

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### VIETNAM

#### EXECUTIVE SUMMARY

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

#### **Priority Actions Requested in 2006:**

- **Issue Implementing Regulations to Fix Deficiencies in Newly Passed Copyright Law:** The new Intellectual Property Law was enacted on November 29, 2005, and will go into effect July 1, 2006. While the law strengthens protection in some respects, key issues were dealt with in ways incompatible with Vietnam's current or anticipated treaty obligations. The Vietnamese Government is reportedly working on implementing regulations for the new IP Law. Many of the noted deficiencies in the new Law (see below) could be remedied in the implementing regulations.
- **Commence Public Awareness Campaign About New IP Law and Announce July 1 Crackdown:** The Vietnamese Government should take the opportunity of the new Law to launch a public awareness campaign about copyright protection. The Government should bring in local creators to discuss why copyright protection is important to Vietnam's future development. The Government should announce an anti-piracy campaign to begin July 1.
- **Commence Piracy Crackdown on July 1:** The Vietnamese Government should gear up its enforcement organs for the anti-piracy campaign referred to above and devote sufficient resources and manpower to make it a success. Beginning July 1, 2006, the Government's authorities, including police, should target sources of pirate production, pirate distribution warehouses, pirate retail shops selling CDs, DVDs, books, engaging in hard-disk loading of computers. As per the Law, pirate product and tools and materials should be seized, and shops dealt with administratively, including fines, license revocations and shop closures.
- **Apply Criminal Remedies to Address Copyright Piracy (and If Necessary, Amend Criminal Law and Thresholds):** The new IP Law states that criminal remedies are available for copyright infringement in appropriate cases. Unfortunately, the Criminal Code provision has not been used effectively to deter piracy. Vietnam cannot reduce piracy levels and meet international norms until it provides an effective criminal remedy. Police involvement in raids, followed by prosecutions, must occur; if this requires amendments to the Criminal Code and a Supreme Court re-interpretation of the criminal threshold, then those steps should be taken.
- **Broader Market Access Should be Afforded:** Various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies' setting up subsidiaries to produce or distribute "cultural products." Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of the Vietnamese market.

- **Pass Optical Disc License Regulation:** Vietnam now has between five and seven optical disc plants with capacity that far outstrips any rational legitimate domestic demand. As such, the Vietnamese Government should swiftly adopt a comprehensive regulation on the licensing of optical disc manufacture, including the use of SID Codes for identification purposes, and imposition of inspections by the Government on optical disc production facilities.

For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<b>VIETNAM</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2001-2005<sup>1</sup></b>										
<b>INDUSTRY</b>	<b>2005</b>		<b>2004</b>		<b>2003</b>		<b>2002</b>		<b>2001</b>	
	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>
<b>Business Software<sup>2</sup></b>	26.8	91%	30.0	92%	24.0	92%	29.1	95%	26.3	94%
<b>Books</b>	16.0	NA	16.0	NA	12.0	NA	NA	NA	NA	NA
<b>Motion Pictures<sup>3</sup></b>	NA	NA	10.0	NA	7.0	100%	7.0	100%	7.0	NA
<b>Records &amp; Music</b>	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	42.8		56.0		43.0		36.1		33.3	

## **PIRACY AND ENFORCEMENT UPDATES IN VIETNAM**

Piracy levels in Vietnam rank among the highest in the world; the music and recording, as well as business software industries report over 90% piracy rates. Such high rates indicate a total lack of effectiveness of the current copyright laws on the books, a total failure to enforce, and lack of effective market access, which in itself could drive piracy levels down.

**Optical Disc Plants Vietnam:** The Vietnamese Government indicates there are between five and seven optical disc plants in the country. The plants include at least 12 production lines, capable of producing at least 42 million discs per year. This production capacity is far greater than any rational domestic legitimate demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products (notably entertainment software) have been found in several Asian countries, Canada, the Czech Republic, and Poland. CD-burning operations also exist in the country, with pirated PC games being sourced from cracked versions made available through the Internet. Piracy of entertainment software is also widespread in Internet cafés.

