

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: The recent article in CNET, “Vietnam: Where Pirated Apps Match Personal Budgets” speaks volumes about the piracy situation in Vietnam.¹ Piracy remains an open and often brazen commercial act in Vietnam providing high profitability and little risk to pirates. Vietnam has among the highest piracy rates in the world and mounting losses due to piracy. The Internet represents the new horizon, and there is too much activity to expect an *ad hoc* approach by the government to be effective. IIPA commends the government of Vietnam in 2007 for agreeing to procure legal software, acting administratively against the unauthorized use of software by businesses and government, and helping to reduce signal theft by removing pirated international channels from local operator VTC. Notably, it appears that corporations, that once infringed with impunity, now take IPR more seriously and are willing to discuss settlements to avoid sanctions. In 2008, unfortunately, less enforcement activity ensued against end-user business software piracy, and music and other forms of piracy soared, especially on the Internet, despite some cooperation from the government in detecting and removing online piracy. In 2007, the United States signed a Trade and Investment Framework Agreement with Vietnam, and in May 2008, Vietnam formally applied to the United States Trade Representative for eligibility to receive benefits under the Generalized System of Preferences trade program. Vietnam also has expressed interest in joining the Trans-Pacific Strategic Economic Partnership Agreement. Now more than two years after joining the World Trade Organization, the government of Vietnam must demonstrate that it plays by the rules and deserves the beneficial treatment accruing to GSP beneficiaries and free trade partners, and that it has the will to recast itself from its current label as a piracy haven.²

Priority Actions Requested in 2009: IIPA requests that the government of Vietnam take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Adopt a more coordinated and better financed ‘zero tolerance’ policy to reduce online piracy, including a regulatory approach (e.g., notice and takedown) and further cooperation among service providers. Target cases should be prosecuted at court against egregious cases of Internet piracy, and administrative authority should be exercised to prevent unfair business practices and address activities of commercial entities that actively facilitate infringement. Government-run networks (including university networks) should be monitored closely to minimize infringing activity.
- Reduce physical piracy through devotion of greater resources and manpower to provide a deterrent against infringement, including targeting sources of pirate production like CD-R burning facilities, pirate distribution warehouses, pirate retail shops selling CDs and DVDs, businesses engaged in end-user piracy of software, and illegal reprinting or photocopying facilities. Remedies should include tough administrative fines under the 2008 Revised Ordinance, license revocations, shop closures, and criminal penalties through prosecutions at court under the February 2008 Criminal Circular.

Legislation and Market Access

- Retain criminal remedy provided under the Criminal Circular (February 2008).
- Join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Afford U.S. right holders with access to the market in Vietnam, by eliminating foreign investment restrictions and other barriers to entry with respect to production, importation and distribution of physical product, and importation and distribution of product online and through mobile networks, in order to provide a legitimate alternative to pirate product.
- Pass optical disc licensing regulation.

¹ Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at http://news.cnet.com/8301-17938_105-10122530-1.html.

² In June 2008, on the occasion of the visit of Vietnamese Prime Minister Nguyen Tan Dung, a Joint Statement noted, “two-way bilateral trade topped \$12 billion in 2007 and that the United States is Vietnam’s top export market.” Office of the Press Secretary, *Joint Statement Between the United States of America and the Socialist Republic of Vietnam*, June 25, 2008, at <http://www.whitehouse.gov/news/releases/2008/06/20080625-4.html>.



VIETNAM										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	123.0	83%	120.0	85%	53.0	88%	21.0	90%	30.0	92%
Books	NA	NA	17.0	NA	18.0	NA	16.0	NA	16.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	10.0	NA
Records & Music	NA	95%	NA	95%	NA	95%	NA	95%	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	123.0		137.0		71.0		37.0		56.0	

PIRACY CHALLENGES IN VIETNAM

Internet Piracy Exploded in 2008: In 2008, Internet piracy exploded in Vietnam. Vietnam has seen rapid growth in Internet usage as well as mobile device penetration. Vietnam now boasts over 20.2 million Internet users (23.4% penetration) as of June 2008, up from 18 million in 2007, according to Vietnam Internet Network Information Center. This number is well above the regional average of 15.3% and with a higher penetration rate than either Indonesia or Thailand. According to VNNIC, as of August 2008, Vietnam had nearly 1.8 million broadband Internet connections, a 50% increase over the previous year. Industry has notified the government of Vietnam of many sites that provide illegal content, including music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products). University networks are increasingly used for dissemination of infringing content. Vietnam's national television station has also been negatively impacted by online piracy. As an example, the station held the rights to broadcast the "Ms. World Pageant" live. However, after the pageant's organizers discovered that many online sites had infringing content or rebroadcasts on their websites, they cancelled the contract. As a result, most of the "Ms. World Pageant" was not shown, causing many of the advertisers to pull out of their ad deals.

