

# **2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT**



Submitted February 6, 2015  
to the  
United States Trade Representative

by the  
International Intellectual Property Alliance®



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February 6, 2015

*Submitted via regulations.gov Docket No. USTR-2014-0025*

Susan F. Wilson

Director for Intellectual Property and Innovation

Office of the U.S. Trade Representative

600 17th Street, N.W.

Washington, D.C. 20508

Re: IIPA Written Submission Regarding 2015 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 79 Fed. Reg. 78133 (Dec. 24, 2014)

Dear Ms. Wilson:

The International Intellectual Property Alliance (IIPA) provides this response to the above-captioned Federal Register Notice requesting written submissions from the public concerning intellectual property protection and market access regimes in U.S. trading partners, in the "Special 301" review.<sup>1</sup>

The ultimate goal of Special 301 is not to catalogue trade barriers as such, but rather to enhance the ability of U.S. creators to reach foreign markets through legitimate channels in competitive and growing marketplaces, physical and online. Many of the changes needed in foreign markets in order to advance this goal – higher standards of copyright protection, efficient copyright enforcement, sound legal structures for licensing, and elimination of market access barriers – also help our trading partners to develop, nurture, and enjoy the benefits of their own local cultural and creative output. The real beneficiary is the consumer, who will have greater access, through more avenues than ever before, to increasingly diverse creative output – the literary works, music, movies and TV programming, video games, software, and other products and services that depend on or are protected by copyright.

With this broad vision in mind, IIPA has participated in every Special 301 review since the 1988 Trade Act created this process. This year, as in the past reviews, we provide public comments on acts, practices and policies of our key trading partners that present obstacles to achieving this goal. Over the years, we have witnessed enormous opportunities afforded by changing market conditions and new technologies, with huge potential to expand economic growth and cultural activity in key foreign markets. Unfortunately, much of this potential for economic and creative growth has gone unrealized due to the impacts of inadequate copyright protection and market access barriers. IIPA's recommendations therefore also discuss emerging best practices to address these issues.

This year's IIPA Submission focuses on markets where IIPA members are actively engaged, and/or where we believe active engagement by the U.S. government will reap positive results for creators and the industries that support them. IIPA identifies opportunities and challenges facing creative industries in these key foreign markets, which, if met and addressed, will promote job creation and economic growth, increased foreign direct investment, increased exports, and other benefits flowing from adequate intellectual property protection and effective enforcement systems. We applaud USTR for making the Special 301 process a positive catalyst for change to address our creative industries' challenges in key markets around the world.

<sup>1</sup>The Federal Register notice invites "written submissions from the public concerning foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection." IIPA will file under separate cover a Notice of Intent to Testify at the February 24, 2015 public hearing on Special 301.

The Special 301 process has yielded significant progress in a number of countries, which is clearly documented by the Special 301 historical record. For instance, Korea, which appeared on the Priority Watch List in the original 1989 USTR “Fact Sheet,” and which figured in USTR lists for the next 19 years, no longer appears on any Special 301 list. This is because Korea has transformed its copyright law and enforcement regime into one which now serves as a model for Asia. There are many other countries in which, although some problems remain, there have been similar improvements in their intellectual property regimes and/or market access rules, so that they no longer appear on a Special 301 list. Such countries include: Australia, Bahrain, Brunei, Cyprus, Czech Republic, Denmark, Germany, Hungary, Ireland, Japan, Jordan, Latvia, Lithuania, Macau, Malaysia, New Zealand, Oman, the Philippines, Poland, Qatar, Singapore, and Slovakia.

In this year’s IIPA Submission (which includes this letter and appendices), IIPA recommends that 15 countries appear on the 2015 Special 301 list, that two markets be subject to an Out-of-Cycle Review (OCR), and that the U.S. commit to “special engagement” with two additional countries. These recommendations can be summarized in the following chart:

IIPA 2015 Special 301 Recommendations				
No Change	Priority Watch List	Watch List	Out-of-Cycle Review	Special Engagement
Ukraine	Chile China (306) <sup>2</sup> India Indonesia (OCR) Russian Federation Thailand Vietnam	Brazil Canada Colombia Mexico Switzerland Taiwan United Arab Emirates	Hong Kong	Italy Spain
1	7	7	1	2

While IIPA does not provide a separate report on Hong Kong this year, we recommend an Out-of-Cycle Review (OCR) to monitor whether Hong Kong has enacted long-overdue copyright modernization legislation for the digital networked environment, while rejecting proposals to insert a broad and ill-defined exception to the exclusive rights of copyright owners, modeled on the user-generated content exception recently adopted in Canada. In the case of certain other countries, including Argentina, Costa Rica, Ecuador, Peru, Venezuela, and Turkey, which still appear on USTR’s 2014 Special 301 list, IIPA is not providing any new information in this filing. This reflects the fact that IIPA is not aware of any information that would have a bearing on such countries’ status under Special 301, and is not aware of information to indicate any substantial change in the problems previously identified. Thus, we do not propose any change in their status.

## A. ABOUT IIPA; IIPA’S INTEREST IN SPECIAL 301

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.theesa.com](http://www.theesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association of America ([www.mpaa.org](http://www.mpaa.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)). IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software including interactive video games for consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of

<sup>2</sup>The notation “306” refers to monitoring of a country’s compliance with trade agreements with the U.S. under Section 306 of the Trade Act.

audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

In December 2014, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2014 Report*, prepared by Stephen E. Siwek of Economists Inc. According to the report, the "core" copyright industries in the U.S. generated over \$1.1 trillion dollars of economic output in 2013, accounting for 6.71% of the entire economy. The core copyright industries also employed nearly 5.5 million workers in 2013, accounting for over 4% of the entire U.S. workforce, and nearly 5% of total private employment in the U.S. These workers earn on average 34% higher wages than other U.S. employees. The core copyright industries also outpaced the U.S. economy, growing at 3.9% between 2009 and 2013, while the U.S. economy grew by 2.25%. When factoring in other industries that contribute to the copyright economy (which together make up the "total" copyright industries), the numbers are even more compelling. Finally, the report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. In 2013, these sectors contributed \$156 billion in foreign sales and exports, exceeding that of many other industry sectors, including: chemicals, aerospace products and parts, agriculture, and pharmaceuticals and medicines.<sup>3</sup> Studies such as this amply demonstrate the contribution of creators, and the copyright-based industries that support them, to the economy. They also highlight what is at stake if those creators and industries – which rely on high standards levels of copyright protection and open markets – have to face the additional hurdles and costs associated with obstacles such as copyright piracy and market access or discriminatory trade barriers.<sup>4</sup>

Content industries and their legitimate distributors continue to explore new modalities of delivering content to consumers, launching new legitimate businesses, services, or apps, to make movies, music, video games, and published materials available to more people in more countries in more diversified and flexible ways than ever before.<sup>5</sup> Unfortunately these innovative new services are confronted with unfair competition from those who engage in piracy as a high-profit, low risk enterprise, unencumbered by the considerable costs associated with either producing copyrighted works, obtaining rights to use them, or protecting them against theft. Market access or discriminatory barriers imposed by governments further harm creators and discourage investment in legitimate services.<sup>6</sup> In this way, piracy and market

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<sup>3</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2014 Report*, December 17, 2014. The report can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth is well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of Copyright: Overview*, and the WIPO website now lists 49 country studies employing virtually the same agreed-upon methodology. See [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf). These national studies provide the economic underpinnings for efforts to reform copyright law, improve enforcement, and lower market access barriers. The Motion Picture Association Asia Pacific has issued a series of "Economic Contribution of the Film and Television Industry" studies for Malaysia (2014), India (2013, 2010), Taiwan (2013), Shanghai (2012), Japan (2012), New Zealand (2012, 2009), Indonesia (2012), Thailand (2012), South Korea (2012), China (2012), Australia (2011), and Hong Kong (2009). See Motion Picture Association Asia-Pacific, *Research and Statistics*, at <http://mpa-i.org/research-and-statistics/>. See also UK Music's *The Economic Contribution of the Core UK Music Industry* (2013), at [http://www.ukmusic.org/assets/general/The\\_Economic\\_Contribution\\_of\\_the\\_Core\\_UK\\_Music\\_Industry\\_WEB\\_Version.pdf](http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry_WEB_Version.pdf), and PWC's *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), at <http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf>. See also Economists Inc.'s *Video Games in the 21st Century: The 2014 Report* (2014), at [http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury\\_2014.pdf](http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury_2014.pdf).

<sup>4</sup>In an increasingly digital, online, and mobile marketplace, true estimates of the cost of copyright piracy are difficult to quantify. A study released in 2011 by BASCAP (Frontier Economics) estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, potentially growing to \$80-240 billion by 2015. Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy* (BASCAP), February 2011. The Motion Picture Association commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan* (2011) and *Economic Consequences of Movie Piracy: Australia* (2011). In January 2014, the United Nations Office on Drugs and Crime launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeiting and piracy. See "Counterfeit: Don't Buy Into Organized Crime" - UNODC Launches New Outreach Campaign on \$250 Billion a Year Counterfeit Business, January 14, 2014, at <http://www.unodc.org/counterfeit/>. The campaign informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk, and contributes to other ethical and environmental concerns.

<sup>5</sup>See, e.g., <http://wheretowatch.com/> (movies and TV content); <http://www.pro-music.org/> (music); and <http://www.theesa.com/purchasing-legitimate-digital-copies-games/> (video games).

<sup>6</sup>See, e.g., United States Trade Representative, *2014 National Trade Estimate Report on Foreign Trade Barriers*, March 31, 2014, at <http://www.ustr.gov/sites/default/files/2014%20NTE%20Report%20on%20FTB.pdf>, for the U.S. report on many market access and other trade barriers around the world. IIPA and MPAA filed written submissions in the NTE docket. See International Intellectual Property Alliance, *IIPA Written Submission in Response to: Request for Public Comments to Compile the 2015 National Trade Estimate Report on Foreign Trade Barriers*, 79 Fed. Reg. 48292 (August 15, 2014), October 29, 2014, at [http://www.iipa.com/pdf/2014\\_Oct29\\_IIPA\\_NTE\\_Filing.pdf](http://www.iipa.com/pdf/2014_Oct29_IIPA_NTE_Filing.pdf); Motion Picture Association of America, *MPAA Comments Regarding the 2015 National Trade Estimate Report on Foreign Trade Barriers* (Docket: USTR 2014-0014), October 29, 2014, at <http://www.mpaa.org/wp-content/uploads/2014/10/MPAA-Foreign-Trade-Barriers-Report.pdf>.

access barriers not only damage existing authorized distribution channels, but also impede the evolution of new legitimate channels.

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## B. SUMMARY OF THE IIPA 2015 SPECIAL 301 SUBMISSION

The IIPA 2015 Special 301 Submission provides information intended to assist the U.S. government in defining plans of action for the year ahead to improve copyright protection and open markets to U.S. materials protected by copyright in key countries. Section C follows the lead of USTR in providing a section on “Developments in Intellectual Property Rights Protection and Enforcement,” which discusses broad global trends and issues in IPR protection and enforcement. Section C is divided into the following sections:

1. Positive Developments
2. Key Challenges for Copyright Industries
3. Implementation of Treaties and Trade Agreements
4. Market Access Barriers

Within these sections, IIPA takes the opportunity to comment on the acts, policies, or practices in some countries not covered in a full country survey but deserving of mention to illustrate a specific concern. [Appendix A](#) to the Submission includes all the country surveys.<sup>7</sup> [Appendix B](#) to the Submission provides a chart of countries/territories' placement on Special 301 lists by USTR since 1989.<sup>8</sup>

## C. DEVELOPMENTS IN INTELLECTUAL PROPERTY RIGHTS PROTECTION AND ENFORCEMENT

### 1. Positive Developments

IIPA notes positive developments in the following markets:

- **China** – While China remains one of the most difficult markets in the world for creators and copyright holders, there have been several positive actions over the past year or so that warrant mention. Major online piracy services such as *QVOD*, *Baidu*, *SiluHD*, *HDstar*, *DY161*, and *FunShion*, were subject to deterrent enforcement actions in Chinese courts. The first criminal conviction was obtained against a defendant engaging in, and profiting from, illegal camcording of a movie in an exhibition facility. Market opening measures (highlighted in greater detail in the country report in Appendix A) suggest that China's market is becoming more accessible to U.S. entities. There remain concerns over lack of full market access for many sectors, and a new provision imposing onerous censorship and quotas for the online distribution of audiovisual materials raises further concerns. Much more needs to be done to allow U.S. copyright industries to compete in an open and transparent manner in China, and to ensure that actions taken by the Chinese government translate into legitimate sales. For instance, Chinese per capita spending on music from legitimate sources remains among the lowest in the world, reducing that country's music market to a small fraction of what it should be.
- **The Philippines** – The Philippines, under the leadership of outgoing Intellectual Property Office (IPO PHL) Director General Ricardo Blancaflor and Optical Media Board (OMB) head Ronnie Ricketts, has found innovative ways to improve copyright protection in the archipelago. With limited resources, the IPO PHL and OMB have sought ways

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<sup>7</sup>Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Amanda Wilson Denton, Eric Schwartz, and Steven Metalitz, and are based on information furnished by IIPA's member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

<sup>8</sup>Many of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of “priority foreign countries,” provides that the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.” Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these countries/territories named by IIPA are particularly vulnerable.

to eradicate hard goods piracy in malls. Strong copyright provisions were added to Philippine law to address third party liability and provide IPO PHL with enhanced enforcement authority. A law outlawing camcording resulted in a reduction of detections. While concerns remain, including unauthorized on-demand photocopying and the use of social media platforms to sell unauthorized books, mobile device “repair” shops doubling as piracy portals, and weak provisions on technological protection measures (TPMs), Philippine aspirations to join the Trans-Pacific Partnership (TPP) no longer appear as unrealistic as in the past.

- **Spain** – IIPA is encouraged that Spanish policymakers have adopted important reforms to the Intellectual Property Law and Civil Procedure Law in 2014, which could allow for meaningful action against online piracy. The success of these amendments will rest on the will of the government to vigorously enforce its provisions, the interpretation of the courts and administrative bodies charged with copyright enforcement, and the strength of further amendments to the Criminal Code that Spain’s Congress could adopt as early as mid-2015. The copyright industries seek evidence that cases before the Spanish Copyright Commission and civil and criminal actions can proceed effectively against infringing linking sites, peer-to-peer piracy, and circumvention devices. Spain’s Internet piracy problem remains one of the most acute in the world, and decimates the market for local and international music, independent films and their authorized distributors, and other copyright materials in the country.

## **2. Key Challenges for Copyright Industries**

In this section we summarize some of the overarching trends and challenges confronting the U.S. copyright industries seeking to compete in overseas markets.

### ***a. The Need for Deterrent Enforcement Responses to Copyright Infringement***

As an overarching objective for the copyright industries, IIPA supports activities to secure globally effective legal frameworks capable of providing deterrent enforcement against copyright infringement, and to ensure that enforcement authorities employ these legal frameworks to combat such infringement. To advance these goals, countries should —

—dedicate enforcement resources (and provide training and capacity building) commensurate with the scale of the piracy problem;

—provide for “effective action” and “remedies that constitute a deterrent” to infringement, as the minimum required by the World Trade Organization’s TRIPS Agreement, through civil, administrative, and law enforcement channels, and effective adjudication in the courts;

—update laws and enforcement tools to meet current infringement challenges, including organized crime and cybercrime syndicates; and

—implement (and accede to) the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

### ***b. Internet and Mobile Network Piracy***

IIPA members’ companies are leaders in the new online and mobile economy. The remarkable growth of new fully licensed and legitimate channels for consumers around the world to access creative content in a variety of new and innovative ways is one of the most encouraging trends in global markets for copyright material. Unfortunately, widespread Internet and mobile network piracy, often by services that profit from enabling others to infringe copyright, hampers the growth of legitimate services in global markets, and limits their market opportunities.<sup>9</sup> Online and mobile

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<sup>9</sup>According to a NetNames study in late 2013, an astonishing 23.8% of all Internet bandwidth in North America, Europe, and the Asia-Pacific is devoted to copyright infringement. David Price, *Sizing the Piracy Universe*, NetNames, September 2013 (available to registered users). A 2011 study by Envisional concluded that nearly half of all infringing activity occurred using BitTorrent, with the rest divided among cyberlockers, peer-to-peer (P2P) downloading and uploading, forums or bulletin boards, and streaming. Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).



network piracy threatens the viability of licensed platforms,<sup>10</sup> and erodes the capacity of authors, artists, musicians, filmmakers, video game developers,<sup>11</sup> performers and songwriters to earn a living from their craft. To address these concerns, IIPA supports approaches such as:

- USTR's "Special 301" "Out-of-Cycle Review of Notorious Markets," identifying key marketplaces that are involved in intellectual property rights infringements. This initiative has led to closure of Internet websites or mobile apps whose businesses were built on illegal conduct, greater cooperation from identified "notorious" and other suspect sites, and the facilitation of licensing agreements for legitimate distribution of creative materials. IIPA members identified 86 notorious markets in the most recent filing in October 2014, with Canada, China, Brazil, Russia, and Switzerland accounting for roughly half of the sites nominated. Ukraine, Spain, Vietnam, Argentina, Hong Kong, Indonesia, Mexico, Peru, and Thailand are among the other countries with which such sites are associated.
- Establishing a framework that creates incentives for network service providers to work with right holders to curb the use of their networks and services for infringing purposes,<sup>12</sup> and removes impediments to such cooperation, including by implementing the WCT and WPPT, recognizing online piracy as a form of cybercrime, and fostering cooperation among all industry stakeholders (including ISPs) in the online supply chain to combat online infringements. Some governments – for instance, in South Korea and Singapore – are embracing more proactive solutions, such as legislation to provide more effective remedies against online infringements, both those hosted within and outside their borders.
- Inter-industry cooperation to combat systematic online infringement of copyright. This effort must involve all participants in the online advertising ecosystem (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services),<sup>13</sup> the payment processing industry, and search engines.

**c. *Media Boxes/Set-Top Boxes (STBs)***

In a growing and troubling trend, devices intended to enable consumers to stream and/or download copyrighted content from online sources without authorization or license have proliferated in markets around the world, particularly in China, Taiwan, Indonesia, Thailand, and Vietnam, as well as Malaysia, Hong Kong, and Singapore, and as far away as Spain and UAE. Called Media Box, Set Top Box (STB), or Over-The-Top (OTT), these boxes are primarily manufactured in China and Ukraine (although some are sourced from Spain). Unlike legitimate boxes, these: 1) enable users to decrypt without authorization encrypted pay television programming; 2) facilitate easy access to remote online sources of unauthorized entertainment content including music, music videos, karaoke, movies, published materials and TV dramas; and 3) permit storage of unauthorized content. The boxes can be hooked up to smart TVs, facilitating easy access to all kinds of unauthorized entertainment content. Enforcement authorities must take effective action against these forms of piracy, or losses will mount.

