WL														
LUXEMBOURG																											WL										
MACAU																							WL	WL	PWL	PWL											
MALAYSIA			OCR	OCR								WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR										WL	WL		
MEXICO	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO									PWL	
MOLDOVA																								WL													
NAMIBIA																																					
NIGERIA																																					
NETHERLANDS																																					
NEW ZEALAND																																			WL	WL	
NICARAGUA																											OO	OO									
NORWAY												WL	WL	WL	WL	WL																					
OMAN																																					
PAKISTAN		WL	WL	WL	WL	WL	WL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
PALESTINIAN AUTHORITY																																					
PANAMA																																					
PARAGUAY		WL	WL	WL					WL+OCR	WL+306+OCR	WL	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO								
PERU		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL			
PHILIPPINES											WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
POLAND	WL														WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL			
PORTUGAL																																					WL
QATAR																																					
ROMANIA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	OO	WL								
RUSSIAN FEDERATION	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
SAN MARINO																																					
SAUDI ARABIA		PWL	PWL+OCR	PWL	WL									WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		
SERBIA AND MONTENEGRO																																					
SINGAPORE																																					
SLOVAK REPUBLIC																																					
SLOVENIA																																					
SOUTH AFRICA	PWL																																				
SOUTH KOREA																WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL	
SPAIN								OCR	OCR	OCR	OCR		WL	WL	WL	WL																					
SWEDEN																																					
SWITZERLAND	WL			WL	WL	WL	WL																														
TAIWAN	WL																																				
TAJKISTAN					WL	OCR	OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	

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USTR 301 PLACEMENT (as of April/May of each year)																																				
COUNTRY	IIPA RECOMMENDATION JANUARY 2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989		
THAILAND	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL		
TRINIDAD & TOBAGO		WL	WL					WL	WL	WL																										
TUNISIA																									OO											
TURKEY		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		
TURKMENISTAN		WL	WL	WL	WL	WL	WL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL													
UNITED ARAB EMIRATES	WL		WL	WL	WL																	WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			
UKRAINE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	301	PFC	PWL+GSP	WL	WL	WL	WL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PFC	PFC	PWL	PWL	WL									
URUGUAY																		WL	WL	WL	PWL	PWL	WL	WL	OO	OO										
UZBEKISTAN		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL													
VENEZUELA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
VIETNAM	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO								
YEMEN																									OO											

301: 301 Investigation
PFC: Priority Foreign Country
PWL: Priority Watch List
WL: Watch List
OO: Other Observations (an informal listing formerly used by USTR)
SM: Special Mention
OCR: Out-of-Cycle Review to be conducted by USTR
GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.
DS: Dispute Settlement