Industry sources indicate Internet piracy comes in the form of illegal downloads from hosting websites, deep links, in which a website contains links to pirate material hosted by third-parties, with Socbay and Zing as examples, piracy-oriented search engines, peer-to-peer (P2P) downloading services, and cyber-locker solutions, whereby users can store all their illegal copies on a server available anytime to them from anywhere. Pirates do not discriminate between Vietnamese and foreign works, and the Internet pirates involved offer large number of infringing files including local, regional and international works.

Mobile Device Piracy Also Soared in 2008: With mobile penetration also skyrocketing in Vietnam, estimated at 52.4 million mobile devices as of October 2008 (according to the International Telecommunications Union),⁴ or 60% mobile penetration, it is no wonder Vietnamese are obtaining their content from digital sources, since so much of it is being used on mobile devices.

Physical Piracy Dominates the Market, Although Major Cities Improved Marginally: The markets in major cities like Hanoi and Ho Chi Minh City remained mired in physical piracy, although with the development of the Internet, some physical piracy began to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed. As a result of piracy, all industries suffered, leading to further deterioration of an already strained economy for local Vietnamese working in the creative industries. Press reports have prices in Hanoi for movies at about VDD15,000 (US\$0.87) per DVD, and half of that for an audio CD. The author of a recent article on the topic notes, "[t]hese shops are open, just like any legitimate business."⁵ In fact, for the music industry, with piracy levels still

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Vietnam. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

⁴ *Vietnam Mobile Market Shows Skyrocketing Growth Despite Economic Turmoil*, at <http://www.itu.int/ITU-D/ict/newslog/Vietnam+Mobile+Market+Shows+Skyrocketing+Growth+Despite+Economic+Turmoil+Vietnam.aspx>.

⁵ See *supra* note 1.

over 90%, financial returns dropped so deeply in 2008 that the companies involved were unable to invest in new albums and artists. Instead, companies operating in Vietnam have shifted their focus to different revenue streams, such as ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing. Even the Copyright Office of Vietnam understands that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights”.⁶

Optical Disc “Burning” and Some Factory Production in Vietnam Continue to be Major Irritants: Optical disc pirates continue to operate, as technological advances in Vietnam and lax enforcement of the laws have made Vietnam an attractive place for pirate optical disc manufacture in recent years. The government of Vietnam understands (and has been informed by U.S. contractors) that eight optical disc plants operate in Vietnam, with an estimated production capacity of at least 42 million discs per year. This capacity dwarfs any rational legitimate domestic demand. Where factory discs are not available, piracy storefronts are more than happy to supply any content on recordable discs, complete with hacking or cracking instructions for those products embedded with technological measures to protect the original discs from being illegally accessed or copied.⁷ Vietnamese-sourced pirate products flood the domestic markets and have been found in other Asian countries, Canada, the Czech Republic, and Poland in recent years. The industries have intelligence that syndicates outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam) largely in response to Vietnam’s booming economy. Apparently these underground plant operators are increasing production in order to respond to higher disposable income rates in Vietnam and a resulting desire among Vietnamese consumers for the latest western music and movies.

High Levels of Business Software End-User Piracy Persist in Vietnam: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the software industry, thereby stunting the growth of the IT sector. Retail piracy and hard disc loading continue to cause losses as well. Most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers continue to suffer from overwhelming piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copy shops all sell illegal copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers who engage local production. 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 also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. This type of misuse hurts legitimate local and foreign publishers alike, resulting in distribution of unauthorized books through the mainstream state bookshops. Government publishing houses could help reduce piracy by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy. Universities, likewise, should play a role in reducing piracy of academic materials. Online piracy of books and journals grew significantly in 2008, with university networks among the biggest hosts for illegal content (e.g. hcmut.edu.vn).

Signal Piracy: IIPA is pleased to report that Vietnam saw a “dramatic fall” in illegal pay TV connections. The improvement has been attributed largely to the removal of pirated international channels from local operator Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telematics. Nonetheless, industry reports that there remain challenges in this market that continues to rapidly evolve.