**d. *Illegal Camcording of Theatrical Motion Pictures***

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, especially during theatrical exhibition. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both) from the theater screen and/or sound system. One digital (camcorder) copy can trigger the upload, making available

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<sup>10</sup>Research indicates there is a correlation between shutting down a major suspected piracy service, or improving enforcement legislation, and increases in legitimate distribution of copyright materials. See, e.g., Dianna Dilworth, *How to Stop Piracy: Carnegie Mellon Professor Michael Smith at DBW*, January 16, 2013, at [http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw\\_b31162](http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw_b31162) (Carnegie-Mellon Economist Michael D. Smith indicates his research demonstrates that every 1% reduction in Megaupload usage translated into a 2.6-4.1% increase in legitimate digital sales).

<sup>11</sup>Online piracy of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in ESA vendor monitoring of P2P and direct download activity. For 2014, ESA vendors identified Russia, Brazil, Ukraine, Italy, and India as the top five countries in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.

<sup>12</sup>Online piracy services often hide behind "virtual" servers hosted secret cloud storage companies, making detection and enforcement difficult. See, e.g., *The Pirate Bay Comes Back Online Seven Weeks After Police Raid*, The Verge, January 31, 2015, at <http://www.theverge.com/2015/1/31/7956209/pirate-bay-back-online-seven-weeks-after-police-raid>.

<sup>13</sup>Digital Citizens Alliance, *Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business: A Report on the Profitability of Ad-Supported Content Theft*, February 2014, at [www.digitalcitizensalliance.org/followtheprofit](http://www.digitalcitizensalliance.org/followtheprofit).

and mass reproduction and distribution of millions of illegal Internet copies instantly destroying whole markets or the ability to recoup production investment. For example, two days after a major U.S. motion picture was released in the U.S., someone sitting in a theater in Puebla, Mexico camcordered it and put it online. In less than one week, that illegal copy was downloaded in 25 different countries. Over two months, it was downloaded in 172 countries more than 558,000 times. In 2014, the Motion Picture Association of America identified 543 total illegal recordings of its member company titles from cinemas around the world, including 282 video captures and 261 audio captures. These films do not include numerous independent or foreign films that were illegally camcordered.

A multifaceted approach is needed to tackle this problem, including educating the public about how unauthorized camcording hurts both businesses and the consumer; working with the private sector to identify and prevent unauthorized camcording in cinemas; and enacting and enforcing anti-camcording legislation to outlaw the possession of an audiovisual recording device in a theater with the intent to copy or transmit all or part of a motion picture, as has been done in many foreign markets (including Canada, Japan, Korea, and the Philippines). Indonesia and Thailand have also acknowledged the problem in recent legislative reforms.

**e. *Piracy of Books and Journals***

The book publishing industry continues to be plagued by large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books. Book and journal piracy calls for aggressive action by law enforcement authorities. Government agencies, universities and educational institutions (especially those which are state-funded or operated) should do more to promote and adopt appropriate use and copyright policies, in particular the use of legitimate textbooks and journal publications, and to discourage the use of unauthorized copies of all literary, educational and professional works. The U.S. government should ensure that such acts of infringement are fully covered in all bilateral, regional, and multilateral engagements. In addition to discussion of these issues in various country surveys in Appendix A, publishers note significant problems in Malaysia and Egypt with respect to book piracy. While unauthorized photocopying of educational materials continues to be problematic, in Malaysia, publishers must also deal with entities that engage in large scale unauthorized reproduction of academic textbooks for export. Over the last two years, publishers have found numerous online vendors selling and exporting counterfeit copies of academic textbooks into the U.S.

**f. *Circumvention of Technological Protection Measures (TPMs)***

Today, more consumers enjoy authorized access to more copyright works in more diverse ways and at more affordable price points than ever before. A major reason for this progress is the widespread use of TPMs. TPMs foster many of the innovative products and services available online by allowing creators to control and manage access to copyrighted works and to diversify products and services. New business models depend on such controls. TPMs also ensure that works made available in hard goods (DVDs and Blu-ray discs), in the online or mobile environment (including E-books), or through on-demand or conditional access (e.g., pay-TV, PPV) are not easily stolen. Unfortunately, there are business models built entirely around manufacturing and distributing technologies, software, devices, components, or tools, or around providing services, to gain unlawful access to the content or to copy it without authorization. While TPM legal protection, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to implement any or adequate protections, including (among other countries in the country surveys) India, Thailand, and Mexico. IIPA also notes Israel as the only OECD country that has failed to adopt any protection whatsoever in this field.

**g. *Pay TV Piracy and Signal Theft***

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet, costs right holders dearly. Related problems include: unauthorized tapping into the lines of legitimate cable TV companies;

operators who take broadcast signals by unauthorized means (hacked STBs or stealing “overspill” signals from neighboring countries) and sell them to consumers without paying for any of the content. The latter is a problem of growing severity in several countries in the Caribbean and Central and South America, including Trinidad and Tobago, Barbados, Jamaica, Guatemala, Honduras, and Ecuador. In most of these cases, the signals are encrypted, and pirates must circumvent or hack in order to access the content. Regulations and enforcement must therefore focus on prohibiting the trafficking in pay-TV or signal theft devices or technologies; the unlawful decryption of encrypted cable or satellite signals; and the onward use of the signals already decrypted (whether lawfully or not) without the authorization of the right holder of the content or of the signal. Such laws can help foster licensing of broadcasters and cablecasters, and the weeding out of unlicensed television distributors. In addition, the problem of rogue pirate TV channels that create their own broadcasts by playing a DVD and airing the signal on their system is re-emerging in Egypt and the broader Middle East and North Africa region.

#### ***h. Hard Goods Piracy (Including Pirate Optical Discs)***

Hard goods piracy, including optical disc (OD) products, continues to inflict losses, especially in markets with lower Internet penetration. Small agile operations “burn” music, books and reference publications, video games, and movies onto recordable media. Producers/vendors set up production or distribution operations in a wide variety of locations, including old factories, warehouses, or “burn to order” shops. As an example of the harm caused, high-quality DVDs, Blu-ray discs, and box sets of music or audiovisual materials continue to be manufactured in locales such as China and find markets throughout Asia, the Middle East, and Africa. Where unlicensed or illegal activity is detected, copyright laws or specialized OD laws or regulations should be enforced. Programs such as surprise OD plant or shop inspections and exemplar (sample) disc collection should continue. In the most recent filing cycle, IIPA members identified “notorious” physical markets for the distribution of pirate hard goods in Mexico and India (making up over half the markets cited), as well as in China, Thailand, Brazil, Ukraine, Peru, Russia, Canada, Ecuador, and Indonesia.

#### ***i. Mobile Device Piracy/Hard-Disk Loading***

Not all retail piracy involves the sale of illegal copies directly. One example is mobile device or hard-disk loading piracy, performed by unscrupulous dealers who install copies of copyright materials without authorization from the copyright holder into the memory of devices they sell. Many pirates operate stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material onto any device, cell phone, smart phone, tablet, mp3 player, external hard disk, pen, thumb, flash, USB drive, or computer. Others provide an illegal “app” for a smart phone or tablet to illegally download content, especially in countries with significant mobile penetration and mobile broadband. Mobile device piracy and hard-disk loading occur in many markets, with concentrations in Asia including China, Taiwan, Indonesia, and Thailand.

### **3. Implementation of Treaties and Trade Agreements**

The negotiation of multilateral trade agreements (such as the WTO TRIPS Agreement), as well as regional and bilateral free trade agreements (FTAs) or Trade Promotion Agreements (TPAs) over the past two decades, has proven to be of great value to the U.S. economy. These agreements feature enforceable obligations for our trading partners to modernize their copyright law regimes and improve enforcement procedures. They have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries, a true win-win for all parties. In addition to the TRIPS agreement, to which 160 countries have now acceded, U.S. FTAs or TPAs with 20 countries have entered into force, most recently with Korea, Colombia and Panama in 2012.

The pending negotiations for a Trans-Pacific Partnership (TPP) FTA present an opportunity to expand the benefits of existing FTAs to a broad range of markets around the Pacific Rim, representing 40% of global GDP.<sup>14</sup> IIPA

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<sup>14</sup> TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

has long called for using the TPP to enhance copyright protection and enforcement standards in these markets, building upon those agreed to by current FTA partners Australia, Singapore, Chile, and Peru, as well as by Korea. Such an outcome would contribute to U.S. job growth and increased foreign sales and exports of U.S. copyright materials in these key markets. IIPA also urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified in various TPP negotiating countries.<sup>15</sup> The TPP E-Commerce chapter and market access provisions for services and investment should require our partners not only to eliminate discriminatory taxes and policies, but also to open markets to foreign competition, including in the creative and cultural sectors.

In this year's Submission, IIPA discusses issues related to countries' bilateral, regional, and multilateral copyright obligations in several country surveys in Appendix A. In particular, USTR, the Department of Commerce, U.S. Embassies abroad, and all interagency members of the Special 301 Subcommittee should sustain close monitoring of trade agreement compliance. IIPA specifically notes Colombia, Chile, and Peru as examples of three trade agreement partners of the United States that have allowed deadlines for the implementation of important copyright-related commitments to lapse. Chile's obligations regarding TPMs legislation, effective ISP liability provisions, deterrent-level civil and criminal sanctions for copyright infringement, and statutory damages are now eleven years past due. Similarly, Colombia has failed to meet its obligations regarding effective ISP liability and the bulk of its remaining copyright commitments, and its obligation to provide civil liability for the circumvention of TPMs will be overdue this May if not implemented promptly. IIPA also notes that Peru has not met its TPA obligations with respect to ISP liability and statutory damages for copyright infringement, which are more than four years past due.

Finally, we note that in early 2014, the government of Antigua and Barbuda announced plans to commence revisions to its intellectual property laws to "invoke" a WTO-approved remedy (in an unrelated trade dispute) to cross-retaliate against U.S. intellectual property rights worth \$21 million a year. While bilateral discussions continue, IIPA's firm view has not changed: suspending intellectual property rights is not the right solution, and state-sanctioned theft is an affront to any society. Should the government of Antigua and Barbuda determine to move forward in this manner, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would, by definition, fail to provide adequate and effective IPR protection as required under U.S. trade laws governing trade benefits such as those offered under the Caribbean Basin Initiative. In that event, we believe that the U.S. should take appropriate, immediate and robust action to uphold U.S. trade laws.

## 5. Market Access Barriers

The U.S. copyright industries suffer from various market access barriers, investment restrictions, and discriminatory treatment that make it difficult to compete on a level playing field in some crucial foreign markets. All efforts to address copyright infringement will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Thus, the reduction of market access impediments is a key component of ongoing efforts to combat piracy. Among other forms, market access barriers include:

- discriminatory restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;
- high tariffs, taxes, or fees on core copyright businesses and their products and services;
- the maintenance of quotas on audio-visual programming, including screen time and broadcast quotas, or complete bans on broadcast of foreign programming or advertising;
- ownership and investment restrictions on copyright-related businesses;
- discriminatory, onerous, and/or dilatory content review/censorship systems;
- periods during which foreign governments prevent U.S. producers from opening their films, or impose onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);

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<sup>15</sup>As an example, IIPA notes that Vietnam has some of the most restrictive market access barriers in the world for copyright materials.

- local print requirements; and
- onerous import duties or the inclusion of royalties in the calculation of the duties.

While market access barriers like those above are discussed in a number of the IIPA country surveys, including Brazil, Vietnam, China, Indonesia, Thailand, and India, other countries also employ them to the detriment of U.S. copyright industries. Notably, Malaysia imposes a broad array of harmful barriers, including investment prohibitions or restrictions on broadcasting, cable and satellite services; excessive box office taxes and imposition of fees for Digital Cinema Packs transmitted electronically; and screen and broadcast quotas.

Whatever form they take, all market access restrictions that impede the entry of legitimate products make it easier for pirate operations to fill the void, and to become *de facto* “exclusive” distributors who can cement strong loyalties with their consumer base that make them even harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

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## E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates revenues, jobs, and exports. Likewise, the health and competitiveness of our trading partners also depends on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster local jobs in creative industries, increase cultural diversity, promote international trade and exports, increase tax revenues from legitimate cultural industries, and attract more foreign direct investment. It is essential to the continued growth and future competitiveness of creative industries around the world that our trading partners provide modern levels of protection for copyright; more effective policies and tools to enforce that protection; and freer, more open markets. Our country must remain committed to flexible and innovative responses to the constantly evolving threats to copyright worldwide. Special 301 remains one cornerstone of the U.S. response. We urge USTR and the Administration to use the Special 301 review and other trade tools to encourage the countries and territories identified in our Submission make the political commitments, followed by the necessary actions, to bring real commercial gains to the U.S. creative industries through strengthened copyright and enforcement regimes worldwide.

We look forward to our continued work with USTR and other U.S. agencies on meeting the goals identified in this submission.

Respectfully submitted,

/Steve Metalitz/  
/Michael Schlesinger/  
/Eric Schwartz/  
/Amanda Wilson Denton/

Counsel for  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** In light of recent political developments, the Government of Ukraine clearly has a limited capacity to effect certain legal reforms, and has its priorities elsewhere. Still, IIPA is very disappointed that no progress has been made in the past several years on any of the issues which led to the designation of Ukraine as a Priority Foreign Country (PFC) – wherein the Special 301-mandated U.S. Government investigation found that Ukraine fails to provide adequate and effective protection, and as a result, the U.S. Government maintains its authority to immediately withdraw economic benefits. IIPA recommends that the U.S. Government continue to identify Ukraine as a priority.<sup>1</sup>

**Executive Summary:** On May 1, 2013, Ukraine was designated by the U.S. Government as a PFC, and an investigation was initiated under section 301 of the Trade Act of 1974. Countries are designated a PFC if “acts, policies and practices” are deemed “unreasonable and burden or restrict U.S. commerce” including “the denial of adequate and effective protection of intellectual property rights.” The PFC designation of Ukraine was based specifically on three critical problems in Ukraine’s intellectual property rights (IPR) regime: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) the “widespread use of infringing software by Ukrainian Government agencies.” On March 13, 2014, the U.S. Government completed its PFC investigation, focusing on the economic harm to U.S. rights holders caused by the three identified problems. It concluded that “certain intellectual property rights (IPR) acts, policies and practices of Ukraine are unreasonable and burden or restrict United States commerce and are thus actionable under section 301(b)” but “[i]n light of the current political situation in Ukraine, the Trade Representative has determined that no action under section 301 is appropriate at this time.” In the Special 301 Report (May 1, 2014), the USTR again noted that certain acts, policies and practices in Ukraine were “actionable” but “that no action under section 301 is appropriate at this time.” Further, the U.S. Government said it “remains committed to addressing the problems that served as the basis for the designation of Ukraine as a PFC, and appreciates Ukraine’s recent outreach and ongoing engagement in exploring how to ameliorate these problems and improve its overall IP regime. The United States looks forward to working with Ukraine on these three issues.”

In short, the IPR problems that resulted in the PFC designation remain wholly unaddressed. The IPR shortcomings continue to cause severe economic harm to U.S. and other copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders. IIPA urges the U.S. Government to work with the Government of Ukraine to address and correct these IPR deficiencies as quickly as possible, as is appropriate under the circumstances. Even with the political limitations of the current Government of Ukraine, IIPA is particularly concerned that the issues related to collective administration remain unaddressed, because the Government of Ukraine could resolve these quickly and with a minimum of effort.

Weak copyright protection has been a longstanding problem in Ukraine, but it substantially worsened in the past several years. Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries regionally. For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity. In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government, to combat and target the digital piracy problem, but the plan was never implemented.

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<sup>1</sup>For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



One key to addressing digital and hard copy piracy in Ukraine is improved and effective criminal enforcement. Ukraine is obligated to have effective enforcement, including criminal enforcement, in place under its treaty (including WTO/TRIPS) and bilateral commitments. Instead, Ukraine has become a safe haven for criminal syndicates involved in copyright piracy. Neither proper resources nor on-the-ground actions have been dedicated to addressing piracy, and the legal framework has many key deficiencies, all resulting in weak criminal enforcement. Ukraine (along with Russia) is a major source for free and pay-for-download piracy of music and film, and for some of the world's top BitTorrent systems. Ukraine also remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. In addition to digital piracy, Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films and entertainment software, and irregular and insufficient border enforcement allows this pirated material to flow freely into and out of Ukraine.

There are administrative, executive and legislative solutions to the IPR problems in Ukraine, including the problems identified in the PFC investigation. Undertaking the recommended actions on each of the identified problems, as set out in detail below, would best accomplish the goal of improving the IPR economic climate for the copyright industries to develop legally in Ukraine, benefiting the local economy, as well as U.S. and other foreign rights holders.

## **PRIORITY ACTIONS REQUESTED IN 2015**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2015. These priority recommendations are directly related to the designation of Ukraine as a PFC, and would improve online enforcement and address the failures relating to collecting societies:

**Criminal enforcement**, including prosecutions and deterrent sentencing, focused on:

- Owners of the numerous free and pay-per-download and streaming film and music sites, as well as BitTorrent sites. Criminal enforcement authorities should use existing laws to prosecute operators of sites dedicated to pirated music, film, entertainment software and/or printed materials (including sites relying, in bad faith, on rogue collecting society licenses).
- Principals of the rogue collecting societies that offer illicit "licenses" to both online and physical businesses without authority from rights holders.
- Organized crime syndicates – applying criminal prosecutions and deterrent sentences instead of the standard practice of relying on non-deterrent administrative penalties. Targets should include the syndicates operating websites and peer-to-peer operations, hard-copy distribution centers, camcording operations, and optical disc media production facilities (including CD-burning operations).

**Legal reforms** focused on:

- Amendments to the Copyright Law, Law on Telecommunications and Code on Administrative Offences, to promote a fair and effective response to online piracy, including: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights or that facilitate such infringement (including knowingly and intentionally providing links to infringing content); and (3) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. In October 2014, international IP experts prepared amendments (an anti-piracy draft law) to properly address the above problems; the October amendments were meant to improve an August 2014 draft law prepared by the State Intellectual Property Service of Ukraine (SIPSU).
- Adopting the Law "On Collective Management" to require relevant organizations for the rights of broadcasting, public performance and other communications to the public, to operate on the basis



of “volume of rights” (and to be consistent with Article 168 of the EU-Ukraine Association Agreement requiring bilateral agreements with foreign organizations to operate transparently and effectively).

- Amendments to the Copyright Law and Criminal Code to make camcording in movie theaters illegal, by excluding such camcording from any “private use” exception, and criminalizing this activity. The Law on Cinematography should also be amended to repeal the requirements of the local production of film prints.