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>2</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Vietnam, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>3</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

Despite modest efforts from some local publishers and government officials, book publishers continue to suffer from overwhelming book piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copyshops all sell illegal copies of bestselling trade books, travel books and academic textbooks. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers' licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are still being misused, resulting in distribution of unauthorized books through the mainstream state bookshops. Copies of such books also flow to Cambodia. Government publishing houses could help reduce piracy in the English language teaching sector by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy (mainstream bookshops require this information in order to make inventory decisions).

**Signal Piracy:** Piracy of cable and satellite broadcasting signals remains a significant problem, made more egregious by the fact that a state owned company, controlled by the Ministry of Posts and Telematics, is openly pirating content in serving hundreds of thousands of end users throughout the country.

**Business Software End-User Piracy:** Business software piracy is rampant in Vietnam. The most damaging form of piracy for this sector is corporate end user piracy. Vietnam has done little to use what administrative authority it does have to fight against software piracy.

## **TRAINING AND PUBLIC AWARENESS**

The Business Software Alliance provided some enforcement training to authorities in 2004 and 2005. The motion picture industry participated in an IPR Workshop on "Counterfeiting and Border Measures" jointly organized by the World Customs Organization and Vietnam Customs in Ho Chih Minh City in January 2005.

## **COPYRIGHT LAW AND RELATED ISSUES**

**New Intellectual Property Law Enacted:** On November 29, 2005, the Vietnamese National Assembly passed the "Intellectual Property Law,"<sup>4</sup> which will go into effect on July 1, 2006. The law results in a number of advances in Vietnam's copyright system. For example, it provides protection for temporary reproductions (Article 4(10)), and provides for the first time in Vietnam protection against circumvention of technological protection measures used by right holders to protect their works/subject matter in the digital environment (Articles 28(12) and 35(7)), as well as prohibitions against trafficking in circumvention devices (Articles 28(14) and 35(9)).<sup>5</sup> The Law also attempts, less successfully however, to deal with exclusive rights in the digital environment, namely, the right to control the communication to the public of works, sound

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<sup>4</sup> Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated 25 December, 2001.

<sup>5</sup> The term "technical methods" is undefined, so it is unclear whether it includes access controls as well as controls against the unlawful exercise of exclusive rights (the term used throughout is a technical measure "applied by a copyright owner to protect copyrights of his or her work." The implementing regulations being drafted should include a definition of "technical methods" to ensure that access controls are included in coverage, a very important aspect of TPM protection and necessitated by the WCT and WPPT language. It is also unclear what, if any, exceptions apply to the anti-circumvention provisions. The implementing regulations must spell out that violation of the TPM-related articles constitutes a separate violation, or questions about the efficacy of these provisions will remain.

recordings, etc. including an interactive right (making available) (see discussion of this issue below). Unfortunately, the new Law still contains a number of deficiencies when evaluated on the basis of full TRIPS compliance and compliance with the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).<sup>6</sup> The drive toward WTO accession no doubt has infused energy into the copyright drafting and legislative process, and in Vietnam's overall willingness to try to align itself with the international community on issues related to the protection of copyright.<sup>7</sup> As such, it is truly a major disappointment that the Vietnamese did not take this legislative opportunity to ensure that its law complies with the BTA or is TRIPS-compatible. The Vietnamese Government should work to correct as many deficiencies as possible when issuing the implementing regulations. The following is a non-exhaustive list of concerns in the new IP Law (with respect to copyright).