ENFORCEMENT CHALLENGES IN VIETNAM

Overall Lack of Resources and Deterrence Equates to Continuing Prevalence of Piracy: The Vietnamese government continued to cooperate with certain right holders to try and curtail piracy in 2008. Nonetheless, the Copyright Office of Vietnam admits that the Ministry of Culture, Sports and Tourism “has made every efforts [sic] but is unable to

⁶ Copyright Office of Vietnam, Overview of Copyright in 2008, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.

⁷ See *supra* note 1. The author is quoted notes regarding the pirate software found in neighborhood shops in Hanoi, “These software applications, of course, come with “crack”—a hacking application that allows for bypassing the vendors’ antipiracy mechanism. All are guaranteed to work; if not, you’ll get another copy that does or get your money back.”

meet the requirements to establish order in the field of copyright and handle strictly the organizations and individuals who violate copyright, related rights.”⁸ Aggregate statistics provided on the website of the COV (<http://www.cov.org.vn/Vietnam/home.asp>) in its 2008 report indicate that the Ministry has “examined and settled” 20 cases involving copyright piracy (both physical and Internet apparently included), meting out administrative fines of a grand total of VND 225 million (US\$37,087).⁹ Under any circumstances, given the amount and scope of piracy in Vietnam, these amounts cannot have provided a deterrent to further infringements in the country. While intentions seem positive, the lack of effort and results, and frankly, the *de minimis* level of fines being meted out, indicate to IIPA that the government has thus far failed to organize itself in a way that will allow it to significantly reduce piracy in Vietnam. Finally, notwithstanding the existence of a criminal remedy (under the Criminal Code, and under the February 2008 Criminal Circular, discussed below), no criminal convictions for copyright piracy have ever been meted out in Vietnam.

Devotion of More Resources to Defeat Physical Piracy Required: Simply, the government must devote greater resources and greater manpower in order to achieve significant reductions in physical piracy. While *ex officio* actions commenced in 2007 in the form of unannounced sweeps of shops dealing in pirated DVDs, VCDs and CDs, such activity waned in 2008. Only a ‘zero tolerance’ campaign against open and blatant piracy activities of all kinds, with deterrent administrative fines, meted out to their maximums (including new maximums under the Revised Ordinance on Administrative Penalties, effective August 1, 2008), license revocations, shop closures, and criminal penalties, can result in a significant reduction in piracy in Vietnam. Regarding book piracy, the publishers note that so far, universities have been relatively passive in legalizing usage of published materials on campuses, except for some positive steps in this regard by particular universities in Hanoi. Universities need to become more active in ensuring that and that campus facilities, photocopying machines and networks alike, are used for only legitimate purposes.

Internet Piracy Requires Coordinated Response from Well-Trained Professionals: The government of Vietnam needs to devote additional resources, time, expertise, and equipment, in order to build capacity, train its officers, and ultimately, take needed actions to reduce Internet piracy in 2009. In 2008, MOCST, Ministry of Information & Communication Inspectors, and Police officers inspected several infringing sites, resulting in some administrative punishments. The COV reported fining FPT, a major Vietnamese IT company, in the amount of “20 million VND” for “for transmitting films without permission from some big broadcasting organizations in the world.”¹⁰ There have also been some positive responses from service providers related to specific sites of concern.¹¹ While the answers in all cases have not been wholly satisfactory, and while services “baamboo,” “timhanh,”¹² “ephim” and “zing” (for some repertoire) remain sites whose business model appears to be based on providing access to infringing materials in the online space, overall, IIPA views as encouraging the willingness of service providers to work with right holders to take down infringing material, and the COV’s willingness to engage with the alleged infringers on behalf of right holders. With the mobile market expanding so rapidly in 2008, estimated to rise to 70% by 2009, the government of Vietnam must remain vigilant and resist any attempt by pirates to established fixed mobile device piracy shops or services.