Other issues that should be addressed include:

- **Criminal enforcement**, including prosecutions and deterrent sentencing against owners and operators of open air and street market piracy, especially against the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Overall effective **criminal enforcement** which requires: (1) coordination by key agencies – including the Ministry of Internal Affairs and General Prosecutors Office; (2) a significant increase in the number of investigations (criminal searches) and prosecutions; (3) additional resources, especially for police enforcement personnel dedicated to IPR crime (the Economic Crime and Cyber Crime police units); and (4) coordination of enforcement practices and investigations of IP-related crimes, including the issuance of guidelines for police officers.
- **Administrative and customs enforcements**, focused on moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions. *Ex officio* authority should be used to improve border controls, especially along the Russian border, focused on railroad traffic.
- **Legal reforms** including:
  - e-Commerce Law amendments, as companion amendments to the Copyright Law, to provide ISP liability consistent with global norms.
  - Copyright Law amendments to ensure that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
  - Criminal Code amendments to Article 176 to ensure the availability of criminal remedies against online piracy of all works and sound recordings, as well as remedies against repeat infringers (even if each separate infringement is below the criminal infringement threshold); and to establish in the Criminal Procedure Code clear rules for prosecuting infringers.
  - Abolishing the hologram sticker system (or, at the very least, fixing it so that it cannot be used by infringers to make pirated products appear legitimate) – as required in the 2010 Action Plan.
  - Fully implementing the WIPO digital treaties – in the Copyright Law and Criminal Procedural Code. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.

## COPYRIGHT ENFORCEMENT IN UKRAINE

As noted, the designation of Ukraine as a PFC was based on its failure to provide effective online enforcement and for its myriad failures relating to collecting societies. Each of these two issues is treated in depth in this section.

**Internet Enforcement:** One of the PFC-identified problems in Ukraine impacts all of the copyright industries. It is the failure by the Government of Ukraine to implement an effective and systemic means to combat widespread online infringement. Weak enforcement has resulted in an exponential increase in the number of illegal peer-to-peer hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world's largest), located in Ukraine. In fact, some Internet pirates have purposefully moved their servers and operations to Ukraine to take advantage of the current chaotic situation. Many of these illegal services and sites target audiences throughout Europe and the United States. In 2014, Ukraine was third in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, up from fourth in 2013, and 20th in 2011.

*Ex.ua* is one of the most popular download and streaming sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content (according to Alexa it is the 16th most visited site in Ukraine). The U.S. Government listed *ex.ua* in 2012 and again in 2013 (in its report released in February 2014), as a "Notorious Market" as a part of the Special 301 Out-of-Cycle review, because of the site's ongoing illegal activity and what the U.S. Government described as its "full range of infringing content." The U.S. Government also noted that the site was back in operation days after enforcement actions in 2012 were halted (and the criminal case dropped) "as a result of political criticism and popular opposition. No further enforcement actions have been taken and the site reportedly continues to monetize infringing content." Some IIPA members report that in 2014, *ex.ua* did respond to some notice and takedown requests. There are hundreds of other pirate sites including torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites, such as: *extratorrent.cc* (also on the 2013 "Notorious Markets" list of the U.S. Government) and *sumotorrent.sx*, which offer large quantities of unauthorized downloaded content from the BitTorrent network; *futubox*, hosted in Romania but managed in Ukraine, which offers films and TV programming; and many other sites which offer unauthorized pre-release and recently released music and film materials via storage locker links posted by the administrator and users of the site. The recording industry reports that free and paid download sites (like *newalbumreleases.com* and *jams.to*, both hosted in Ukraine) remain a major source of piracy in Ukraine (some selling whole albums for US\$1) with some ISPs such as "Hosting Solutions Ltd." specifically attracting pirate sites. Hosting Solutions also provides hosting services to other pirate sites including: *torrentbit.net*, *btloft.com*, *bitloft.org*, *torrentz.cd*, *torrentpond.com*, *btmon.com* and *torrentz.wf*. Some of these websites offer incentives such as free giveaways in return for users making monetary "deposits" onto the sites. Few of these sites have suffered any meaningful stoppages of their activities, as demonstrated by the *ex.ua* case. In addition, in 2014, there was not one criminal sanction imposed in Ukraine for Internet piracy (neither against any infringing individual or site operator or administrator). There were 71 criminal digital piracy investigations opened in 2014, compared with 85 in 2013. In 2014, there were 28 pirate sites targeted by anti-piracy organizations which were closed by the police (compared to 16 in 2013), although some were operational again immediately after their "closure."

A roadmap for improved enforcement against digital (and hard copy) piracy was agreed to in the U.S.-Ukraine Action Plan of 2010 – with very specific steps set out to effectively combat Internet piracy. The "plan" was actually a formal summary of commitments made by the Government of Ukraine (to the U.S. Government). It has never been implemented.

In many cities and towns outside Kiev – especially where Internet bandwidth is relatively slow – a problem exists with so-called "LAN" (Local Area Networks) sites. These are high-speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and video games. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints or

bandwidth limitations (as users might encounter when visiting infringing sites abroad). In 2014 there were only two criminal cases brought against LAN operators (compared with six in 2013).

In addition to infringing hosted content available for download, other common types of Internet piracy are: mail order – with orders placed online and products delivered by mail; sales of fake certificates of authenticity; and, the distribution of “cracked” product keys through locally hosted web-sites (especially of online entertainment software).

The U.S. Government noted in its 2013 designation of Ukraine as a PFC that the Ukraine IPR regime failed “to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content.” In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. In the past, the ISP association (IAU) – citing this statutory language – has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation.

Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are hundreds of ISPs in Ukraine and well over 100 sites offering pirated content). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal peer-to-peer traffic, and some ISPs will delete links upon request. The anti-piracy organization UAPA and the Motion Picture Association of America (MPAA) report about a 20% response rate to notice and takedown requests (there are no laws mandating compliance). In 2014, UAPA issued 1,119 takedown notices to ISPs and cease and desist letters to site operators in Ukraine.

The 2014 draft law would institute notice and takedown provisions (and in a positive note, allow rights holders to do so directly, as is the international standard, without the need for a state authority or court), and would require that material taken down “stay down.” Prior drafts had problems with inefficient notice processes and timeframes, but these appear to have been improved or corrected in the current draft. Also recommended for inclusion in any new law are two critical reforms for effective digital enforcement: (1) third party (ISP) liability consistent with global norms; and (2) the ability of rights holders or enforcement authorities to collect information about suspected infringing website owners.

Currently, the Criminal Procedure Code does not grant police *ex officio* authority (although some government officials claimed otherwise); so the police are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet crime investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes.

**Collecting Societies:** The unfair, nontransparent administration of the system for the collective administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. Collecting societies in the music sector, specifically in connection with broadcasting, public performances and other communications to the public, can provide an effective and indispensable means for licensing. Currently, the

accreditation process in Ukraine for collecting societies is in chaos. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the entire existing accreditation procedure. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in the State Intellectual Property Service of Ukraine (SIPSU) (formerly known as the State Department of Intellectual Property (SDIP)). SIPSU, which has a new director as of December 2014, is currently part of the Ministry of Economic Development and Trade (after a 2013 re-organization which moved the IPR portfolio from the Ministry of Education and Science). The 2013 court decision put SIPSU's authority to accredit authorized collecting societies on hold. The current situation has prevented the development of the marketplace for legal music services, resulting in the loss of millions of dollars in legitimate business for music rights holders in Ukraine.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented. The accreditation process should reflect commercial realities and be based on the society that represents the "majority of commercially relevant rights holders," as IIPA and other organizations have long suggested. Under IIPA's proposed solution, the current accreditation system would be re-constituted, and societies would be granted operational licenses based on their representation of a majority of commercially relevant rights holders, and if they undertake their operations in a transparent matter. That would avoid the old system of providing favorable treatment to the undemocratic, non-representative, non-transparent collecting societies, that also have internal government influences, and which have unfortunately been allowed to operate.

Two legitimate organizations – the Ukrainian Music Alliance (UMA) (broadcasting) and the Ukrainian Music Rights League (UMRL) (public performances) – represent over 80% of the domestic and international repertoire for music. They were both registered by SDIP (SIPSU) under the prior regulations, although their status as the only accredited organizations in their respective areas was revoked by SIPSU in 2012 despite their fair and transparent operations, and despite support from local and international rights holders. A new accreditation process was announced, and then overturned by an administrative court decision in January 2014 – leaving everything at a standstill. And worse, in the vacuum, rogue collecting societies continue to operate and prosper in the chaotic market. Reconfirming UMA and UMRL as accredited registered rights management organizations (in their respective areas) would greatly improve the situation for producers and performers.

While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened because the Government of Ukraine has not undertaken proper actions against organizations which purport to grant "licenses" for which they do not have rights.

In 2013 and 2014, the General Prosecutors Office (GPO) and SIPSU undertook investigations into the activities of the collecting societies (both those supported by rights holders and the rogue societies). These investigations confirmed violations of the relevant regulations. SIPSU was provided copies of the reports, but to date, has not taken action against these societies. Urgent action is needed to bring order to the licensing environment. SIPSU's first priority should be to stop all activities of the collecting societies created in violation of the current copyright law and regulations on collective management.

Last, IIPA continues to recommend amending the procedure for authorizing a collecting society for private copying levies. The current regulation (order #503 from 2003) did not specify that there should be a single organization for this type of activity. As in the other areas, this has led non-representative collecting societies (like VAAP) to seek authorization and collect this type of revenues alongside UMA, a rights holder supported organization. In 2013 VAAP applied for authorization and was rightly denied it in a decision later confirmed by one court. Despite that, in December 2014 VAAP re-applied and was accredited by SIPSU as an authorized collecting society for private copying levies. This has added to the chaos of collective management in Ukraine. The 2014 decision by SIPSU violates Ukrainian law requiring a society to have at least two years' experience in collecting and distributing

royalties; in fact, in 2013 VAAP collected a total of US\$1,400 and did not distribute those monies. SIPSU should immediately revoke the authorization of VAAP.

**Criminal Enforcement:** One significant shortcoming in the Ukraine enforcement regime that cuts across all the copyright industries, and impacts digital and hard-copy piracy, has been the absence of effective criminal prosecutions and deterrent sentencing.

Amendments made in 2005 to the Criminal Code (Article 176) lowered the high threshold for criminal prosecution. The current threshold is 12,180 UAH (or US\$772), which concerns some of the copyright industries because it is still too high and thus a bar to criminal enforcement, resulting in rights holders using less effective administrative actions instead. This is particularly true for online piracy matters, where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material for each rights holder does not exceed the threshold, the criminal case does not proceed. There are other procedural problems as well, including: (1) rules regarding the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) delays and case dismissals that can be fixed with changes to the Criminal Code or Criminal Procedure Code; and (4) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem in criminal and civil cases is the required proof of ownership, including a complete chain of title, and the denial of standing to licensees, especially of foreign record companies.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior, but there are fewer than 100 officers serving in that division for the entire country, too few to conduct effective actions sufficient to deter piracy. A Cyber Crime Unit was also created within the Ministry of the Interior; in 2011, it commenced its work on IPR (including copyright) enforcement; in 2012, a new unit was formed to focus on cyber crimes. More and better resources should be dedicated exclusively to copyright and related rights violations, and officers should be provided with effective training (including IT skills), equipment, and high-speed broadband connections (IIPA members have helped train these officials in the past, and continue to be willing to do so). The current number of state IP inspectors in SIPSU empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate.

**Other Key Enforcement Issues:** Two outdoor markets were designated as “Notorious Markets” by the U.S. Government in its 2013 report (released in February 2014) for their large-scale piratical operations. They are: the Petrovka Market in Kiev (also designated in 2012), which houses “as many as 300 stands” selling pirate and counterfeit material; and the “7-Kilometer” open market in Odessa “with more than 5,000 stalls serving over 100,000 customers per day,” according to the U.S. Government report. There are many other markets throughout Ukraine selling hard copy pirated material. A total of 24 hard goods raids were undertaken by the police in 2014, down from 54 in 2013.

The camcording of motion pictures and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries, resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the Internet and burned to optical discs for distribution. In 2014, at least 12 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. The number of audio recordings sourced from Ukrainian theaters increased from 31 in 2013 to 51 in 2014.

Amendments to the Copyright Law and the Criminal Code are necessary to effectively enforce against illicit camcording.

All of these copyright industries continue to report persistent problems with the administration of the current hologram sticker system which was adopted in 2000. Some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine. In addition, optical disc piracy (especially of CD-Rs and DVDs), still persists; there was no information on any raids against optical disc plants in 2014 (there was one such raid in 2013). Broadcast television piracy continues to be a major problem for the motion picture and recording industries – both with regard to regional and nationwide broadcasts.

Although administrative actions have been undertaken against stores, kiosks and other forms of street-level piracy, these actions were not coupled with severe enough penalties to deter these crimes (most fines were from US\$40 to a maximum of US\$400).

In the 2012 Customs Code, Customs officials were granted *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the (new) State Fiscal Service are not sufficiently engaged in enforcement measures, and thus are under-utilizing their authority, with the exception of some minor seizures by customs authorities of illegally produced CDs and other pirated materials; cooperation with right holders could be improved as well.

## **LEGAL REFORMS**

**Copyright Law:** Various proposals to amend the Copyright Law have been introduced in recent years. Bill #6523 (later, Bill #0902) was introduced in the Verkhovna Rada in 2010 and passed its first reading in February 2011, but was never enacted into law.

Separately, amendments to the Copyright Law, the Law on Telecommunications, and the Code on Administrative Offences, intended to improve digital piracy enforcement, were proposed in 2013 (revised numerous times), and again in August 2014 – the latter contained significant improvements from earlier drafts. These 2014 amendments would provide for mandatory notice and takedown provisions, replacing the current voluntary system. However, as noted above (in the Internet Enforcement section), these amendments, however much improved, would address only one piece of the complete architecture required for Internet enforcement, namely a notice and takedown regime, and lack third party liability and other reforms. The proposed notice and takedown provisions still need further refinement as proposed in the package of improvements offered by international experts in October 2014. To be effective, notice and takedown should not (as earlier drafts of the bill proposed) create a highly bureaucratic set of procedures to render efforts to take down infringing materials time-consuming, costly or unworkable; nor should they provide broad exclusions from liability. Rather they should incorporate third party liability under generally accepted standards (including provisions to reasonably gather and retain evidence). New efforts are underway (including discussions in January 2015) to draft IPR legislation.

Other deficiencies in the Copyright Law remain, including: the need to more clearly define temporary copies, to impose damages, and to exclude camcording from the scope of the private copy exception. Three other amendments to the Copyright Law which were contained in the old Bill #0902 should be adopted: (1) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (2) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; and (3) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52 – to double actual damages).

**Anti-Camcord Legislation (Copyright Law amendments):** The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine, which is why an amendment to the Copyright Law is needed. The Copyright Law reform proposals (Bill #6523 and Bill #0902) included an anti-camcording amendment

that would have specifically excluded camcording in movie theaters from the scope of the Copyright Law's private copy exception. The law, if enacted, would have prohibited the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption; it should be enacted.

**Law on Collective Management:** New regulations to govern the activities of Ukrainian collective management organizations are needed to improve the current chaotic situation, and to restore public trust and basic business practices for the administration of public performance rights and the broadcast markets. IIPA recommends the completion of a new draft Law on Collective Management, and that any such law incorporate the recommendations of European Union and U.S. experts in the music industry.

**E-commerce Law:** There is a draft E-commerce Law currently being considered by the Verkhovna Rada for a first reading. Before its final adoption, the draft should be amended to include third party liability provisions under generally accepted standards as set out in the U.S. Government's designation of Ukraine as a PFC (and, consistent with the Association Agreement with the European Union).

**Criminal Code and Criminal Procedure Code:** In addition to the criminal threshold, IIPA additionally recommends amending Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. Any amendment to the Criminal Code should also ensure that repeat copyright infringements (within twelve months) would automatically lead to a criminal, and not solely an administrative, prosecution. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement; 2012 amendments made it a requirement also for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to the court. It should also be clear that the police have the authority to seize all copyright products and equipment, for use at trial (they currently only do so in software cases).

**WIPO Digital Treaties:** In 2001, Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), which entered into force in 2002. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of "intentional" circumvention, which is a major impediment to protection.

**Administrative Remedies:** Administrative remedies (as required by the 2010 Action Plan) do exist but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend. Administrative courts should be able to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the code.

**Customs Code:** The Customs Code of Ukraine provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised in 2012. While some administrative improvements were made in recent years, IIPA recommends the abolition of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement for some industries.

**Market Access:** There are two serious barriers to market access confronting IIPA members, and in particular, the motion picture industry. These barriers are: (1) an obligation to manufacture film prints and digital

encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

The compulsory manufacturing requirement is included in the Law of Cinematography (amended in 2010) requiring the production of film prints locally for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency, and entered into force in 2012.

In addition, in 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012 a new Customs Code was adopted which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.

### **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

IIPA filed a petition in 2011 to have Ukraine's Generalized System of Preferences (GSP) benefits suspended or withdrawn. Given the current IPR circumstances (and assuming the GSP program is re-authorized in 2015), IIPA recommends that the U.S. Government accept the IIPA petition and move to suspend or withdraw Ukraine's benefits, if there is no progress by the Government of Ukraine to properly address the problems identified in its IPR regime.



# **PRIORITY WATCH LIST**

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2015.<sup>1</sup>

**Executive Summary:** As negotiations for a Trans-Pacific Partnership (TPP) with Chile and many other nations draw to a close in 2015, it is more pressing than ever that Chile should demonstrate its commitment to its existing obligations under the U.S.-Chile Free Trade Agreement (FTA), now eleven years outstanding. Chile's failure to meet its requirements to adopt tools crucial to the creative industries in fighting widespread piracy, such as protections for technological protection measures (TPMs) and statutory damages for copyright infringement, stands in stark contrast to the country's image across Latin America as a model of modernization. Chile's 2010 Copyright Law amendments fail to resolve these and other gaps in copyright protection and enforcement, and set forth an Internet enforcement regime that falls short of the type of online anti-piracy mechanisms contemplated in the FTA. Even where the law is adequate to bring action against certain copyright crimes, police and court personnel are not adequately equipped to bring cases to deterrent remedies.

Chile remains a world leader in the sale of circumvention devices such as video game copier devices made available through online auction sites. The Chilean Government endeavors to promote local filmmakers and musicians, but simple tools to promote voluntary cooperation against Internet piracy and combat illegal camcording are sorely lacking, allowing unauthorized files to proliferate online. As Chile works to build its local creative industries and its international reputation as a strong trading partner, it can no longer ignore the basic needs of a robust digital economy.

### PRIORITY ACTIONS REQUESTED IN 2015

- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- Further amend the copyright law to fully satisfy FTA obligations with respect to: effective Internet Service Provider (ISP) liability provisions, deterrent-level civil and criminal sanctions for copyright infringement, the establishment of statutory damages, and an effective civil *ex parte* search remedy.
- Place greater priority on anti-piracy actions among administrative and enforcement authorities and improve the speed of civil copyright infringement litigation through increased resources and coordination.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

### COPYRIGHT PIRACY IN CHILE

Piracy in Chile is characterized by significant levels of file sharing of infringing content over peer-to-peer (P2P) networks, hosting of unauthorized material on websites, illegal use of cyberlockers, hyperlinks to infringing materials, blatant online sales of circumvention devices for use with illegal video game files and, increasingly, illegal mobile and smart phone downloads. The most popular piracy sources in Chile are P2P networks such as BitTorrent, and links to cyberlockers containing infringing content posted on social sites such as *portalnet.cl*.