### **Substantive Issues**

- **Restrictions on IP Rights:** Article 7(2) gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact would create inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties, and should pose a major obstacle to Vietnam's accession to the WTO. The second half of Article 7(3) violates Vietnam's current and future obligations by permitting the State to restrict the ability of a right holder to exercise lawful rights, and worse yet, could result in an open-ended compulsory licensing to use copyright materials seemingly without limitation or reason. The provision should be deleted. The first clause of Article 8 would also run afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. That clause must be deleted.<sup>8</sup>
- **Civil Code Supremacy:** Article 5 retains a clause making the Civil Code supreme to the IP Code where inconsistent. Supremacy of the Civil Code, and the legal uncertainties and inconsistencies resulting from such parallel and inconsistent legislation, seriously endangers Vietnam's ability to fulfill its present (Berne, BTA) and future (TRIPS, WCT/WPPT) obligations.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.
- **Importation Right Not Provided (BTA Requirement):** Articles 20 and 30 fail to provide an "importation" right as required by BTA Articles 4.2(a) and 4.6(b).
- **Exceptions Overly Broad:** Certain exceptions, including Article 25(a) (personal use copy exception), (d)*bis* (library archive copies "for the purpose of research"), (g) ("[d]irectly recording and reporting performances for public information and educational purposes"),

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<sup>6</sup> Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA). The BTA required Vietnam to bring its copyright regime, including enforcement provisions, into compliance with the TRIPS Agreement by December 2003. This has still not occurred.

<sup>7</sup> Vietnam acceded to the Geneva Convention (the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms) on July 6, 2005 and the Brussels Convention in late 2005. Vietnam was also planning to accede to the Rome Convention at the end of 2005. There are no plans to accede to WCT and WPPT although Vietnam acknowledges that its law will comply with these and Vietnam will eventually accede.

<sup>8</sup> We note that a new Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

and (j) do not accord with the Berne Convention, TRIPS, and the BTA. For example, Article 25(j) regarding personal use imports needs to be specifically narrowed in order to comply with TRIPS Article 60. Article 25(e) is Berne and TRIPS-inconsistent, as it provides that it is permissible to put on stage “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” as long as there is no admission charge; however, the provision that performers may not be paid was struck in the bill that was passed into law. It was already believed that “cultural gatherings” and especially “promotional campaigns” could be read in an overly broad way, but with payments being made, this provision runs afoul of the Berne three part test.<sup>9</sup>

- **Impermissible Compulsory Licenses:** Article 26 enacts into law in Vietnam a broad broadcasters’ compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).<sup>10</sup> Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this legislation) for use of sound recordings and video recording for commercial “broadcasting” is in violation of international standards; 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne three part test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **Duration Provisions Are BTA-Incompatible:** Articles 27(2)(a) (with respect to cinematographic works) and 34(2) (with respect to phonograms) violate BTA Article 4.4 since they do not provide the term promised under that Agreement.<sup>11</sup>
- **Scope of “Communication to the Public” Right Unclear:** While it appears some legislators intended that this law fully implement the WCT and WPPT, in the end, the term “communication to the public” was left undefined, and while the exclusive right in Article 20(d)*bis* provides a potentially broad right “[t]o communicate the work to the public by wire or

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<sup>9</sup> By contrast, Title 17, Section 110(4) of the U.S. Copyright Act permits “performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers” if there is “no direct or indirect admission charge” or if “proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.” Section 110(4) also provides right holders with an opportunity to object to such performances. The Vietnamese provision is much broader in the subject matter (“dramatic works and other forms of performing arts”), the setting (“cultural gatherings or in promotional campaigns”) and the payment scheme (payments not prohibited).

<sup>10</sup> The Article reads as follows:

Use of published works without obtaining permission but paying royalties, remuneration

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations,
2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.
3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

<sup>11</sup> “Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.”

wireless means, through electronic information network or by any other technical means,” the right as enacted does not expressly include the interactive “making available” right of the WIPO treaties. As noted below, the fact that the “making available” language does appear in the definition of “broadcasting” at least suggests that omission of the concept in Article 20 was not an inadvertent oversight.