Business Software End-User Piracy Enforcement Waned in 2008: The government has issued Decision No. 51 with the goal for Vietnam to reduce its software piracy rate to at least meet the level attained by other countries in the region. Unfortunately, the Business Software Alliance reported only six end-user raids in 2008, a decrease from 2007. The government of Vietnam reported inspecting 1,200 computers in 2008 for unlicensed software, and indicated that some of the businesses inspected admitted using unlicensed software. In each of these cases, right holders filed complaints and

⁸ In Vietnam, the Inspectorate of the Ministry of Culture, Sports & Tourism is the leading enforcement agency, with the Division of High-Tech Crime (economic police of the Ministry of Public Security), the Customs General Department (under the Ministry of Finance) (which may suspend goods suspected of infringing copyright from entering the channels of commerce), the Market Management Bureau (under the Ministry of Industry & Commerce) (which deals principally with illegal imports being sold in Vietnam), the Inspectorate of the Ministry of Information & Communication, and the courts at various levels (under the Supreme Court) all having their own competence in certain areas to enforce copyright. The MOCST Inspectors have the right to administer administrative punishments, while MIC Inspectors may also administer punishments or remedies when the Internet is involved, and have been involved in dealing with infringing sites upon request of an MOCST Inspector.

⁹ See *supra* note 6.

¹⁰ *Id.*

¹¹ For example, upon sending notices to “sobay” and “zing,” those site operators removed some of the links mentioned in the notice. IIPA notes optimistically that FPT has shown responsiveness and a willingness to take down infringing material with respect to most sites it has been notified about, including “nhacso,” which reportedly fully cooperated in taking down infringing music material. IIPA understands that FPT remains in license negotiations or already has licenses from some major copyright owners.

¹² IIPA understands that the government may be pursuing Bamboo and Timhanh on Internet piracy; if so, this is also welcome news.

provided information and support. However, administrative fines arising out of these are non-deterrent, as they did not even amount to the cost of legalizing. The authorities have never taken *ex officio* raids against businesses engaged in end-user piracy of business software. This level of enforcement clearly cannot suffice to remove piracy from the markets.

In order to improve relations and foster greater awareness of software end-user piracy and build capacity, the Business Software Alliance provided seminars and workshops for officers of MOCST, the Police, District and higher court judges and officers of the court, all relating to the investigation of end-user piracy of business software. Such workshops were held in Ho Chi Minh City and Hanoi in February 2008, and in Đà Nẵng in April 2008. Another important capacity-building activity was the establishment in August 2008 of a Memorandum of Agreement establishing the “Partnership in Protection of Software Copyright” between BSA, the Vietnam Software Association, the Inspectorate of MOCST, and the Copyright Office of Vietnam. This MOA is intended to lead to an intensification of cooperation and coordination efforts in protecting computer programs, and enhance inspections of suspected copyright violations. Anecdotal information indicates that the BSA marketing campaign which publicized the MOA and the enforcement actions initiated by BSA members has heightened IP awareness in the country.

Courts and Judicial Reorganization: There have been very few cases involving copyright reaching final court decision in Vietnam, and thus, the courts have not been well tested and lack clear direction on how to handle copyright cases.¹³ Prosecutors have brought no cases to IIPA’s knowledge under the Criminal Code or the February 2008 Criminal Circular. This failure of the judicial system in 2008 is perhaps the greatest single disappointment for right holders, who hoped that finally, the laws in Vietnam would be applied to their maximum extent. IIPA understands that a process is underway to review and revamp the judiciary in Vietnam. Building IP expertise must be a part of this effort, to avoid what IIPA understands to be brain drain from the ranks of the procuratorate and the courts to the private sector or overseas.

COPYRIGHT LAW AND RELATED ISSUES

Criminal Code Revision Should Preserve Remedies Under Circular: In February 2008, the Supreme Court and Procuratorate of Vietnam issued a long-awaited Circular confirming that all violations listed in the 2005 Law on IP (copyright infringements, TPMs violations, and unlawful decryption of encrypted signals, etc.) are subject to criminal remedies in Vietnam, with no monetary or numerical threshold. The acts covered are criminalized as long as they are “on a commercial scale and for commercial purposes,” a phrase that poses some interpretive issues. Nonetheless, the Circular in general was viewed by industry as a step forward.

The government is now undergoing a drafting process to revise the Criminal Code of Vietnam, a process which will likely require a revision to the Circular to conform it with the Code once the Code is enacted. IIPA understands that the draft overhaul of the Criminal Code may curtail the kinds of acts that are currently considered crimes.¹⁴ IIPA opposes such a change, and in particular notes that the current Circular, appropriately, criminalizes all the acts that are deemed violations under the IP Code (namely, those enumerated in Article 28 of the Code as to works, and Article 35 as to related rights).¹⁵ Since TRIPS requires criminalization of at least all acts of commercial scale copyright piracy, and since the WCT and WPPT require adequate enforcement measures and effective remedies with respect to the normative obligations contained therein, including the communication to the public right, the interactive making available right, and protection against circumvention of TPMs, it is appropriate that the new Criminal Code retains the current structure of the Circular. IIPA understands that the draft revision was discussed in a November 2008 National Assembly hearing, and that it will