<sup>1</sup>For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



The sites *h2zone.cl* and *NeoGames.cl*, which are both hosted and operated in Chile, continue to be leading purveyors of circumvention devices against which there are no means of enforcement. In 2014, Chile placed 18<sup>th</sup> in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select members of the Entertainment Software Association (ESA) member titles on public P2P networks. Notably, Chile ranked ninth in the world in P2P infringement of console-based video games.

The recording industry saw an increase in its digital sales in 2014, but it continues to be heavily affected by piracy via P2P exchanges and links posted on blogs and social websites. Another problem that is now well-established in Chile stems from the cyberlinks posted on forums and social sites. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 35% of the total digital market (figures for the rest of the region show an average of 25% for most markets). This situation caused a reduction in the number of people accessing legal music sites in 2014. By contrast, the audience for legal music sites increased in the remainder of the region.

**Camcord piracy:** The unauthorized camcording of films in theaters has a significant negative impact on both U.S. and Chilean filmmakers. Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. While camcording of major studio titles in Chile has declined in recent years, this remains a concern for producers and local distributors. The Academy Award-nominated *NO*, by acclaimed Chilean filmmaker Pablo Llorain, was camcordered and posted to an illegal website shortly after its 2012 release in Chile, but before it was legitimately available in other territories. Illegal websites, release groups, and brokers maintain a presence in Chile creating a ready-made international online distribution network for any future illicit camcords.

**Signal piracy:** The pay television industry in Chile also continues to experience problems with signal theft, including via "free to air" boxes, which began to flood into Chile in 2009. As a result, 2013 losses to the industry in Chile alone were 86 million dollars.<sup>2</sup> Free to air decoders contain a card with modified software able to capture satellite signals from television protected by copyright. Because the sale of devices is separate from the sale of software that allows the satellite signal to be captured, it is impossible to enforce the illegality of the device itself. As a result, Chilean police have not taken action against the sale of equipment. Local industry has proposed a specific criminal offense penalizing the sale of this equipment within the law creating the Superintendent for Telecommunications, as well as efforts to raise public awareness about the negative effects of this and other forms of piracy.

## **COPYRIGHT LAW ISSUES IN CHILE**

The concerns that IIPA has voiced in past years with the deficiencies in Chile's implementation of its copyright obligations under the U.S.-Chile FTA, which went into force on January 1, 2004,<sup>3</sup> remain as urgent as ever. Chile adopted amendments to its Copyright law in 2010 to address some, but far from all, of its FTA obligations. As adopted, the amendments contain significant gaps in the following areas<sup>4</sup>:

**No protection for TPMs:** (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Rights holders remain extremely disappointed that Chile continues to ignore its obligation under the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work. Due to the lack of protection under current law, the sale of circumvention devices continues unabated online, in specialty markets, and in formal shopping malls, such as *Galeria Las Palmas*, where sales occur alongside legitimate video game products.

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<sup>2</sup>Data from the Business Bureau (<http://businessbureau.com/bb-consulting/?l=en>).

<sup>3</sup>The U.S.-Chile FTA is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html).

<sup>4</sup>These legal requirements and the 2010 Copyright Law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <http://www.iipa.com/rbc/2013/2013SPEC301CHILE.PDF>.

No notice and take down mechanism: (See FTA Article 17.11.23.) Chile's Copyright Law as amended creates a "notice plus notice" architecture for Internet Service Providers (ISPs) to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement outside of a court order.<sup>5</sup> While the new ISP liability provisions fall short of establishing an effective notice and takedown procedure as required by the U.S.-Chile FTA, they do take an important first step in developing voluntary notice systems between rights holders, ISPs, and users. The recording industry reports that cooperation with ISPs continues in regards to notices sent to P2P users who are engaged in the exchange of unauthorized music files. The number of notices sent by the recording industry's local organization, IFPI CHILE, has increased to 600 per week. However, the actual impact of the campaign is extremely difficult to measure in view of the lack of deterrents or sanctions to recidivists. Unfortunately, since the adoption of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, the government has failed to come back to the table to develop an FTA-compliant notice and takedown system. The "notice plus notice" system also sets a non-compliant and low bar precedent for efforts in the rest of the region to deter and contain the Internet piracy problem.

No statutory damages or civil *ex parte* remedy: (See FTA Articles 17.11.9 and Article 17.11.12.) No provisions are included to establish statutory damages or to strengthen the civil *ex parte* search remedy. Chile is also required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products.

Overbroad exceptions to protection: (See FTA Article 17.7.3.) The Law as adopted contains certain exceptions that appear to be incompatible with the FTA, including: a reverse engineering exception that is not restricted to achieve interoperability, exceptions that could allow libraries to reproduce entire works in digital form without restriction, and the lack of overarching language consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.

Several other FTA obligations also remain outstanding, including to provide: a full right of communication to the public for producers of phonograms (Article 17.6.5); adequate protection for temporary copies (Articles 17.5.1 and 17.6.1); legal remedies for rights management information (Article 17.7.6); and various border measures (Articles 17.11.17 through 17.11.21).

We also urge the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters, with deterrent penalties. Such a measure should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

## **COPYRIGHT ENFORCEMENT IN CHILE**

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime), and with Chile's intellectual property agency (INAPI). However, additional resources and increased judicial attention are needed to follow through on the positive efforts of the National Police (*Carabineros*) and Civil Police. Police and customs officials take *ex officio* actions on a regular basis and involve rights holders in legal procedures, but authorities need to take enforcement actions with greater frequency against Internet sites distributing infringing products. Prosecutions for copyright crimes are too infrequent and rarely result in deterrent sentencing, and civil actions face procedural obstacles and delays.

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<sup>5</sup>The ISP liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. This provision falls far short of FTA compliance. Meanwhile, the mechanism for a voluntary notice system by which ISPs are to forward notices of infringement to users within five working days of their receipt (Article 85U) has had some positive impacts, as discussed in the text, but lacks incentives for compliance, and thus, standing alone, is simply an inadequate response to widespread Internet piracy.

**Criminal enforcement obstacles:** There are three overwhelming problems in getting effective criminal enforcement in Chile. First, the IPR Prosecutor's Office is not dedicating the time and resources to understand and build Internet piracy cases, while the National Prosecution Office lacks a special branch to investigate intellectual property cases. Second, the *Carabineros*, the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent, and the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to effectively substitute community services and a probationary period for criminal penalties.

**Market access:** Proposed screen quota legislation that had been considered in the Chilean Congress in 2013 was not the subject of active debate in 2014, possibly thanks to the "Cooperation Agreement for the Development and Strengthening of the Film Industry," signed in December 2013 among exhibitors and producers to address the desire to boost the local film industry. That agreement, however, will expire and is up for review in early 2015. The screen quota project does remain on the docket in the lower house, and would require exhibitors to show one Chilean or Latin American film for every three "foreign" films shown on all screens nationwide during the previous six months, and to oblige theaters to run these films so long as a certain number of spectators come to see them. Such legislation may run afoul not only of Chile's Constitution but of its international obligations. Chile recently adopted a bill putting in place a 20% quota in favor of local musicians over radio broadcasts.<sup>6</sup>

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<sup>6</sup>See <http://santiagotimes.cl/controversial-music-law-sparks-air-wave-debate/>.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** Creative industries in China witnessed some positive changes in 2014, including effective enforcement actions against major online piracy targets and important market-opening measures. For example, strong enforcement measures were taken in China against key online piracy services (including *QVOD*, *Baidu* (video player), *SiluhD*, *HDstar*, *DY161*, and *FunShion*), and incentives introduced for more film co-productions in the country. These and other developments translated into commercial gains for some right holders, but more needs to be done to combat piracy and to further open markets for all creative sectors.<sup>2</sup>

China's long history of unauthorized use of music has completely distorted the country's music market, greatly prejudicing the ability of record companies to generate revenue through licensed platforms. Hundreds of unlicensed music services disturb the online marketplace, even though in 2014, China partially opened the music distribution market to foreign entities, agreed to allow them to choose their licensees, and allowed foreign entities to engage in content self-review for the first time. Media box/set-top box (STB) piracy continues to threaten the legitimate film and television industry in China and in other important markets in Asia. Unauthorized camcording worsened in Chinese cinemas, notwithstanding the first criminal conviction in China against a camcording broker and rogue website operator *DY161*; and signal theft of pay-TV content remains a threat. Though progress has been slow, cooperation has continued in the enforcement effort against the piracy of online journals of scientific, technical, and medical (STM) materials. In the meantime, new copycat services facilitating unauthorized access to STM materials threaten the professional publishing market.

Positive market access developments in China included the opening in late 2013 of the market in the Shanghai Free Trade Zone (FTZ) to foreign investment, allowing the introduction of video game consoles into China for the first time and easing restrictions on the distribution of foreign audio and audiovisual materials. Positive changes appear to be forthcoming to the *Foreign Investment Catalog*. However, much more needs to be done to open the Chinese market so that foreign entities may release movies; produce, promote, and distribute music; and participate in the publishing market. In September 2014, a new measure was introduced that imposes registration requirements, onerous censorship, and strict quotas on foreign films and "television dramas" for online distribution. This measure is already having a direct negative impact on Chinese video websites and all foreign content providers' licensing businesses. Further, implementing regulations concerning foreign investment in online music services have not yet been issued, and many basic production activities in the music sector remain on the prohibited investments list.

IIPA seeks further reforms to allow distribution of more imported films on fairer terms, and to encourage more private Chinese enterprises to be licensed by the Chinese government to engage in the distribution of films. In this regard, the 2012 U.S.-China Film Agreement must be fully implemented immediately. While partial implementation created 14 more theatrical slots for imported films on an increased revenue sharing basis, there remains substantial and crucial work to be done to introduce the broader market reforms the Agreement was meant

<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of China's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>A May 2011 United States International Trade Commission (USITC) report found that overall IP infringement (of which copyright infringement was found to be the largest part) in China costs the U.S. economy as much as \$107 billion in exports and upwards of 2.1 million jobs. USITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).



to achieve. The failure to fully implement the Agreement, and the introduction of new barriers with respect to all types of distribution of imported films and TV programming, create a fertile environment for pre-release and mass piracy of the films sought by the Chinese people. The Agreement will be reviewed in 2017, and we urge USTR to press for full compliance.

## **PRIORITY ACTIONS REQUESTED IN 2015**

### **Enforcement:**

- Take further action against websites offering infringing content and/or those deploying non-hosted platforms such as *Xunlei* (recently sued over video piracy), *Tgbus*, *Duowan* and *Baidu* (video). Implement *2012 Network Rules* with regard to liability, and have State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) revoke business licenses and stop enterprises from providing access to infringing content.
- Bring more targeted and deterrent actions, with transparency, against camcording, media box/STB piracy cases, and pay-TV piracy.
- Facilitate more efficient transfer of copyright cases between administrative and criminal authorities, ensure that the Economic Crimes Division of the PSB (not the Public Security Division) is assigned to such cases, and make clear that such transfers are required upon "reasonable suspicion" that the criminal thresholds are met.
- Allow right holders as victims the right to file collateral civil claims for compensation during criminal IPR trials.
- Follow through on JCCT commitments for transparent, comprehensive, and verifiable progress for strengthening IP protection for published materials and other copyrights in university (including library) settings.
- Ensure that SAPPRFT, theater owners, and others associated with the chain of theatrical distribution of films, make efforts to prohibit (including criminal penalties) and deter unauthorized camcording.
- Establish a central authority to compile statistics of civil, administrative, or criminal cases involving copyright; and fully implement the *Opinions on Disclosure of Information on Administrative Sanctions Against IP Piracy* (2013).
- Enhance "pre-release" administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing a voluntary government-backed online copyright bulletin board.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale and technical complexity of piracy problems.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.

### **Legislation:**

- Enact comprehensive copyright law reform as "first tier" legislation, incorporating changes recommended by IIPA and member associations in various past filings (including, e.g., the adoption of rights of communication to the public and broadcasting for sound recordings).
- Include intellectual property provisions in the ongoing Criminal Law reform process, including: 1) lowering thresholds; and 2) ensuring criminalization of Internet piracy, including infringements undertaken for purposes other than commercial gain, as well as circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, software, devices, components, and services.
- Enact a criminal prohibition on the use, or attempted use, of an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility.

### **Market Access:**

- Ensure full implementation of all commitments contained in the U.S.-China Film Agreement, due to be reviewed in 2017, including the crucial step to ensure the promotion and licensing of private Chinese enterprises to engage in national distribution of imported films in competition with China Film Group and Huaxia.
- Revoke the *Notice* imposing registration requirement, onerous censorship, and strict quotas on foreign films and television programming for online and television distribution in China.

- Complete revisions to the *Catalogue of Industries for Guiding Foreign Investment* to open the possibility of foreign co-investment in audio and audiovisual production and distribution activities, among others; issue relevant implementing rules.
- Formally revoke the requirement to appoint an exclusive licensee for online music distribution, consistent with verbal assurances of the same.

## **PIRACY AND ENFORCEMENT UPDATES IN CHINA**

Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's filing serves as a supplement to those, and is not meant as an exhaustive review of all issues.<sup>3</sup>

**Addressing Online/Mobile Piracy in China:** As of June 2014, China had the largest Internet user base in the world, estimated at 632 million users, including 532 million mobile web users. This creates the potential for enormous market opportunities for right holders. With increased enforcement actions in 2014, and some market-opening measures, the overall situation in China is improving for some creative sectors. However, online piracy, and its impact on licensing negotiations between rightholders and licensed platforms, remains the dominant issue in China, including illegal download sites, P2P piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, and auction sites selling pirated goods and high quality counterfeits. Of the 400 sites being monitored by the music industry and their 225,000 infringing music links detected as of December 2014, approximately 33% were from cyberlockers. The video game industry identifies that approximately 60% of its online piracy problems in China were from cyberlockers. Infringing mobile applications have also grown as a problem, with the music industry reporting to authorities 200 such infringing apps in 2014.

2014 witnessed some significant and targeted enforcement activity. The following key enforcement actions taken in late 2013 and 2014 against Internet piracy, some of which were carried out in conjunction with "Operation Sword Net" activities in 2014 conducted by NCAC, PSB, and MIIT, have started to have an impact on online piracy and to foster a more robust legitimate market online.<sup>4</sup>

- In December 2013, NCAC, together with State Internet Information Office, MIIT, and MPS, jointly held a press conference to announce the results of the "2013 Special Campaign for the Crackdown on Internet Piracy." *Baidu* (*Baidu Player - v.baidu.com*) and *QVOD* were ordered to immediately cease facilitation of copyright infringement, and penalties of RMB250,000 (US\$41,000), the maximum administrative fine under the law, were assessed to each service.
- In May 2014, the Beijing No. 1 Intermediate People's Court issued a decision holding liable P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion.com*. This site has caused significant harm throughout Greater China, including Taiwan, as well as Hong Kong and Singapore. The total award was RMB995,535 (US\$161,348) in respect of 23 civil actions filed.
- In November 2014, NCAC meted out administrative remedies against website operators of *Yyets*, and *Shooter.cn*, which were engaged in the flagrant mass dissemination of unauthorized copies of foreign films and TV shows with Chinese subtitles. *Yyets* is still accessible, but only maintains a front webpage indicating countdown to its transformation, presumably the launch of a new service (which it says will take place on

<sup>3</sup>See, e.g., IIPA, *China*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301CHINA.PDF>; IIPA, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (79 Fed. Reg. 48291, August 15, 2014), September 17, 2014, at [http://www.iipa.com/pdf/2014\\_Sep17\\_ChinaWTO.PDF](http://www.iipa.com/pdf/2014_Sep17_ChinaWTO.PDF).

<sup>4</sup>Reportedly, during the six-month campaign in 2014, 750 websites with unlicensed content were shut down and fined 3.52 million yuan (\$562,345). Music industry fights online piracy, calls for paid services, ECNS, February 4, 2015, at <http://www.ecns.cn/business/2015/02-04/153610.shtml> (also reporting the establishment of a new alliance against online piracy, including nearly 30 companies and organizations, including Chinese and foreign stakeholders and legitimate online services).



February 6, 2015). *Shooter.cn* shut down its operations and was fined RMB100,000 (US\$16,207) by the Shanghai Cultural Task Force in November 2014.

- In June 2014, the Shenzhen Market Supervision Administration issued an administrative fine of RMB260 million (about US\$42 million) against *QVOD*. In August 2014, the CEO of *QVOD* was arrested in South Korea, and later extradited back to China for criminal prosecution.
- In May 2014, the Beijing Haidian District People's Court handed down a criminal conviction against the CEO of the websites *siluHD.com* and *HDstar.org* for providing downloads of pirated high-definition content on a pay-per-view subscription basis. The CEO was sentenced to five years' imprisonment and a fine of RMB1,000,000 (approximately US\$160,000).<sup>5</sup>
- In November 2014, the District Court in Hefei City (Anhui Province) issued the first-ever criminal conviction against a camcording broker who also operated the rogue web site *DY161.com*. The defendant was sentenced to seven months' imprisonment and a fine of RMB200,000 (about US\$24,500).

Self-help actions had some effect over the past twelve months, and content providers have been generally more responsive to notices or cease and desist (C&D) letters. The music industry reports an increasing number of cease-and-desist (C&D) actions targeting online piracy, almost quadrupling in three years (from 8,943 in 2011, 13,233 in 2012, and 15,055 in 2013, to 33,782 as of December 2014). As to the 200 infringing mobile apps noted above, mostly from the Apple Store, the takedown rate upon notice to the mobile providers was over 92%.<sup>6</sup>

These actions, while helpful and indicative of a more cooperative attitude among key players in the Internet ecosystem, unfortunately did not make a significant dent in the infringement of music in China over the past year or increase revenues significantly. The legitimate music market remains a small fraction of its potential. Despite having the largest number of Internet users in the world, China's music market is ranked 21<sup>st</sup> globally, with revenues in 2013 at US\$82.6 million, including US\$65.4 million in revenues from digital/online uses of music.<sup>7</sup> Worse yet, online music piracy sites and hard goods exports from China are negatively affecting foreign markets, e.g., Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others. The local music industry informed the Ministry of Culture about 100 problematic websites in early 2014, and informed NCAC about additional 100 websites as part of "Operation Sword Net" in July 2014. In response to the NCAC notifications, Local Cultural Enforcement Agencies (LCEAs) from Tianjin, Qinhuangdao, Neimenggu, Shenzhen, Hangzhou, Chengdu, Fujian, Anhui, Shandong, Jiangsu, Guangzhou, Shijiazhuang, and Shanghai have contacted the industry for assistance, resulting in the closure of 38 websites, changes in business models for 8 websites (ceasing to offer music), deletion of alleged infringing tracks on 63 websites, and transfer for criminal investigation of 2 websites (*Vdisk* and *15ktv*).<sup>8</sup>

Recent innovative industry approaches to the problem have included China's Capital Copyright Industry Alliance (CCIA), which brought together more than 70 local organizations to strengthen copyright protection. Under its auspices, the record and motion picture industry associations have commenced a "Qingyuan Action." The action requests that the Internet Advertising Alliance (IAA) stop advertising support of pirate websites. Baidu, being an IAA member, has joined the Action, and agreed that it will stop advertisements on infringing websites on receipt of complaints. The local record industry association also signed a Memorandum of Understanding (MOU) with CCIA for an expedited method ("green channel") to mark websites infringing music, and for Baidu to halt advertisements on

<sup>5</sup>Six other employees were also convicted, fined, and sentenced to prison for terms ranging from one to three years.