- **Scope of Rights for Producers of Phonograms Unclear:** The scope of rights for producers of sound recordings is similarly left unclear, since sound recording producers receive in Article 30 a broad right to “[d]istribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public,” but again, the “making available” language is missing. Article 30(2) similarly leaves more questions than it answers, providing, “[t]he producer of a phonogram shall have the right to get material benefits when his or her phonogram is distributed to the public.” To the extent it clarifies the exclusivity of the right (i.e., the ability to enjoy the economic right), it can be dropped as duplicative. To the extent it sets out the possibility of a right of remuneration, it is quite problematic since “distribution” is arguably so broad (and, e.g., to the extent it creates remuneration for “rental” this would be TRIPS-incompatible). Article 35(3) does make it an infringement to “communicat[e] to the public” a phonogram without permission, and while this appears helpful, it also adds to the uncertainty given the failure to enumerate this right in Article 30.
- **Broad “Broadcasting” Right Afforded, Including “Making Available” Right, But Apparently Only Afforded to Performers and Broadcasters:** A new definition of “broadcasting” was added at the last minute (Article 4(11)). This definition is very broad, defined as “transmission by wire or wireless means” and including transmission “to the public for its reception at a place or at a time select[ed] by them.” This sets forth the WCT/WPPT “making available” right, but the scope of the right in the Vietnamese law is to “sounds or sounds and images.” Further, the “broadcast” right is only apparently afforded to performers (Article 29(3)(c)) and broadcasters (Article 31(1)(a)). It is illogical to provide an interactive “making available” right for performers and broadcasters and not for authors of works (see discussion above) and producers of sound recordings, especially given the stated wish of many legislators in Vietnam to take the opportunity afforded by this legislation to fully implement the WIPO treaties.

### **Enforcement Issues**

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and apparently imposes a Berne-prohibited formality by requiring a registration certificate in order to enforce copyright. Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, *enforce* and exercise rights or benefits in respect of copyright and related rights.” Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures), since they apply the same standard of proof, also violate international standards.
- **Level of Administrative Remedies Left to Implementing Regulations:** Article 211(2) provides, “[t]he Government shall make specific provisions for acts of IPR infringements to be liable for administrative remedies, form and level of remedies and procedures for imposing such administrative remedies.” Article 214 similarly provides, “[t]he Government shall make detailed provisions for the method of determination of the value of infringing goods” (after noting the administrative fine is “at least equal to the value of the discovered infringing goods but must not exceed five times of that value”). The great danger is that the Vietnamese Government will set administrative fines and remedies in implementing

regulations at a “value” lower than a legitimate retail price. IIPA hopes the outcome of implementing regulations will be on-their-face deterrent administrative remedies, including deterrent fines, seizure, forfeiture and destruction of infringing goods, as well as materials and implements used in the infringement, and other necessary remedies, such as business license revocation and shop closure where necessary.

- **Criminal Penalties: IP Code/Criminal Code Remain TRIPS-Incompatible:** Article 212 dealing with criminal penalties does nothing to resolve doubts about whether Vietnam’s criminal remedy is TRIPS-compatible.<sup>12</sup> TRIPS (and the BTA) require that Vietnam provide criminal penalties at least in cases involving copyright piracy on a commercial scale, and that remedies be sufficiently severe to provide a *de facto* deterrent to further infringement. Article 14 of the BTA requires Vietnam to “provide criminal procedures and penalties to be applied at least in cases of ... infringement of copyrights or neighboring rights on a commercial scale,” and to provide that “penalties *available* include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity” (restating the TRIPS Article 61 test). Article 14.2 of the BTA also requires Vietnam to “provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.” The current draft IP Code does not expressly provide for BTA or TRIPS-compatible criminal penalties. As noted below, the Criminal Code is not helpful in resolving the ambiguities and potential weaknesses in the criminal statutes, regulations and interpretations.
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed (if permissible constitutionally). Article 202(5) of Vietnam’s IP Law provides that one application of civil remedies could include “Compelling distribution or use for non-commercial purpose of goods, materials and equipment used for the production and business of IPR infringing goods.” This provision falls short of what the BTA (and TRIPS) would allow, notwithstanding that the drafters added “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” There remains no possibility of seizure or destruction of the infringing goods, materials or equipment used in the infringing activity. With regard to administrative remedies, Article 214(3)(a) is similarly too broad, providing for the possibility of “distribution and use of the [goods/implements] for non-commercial purpose provided that such distribution and use does not affect the IPR owner’s capacity to exploit his/her IPRs.”
- **Possibility of “Re-Export” of Illegal Goods:** Article 214(3)(b) provides for “Compelling delivery out of the territory of Vietnam or re-export of the IP counterfeit goods, materials and equipment that are imported mainly for manufacturing such intellectual property counterfeit goods.” It must be confirmed that this applies only to “counterfeit trademark goods.”
- **Secondary Liability and Limitations of Liability for Internet Service Providers** We note at the outset our disappointment that Article 442(2) of the 3rd Draft IP Code was stricken from subsequent drafts. That Article provided that “[t]he person who does not directly conduct the act of infringement of intellectual property right but assigns, hires or orders other