¹³ In one of the first reported copyright cases to make its way to the Supreme Court in Vietnam, the People’s Supreme Court in Hanoi issued a decision on the first major literature copyright lawsuit between two experts of the literature classic Tale of Kieu (the 3,254-verse epic work by Vietnam’s most revered poet, Nguyen Du), finding that Dao Thai Ton’s reproduction “in a faithful and comprehensive way” and use of the essays of Nguyen Quang Tuan “in their original versions” in his book titled *Tale of Kieu – Research and Discussion* was permissible under Vietnamese law (the case was brought prior to the adoption of the new IP Code) since the purpose was to provide commentary and criticism of Mr. Tuan’s interpretation. It appears that the new IP Code would not permit such wholesale copying of the essays without permission or license, would not meet the criteria of any exception under Vietnamese law, and would not meet Vietnam’s international commitments.

¹⁴ IIPA also understands that the drafters may be proposing removal of “commercial purpose,” which would be helpful, and is proposing increasing fines to the level in the new Revised Ordinance on Administrative Penalties (effective August 1, 2008).

¹⁵ These include, *inter alia*, criminalization of commercial scale unauthorized public performances, unauthorized communications to the public including making available, unauthorized importations (and exportations), rentals, violations involving circumvention of technological protection measures (TPMs) (both the act of circumvention and trafficking in circumvention devices), and certain other acts, such as distribution and export of decoding devices for encrypted signals.

come before the National Assembly again in May 2009. IIPA hopes the National Assembly will decide not to backtrack on protection achieved in the Criminal Circular, as was the case in earlier drafts, and will instead adopt a *mutatis mutandis* approach in adopting the Criminal Circular approach.

Copyright Law and Implementing Regulations to IP Code Remain Not Fully in Compliance with International Standards: Copyright law in Vietnam is governed by the “Intellectual Property Code,”¹⁶ effective July 1, 2006, and an implementing Decree.¹⁷ In addition, the Civil Code applies, as Article 5 of the IP Code retains a clause making the Civil Code supreme to the IP Code where inconsistent regarding “a civil matter.” The law resulted in a number of advances in Vietnam’s copyright system, like protection for temporary reproductions (Article 4(10)), and 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)) and against trafficking in circumvention devices (Article 28(14)). The Law still contains some deficiencies, however, when evaluated on the basis of full TRIPS compliance and on the basis of the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).¹⁸ IIPA understands that the government of Vietnam has begun work to amend the IP Code to bring it fully into conformance with its international obligations, and IIPA recommends that the BTA commitments discussed herein, including term of protection and parallel imports, must be fulfilled as to the U.S. and in accordance with the most favored nation principle (TRIPS Article 4). IIPA also hopes the government will take the opportunity presented by the revision to fully comply with and accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (changes to fully implement the “making available” right and protections for technological protection measures are highlighted below). Vietnamese officials have indicated that, despite not yet having set an exact timeframe for accession, Vietnam is seriously researching the treaties and plans to accede at the appropriate time.

IIPA would greatly look forward to the opportunity to review draft proposals to improve the IP Code, and the following is a non-exhaustive list of some of the deficiencies which should be the subject of any revision:

- **Making Available Right:** The Vietnamese enacted, in Article 20(d’), an exclusive communication to the public right, namely, the right “[t]o communicate the work to the public by wire or wireless means, through electronic information network or by any other technical means.” Related rights get the same “by any other technical means” language as part of the distribution right (for example, Article 30(1)(b) provides producers of sound recordings the 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.” It is believed the intention of the drafters was to encompass within these rights interactivity, i.e., the right to make available the work (performance or sound recording) in such a way that members of the public may access these works from a place and at a time individually chosen by them. In the revision of the IP Code, and to ensure proper coverage, and full implementation of the WCT Article 8, and the WPPT Articles 10 and 14, the government should adopt the making available language.
- **Technological Protection Measures:** As noted, one of the advances of the IP Code was that it provides protection against circumvention of technological protection measures used by right holders to protect their works/related rights in the digital environment (Articles 28(12) and 35(7)) and against trafficking in circumvention devices (Article 28(14)). However, it appears an inadvertent gap was created in enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14)) was not made applicable to related rights. This can be resolved in one of two ways: Article 28(14) can be made applicable, *mutatis mutandis*, to related rights, or a separate provision of Article 35 can provide that the following is a “related rights infringement”:
“Producing, assembling, altering, distributing, importing, exporting, selling or leasing an item of equipment when knowing or having basis to know that such equipment is used for invalidating the technical measures taken by the related rights owner to protect his/her related rights.”
- **Restrictions on IP Rights:** Article 7(2) potentially 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 could create inconsistencies with the Berne

¹⁶ 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 December 25, 2001.