<sup>6</sup>To date, China has not provided approval for market access to Google Play, but as of November 2014, reports indicated Google was working on entering the market and making its store accessible on more devices in China. See, e.g., Rolfe Winkler, Alistair Barr, Wayne Ma, *Google Looks to Get Back Into China*, The Wall Street Journal, November 20, 2014, at <http://www.wsj.com/articles/google-looks-to-get-back-into-china-1416527873>.

<sup>7</sup>At present, Chinese spend \$0.10 per capita on music, and if they spent the same as they spend in Thailand – a country with similar per capita GDP and fairly high piracy rates – the size of the Chinese market would be US\$1.22 billion. If spending equaled that in the U.S., however, the market size would be \$19 billion. China Mobile reportedly generates over US\$3 billion a year from value-added music services, predominantly the Caller Ringback Tone (CRBT). However, only around 2% of these revenues make their way back to right owners in China. See Ed Peto, *Glaciers Aligning: Progress In The Chinese Digital Music Industry*, March 13, 2014, at <http://www.chinamusicbusiness.com/article/china-great-digital-music-leap-forward/>.

<sup>8</sup>Difficulties in Internet enforcement in China include evasive techniques of the proprietors of the infringing sites. While all Chinese websites have to register with miibeian.gov.cn, and while one can search the proprietors (people or companies) by using their registration number, domain name, IP address, or "Whois" data, many infringers use fake registration information, making it much more difficult to locate the actual person or company.

such marked websites. The first stage of the action was launched in April 2014. Hundreds of links have been reported in the months since.

In the meantime, IIPA remains concerned about hundreds of unlicensed web services in China,<sup>9</sup> and combating copyright infringement on the Internet must remain a top priority for the Chinese Government.<sup>10</sup> Many websites were cited by IIPA members in their “notorious markets” Out-of-Cycle Review (OCR) filings to the U.S. Trade Representative in the fall of 2014. Sites linked to China include *Music.so.com* and *Verycd.com*. Piracy concerns over the *Xunlei* video-on-demand service were thought to have been addressed in a Content Protection Agreement entered into between *Xunlei* and the Motion Picture Association of America in June 2014, designed to “promote legitimate access to film and television shows online.”<sup>11</sup> However, after continued concerns over various acts of copyright infringement, on January 19, 2015, motion picture studios announced that they had filed civil actions against the operators of Shenzhen Xunlei Networking Technology Co. Ltd., the proprietors of *Xunlei*, seeking damages, orders to stop the infringing activity, a public apology, and costs.<sup>12</sup>

The problem of online journal piracy in China unfortunately continues to be without a satisfactory resolution. While the *KJ Med* entity, which offered STM journal articles for purchase and delivery by e-mail, is no longer operational, the law enforcement investigation into the operations of the site remains pending, many years after the original complaint and four years since the most recent complaint. Until there is a final resolution to the matter and the service is permanently dismantled, other similar services will not be deterred. In 2014, AAP member publishers found several new sites engaging in infringing activity very similar to *KJ Med* (i.e., providing unauthorized access to, or unauthorized copies of, STM journal articles). Publishers are also concerned about “sharing services,” open online platforms where users can upload and share documents. These services, such as *Baidu Wenku*, *Sina*, and *Docin*, employ “digital coin” systems, whereby coins earned through uploading documents may be used to “purchase” English language and Chinese translations of trade books, textbooks, and journals for download. These sharing services have ineffective notice and takedown processes for reporting and addressing infringements, and take no proactive steps to prevent even the most obvious infringement. Other online entities sell login credentials that are used to gain unauthorized access to proprietary online journal databases.

**Camcording Tied to Online Piracy, Harms Audiovisual Right Holders:** Unauthorized camcording of movies in theaters – a key source for online audiovisual infringements – is one of the most damaging problems in China for the audiovisual industry. The problem is particularly acute in Guangdong and Hebei, and in third-tier cities. The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, NAPP, and SAPPRFT, and with the China Film Distribution and Exhibition Association. The November 2014 criminal conviction of a Hefei camcording broker is a very positive sign. The Chinese government should enact a criminal law which prohibits and penalizes using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility. In addition, the Chinese government, theater owners, and others associated with the chain of theatrical distribution of films should take stronger efforts to deter unauthorized camcording.

**Media Box/Set-Top Box (STB) Piracy Burgeoning Out of Control:** Media box/set-top box (STB)/over-the-top (OTT) piracy consists of the manufacture, distribution, and use of devices which facilitate massive

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<sup>9</sup>Many music services remain unlicensed, and even those that are licensed may not cover all rights (for example, some licenses only extend to streaming), and the licenses are restricted to the territory of China, so these sites’ availability in foreign markets is particularly damaging.

<sup>10</sup>Full and proper implementation of the 2012 *Network Rules* is critical to hold liable websites and online and mobile services that encourage infringement. Full implementation of the *Network Rules* is necessary for ensuring that service providers are: 1) subject to clear secondary liability rules, including in cases of willful blindness; 2) obligated to respond in a timely manner to takedown notices; and 3) incentivized to take action against repeat infringers. One step IIPA has noted would be helpful is the establishment of a voluntary government-backed online copyright bulletin board to enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works.

<sup>11</sup>Xunlei is extremely popular in China, being the 99th most accessed site in China. The site is also ranked 638th most accessed in the world, and ranks extremely high in Hong Kong (408th), Taiwan (481st), and Korea (637th) as well.

<sup>12</sup>Motion Picture Association, *MPAA Studios File Civil Actions Against Xunlei for Mass Infringement of Copyright*, January 20, 2015, at <http://www.mpa-i.org/wp-content/uploads/2015/01/MPAA-Studios-File-Civil-Actions-Against-Xunlei-For-Mass-Infringement-of-Copyright.pdf>.

infringement. These devices are generally manufactured in Shenzhen, China (although Ukraine and Spain have been cited as other hubs for manufacture and/or distribution),<sup>13</sup> and exported to overseas markets, particularly throughout Asia (Hong Kong, Taiwan, Singapore, and elsewhere) where the content is not licensed. The devices are often manufactured or promoted and advertised to enable infringement of copyright or other illegal activities. Chief among these activities are: 1) enabling users to decrypt without authorization encrypted pay television programming; 2) facilitating easy access to remote online sources of unauthorized entertainment content including music, music videos, karaoke, movies, video games, published materials and TV dramas; and 3) permitting storage of unauthorized content, including pre-loading the devices by the manufacturer with hundreds of high definition (HD) motion pictures prior to shipment; allowing vendors to load content upon import and prior to sale or as an “after sale” service; or allowing users to employ direct download sites or torrents to download materials onto the devices. Since China is the main source of this problem spreading across Asia, the Chinese government should take immediate actions against identified manufacturers and key distribution points for these boxes that are being used illegally.

**Pirate Books and Hard Goods, Including for Export, Remain Problematic:** The industries continue to report piracy of hard goods which harm both the domestic Chinese market and those outside of China. Some companies report physical piracy, for example, in the form of English language textbooks, but this is not as substantial a problem as print piracy of trade books. Reports indicate that pirated (largely consumer and religious) books printed in and exported from China are showing up in parts of Africa. While university-sanctioned piracy has declined over the years, the Ministry of Education should be more involved in fighting piracy on campuses and educating librarians and students. The Ministry of Science & Technology should also become more proactive to address pirate document delivery services, and the Chinese Academy of Sciences should do more to educate information officers/librarians of the 100 research institutes in China. China remains a major export center for pirate DVDs of movies and music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese movies and music products.

**Next-Generation Pay-TV Signal Theft:** Pay-TV piracy is a growing concern in China, as well as China's role in the worldwide manufacture and export/distribution of pay-TV circumvention devices. It is believed that signal theft has widened in China's second and third tier markets in recent years. In addition, concerns have been raised about the deployment of services providing unauthorized retransmission (including over the Internet) of digital pay-TV services. The film and TV industries are still learning about the size and scope of the problem, but the emergence of this next-generation digital pay-TV is certainly a cause for concern.

**Continued Need for Enhanced Chinese Government Resources to Tackle Piracy:** The disproportionately small amount of resources devoted to fighting piracy in China, when compared for example, with those deployed to stop counterfeiting, creates a recipe for failure. Many of the most serious copyright infringing activities also occur online, and the lack of capability amongst administrative enforcement officers – in their knowledge of both the technical details of the law and the technological complexities of the online environment – further limit the efficacy of the administrative system. Civil enforcement efforts are plagued by non-deterrent remedies (e.g., low damages and limited injunctive relief) and overly burdensome procedures (e.g., extensive documentation and legalization requirements). As such, the Chinese government should be encouraged to expand resources and capability at NCAC, local CAs, and LCEAs, commensurate with the scale of the piracy problem. Given the ongoing prohibition on foreign right holder investigations into piracy, it becomes even more incumbent upon the Chinese government to enhance its own resources.

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<sup>13</sup>According to the Audiovisual Anti-Piracy Alliance (AAPA), “Irdeto's investigations have shown that Spain is now an important hub for the sale and distribution of pirate OTT streaming content and services.” Audiovisual Anti-Piracy Alliance (AAPA), *Infringement of Intellectual Property Rights on the Internet: AAPA speaks at OHIM-Europol-Eurojust Conference*, November 6, 2014, at [http://www.casbaa.com/images/stories/casbaa/regulatory/copyright/AAPA\\_speaks\\_at\\_OHIM-Europol-Eurojust\\_conference\\_.pdf](http://www.casbaa.com/images/stories/casbaa/regulatory/copyright/AAPA_speaks_at_OHIM-Europol-Eurojust_conference_.pdf).

## COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>14</sup> These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.<sup>15</sup>

**Copyright Law Reform:** It is critical that China move swiftly to enact and implement amendments to the Copyright Law. The draft currently sits with the State Council Legislative Affairs Office (SCLAO), which received further public comments in July 2014. IIPA commented on the SCLAO draft, noting numerous improvements in the draft compared with prior efforts, and believes that time is of the essence to adopt the Bill.

The current draft would establish a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (presumably including non-hosted infringements) of third parties. In so doing, the law may make it possible to efficiently remove infringing materials from the Internet as well as to halt people from engaging in massive infringements, but much will depend on the implementation of these measures.<sup>16</sup> Many other important topics are taken up in the draft Copyright Law revision. Some of the current proposals may require minor revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices. IIPA has identified the following areas worthy of attention in the current proposal.

- Ensuring the law retains flexibility to provide effective administrative and criminal remedies (beyond the express prohibitions in Articles 217 and 218 of the Criminal Law), including TPMs and rights management information (RMI) violations, pay-TV signal theft, and unauthorized camcording (the use of an audiovisual recording device in a cinema to make or transmit part or whole of an audiovisual work).
- Ensuring TPMs protections cover all access controls, cover TPM "technologies" and prohibit circumvention "technologies," contain a seizure remedy, and do not create overly broad exceptions.
- Confirming WCT- and WPPT-compatible communication to the public and "making available" rights, including exclusive "making available" rights as to related rights, and rights of remuneration as to broadcasts and public performances of sound recordings.
- Confirming expressly the protection of temporary reproductions.
- Confirming rights in original live broadcasts as audiovisual works.
- Extending copyright term to life of the author plus 70 years, or 95 years for works and sound recordings whose term is calculated from publication.
- Ensuring that relevant, clear and effective presumptions of ownership and subsistence of copyright are afforded.
- Ensuring collective management structures do not entail mandated state controls and retain voluntary (opt-in), open and transparent, and inclusive operating structures (see discussion below).
- Permitting authorities to use evidence obtained in administrative enforcement, ensuring right holders have a right to information and to appeal administrative decisions, and ensuring investigative authority is not used to harass the injured right holder.
- Ensuring the availability of *ex parte* relief, preservation orders issued within 48 hours of application, and appealable written decisions from applications for such relief or order.

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<sup>14</sup>Last year's major development was the entry into force on January 1, 2013 of *Network Rules* to address online infringements. *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. These *Rules* replaced the 2006 *Regulations on the Protection of the Right of Communication through Information Networks*.

<sup>15</sup>IIPA also notes the commencement of official operations of the National Leading Group (NLG) in July 2013, which has been helpful in mobilizing greater resources to address copyright infringements throughout the country.

<sup>16</sup>The latest draft has deleted the reference to "blocking" which was in previous drafts, but retains the request that ISPs "delete, disconnect the links, etc." to infringing content. It is believed the concept may still be included, both in the terminology that remains, and the fact that the list of measures is non-exhaustive (with reference to the word "etc.").

- Ensuring that costs of litigation and attorney's fees are fully recoverable.
- Prohibiting trafficking in encrypted satellite or cable signals, receipt and use of unauthorized decrypted signals, and further unauthorized distribution of decrypted signals.
- Narrowing the software "decompilation" exception to only that part indispensable to achieving compatibility (interoperability).
- Harmonizing remedies available against unauthorized use of computer programs.
- Ensuring the draft "orphan works" proposal preserves injunctive relief and reasonable compensation, requires "diligent search in good faith" for the owner, specifies the range of permissible uses, and specifies the remedies available to a copyright owner that comes forward.
- Ensuring that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope, and are otherwise consistent with all three steps of the three-step test.
- Re-inserting the word "written" to appropriately narrow the personal study and research exception; ensuring that any private or personal use, in particular research, must be for a non-commercial purpose; and ensuring that any such private or personal use, whether reproduction or otherwise, must be undertaken by that user only.
- Ensuring that the education exception is limited to reproduction of a limited portion of the work only done by a person teaching or receiving the lesson in the classroom setting, and is for a non-commercial purpose.
- Ensuring that the scientific research exception is limited to personal research for a non-commercial purpose.
- Ensuring that the requirement to register a license is not enforced to create a prohibited formality.

The collective management provisions of the latest Draft Copyright Law remain concerning. First, they appear to allow CMOs to assert the authority to manage "the entire body of right owners to exercise the copyright and related rights with respect to public dissemination of works of music or audiovisual works or other use of works through self-assisted Karaoke systems" on a nationwide level, unless the right holder opts out in writing. Such extended collective management has only been adopted in a few jurisdictions that have significant and lengthy experience with CMOs. The current draft language does not specify how many right holders must authorize it or provide any criteria for determining whether a particular organization can "represent nationwide the interests of the right owners." The presumption should be reversed by requiring right holders to opt in if they wish. Second, these draft provisions appear to mandate a joint "unified standard of royalty fee." CMOs acting on behalf of different categories of right holders should remain free to collect their remuneration separately. Draft Article 65 creates a default presumption that the "unified standard of royalty fee" will be collected by a joint CMO, which is not in line with current best practice. Finally, the draft appears to limit the damages which can be awarded to right holders for rights administered by CMOs but in which the right holder has not chosen to use a CMO. To the extent compensation to such a right holder is limited to "the fee standard of the relevant collective copyright management," this would impinge on the ability of right holders not employing a CMO to exercise and enjoy their rights.

**Civil Compensation Rules Should be Strengthened:** The current Copyright Law includes general provisions on the availability of civil remedies such as cessation of infringements, eliminating the effects of the act, making a public apology, or paying compensation for damages in infringement cases where the right holder suffered loss from the infringing activity. Where actual loss cannot be established, the Law provides an alternative statutory damage award of up to RMB500,000 (Article 49). There are, however, a number of uncertainties that arise from this provision. It should be made clear that the Article 49 remedy may be elected by the right holder, in addition to proving all or part of the losses, and that damages may still be awarded with respect to each individual act of infringement as opposed to one award for a series of infringements committed by the same defendant. If these principles are not adhered to, civil damages under Article 49 will not be adequate to compensate the right holder for the harm caused, because the maximum under that article is too low, and also because the provision does not include a mandatory minimum award.

**Criminal Code Reform Should Include Intellectual Property:** According to the latest reports, the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying JIs) and other related provisions are not set to be considered in China's Criminal Law reform process. This would be a major missed opportunity, and we urge the Chinese Government to reconsider this decision. Remaining gaps include:

- Thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).<sup>17</sup>
- Leaving some critical commercial scale infringements without a criminal remedy because of the requirement to show that the infringement is carried out "for the purpose of making profits," an undefined phrase. It is often difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy.
- Failure to separately define criminal violations related to the WCT and WPPT, for example, circumvention of technological protection measures, or trafficking in circumvention technologies, software, devices, components, and services.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.
- Lifting the jurisdictional bar limiting foreign right holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts.

**Establishment of IP Courts:** On August 31, 2014, the National People's Congress passed legislation establishing specialized IP courts in Beijing, Shanghai and Guangzhou. The IP court in Beijing opened on November 6, 2014, has four hearing rooms, and as of December 2014 had selected 22 of its 30 judges. These IP courts will handle civil and administrative cases related to patents, computer software, technology secrets, trademarks and some copyrights (when cases meet certain thresholds), according to the Supreme People's Court (SPC). The IP courts in Shanghai and Guangdong opened in December 2014. It is unclear how the opening of these courts will affect copyright cases, which thus far, and particularly in recent years, have received fairly favorable treatment in the key courts in the major first tier cities.

**Administrative Criminal Transfer Regulations Need Significant Improvements:** The amended *Criminal Transfer Regulations* are well intentioned, but do not adequately address existing challenges to the effective transfer of administrative cases to criminal investigation and prosecution. The *Regulations* leave unclear whether transfers are required upon "reasonable suspicion" that the criminal thresholds have been met, and thus, some enforcement authorities believe "reasonable suspicion" is insufficient to result in a transfer, requiring proof of illegal proceeds. However, administrative authorities do not employ investigative powers to ascertain such proof. The "reasonable suspicion" rule should be expressly included in amended transfer regulations.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

IIPA has consistently stressed the direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, both foreign and domestic, to Chinese consumers. When legitimately licensed content is blocked from the marketplace, a vacuum for piracy is instantly created. This was a motivating factor when several IIPA members, believing that China was not living up to its WTO obligations, urged the United States to bring a case against China regarding many market access barriers in music, audiovisual products, and publications. The United States prevailed in that case, which concluded in 2009.

Since the WTO case, some sectors have experienced a gradual positive shift in the market access situation in China, including some easing of investment restrictions in amendments to the *Catalogue of Industries for Guiding*

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<sup>17</sup>The Supreme People's Procuratorate has expressed interest in prosecuting online piracy cases, and is exploring issues related to the evidence needed to meet the thresholds for criminal liability. There may be a need to address thresholds so that non-hosted online services such as P2P streaming services can no longer escape liability.

*Foreign Investment.* In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution.<sup>18</sup> China also agreed to allow foreign entities to choose their licensees, and allowed foreign entities to engage in content self-review of music for the first time. New incentives were introduced for more film co-productions in China. In November 2014, the National Development and Reform Commission (“NDRC”) launched a public consultation on a new draft *Catalogue of Industries for Guiding Foreign Investment* which contains further easing of investment restrictions. For example, the restriction on foreign investment for the service of distribution and sale of audiovisual products has been removed, so foreign-invested entities would be allowed to operate such services through their wholly owned companies in China. The Draft *Catalogue* also proposes to move the “production business of audio-visual products” from “Prohibited” list to the “Restricted” list. These would be positive steps, if adopted.