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<sup>12</sup> A proposed change in a previous draft would have come closer to compliance. Specifically Article 249(2) of the 4th Draft of the IP Code provided that the following would be subject to criminal penalties:

- “Any of the acts of infringement provided for in Article 218 conducted after the infringer has been handled by administrative procedures, or after the infringer has been sentenced for this crime and the criminal records have not yet been deleted.”
- Any act of intellectual property right infringement resulting in serious consequences to the society.”

person to conduct that act shall be considered as the infringer of intellectual property rights.” Establishing secondary liability for copyright infringement in the IP Law would have provided the context for what the Government is now contemplating: treatment of “service providers” when infringing materials or activities occur on their services. IIPA understands that a draft E-Transactions Bill which would have giving ISPs blanket immunity for copyright infringement occurring over their services was scrapped, in favor of the approach taken in the IT Bill.<sup>13</sup> IIPA’s view is that the draft IT Bill should not be considered seriously for passage until it is reworked to do more to foster incentives for “suppliers” (as defined therein) to cooperate with right holders in combating online piracy,<sup>14</sup> and to adopt a robust “notice and takedown” mechanism.<sup>15</sup>

**Criminal Code of Vietnam:** There are several problems with Article 131 of the Criminal Code which criminalizes certain acts of copyright infringement.

- It is unclear what the thresholds are (e.g., terms like “serious consequences,” “very serious consequences,” and “particularly serious consequences” are defined in only vague ways in court interpretations).
- It is unclear whether “appropriating” in Article 131 covers all commercial scale piracy (e.g., potentially all acts of infringement, end-user piracy of software, etc.).<sup>16</sup>
- The penalties for “serious consequences” may be too low to deter further infringements, i.e., they may result only in “non-custodial reform” (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).<sup>17</sup>
- Neither the IP Code nor the Criminal Code provide that “judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense” as required by the BTA and TRIPS.
- Finally, we are told that the police in Vietnam will not investigate or enforce copyright infringement cases because Article 131 violations are considered “human rights” violations rather than economic crimes. This is a serious problem that must be addressed for Vietnam to achieve TRIPS compatibility.

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<sup>13</sup>Bill entitled “Information Technology Law, Based on the Constitution of the Socialist Republic of Vietnam dated 1992, amended and supplemented in accordance with Resolution No. 51/2001/QH10 dated 25/12/2001 of Legislature X, Session 10.”

<sup>14</sup>In general, Articles 20-23 seem intended to describe instances in which a “supplier” is not liable (with notions roughly parallel to those adopted in the United States and the EU). Unfortunately, the current formulation creates blanket immunities from liability rather than remedial limitations, i.e., it does not preserve incentives for service providers to cooperate with right holders to fight infringements online.

<sup>15</sup>The IT Bill creates no notice and takedown mechanism whereby right holders can make “suppliers” aware of infringing activity, upon which the supplier is obliged to expeditiously take down or block access to the infringing material or the user engaging in the infringement.