¹⁷ Decree No. 100 on Detailed Regulations and Guidelines to the Implementation of Number of Provisions of the Civil Code and the Intellectual Property Law on Copyright and Related Rights, Decree No. 100/2006/ND-CP, September 21, 2006, at <http://www.gov.vn/english/viewNew.asp?newId=79>.

¹⁸ See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

Convention, the TRIPS Agreement and the WIPO Treaties. 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 could even 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 also runs 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 should be deleted.¹⁹ The government of Vietnam has indicated that Articles 7(2) and 7(3) are meant to be read in conjunction with the particular provisions of the IP Code, and that nothing within the IP Code curtails copyright (although admittedly, the Articles may be aimed at certain patent provisions, including provisions on patent compulsory licensing). IIPA takes little comfort from these explanations, since nothing in Articles 7(2) and 7(3) limits their coverage to patent. The government also claims Article 8 complies with TRIPS. Article is markedly similar to a provision in China's Copyright Law (Article 4) which was just found not to be in compliance with the Berne Convention, as incorporated by the TRIPS Agreement in a WTO Panel decision.

- **Civil Code Supremacy:** As mentioned above, the Civil Code is supreme to the IP Code when regarding "a civil matter." The government of Vietnam has explained this hierarchy as not threatening the applicability of any "IP matters" for which the IP Code would remain supreme (with "higher legal effect"). It remains unclear to IIPA what "a civil matter" refers to, and the lack of certainty and potential inconsistencies give rise to concern.
- **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. Article 35 of the implementing regulations reinforces the supremacy of copyright over related rights.
- **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). The government of Vietnam claims that Article 20 in fact does provide an exclusive importation right, noting 20(d)(1) provides the right "to circulate to the public or import the original or copies of the work." IIPA's translation of Article 20(d)(1) grants the right "[t]o circulate to the public the original or copies of the work." If IIPA's translation is incorrect, and indeed, the government's paraphrase is express in the IP Code, then Vietnam's law complies with the BTA as to works. The law with regard to related rights remains in violation of Article 4.6(b) of the BTA. The government of Vietnam refers to Article 35(8) of the IP Code, but this refers to importation of sound recordings when rights management information has been removed or altered without permission, and does not afford an importation right as required by the BTA.
- **Exceptions Overly Broad:** Certain exceptions in the IP Code may be overly broad. Explanations in Decree No. 100 are helpful at explaining the personal use copy exception. Other exceptions, e.g., Article 25 (g) on "[d]irectly recording and reporting performances for public information and educational purposes," and Article 25(k) regarding personal use imports, and Article 25(1)(e) on "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns," remain problematic. IIPA also remains concerned that Article 25(2) of the implementing regulations appears to allow the copying of a computer program "for archives in libraries for the purposes of research," which would create a TRIPS-incompatible exception which must be remedied.
- **Impermissible Compulsory Licenses:** Article 25 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)).²⁰ 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

¹⁹ IIPA notes 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.

²⁰ 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.

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) do not comply with BTA Article 4.4 since they do not provide the term promised under that Agreement.²¹

Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Potential Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and could impose 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. The government of Vietnam’s position is that the language in Article 203, requiring right holders to provide “necessary evidence proving basis the establishment of copyrights, related rights, of which Copyright Registration Certificate and Related Right Registration Certificate are consider as acceptable an evidence” does not require right holders to provide a registration certificate. Even if it does not, the provision fails to resolve the potential conflict with the necessity under TRIPS, Berne and the BTA to afford right holders with a presumption of ownership.
- **“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 Code 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 the phrase, “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” As such, there appears to remain 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.” The government of Vietnam has responded, that

“Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008 regulates where laws of Vietnam or international treaties to which Vietnam is party provide that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.”

While it appears the cited Circular does conflict with the IP Code, it is unclear to IIPA that the Circular trumps the IP Code, and in any event, it remains highly doubtful that the IP Code in its current state could be interpreted as compatible with TRIPS and the BTA.