Unfortunately, many core activities of copyright industries remain restricted or prohibited. For example, the *Negative Investment List* in the Shanghai FTZ expressly prohibits investment in “online audio and video programs,” as well as so-called “Internet cultural business,” while the rules also indicate, “Foreign investors are forbidden to be engaged or involved in operation of online video games directly or indirectly.” Other rules of the Ministry of Culture also appear to create conflict with respect to foreign-invested entity involvement in Internet distribution of music.<sup>19</sup> In addition, the U.S.-China Film Agreement (discussed below) remains only partially implemented and has not introduced the broader market reforms that would increase theatrical distribution opportunities for U.S. independent film producers by allowing private Chinese distributors to engage in national distribution of imported independent films. On top of this concern, new barriers have been announced for online and television distribution that are already negatively impacting the Chinese marketplace (discussed just below).

**New SAPPRFT Notice Raises Serious Concerns Over Future of Online Distribution of Foreign Films and Television Programming:** In September 2014, SAPPRFT issued the *Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas*. The Notice requires online distributors of foreign films and TV dramas to obtain permits, submit content to SAPPRFT for censorship review, register and upload relevant information by March 31, 2015 on SAPPRFT’s official registration platform; and cap foreign content at 30%. Furthermore, foreign films and TV dramas that are not registered by April 1, 2015 will not be allowed for online transmission. This Notice is already having a damaging effect on Chinese websites and the licensing of audiovisual content. Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the new Notice, and have cited conflicting reports on the corresponding requirements. There is great concern that delays in clearing legitimate content will inadvertently result in a resurrection of rogue sites providing uncensored content. The new Notice could also have the unintended consequence of increasing VPN usage (to obtain access to foreign content kept out due to implementation of the Notice), which is undesirable from both the creative industries’ and Chinese government’s standpoint. The Notice raises serious concerns, since it imposes a new formality – a registration requirement – which will be difficult and costly to meet; creates censorship delays, which will undoubtedly lead to increases in online piracy, puts the onus on NCAC, NAPP, and MIIT to duly enforce against anticipated upsurge in piracy activity after April 1; and imposes an unwelcome new quota that will do nothing but stifle the industry.

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<sup>18</sup>For music, it remains somewhat unclear whether “music videos” are open to distribution in China, and whether a foreign-invested entity established in the Shanghai FTZ is able to distribute music throughout China. Confirmation of the inclusion of “music videos” as permissible, and the ability to make music available throughout China, would be helpful.

<sup>19</sup>For example, at least according to Ministry of Culture permit rules, it appears foreign entities remain largely barred from engaging in online music distribution in China. Internet music services are considered Internet cultural activities over which the MOC has jurisdiction. Any “Operating Entity” which provides Internet music service in China must obtain and maintain an “Internet Culture Operation Permit.” Issued by MOC, but the ICOP is expressly not available to any Operating Entity which is a foreign-invested enterprise. In other words, if any foreign individual/entity directly or indirectly holds 25% or more of any equity interest in the Operating Entity, such Operating Entity will not be permitted to apply for or obtain the ICOP. Similarly, where music files are stored on the servers of the Operating Entity for the purpose of being downloaded or streamed by consumers, such services will be considered as “dissemination of audio-video over Internet” services (“IP-TV Service”) and an IP-TV Permit must be issued by SAPPRFT. Similar to the ICOP, an IP-TV Permit is not available to any Operating Entity which is a foreign-invested enterprise. For imported music files, the relevant license holder also needs to obtain an import-related approval from MOC.

**Self-Censorship of Foreign Entity Music Should be Continued:** On August 12, 2013, the *Administrative Measures on Content Self-Censorship of Internet Cultural Operating Units of MOC* were issued (entering into force December 2013), allowing foreign entities to self-censor music content. This self-censorship was considered as a pilot project until November 2014, after which time MOC was to decide whether or not to extend or expand it. The Ministry of Culture has not announced whether it will be extending the project, but should do so.

**Appointment of Licensees:** The Chinese government verbally indicated in 2013 that it is no longer necessary to appoint an exclusive licensee for online music distribution. However, to avoid any uncertainty, it is recommended that the Chinese government formally revoke this requirement, so that foreign music companies are free to designate licensees of their choosing.

**U.S.-China Film Agreement Implementation:** The February 2012 U.S.-China Film Agreement has had the positive impact of increasing the box office revenue sharing participation from 14-17.5% to 25% and raising the formal quota for imported box office revenue-sharing films from 20 to 34 films (14 of which enter the Chinese market in enhanced formats). However, China has yet to implement key provisions of the Agreement that would bring broad reforms and introduce competition to the distribution marketplace benefitting all producers. Until the U.S.-China Film Agreement is robustly and fully implemented, and national theatrical distribution can be officially licensed to private Chinese enterprises so they can compete with the dominant SOE incumbents, many film producers will have very limited export opportunities in China.<sup>20</sup> The audiovisual industry strongly encourages China's full compliance with the Agreement. Under its own terms, the Agreement will be reviewed by the two countries in 2017.

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<sup>20</sup>The independent film industry, which produces the majority of U.S. films, continues to experience limited access to the Chinese marketplace, and is only able to secure a very limited number of revenue sharing quota slots. Most independent films are still imported and theatrically distributed in China on a non-revenue share basis, and suffer from lack of distribution options and below-market commercial terms. Both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release, and by a relatively non-competitive and non-transparent marketplace. The lack of legitimate distribution opportunities for independent films make these films particularly vulnerable to piracy as Chinese consumers struggle or are unable to find the content they want through legitimate channels.



# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2015.<sup>1</sup>

**Executive Summary:** Changes are afoot in India, with a new Administration and positive indicators that the government recognizes intellectual property as an important element of India's overall economic future. The drafting of a National IPR Policy, launched by a government-appointed IPR Think Tank, begins, "Creativity and Innovation are the forces which drive growth, development and progress in the knowledge economy," and dubs India's motto as "Creative India; Innovative India."<sup>2</sup> Meanwhile, India is witnessing expansive growth of Internet availability, via both wired and wireless networks, and using a plethora of devices, from computers to mobile phones and tablets. The expansion of Internet connectivity and increasing recognition by the Indian government of the importance of IP to its national economic policy should translate into significant new market opportunities for right holders. As an example of what is at stake for just one creative industry sector, a report released in 2014 indicated that the total gross output of the Indian film and TV industry in FY2013 is estimated at US\$18.5 billion, providing more than 1.8 million jobs.<sup>3</sup>

Despite these opportunities, evidenced by the launch of many legitimate services in India,<sup>4</sup> copyright piracy,<sup>5</sup> regulatory barriers, and market access barriers<sup>6</sup> inhibit the continued growth of domestic and foreign copyright stakeholders in India. Pirate online services undermine not only the local Indian market but also the vast potential export market for the Indian creative industries. Indian content is often exported or licensed via global deals, reflecting the considerable demand internationally for accessing Indian creative works; and yet the value of licensing remains negatively affected by the availability of the same content via pirate sources. In addition to growing online and mobile piracy, unauthorized camcording of movies in the theaters, hard goods piracy including the unauthorized use of published materials, and signal piracy involving unauthorized distribution and/or receipt of pay-TV content, all harm creators in the Indian market.

While good cooperation is forthcoming against hosted content online, the IT Act should be amended to provide a more expeditious and effective remedy to seek orders to halt access to infringing materials through services (whether in India or not) built on infringement. The Cinematograph Bill should be amended with specific provisions to prohibit the unauthorized camcording of movies. The Copyright Act should ensure adequate protection against the circumvention of technological protection measures (TPMs) and trafficking in circumvention devices/technologies (to ensure full implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)). Rollout of new locally manufactured pay-TV set top boxes (STBs) as well as imported STBs must adopt adequate TPMs. Greater priority should be assigned to copyright piracy cases (both source and online) by police, prosecutors, and judges, to overturn the trend of low conviction rates and non-deterrence. Uniform enforcement procedures should be adopted by the states and subject to better national

<sup>1</sup>For more details on India's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of India's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>National IPR Policy (First Draft), December 19, 2014. IIPA has commented on the First Draft with various suggestions, largely consistent with this filing.

<sup>3</sup>Deloitte, *Economic Contribution of the Indian Motion Picture and Television Industry*, March 2014.

<sup>4</sup>Legitimate platforms online in India include Big Flix, Eros on Demand, Box TV, iTunes India, Yahoo India, You Tube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas, Myplex, and Biscot Talkies. The Motion Picture Distributors' Association (MPDA), along with The Film and Television Producers Guild of India (FTPGI) launched an initiative [www.findanymovie.in](http://www.findanymovie.in) to help consumers find legitimate sites. In the physical marketplace, Landmark, Crossword, and Planet M sell legitimate Blu-ray discs, DVDs, and VCDs.

<sup>5</sup>For example, the local music industry estimates harm from music piracy alone in India at INR800 Crore (around US\$125 million).

<sup>6</sup>The United States International Trade Commission (USITC) notes in a December 2014 report on India, "The main policy barriers [adversely affecting U.S. companies doing business in India] include tariffs and customs procedures, foreign direct investment (FDI) restrictions, local-content restrictions, treatment of intellectual property (IP), taxes and financial regulations, regulatory uncertainty, and other nontariff measures." USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, at <http://www.usitc.gov/publications/332/pub4501.pdf>. The report further finds that "If tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double."



enforcement coordination. Steps should also be taken to ease market access and regulatory barriers such as high tariffs and taxes, “must provide” requirements in the pay-TV sector, and compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries.

## **PRIORITY ACTIONS REQUESTED IN 2015**

### **Enforcement**

- Hold regular consultations between copyright stakeholders and ISP and mobile networks to foster greater cooperation and expeditious and effective remedies against online and mobile infringements.
- Halt instances of unauthorized camcording and avoid export out of India of illegally sourced motion pictures.
- Introduce cybercrime law enforcement officers in all state police stations; add centralized IP crime unit under Central Bureau of Investigation (CBI) Cyber Crime Detective unit to ensure proper investigation of IP crimes, including Internet piracy, in a systematic, coordinated, and efficient manner.
- Establish standard operating procedures for enforcement agencies.
- Encourage establishment of special IP panels with expert judges, and IP-devoted prosecutors, to accelerate effective and deterrent adjudication processes in both civil and criminal cases.
- Have Indian Customs effectuate *ex officio* seizures, followed by destruction, of illegal exports as well as imports.

### **Legislation**

- Immediately implement legislation to deal nationwide with online and mobile piracy, including providing a more robust legislative basis for courts to order ISPs to disable access to websites and services enabling infringement.
- Amend the IT Act to make copyright infringement a predicate offense, thereby providing authorities with power to order expeditious remedies against non-hosted online and mobile services built on copyright infringement.
- Enact amendments to India’s Cinematograph Bill making it an offense to possess an audiovisual recording device in a cinema intending to make or transmit a copy of an audiovisual work, in whole or in part.
- Complete the ratification process to carry out the intention behind the Copyright Act 2012 to join and ensure compliance with the WCT and WPPT.
- Further amend the Copyright Law to, among other things:
  - clarify prohibitions against circumvention of access control TPMs, and of trafficking in circumvention technologies, devices, components, or services.
  - remove burdensome restrictions on freedom of contract at odds with industry practices and the expectations of the creative parties.
  - remove or restrict the scope of statutory license provisions for broadcasters, which is negatively affecting the operation of market economics for audiovisual and musical works, and sound recordings.
  - establish enhanced penalties for “pre-release” piracy.
- Provide tax benefits for copyright associations so that they may use the tax savings for anti-piracy and capacity building activities in the country.
- Amend state organized crimes (Control of Goonda) laws to include book, music, and video game piracy.
- Conduct a study through WIPO on the contribution of India’s creative industries to the Indian economy.
- Ensure that adequate IP protection forms a crucial element of the forthcoming Digital India Policy.

### **Market Access**

- Eliminate significant market access barriers imposed on the motion picture industry, including:
  - TRAI and government rules banning exclusivity and imposing “must provide” rules in the pay-TV sector.
  - Localization requirements and per-channel fees beaming into India.
  - Price caps for pay-TV channels that stifle the growth of the industry.
  - Foreign direct investment caps for radio/up-linking of news and current affairs TV channels, and pre-approval requirements for most other broadcasters to invest.
  - Ministry of Finance service taxes.
- Eliminate high tariffs on entertainment software and hardware products.

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

Prior IIPA reports on India contain detailed discussion of piracy and enforcement issues.<sup>7</sup> This report serves only as an update and is not to be considered an exhaustive review of the issues.

**Internet Connectivity Creates Opportunities But Also Challenges:** India is now the second largest Internet market in the world, with an estimated 302 million Internet users as of December 2014, surpassing the United States.<sup>8</sup> India boasted over 900 million mobile subscribers (nearly 75% penetration) as of the end of 2012 according to the Telecom Regulatory Authority of India (TRAI), with increasing 3G capabilities (according to IMRB-2012 and Nielsen-2013, India had over 100 million mobile Internet users, with 25 million from rural areas), and a “mobile first” approach that is coming to fruition. The Modi Administration is committed to an even greater “digital push,” including connecting 250,000 village level centers to a “National Broadband Grid” with speeds of at least 2 Mbps. As such, India’s online and mobile markets show enormous potential for commercial growth for creative industries into the future, whether Indian or non-Indian content, urban or rural, English or non-English.

With these increasing opportunities, however, come enormous challenges, including online and mobile piracy. Per indicators from Comscore’s analyses of the top 200 sites in India for copyright piracy, 21% are direct download sites, 21% are torrent sites, 17% are social networking sites, 13% are streaming/direct download sites, 8% are cyberlocker sites, 8% are streaming only sites, 4% are radio sites, 4% are blog sites, and 4% are wireless access protocol (WAP) sites.<sup>9</sup> As of this writing, notorious piracy sites most accessed in India include *kickass.so* (26<sup>th</sup> most accessed site in India), *torrentz.eu* (51<sup>st</sup>), *extratorrent.cc* (66<sup>th</sup>, and linked with *desitorrents.com*), and *tamilrockers.com* (616<sup>th</sup>). Mobile phone downloading on memory cards and mobile apps for downloading and streaming are also on the rise, for tablets, smart phones, and other devices. In 2014, the Entertainment Software Association (ESA) reports that India placed fifth in the world (up from sixth in 2013) in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.

Given the scope of the challenge, it will be essential for the Indian government to establish proper prioritization to online and mobile piracy cases among authorities at all levels, and to ensure proper tools are in place to address both hosted and non-hosted infringements, as well as both domestic and foreign sites. In addition to adequate enforcement tools (which could be secured in part by an amendment to the IT Act to add copyright infringement as a predicate offense, allowing for actions against rogue websites located outside India), accountability among advertising companies (which provide much of the revenue generated by piracy sites that are not subscriber-fee based) and payment processors in India should also be explored. Understanding the organized criminal nature of these offenses will also be crucial to raising the profile of Internet and mobile piracy cases. For example, global organized “release groups” and “camcord brokers” may start in India by procuring from a downstream agent an illegal camcord or print of a motion picture, which is then supplied to a rogue website or another syndicate outside of India.

Industry continued to utilize the courts in 2014 to obtain orders to address the most egregious instances of online piracy. The Delhi High Court issued orders to disable access to 396 copyright infringing websites of audiovisual materials, through three separate John Doe orders.<sup>10</sup> These actions follow on similar orders and good cooperation from ISPs in disabling access to well over 300 websites (containing illegal music files and enabling unauthorized streaming of music) based on similar court orders in 2013. In 2014, the music industry also settled over

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<sup>7</sup>See, e.g., IIPA, *India*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301INDIA.PDF>.

<sup>8</sup>See, e.g., India to Have More Internet Users Than US by December End: IAMAI, *The Times of India*, November 19, 2014, at <http://timesofindia.indiatimes.com/tech/tech-news/India-to-have-more-internet-users-than-US-by-December-end-IAMAI/articleshow/45205187.cms>.

<sup>9</sup>A 2013 study tracking IP-addresses using P2P networks to download films and television content found India to be in the top ten Internet piracy countries in the world. Utpal Borpujari, *India Major Online Film Piracy Hub*, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.

<sup>10</sup>The ISPs in these cases regarded themselves as licensees of the Indian Department of Telecommunications (DOT), so DOT was made a party to the orders and DOT issued the instructions.

50 cases through plea bargaining.<sup>11</sup> Without changes to the IT Act, however, and in the continued absence of a Memorandum of Understanding (MOU) between stakeholders and service providers (ISPs), it may be difficult to make a permanent dent in combating the online piracy problem. It is suggested that, in addition to any changes to strengthen the current legal framework,<sup>12</sup> the Indian government should convene regular meetings between right holders and major ISPs, to foster more voluntary cooperative efforts.

**Unauthorized Camcording Remains Severe:** The past year saw a slight decrease in detections, from 43 in 2013 to 40 in 2014, of major U.S. motion pictures camcordered off theater screens in India.<sup>13</sup> Of the 40 camcorders detected, 24 involved incidents of video camcorders from India which were distributed globally, paired with audio tracks in 12 different languages. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. The local film industry and cinema owners understand the need for urgent action, and some major arrests against camcording syndicates in Surat (Gujarat) and Indore (Madhya Pradesh) have made a dent against this damaging problem in these areas of the country.<sup>14</sup> Unfortunately, Ghaziabad continues to be a hot bed, and is a difficult territory due to the prevailing notorious crime syndicates operating there, despite sensitization of the police. Bhopal is another area where industry is detecting unauthorized camcording activity. The latest instances of unauthorized camcording have spread through Tamil Nadu in the south. Industry has kept police informed of these developments throughout the year. The mobile “app” launched in Andhra Pradesh in 2013 has been helpful in detecting and obtaining reports of piracy and camcording incidents.

Camcording causes lasting damage to the global release window for films, as the “cams” end up online on rogue sites in India and spread throughout Asia and, indeed, to the world. Unauthorized cams appear on rogue sites within hours of the legitimate release of a movie, highlighting the urgent nature of seeking a solution to the problem. Amending the Cinematograph Act, 1952 to include a prohibition on unauthorized camcording will be a first critical step to a more centralized and effective enforcement effort. Continued efforts by cinema owners (e.g., showing slides and placing messages on tickets and within theaters conveying that illegal camcording is not allowed), as well as industry initiatives, have raised awareness of this problem, and hopefully these steps, along with the needed legal reform, can provide some level of deterrence.

**Better State Coordination and National Cybercrime (Including IPR Crime) Strategy Sought:** Indian authorities in the states continue to run thousands of raids per year (over 2,700 in 2014), and industry investigators report good cooperation with authorities. There are various state enforcement cells in the state police headquarters, and states have appointed nodal officers to handle IPR related offenses. The non-bailable nature of copyright offenses has traditionally been helpful, as state cells can run raids on *suo moto* cognizance. This has proven over time to be a very effective and efficient means of enforcement against physical piracy. Many of the states also have laws against organized or immoral crimes, including the Maharashtra Prevention of Dangerous Activities (MPDA) Act of 1981, and other “Control of Goonda” Acts.<sup>15</sup> IIPA would like to see books, music, and video games included for coverage under these laws (to the extent they are not already). Without coverage, book publishers, for example, must lodge formal complaints under Section 200 of the Code of Criminal Procedure to obtain raids.