<sup>16</sup>Specifically, it should be confirmed that illegally “appropriating” includes illegally reproducing, distributing, publicly performing, broadcasting, renting, communicating to the public (including “making available” to the public so that they may access the work/sound recording at a time and a place of their choosing), adapting, translating, compiling, etc. Alternatively, it may be that some of these acts are covered under the term “disseminating” in Article 131(1)(d), but it would be important to confirm whether “disseminating” extends to digital dissemination. It should also be confirmed that unauthorized use of software in a business setting would be criminalized under this “appropriating” language.

<sup>17</sup>The penalty for the crime committed with “serious consequences” is \$1,263 to \$12,630 or “non-custodial reform” of up to two years; thus, a crime of copyright piracy may result merely in a “non-custodial reform” which might be non-deterrent (we note that two years non-custodial reform is the maximum penalty for the lower “serious consequences” violations, so it would depend on the threshold for such violations and the in-practice application of such penalties as to whether this is TRIPS-incompatible).



## Civil Code Amendments

The Vietnam Civil Code was amended and passed by the National Assembly. Unfortunately, our analysis reveals that the Civil Code contains provisions that are inconsistent with the draft IP Code in several crucial areas. Because of these and other inconsistencies and the confusion that will arise in interpreting the laws in Vietnam, IIPA advocates that the Civil Code provisions be trimmed to a few basic paragraphs that do not contradict with the provisions of the draft IP Code.

**The Need for Optical Disc Regulations:** The Copyright Office in Vietnam estimates that there are 5 to 7 optical disc plants in Vietnam, and they plan to issue a decree on optical disc production. If this is true, it is welcome news. Effective prevention of optical disc piracy can only be achieved through targeted legislation and by the establishment of specific enforcement mechanisms. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production," which contains the key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join the other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary.
- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed).
- The ability to inspect plants (in addition to traditional search and seizure), including nighttime inspections, to ensure that plants are engaging in legal activities.
- Government record-keeping of all plants and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license including criminal penalties and possibility of plant closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials (an automatic license is one common approach).

## **MARKET ACCESS**

As noted, various market access barriers exist in Vietnam today, the most serious being the prohibition on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves right holders no choice but to license Vietnamese companies (which often refuse to license due to the prevalence of piracy). Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market in Vietnam, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry as our right holders invariably do. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of this developing market.

**Quantitative Restriction on Foreign Film and Other Restrictions Relating to Audiovisual Content:** Under current regulations, there are no screen quotas or restrictions on the number of imported films. However, under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced. Also, the number of foreign films projected by each cinema would only be allowed to reach two-thirds of the total projected films in any given year. Since the domestic films industry is underdeveloped and the number of domestic films produced has generally ranged between 10 and 15 films or less per year, these proposed restrictions would pose a significant barrier to the import and distribution of foreign films in Vietnam. In the television sector, foreign content is reportedly limited to 50% of broadcast time, although it is unclear whether this is enforced. In addition, foreign programming is not allowed during prime time viewing hours of 7:00 p.m. to 9:30 p.m. Foreign investors may invest in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. Only cinema exhibitors are allowed to import foreign films into Vietnam.

**Sound Recordings and Musical Compositions:** Under present rules in Vietnam, foreign sound recording companies cannot set up subsidiaries to produce or distribute "cultural products"; they must license a Vietnamese company. In the first instance, this has prevented U.S. sound recording companies from establishing businesses in Vietnam. Making matters worse, Vietnamese companies are not interested in licensing legitimate product from American companies given that pirated versions of these products are already available in the Vietnamese market. Thus, right holders in sound recording (and musical compositions) are totally excluded from the market. It is critically important that all U.S. right holders obtain the right, if Vietnam joins the World Trade Organization, to establish wholly owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. U.S. right holders do not challenge the authority of the state to review cultural materials (e.g., through censorship) provided that they do so in a transparent and timely manner that does not operate as a disguised barrier to entry.