Internet Rules Need Revamping to Encourage Service Provider Cooperation: IIPA hopes that the government of Vietnam will take the opportunity in this round of amendments to the IP Code to adopt additional measures to deal with Internet (and mobile-related) piracy, by promoting service provider responsibility, creating mechanisms like statutory notice and takedown to promote cooperation, and other measures to deal with P2P file sharing, such as

²¹ BTA Article 4.4. provides,

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.

implementing a policy of graduated actions leading to suspension of accounts used for repeat infringement and/or where appropriate adopting technological solutions to address repeat infringements. The basic law in Vietnam dealing with Internet issues and service provider responsibility is the Information Technology Law, No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007). Decree No. 55/2001 Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services also has helpful starting-point language on service provider issues. Specifically, Article 6(1) of the Decree provides,

Information stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State's Secrets and other law provisions on intellectual property and Internet information management.

Article 6(2) provides,

Organizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.

Since the Decree was issued at an earlier time, it is in need of greater specificity with respect to copyright matters, and the IP Code revision provides a good vehicle to address the needs of right holders today. IIPA also understands Vietnam may be working on changes to the Decree and would look forward to reviewing a draft when made available.

Administrative Fines Increased, Now Must be Implemented: IIPA is very encouraged that the former maximum administrative fines, VND 20 to 30 million (US\$1,200 to \$1,800) have been increased pursuant to the Revised Ordinance on Administrative Penalties (effective August 1, 2008), to VND 500 million (US\$30,000) (matching the draft Criminal Code maximum fine for copyright infringement). IIPA strongly encourages the government of Vietnam promptly to issue a decree to implement the Revised Ordinance, so that the law can be applied to address the fundamental indifference pirates display to authorities, and to create deterrence in the Vietnamese market.

Optical Disc Regulations: IIPA understands that a draft regulation on optical disc management has been under consideration by Vietnam for some time; this should be enacted and implemented forthwith. Authorities in Vietnam report eight operating plants in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand. A comprehensive regulation on the licensing of optical disc manufacture is urgently needed that includes the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, and a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production" in 2003, which contained many key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. IIPA's previous reports enumerated the essential provisions for an effective optical disc regulatory framework.

MARKET ACCESS BARRIERS IN VIETNAM

Various market access barriers exist in Vietnam today, the most serious being limitations and prohibitions on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves certain right holders, for example, sound recording producers, no choice but to license Vietnamese companies, which often refuse to do so due to the prevalence of piracy, continuing the vicious cycle of high piracy rates and little to no market access. To improve market enhancement and commercial development of Vietnam's cultural sector, Vietnam should look to internationally accepted standards and practices, recognizing that constraining market access for legitimate products complicates efforts to effectively combat piracy. The following describes the market access barriers the industries face.

AUDIOVISUAL SECTOR

Quantitative Restrictions on Foreign Films Imported for Theatrical Distribution: 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 is only allowed to reach two-thirds of the total projected films in a given year. Since the domestic film industry is underdeveloped and the number of domestic films produced has generally ranged between 10-15 films or less per year, these restrictions, if enforced, would be a significant barrier to the import and distribution of foreign films in Vietnam.

Restrictions on Entity Type for Importation of Foreign Films: Foreign investors are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. The policy to modernize the cinema industry should be non-discriminatory and encourage investment in construction and renovation of all cinemas.

FAFILM Monopoly Control Over Video Importation/Distribution: Vietnam Film Import-Export and Distribution Company (FAFILM) maintains a monopoly over home video importation and distribution, leading to lack of competition, some evidence of undue influence, and other problems for the foreign audiovisual sector.

Monopoly Control Over TV Broadcasting: The Vietnamese government controls and owns all television stations in the country. It does not allow foreign-owned TV stations.

Censorship Process for Films: The Ministry of Culture & Information (MOCI) maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

MUSIC/SOUND RECORDING SECTOR

One way to make headway into damaging Internet piracy is to permit legitimate copyright owners to participate in the growing mobile and Internet markets for copyright materials. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers, and foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users. Unfortunately, onerous Vietnamese restrictions are preventing U.S. record companies from engaging in vertically integrated production, publishing, distribution and marketing of sound recordings in physical and electronic form. Vietnam maintains investment barriers, many of which are of a discriminatory nature, against foreign sound recording companies, both pre- and post- establishment. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under GATS as part of its WTO accession.