Increasingly, IP infringements online are tied to organized cybercrime activity and require an enforcement approach that recognizes this connection. For example, the Mumbai police reports that instances of cybercrime in Mumbai are up by 300% between 2013 and 2014.<sup>16</sup> Unfortunately, the lack of attention to cybercriminal activity, and

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<sup>11</sup>Cases against *songsdl.com* and *mp3don.com*, reported in IIPA's 2014 Special 301 report, remain pending.

<sup>12</sup>The Copyright Act provision on notice and takedown will not alone be adequate to address online piracy, since it only provides takedown for a period of 21 days, and failure of the right owner to furnish a court order within 21 days of the takedown notice allows the ISP to reinstate the content.

<sup>13</sup>In IIPA's 2013 Special 301 report, we noted that 53% of all pirated versions of major U.S. releases detected in Asia were sourced to an Indian cinema. In all, a total of 226 forensic matches of camcordered copies have been traced to Indian theaters between 2009 and 2014.

<sup>14</sup>The first operation targeted a major camcording syndicate nicknamed ‘Yamraaj’ located in Indore during the release of ‘Ironman 3.’ The second operation, based on evidence linked to the first operation was against a major release group operating out of Surat in India nicknamed ‘NICKkkDon.’ The second camcording syndicate owned 33 websites and comprised 6000 members. Extensive seizures were made in both cases. These actions in 2013 followed four operations in 2012 in Bangalore, Hyderabad, and Vijayawada with links in Delhi, leading to the closure of eight dedicated piracy websites.

<sup>15</sup>The West Bengal government has recently enacted the West Bengal Prohibition of Audio-Video Piracy Bill 2013, which aims to strengthen antipiracy efforts within the state.

<sup>16</sup>*Indian Cybercrime Registers 300% Rise Since 2013*, The Paypers, November 17, 2014, at <http://www.thepappers.com/digital-identity-security-online-fraud/indian-cybercrime-registers-300-rise-since-2013/757366-26>.

the lack of familiarity, interest, and awareness in IP cases among certain Indian authorities, leave IP infringements in India as a low priority for law enforcement. In November 2014, Mumbai police announced they would add a cybercrime law enforcement officer to all police stations in Mumbai precincts, a welcome move, but this should be replicated in other localities. In addition, a long overdue centralized unit should be established under CBI to cover IPR infringements, with dedicated prosecutors. Both cybercrime officers and the centralized unit should receive training in IPR infringements, online transactions, cybercrimes, and evidentiary requirements in relation to electronic evidence. In conjunction with court reforms discussed below, and increased legal tools to address online piracy discussed above, it is hoped this better coordination will see better results in both civil claims (including those involving court orders to ISPs to address online infringements) and criminal cases (ensuring deterrence with respect to specific defendants and the penalties meted out).

**Lack of Standard Operating Procedures Among States Hampers Right Holder Efforts:** Right holders continue to report a lack of standard operating procedures among the states, leading to some delays and inefficiencies. First, there is often no clear delineation of the proper office to approach with respect to online piracy (i.e., cybercrimes) versus hard goods and source (including camcording) piracy. Second, time frames from registration of a "First Information Report" from the initial criminal complaint made by a right owner, to the execution of a raid, are too slow to maintain enforcement momentum (sometimes taking three to four days, or more), particularly against covert networks when speed of response, confidentiality, adaptability and gathering of evidence are key factors. Law enforcement in smaller cities and towns, where piracy and pirate networks now percolate, must move in a more agile manner and without reluctance to address piracy as it emerges. Third, reports also indicate the concern over the high risk that information about the raid is being leaked. Publishers report that district police departments have differing procedures regarding pre-raid documentation requirements for lodging complaints, evidence gathering details during raids, safeguards during raids, and post-raid recordation. These differing procedures invariably lead to differing enforcement attitudes, inclinations, and awareness; duplication of efforts; and low conviction rates.

**Court Reform Needed to Address Piracy Issues in India:** Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as "courts of first instance") do a creditable job in preliminary matters in civil cases involving copyright infringement, and most positive civil relief measures and court orders emanate from these courts.<sup>17</sup> The experience in other regions, where district courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright, including: clogged dockets; delays due to archaic procedural laws, such as the failure to accept electronic documents and multiple opportunities for parties to delay proceedings; problems with retaining electronic evidence; onerous requests to produce evidence of ownership and/or witnesses; failing to grant seizure orders to copyright owners as a matter of right in civil cases; and difficulty enforcing civil court orders.<sup>18</sup> IIPA urges the Indian government to appoint special IP judges or panels in courts throughout the country. Industry stands ready to develop appropriate briefings for judges on copyright piracy developments, stressing the serious commercial harm caused by various forms of piracy and the need for deterrence.

With respect to compensation, civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the right holder for the injury caused. An amendment bill for enhancing the district courts' pecuniary jurisdiction, which would result in higher court costs (up to 300% of current costs) for cases valued at INR20 million (US\$400,000), was introduced into Parliament in December 2014, per the recommendation of the Delhi High Court.<sup>19</sup> Right holders are deeply concerned that this will severely hamper anti-piracy efforts in India. The Parliament should refrain from making this change.

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<sup>17</sup>Innovative approaches have included Anton Piller Orders, John Doe Orders, Norwich Pharmacal Orders, and Mareva Injunctions, all of which have assisted IP owners in securing infringing goods, as well as assistance to the police in raids, sealing evidence, securing bank account details of defendants, as well as requiring the disclosure of passwords for IT resources etc.

<sup>18</sup>Difficulties arise at times when defendants refuse entry to the Local Commissioner or police refuse to take action, citing lack of available personnel. Irregularities are also reported between police and infringers.

<sup>19</sup>The Delhi High Court is one of the few to have IP specialist judges, and is often used by right holders in civil copyright cases.

Criminal copyright cases in India have generally not yielded effective and deterrent results. While copyright piracy is a non-bailable offense, in practice, bail is often secured on the first day after arrest. There are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be subject to seizure. Criminal prosecutions often take years, by which time relevant witnesses and officers are untraceable and in many cases evidence secured is also compromised, leading to acquittals. In plea bargains (the recording industry reports more than 50 plea bargains in 2014) or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. The experiences of the industries with criminal cases differ by region, but overall, further training of prosecutors (there are no dedicated or IP expert prosecutors) and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful.

**Unauthorized Use of Books Continues to Plague Publishers; Export Monitoring Needed:** Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India. In an effort to combat rampant piracy, publishers long ago established the practice of creating market-specific lower-priced editions of textbooks to meet domestic demand – a significant benefit to Indian students and academics. Unfortunately, these lower-priced editions which are intended only for the Indian market are being exported to more established markets, disrupting publisher sales into those markets.

IIPA continues to monitor two potentially troubling situations. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In recent years, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. This phenomenon threatens to adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. The Indian government should take immediate action to protect continued access by its students to textbooks by empowering Customs to take *ex officio* actions with respect to illegal exports as well as imports at the border. Doing so will send a positive signal to all publishers, including those printers and distributors who rely on copyright in the India-only editions for their livelihoods.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the University premises. The suit seeks to draw the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the activity concerned in this case – the commercial production of course packs which Delhi University has outsourced to a commercial, for-profit, copy shop. The former activity traditionally falls within the scope of what may be permissible under global norms, and the latter falls squarely outside those strictures. Nonetheless, the case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the court, namely, to enjoin the copy shop and the University from commercial acts of unauthorized photocopying, reproduction, and distribution of course packs without appropriate licenses from publishers. The courts can grant the injunction, preserving authors' rights against commercial reprography, and requiring that licenses via the local reprographic rights collective licensing body recognized by the Indian government be granted with appropriate payments for course packs, while still preserving appropriate fair dealing. Doing so will also reaffirm the well-established three-step test which India must adhere to under the TRIPS Agreement and Berne Convention.

**Retail Piracy, Including Mobile Device Piracy, Must be Addressed:** In addition to online and mobile piracy, camcording, and book piracy, retail hard goods in India includes: burned, factory, and imported optical discs;<sup>20</sup> mobile device loading of content onto mobile devices, flash or pen drives as an after-service; unauthorized rental of motion pictures; and unauthorized sales of video games supported by sales of circumvention devices or technologies and modification services for consoles. This activity undermines innovative market-based solutions provided by right holders, such as the MXM Mobile Music Exchange (providing legitimate music to mobile phones in India). In 2014, IIPA members noted the following physical marketplaces in India as “notorious” for the availability of pirated/illegal materials: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika

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<sup>20</sup>In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.



Bazaar, and Sarojini Nagar Market (New Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallupur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Since much pirate material is “pre-release” (for example, Indian and international music records or motion pictures, available on the streets before they are released legitimately to the public), the Indian government should establish enhanced penalties for dealing in pre-release piracy. Police raids taken on the basis of *suo moto* cognizance raids continue to be the most effective enforcement against these markets, and authorities ran in the range of 2,700 raids in India in 2014. Still, the noted lack of criminal deterrence, along with physical pirated material being sourced from several locations (detected in recent years from China, Pakistan, Bangladesh, and Nepal), make physical piracy difficult to eradicate.

**Signal Theft Issues:** The audiovisual industry continues to have problems of signal theft by cable operators. Local cable operators often steal and redistribute content signals. There are, according to industry sources, approximately 60,000 cable systems in India that transmit IIPA member content without authorization. These cable systems affect legitimate audiovisual content business in India, including theatrical, home video, and legitimate television.<sup>21</sup> Restraining orders issued by the Civil Court (Delhi High Court) against entire networks (including all franchisees, distributors and cable operators forming part of the network) as a result of civil actions brought by industry have been successful, but have not resolved the problem. The rollout of digital pay-TV should help the problem of cable signal theft, but India has delayed digital rollout due to its desire to localize the manufacture of set top boxes. Industry urges the Indian government to work with it to ensure that set top boxes locally manufactured, and those imported into India, have adequate TPMs. Unauthorized camcords of motion pictures feed into this form of piracy, since the unauthorized camcords often get retransmitted by these rogue cable or pay-TV systems.

**Circumvention Services Proliferate in India:** Circumvention services and activities are flourishing in India to gain unlawful access to or unlawfully copy (or otherwise utilize) copyright materials. Unfortunately, the Copyright Act as amended fails to adequately address such services or activities. The gap in the law (which essentially requires proof of a nexus between the circumvention and copyright infringement) should be addressed, so that those enabling users to obtain access to copyright materials without permission can be halted.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Act Remains Deficient in Certain Key Areas:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, and as implemented in The Copyright Rules, 2013 (in force March 14, 2013). The Act and Rules, which have been broadly subject to constitutional challenges, remain concerning in certain respects.<sup>22</sup> At best, they represent a missed opportunity to strengthen the regime, support local and foreign creators adequately in the digital and online environment, and craft remedies adequate to keep rogue online piracy out of India. At worst, the Law and Rules may call into question India’s compliance with its international obligations under the TRIPS Agreement and Berne Convention, and may not be in conformity with the standards set out in the WCT and WPPT. In summary terms, further changes to the Act should be contemplated to:

<sup>21</sup> See Vishal Raids Cable Channels Telecasting Pirated Movies, The Times of India, July 12, 2014, at <http://timesofindia.indiatimes.com/entertainment/tamil/movies/news/Vishal-raids-cable-channels-telecasting-pirated-movies/articleshow/38248019.cms>; MSO in Belgaum Booked for Illegal Piracy of Zee TV Signals, Indian Television.com, August 8, 2014, at <http://www.indiantelevision.com/cable-tv/msos/mso-in-belgaum-booked-for-illegal-piracy-of-zee-tv-signals-140808>; Gang Involved in Satellite Signal Theft Busted: 4 Arrested, Z News, June 30, 2014, at [http://zeenews.india.com/news/nation/gang-involved-in-satellite-signal-theft-busted-4-arrested\\_943837.html](http://zeenews.india.com/news/nation/gang-involved-in-satellite-signal-theft-busted-4-arrested_943837.html); Amitabh Kumar, Indian Television Industry Is Fighting Against Piracy for Global Revenues, July 2014, at <http://www.broadcastandcablesat.co.in/indian-television-industry-is-fighting-against-piracy-for-global-revenues.html>.

<sup>22</sup>The Indian Broadcasting Foundation (IBF), and an individual film producer, Anand Bhushan, have challenged the constitutional validity of Sections 17, 18, 19, 31, and 33 of the amended Copyright Act. Music company “Super Cassettes Industries Ltd.,” along with the sound recording society, Phonographic Performance Ltd. (PPL), have challenged the constitutional validity of the new statutory licensing provision, Section 31D. Various industry associations have intervened in both sets of proceedings before the high courts concerned.

- Amend ownership and assignment provisions that are harming and altering existing commercial arrangements in India.<sup>23</sup>
- Ensure coverage in the law of access control TPMs, and ensure prohibition against both the act of circumvention of TPMs as well as the trafficking in circumvention technologies, devices, components, and services, and other changes, in full accord with the WCT and the WPPT.<sup>24</sup>
- Ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS Agreement. As written, any broadcasting organization (radio or television) would be able to apply to the Copyright Board for a statutory license, affecting the negotiating power of right owners. This change represents a serious regulatory and policy restriction on stakeholders, and it should not be permitted to go into effect with respect to non-Indian repertoire. The Indian government stated in 2012 that a new Copyright Board will be created and the rate of royalties determined, but to date, this has not occurred.
- Strengthen the statutory provisions regarding online infringements, so they permit for expeditious takedowns without automatic put-back, and address both hosted and non-hosted infringing activities and services, within and outside India.<sup>25</sup>
- Ensure any exceptions and limitations comply with the Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a)).
- Adopt provisions (such as those provided in the U.S. Family Entertainment and Copyright Act of 2005) that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works or other subject matter.

**Confirm That Camcording of a Motion Picture is Illegal:** The Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera, audio recording device, or other device) with the intent to make or transmit (or attempt to make or transmit) a copy, in whole or in part, of a motion picture from a theater. It is hoped and expected that the Modi Administration’s Ministry of Information & Broadcasting (MIB) will re-introduce an anti-camcording provision in the Cinematograph Bill, but this has yet to be put forward to India’s new Parliament. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully

<sup>23</sup>The Act contains independent rights for authors of ‘underlying works’ incorporated in cinematograph films including granting ‘non-waivable’ & ‘non-assignable’ royalty rights in favor of authors (Sections 17, 18-3, 19). The Act also barred assignment of future rights in respect of modes and mediums of exploitation which have not been invented or are not in commercial use (Section 18-2). As IIPA has previously indicated, the new provisions limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works and set exact percentages or amounts ascribed to be paid to such authors, undermining the flexibility of parties to negotiate agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. To our knowledge, the Rules: 1) do not confirm only the prospective (i.e., non-retroactive) application of Articles 17-19; 2) retain the Section 18 proviso that assignments are deemed invalid as to “any medium or mode of exploitation of the work which did not exist or was not in commercial use” at the time the assignment was made unless that medium or mode was “specifically” mentioned in the assignment, which could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution; and 3) do not clarify that the Act governs the relationship of creative parties with respect to the production of works in India, and not contracting parties outside of India.

<sup>24</sup>The Act now contains a criminal (but not civil) prohibition, in Section 65A, of the act of circumvention of a technological protection measure (TPM) “with the intention of infringing” an exclusive right. The provision falls short of full WCT and WPPT compliance, as described in previous IIPA submissions. The exception on the act of circumvention remains too broad. For example, the Rules do not adequately require, in the case of an exception to circumvent, reporting of 1) information about the tools used to circumvent; 2) the provision under which the exception to the prohibition is based; 3) the underlying work and subject matter being accessed by virtue of the circumvention; and 4) a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public. It is helpful that the reporting does include under Section 80(2)(c) the reason for the circumvention, but Section 80(2)(d) is not as helpful. While it requires the person circumventing to sign an undertaking to accept responsibility for infringement as a result of the circumvention, it imposes no liability on the party enabling the circumvention. Finally, civil as well as criminal relief should be available. As India is witnessing the roll out of the National Broadband Policy, and cable TV digitization is due for completion by December 2014, and the Internet subscriber base in India grows year on year, TPMs become very relevant both to curb online piracy levels and make space for new legitimate distribution models.

<sup>25</sup>The Act now includes a safe harbor provision for ISPs engaged in the ‘transient or incidental storage of ‘works’ with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51 (1) (c)). The Rules provide for takedown within 36 hours of a notice, but are otherwise problematic. While Rule 75(3) provides that the person responsible for the storage of the copy shall take measures to refrain from facilitating such access within 36 hours, this rule shifts the responsibility to right holders that have to comply with burdensome rules and requirements that may not be possible to meet in practice. For instance, according to Rule 75(2)(c) right holders must provide evidence that the copy of the work in question is not covered under a Section 52 or other exception, inappropriately shifting the burden of proof to the right holder. The exception for certain acts of transient and incidental storage of works should be narrowed to those that do not have an independent economic significance and the sole purpose for which is to enable transmission in a network between third parties by an intermediary for a lawful use. Further, while the Information Technology (Intermediaries Guidelines) Rules 2011 imposed due diligence requirements on ISPs, they do not effectively provide incentives for ISPs to assist in curbing online piracy, and carved out from their due diligence requirements is whether the transaction taking place (in which the transient reproduction occurs) is an authorized one. In addition to gaps in the Copyright Act, the Department of Telecom (DOT) should enforce the conditions of its licenses with ISPs, and the current Information Technology (IT) Act and relevant Implementing Rules should be utilized to full effect to address online copyright infringements and infringing websites.



through legislation; instances of camcording have been reduced in several markets with relatively minimal enforcement or government expenditure.

**Amend IT Act to Provide Remedy Against Non-Hosted Infringements:** As IIPA notes above, ISPs exhibit good cooperation when it comes to hosted content, but have not been as forthcoming when it comes to non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. Coverage of copyright infringement as a predicate offense under the IT Act, 2000 Rules, would largely go to solve the problem, since it would require ISPs to take measures to prevent communications infringing copyright or intellectual property rights from being carried on their networks.<sup>26</sup> Under this change, it would not matter where the infringing material emanated from, as long as its destination is India. In that case, the ISP must prevent that material's communication or availability (carriage) on its network. We are pleased that the Modi Administration is considering changes to the IT Act, and urge adoption of this important change.

**Provide Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building:** IIPA recommends that the Indian government amend the tax code to provide exemptions for copyright associations involved in anti-piracy and capacity building activities. Providing this support will help create a win-win situation, since right holder groups will have the wherewithal to provide greater levels of support and capacity building. Such cooperative efforts will both raise awareness of the issues surrounding copyright protection in India as well as promote greater cooperation and more effective enforcement, to the benefit of local Indian as well as foreign creators and right holders.