Vietnamese restrictions on the business of making and selling music, apart from the content itself, are also stifling the development of the Vietnamese music industry, including the participation of US companies in the market. The lack of a meaningful commercial presence of U.S. record companies in Vietnam also inhibits our members' anti-piracy efforts – the effectiveness of which is further hampered by restrictions on the ability of our industry to investigate the activities of pirates in Vietnam. This leaves it incumbent upon the Vietnamese government to enforce intellectual property rights of U.S. content largely on its own.

Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute "cultural products" is unclear. It appears that they must license a Vietnamese company. Vietnamese companies have not been 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 recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted 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. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam's failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, IIPA believes, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies can not do business in Vietnam, then pirates will form a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. right holders, but also local artists.

BARRIERS TO TRADE IN SERVICES

In general, the Vietnamese government has done little to date to reduce or eliminate barriers to trade in services related to the copyright industries. The following are some examples of services for which the Vietnam government imposes restrictions and has taken no or few efforts to reduce or eliminate barriers to foreigners engaging in such services.

- **Restrictions on Trading Rights for Films and Distribution Services:** Importation (trading rights) and distribution services as to foreign films is limited to cinemas and business entities that own or have the right to operate a qualified cinema for at least five years and have a license from the Ministry of Culture and Information (MOCI). The import plan and the contents of foreign films must also be pre-approved by the Ministry of Culture and Information (MOCI).
- **Restrictions on Satellite Television Services:** Local households are prohibited from owning satellite dishes for receiving foreign satellite TV channels. Satellite dish ownership is banned except in approved government buildings, institutions, hotels and foreign compounds.

TRANS-PAC FTA

In late September 2008, U.S. Trade Representative Susan C. Schwab and Ministers of the Trans-Pacific Strategic Economic Partnership Agreement (known as the P-4 Agreement), including Brunei Darussalam, Chile, New Zealand, and Singapore, announced the launch of negotiations for the United States to join the comprehensive Trans-Pacific Strategic Economic Partnership Agreement.²² In November, Peruvian media reported that Peru and Australia announced their intention to join in the Trans-Pac FTA negotiation, and Vietnam has reportedly also expressed an interest in joining.²³ The Ministers agreed to hold the first round of Trans-Pac FTA in March 2009. Opportunities will arise to introduce intellectual property standards similar to those included in the free trade agreements negotiated between the United States and several trading partners, including (among the group) Singapore, Chile, Australia, and Peru. IIPA supports this process and hopes that the government of Vietnam will be prepared to negotiate FTA standards on intellectual property similar to those in force in Singapore, Chile, Australia, and Peru. IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

GENERALIZED SYSTEM OF PREFERENCES

IIPA Does Not Oppose Vietnam Bid for GSP, But Requests One Year Review: On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States on whether to designate “the Socialist Republic of Vietnam as a GSP Beneficiary Country.” The IIPA filing IIPA did not oppose granting Beneficiary Developing Country status to Vietnam under the Generalized System of Preference trade program, but did note several areas in which Vietnam may not fully meet the eligibility criteria, and formally requested that one year after the President designates Vietnam as a BDC, a review be scheduled to determine whether Vietnam has made progress in fully

²² United States Trade Representative, *Trans-Pacific Strategic Economic Partners and United States Launch FTA Negotiations*, September 22, 2008, at http://www.ustr.gov/Document_Library/Press_Releases/2008/September/Trans-Pacific_Partners_United_States_Launch_FTA_Negotiations.html.

²³ *U.S., Peru, Australia to Join TransPac Free Trade Talks*, November 22, 2008, at http://news.xinhuanet.com/english/2008-11/22/content_10394641.htm. See also *Trans-Pacific FTA: Australia, Peru, Vietnam Want to Join the Mega Trade Pact*, ASEAN Affairs.com, September 24, 2008, at http://www.aseanaffairs.com/page/trans_pacific_fta_australia_peru_vietnam_want_to_join_the_mega_trade_pact.

meeting its eligibility criteria sufficient to continue to enjoy GSP benefits. The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from 131 designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP statute requires the President to take into account the following, among other things,

(4) 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 ... ;

(5) the extent to which such country is providing adequate and effective protection of intellectual property rights; [and]

(6) the extent to which such country has taken action to—

...

(B) reduce or eliminate barriers to trade in services...”

The piracy and market access barriers highlighted in this report are the key reasons Vietnam should be scrutinized closely when it comes to beneficiary status under the GSP program.