## **MARKET ACCESS ISSUES**

Market access barriers imposed on the motion picture, video game, and publishing industries result in an unfair playing field for all right holders, forcing them to compete with pirates who already unfairly benefit since they do not pay taxes or follow rules. Addressing market access barriers is therefore critical to reducing piracy, since their removal permits the advancement of legitimate business models bringing greater content to market on more diverse terms. Market access barriers previously addressed by IIPA, and remaining of concern, include:

- TRAI and government rules banning exclusivity and imposing "must provide" rules in the pay-TV sector.
- Localization requirements and per-channel fees beaming into India.
- Price caps for pay-TV channels that stifle the growth of the industry.<sup>27</sup>
- Foreign direct investment caps for radio/up-linking of news and current affairs TV channels, and pre-approval requirements for most other broadcasters to invest.
- Ministry of Finance service taxes.
- Inordinately high and discriminatory entertainment taxes on theatrical admissions,<sup>28</sup> including unconstitutional taxes based on the language of the film, other taxes such as value-added tax (VAT) and service taxes levied by the Indian Government. These taxes can sometimes amount to 30-60%.<sup>29</sup> Subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) would be preferred.

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<sup>26</sup>The Indian government's current position is that copyright is not included in the IT ACT, 2000 Rules, which are limited to public order, threat to national security and breach of peace issues.

<sup>27</sup>TRAI maintains price caps for pay channels in areas with set-top-boxes and also price bands for firms that offer bouquets (to ensure that the price per individual channels is not much higher than the price of a bouquet). TRAI says they will relax the price controls once other television platforms are widely adopted (satellite TV, Internet TV). Such rate regulation of a clearly competitive industry stifles its growth. TRAI should make a strong commitment to "adoption targets" for when they will relax price controls as the U.S. FCC did when the U.S. deregulated cable TV rates.

<sup>28</sup>Entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, to 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to much needed cinema construction.

<sup>29</sup>A service tax imposed by the Ministry of Finance against the temporary transfer of intellectual property rights went into effect in July 2010. Under the service tax policy, the Indian distributor of foreign films is liable to pay the service tax under reverse charge on the payments made to the offshore film producers at the revised rate of 16% (originally set at 10.3%, subsequently raised to 12.36%, and subject to two additional excess taxes totaling 3% on top of the service tax), raising the total amount of central, state, and municipal indirect taxes to between 30 to 60%, constituting double taxation by both the state and national government(s). Although service taxes against the temporary transfer of copyrights were subsequently placed on the Negative List with effect on July 2, 2012, constitutional challenges filed in the Delhi and Mumbai High Courts for the period under dispute remain pending.

- Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
- Onerous regulations on uplink and downlink of satellite signals beaming into India.
- High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards.

One measure which the Indian Parliament is still considering is the general Goods and Services Tax (GST), which could help resolve issues related to entertainment taxes and high tariffs on entertainment software. The tax, estimated to be around 16%, remains under consideration, but will require a constitutional amendment supported by at least two-thirds of Parliament and 50% of the individual states. IIPA supports this initiative as a means to reducing the regulatory burden imposed upon the copyright industries in India.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to participate in training, public awareness, and policy initiatives with various constituencies in India in 2014. The following are some illustrative examples:

- The Motion Pictures Distributors' Association (MPDA), in association with the United States Patent and Trademark Office and the Federation of Indian Chambers of Commerce and Industry (FICCI), conducted further trainings of officials and employees of multiplexes in 2013.
- The "Be a Movie Cop" quiz, an initiative launched by MPDA, India, in association with the Andhra Pradesh Film Chamber of Commerce and leading multiplexes across India, was launched for multiplexes. The quiz is an online training initiative, which attempts to raise awareness on the threats and challenges of camcording in cinemas, while rewarding theater staff with prizes in recognition of their efforts to curb content theft in their cinemas. Over 1,600 theatre staff across India have been trained through this innovative initiative/ platform.
- MPDA, in association with the Confederation of Indian Industries (CII), participated in a training for 50 senior law enforcement officials at the Tamil Nadu State Police Academy, Chennai.
- The music industry conducted training programs for police in West Bengal and Tamil Nadu.
- MPDA participated in a Judiciary training program organized by FICCI at the Chandigarh Judicial Academy attended by more than 150 trainees and sitting judges. The objective of the program was to highlight issues and challenges that the judiciary will encounter in resolving IP disputes in view of evolving technologies and trade policies.
- The Ministry of Human Resource Development (MHRD), in association with FICCI, launched a subcommittee, entitled the Copyright Enforcement Advisory Council (CEAC) to deal with issues relating to enforcement of copyright in India. MPDA shared inputs on the creation of a Standard Operating Procedures manual for law enforcement and the need for raising IP awareness and training to deal with IP cases.
- MPDA joined local screen associations such as FICCI, the Confederation of Indian Industry (CII), the Film and Television Producers Guild of India (FTPGI), FFI (Film Federation of India), American Chamber of Commerce (AmCham), Indo-American Chamber of Commerce (IACC) and the National Film Development Corporation's Film Bazaar to raise awareness on the need for specific laws to combat piracy in the film and entertainment industry in India.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2014. IIPA also recommends that USTR conduct an Out-of-Cycle Review (OCR) later in 2015 to monitor progress on the proper implementation of the law, in line with the comments made in this filing, and other improvements noted in this filing in the areas of enforcement and market access. IIPA supports the continuation of the Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns once that program is renewed.<sup>1</sup>

**Executive Summary:** IIPA welcomed passage and final coming into force of a new Copyright Law in October 2014 (after it was signed by former President Yudhoyono). The new law contains some important new protections required to address current issues, such as mall piracy and burgeoning online infringement, although we understand the provision creating liability in cases of mall owners who facilitate and profit from the infringement of their tenants is suspended while it undergoes a Constitutional challenge. The law also adds specificity with respect to violations involving the circumvention of technological protection measures (TPMs) and criminal penalties that hopefully will provide a deterrent against these current violations causing significant commercial harm to right holders in Indonesia.

IIPA remains concerned about some provisions in the new law, and hopes that some of the remaining concerns may be addressed in implementing regulations, which should be swiftly adopted. Unfortunately, the piracy and enforcement situation in Indonesia remains very difficult. Right holders are often asked by enforcement officials to pay for raids; and criminal raids and prosecutions, even against well-identified and recognized notorious markets, are almost non-existent. Courts are seen only as a last resort and largely ineffective. USTR (in conjunction with other agencies and the Embassy team in Jakarta) should seek to implement a meaningful action plan that: encourages swift implementation and enforcement of the new Copyright Law, sets enforcement benchmarks (including judicial reform), and eases market access barriers.

### PRIORITY ACTIONS REQUESTED IN 2015

#### **Enforcement:**

- Institute comprehensive enforcement reforms (under the oversight of the Anti-Corruption Commission) such as:
  - Establishing a separate Indonesian National Police unit dedicated to IP crimes with adequate funding;
  - Expanding the budget of the Penyidik Pegawai Negeri Sipil (PPNS) team, and increasing the number of copyright piracy raids annually;
  - Ensuring the Directorate of Special Crimes (Ditreskrimsus) and "Type A" Police Commands run sustained IPR police investigations with deterrent results;
  - Establishing a team of IP prosecutors to bring more cases, including high-profile anti-piracy cases; and
  - Establishing a National IP Task Force website tracking piracy prosecutions as part of an effort to increase transparency.
- Commit to judicial reforms in the Jakarta Commercial Courts; expand such courts in Medan, Semarang, Surabaya, and Makassar to adjudicate copyright cases; and establish special IP courts for criminal cases.
- Combat illegal photocopying, print piracy, and unauthorized translations, and legitimize use of published materials at schools and universities.

<sup>1</sup>For more details on Indonesia's Special 301 history, previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



- Take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/technologies).

#### Legislation:

- Ensure full, swift implementation of the new Copyright Law, in particular the new provisions in Chapter VIII (Articles 54 to 56), ensuring compliance consistent with Indonesia's international obligations (including under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Seek immediate repeal of broad exception related to Internet uses (Article 43(d)).
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws that permit broader criminal investigations and enhanced remedies.
- Make optical disc regulations more effective by: 1) routinely conducting off-hours unannounced inspections; 2) enforcing against source identification (SID) code violations; 3) providing transparency in raids and results; 4) covering imports of raw materials; and 5) ensuring that the Department of Industry collects exemplars.

#### Market Access:

- Amend the Negative Investment List (NIL) to allow greater foreign direct investment in media sectors.
- Permanently remove the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law that would, if implemented, impose local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry.
- Repeal Broadcasting Law requirement that any advertising aimed at the local market must be locally produced.
- Reduce import tariff rate on films to pre-2010 levels.

## PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

Prior IIPA reports on Indonesia contain detailed discussions of piracy and enforcement issues. This report serves as an update to those reports and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Retail, Mall, Physical, and Mobile Device Loading Piracy Remain Rampant:** Retail piracy in Indonesia's notorious markets, kiosks and malls<sup>3</sup> remains extremely high. Unauthorized CDs, VCDs, DVDs, and CD-ROMs occupy an estimated 90% of the physical market for most industries, including music, movies (including pirate movies in or claiming to be in Blu-ray format), and video games. Unauthorized photocopying of published materials continues to be a significant problem, particularly around university campuses. Retail pirates also offer to load illegal copyrighted files on to various mobile devices or carriers. The landlord liability provisions in the Copyright Law is apparently suspended pending a Constitutional review. In the meantime, retail and mall piracy continue largely unabated. In 2013, the Governor of Jakarta issued a Decree that malls not allow the sale of counterfeit and pirated materials on their premises (which was sent to the mayors of five cities in Jakarta), but the Decree is not being enforced strictly and there are no consequences for not following the Decree. Although the national response team on infringement of IPR successfully carried out a raid at Glodok Plaza two years ago (resulting in seizure of 15 truckloads of pirated material), piracy activities are still ongoing.

**Internet Piracy and Mobile Network Piracy Worsen, Requiring Swift Implementation of New Law:** Peer-to-peer (P2P) downloading, streaming, cyberlocker, and direct download sites with pirated content dominate the online landscape in Indonesia. Worse yet, the money from advertising, albeit largely from gambling services, malware providers, transactional sex offers, and pornography sites, make offering pirated content a very lucrative and relatively low-risk enterprise. Estimates of Internet usage in Indonesia range between a little more than 71 million users (Indonesia Internet Service Providers Association, Q4 2013) to 83.7 million users (eMarketer, 2014), which in

<sup>2</sup>See, e.g., IIPA, *Indonesia*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301INDONESIA.PDF>.

<sup>3</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials. Notorious markets identified by IIPA members in the fall of 2014 included Harco Glodok (MPAA).

either case approaches 30% of the population and represents double-digit growth year-on-year (Commerce Ministry data is more conservative, but may underestimate users based on per capita estimates of use by each connection and does not take into account mobile). Mobile penetration, which is an enabler of piracy (due to the proliferation of mobile apps facilitating infringing activity), has been at over 100% for several years, and well more than half of Indonesians having mobile phones access the Internet this way (Nielson, 2011). Speeds vary but averaging over 2 Mbps (and a smaller percentage having over 4 Mbps) (Akamai Technologies, Q1 2014), it is clear that an increasing number of Indonesian Netizens are now enjoying limited broadband capability.

These numbers indicate that significant opportunities exist for the launch of legitimate services for the distribution of copyright materials in Indonesia. Unfortunately, with the absence of an adequate legal or enforcement framework up to the present, online and mobile piracy services have proliferated and legitimate services cannot enter this market rigged with piracy. Notorious markets identified by IIPA members in the fall of 2014 and linked to Indonesia (either because they are located there or are extremely popular in the country) include *gudanglagu.com* (cited by RIAA) (878<sup>th</sup>), *4shared* (55<sup>th</sup>),<sup>4</sup> *kickass.so* (57<sup>th</sup>).<sup>5</sup> Other sites of concern include *subscene.com* (45<sup>th</sup>),<sup>6</sup> and *nontonmovies* (103<sup>rd</sup> in Indonesia, 44<sup>th</sup> in Cambodia, and very popular in Singapore and Korea).<sup>7</sup> The new law provides express authority to the Indonesian Government to order ISPs to disable access to websites on the basis of copyright infringement. This law should be swiftly implemented.

**Book Piracy:** Indonesia's market for publications shows great promise for growth, but piracy of published materials makes it one of the worst markets in Asia for publishers. Piracy comes in the form of unauthorized copies of academic textbooks. Industry continued its efforts to disrupt unauthorized photocopying at dozens of retail shops situated near universities. Enforcement activities have expanded beyond Jakarta to target shops in the Yogyakarta area. While many of the shops have stopped accepting requests to photocopy materials, a number of shops have refused to cooperate and continue to engage in unauthorized photocopying activities. University campuses remain central in the fight against unauthorized use of books, textbooks, journals, or other publications. Industry has engaged with directors and deans of campuses to ask them to join the fight against piracy, and these self-help initiatives have led to some improvements in policies for high-level universities, some of which now have policies in place not to allow photocopied books to be brought into the classroom. Academics have also been engaged, and some have taken steps to discourage the use of photocopied textbooks in their classes, banning illegally copied texts from examinations, and encouraging cost-sharing on legitimate texts as an alternative to piracy. The Ministries of Education and Culture should be encouraged to do more to help rights holder groups better address the problem of unauthorized photocopying. More universities should be encouraged to adopt appropriate use and copyright policies, and to better promote the use of legitimate published materials in schools and universities. These policies and messages would better serve students, professors and all university personnel, and be better received, coming from the universities' governing bodies. Online piracy of dictionaries and journal articles is also becoming a problem in Indonesia.

**Signal Theft Remains a Serious Problem in Indonesia:** Signal theft/pay-TV piracy remains a problem throughout the Indonesian archipelago. We understand the local pay-TV company, MNC Sky Vision, has instituted self-help in seeking prosecutions against dozens of individuals engaged in signal theft and set-top box (STB) piracy in 2014. It is critically important, with oncoming convergence of online networks and advances in digital technology, that the government play a supportive role in supporting legitimate pay-TV services and take actions against those engaged in the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related devices/technologies).

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<sup>4</sup>*4shared.com* is a cyberlocker often used to host downloadable infringing content (including major U.S. motion picture titles) for other dedicated piracy sites. They also have an unfiltered search function.

<sup>5</sup>*Kickass.so* is a site designed for the purpose of commercially benefiting from piracy, and currently is the largest torrent site in the world.

<sup>6</sup>*Subscene.com* is a subtitle file download site. They host subtitle files of major motion pictures, but do not host the video files themselves.

<sup>7</sup>*Nontonmovie.com* is a user-generated content streaming site. The site has infringing content (including major U.S. motion picture titles) and can only be accessed in Indonesia.

**Comprehensive Enforcement Reform:** A significant, multi-faceted enforcement reform process must be instituted in order to make significant progress against piracy in Indonesia. The National IP Task Force recently launched a “campaign” against piracy, but the actual efforts have been minimal. Under the direction of the Task Force, and with the oversight of the Anti Corruption Commission, the following steps should be undertaken:

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IPO PPNS team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and “Type A” Police Commands should announce in early 2015 a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle piracy cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids.<sup>8</sup>

Enforcement officials have reportedly been reluctant to conduct regular enforcement actions because of the involvement of organized crime in piracy activities. It is critical that copyright piracy constitute a predicate offense for organized crime statutes, such that Indonesian officials will feel more secure in targeting such criminal groups.

**Comprehensive Judicial Reform:** The courts in Indonesia remain largely ineffective in both the civil and criminal areas.

Regarding civil courts, it is critical to improve the quality and consistency of civil Commercial Court rulings. To this end, the Anti-Corruption Commission should work with the Supreme Court Ethics Committee. Publishing court decisions is also necessary to improve transparency and reduce irregularities. Second, with the exception of Jakarta, very few civil Commercial Court judges are familiar enough with basic aspects of how IPR cases are conducted, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. As a result, they award: only rudimentary judicial remedies with extremely low, non-compensatory (and non-deterrent) damages; no orders to detain, remove, or destroy pirate goods; and unenforceable verdicts. Reform efforts in Jakarta, including enhanced training to create more familiarity with IP cases should be enhanced and extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.

The criminal courts face similar hurdles. Despite the 2009 Attorney General letter categorizing IP cases as “Important Cases ... to accelerate case prosecutions,”<sup>9</sup> in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines. In one case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay.

## **COPYRIGHT LAW AND RELATED ISSUES**

Indonesia’s new Law Concerning Copyright (2014) replaced the prior 2002 law and went into force in October upon signature of former President Yudhoyono. The Law now awaits implementing regulations. The new Law added some strong provisions to potentially provide immediate relief against burgeoning online and digital forms

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<sup>8</sup>At present, case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity and create deterrence in copyright infringement cases.

<sup>9</sup>Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, at <http://www.regulations.gov/contentStreamer?objectId=0900006480e01d5d&disposition=attachment&contentType=pdf>.

of infringement, in line with Indonesia's international obligations under the TRIPS Agreement, the Berne Convention, and the WCT and WPPT.<sup>10</sup> However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations. In several cases, needed changes were omitted.

**Improvements in the New Law:** Improvements in the Law Concerning Copyright (2014) include the following:

***Enforcement Against Internet Infringements:*** Articles 54 through 56 of the Law retain a workable approach to addressing Internet-based infringements in Indonesia. Right holders believe this combination of administrative and judicial relief, when fully implemented, will allow the government to take effective action to halt online infringements. A new requirement (in Article 55) was added between the prior drafts and the final law, namely, that for any act involving an "entire" website, it shall be referred to a court for review within 14 days.

***Temporary Reproductions:*** The Law contains confirmation of temporary copy protection (broad reproduction right "in any manner or form" accompanied with a narrow exception) in Article 49.

***Technological Protection Measures (TPMs):*** The Law provides protection against circumvention of TPMs including criminal penalties for offenders (Article 112) (but coverage of all trafficking offenses, technologies, and access controls should be confirmed in IRs).

***Communication to the Public/Making Available Rights:*** The Law provides a WCT-compatible "communication to the public" right, and a WPPT-compatible "making available" right. Article 27 provides, "phonograms made available to the public through wire or wireless means shall be deemed as a phonogram published for commercial purposes" and are only eligible for a single equitable remuneration. It should be confirmed in implementing regulations that this does not apply in cases of interactive transmissions, which are covered by the exclusive making available right set out in Article 24(2)(d), in order to ensure full WPPT-compatibility.

***Ownership/Work-for-Hire Provisions:*** The Law provides ownership/work-for-hire provisions generally favorable to, and preserving of, existing and longstanding commercial arrangements of right holders/authors (except as noted below regarding termination of "true sale agreement" transfers).

***Term Extension:*** The Law provides for extension of term of protection to life plus 70 for works calculated on the basis of an author (which would include books and musical works). Unfortunately, works "owned or held by a legal entity," as well as computer programs, video games, cinematographic works, phonograms and performances, among others, are only protected for 50 years. This unfair and discriminatory treatment by subject matter or ownership structure should be remedied by providing at least 70 years protection from publication, or 70 years from the life of the author, as the case may be.

***Unauthorized Camcording of Movies:*** While no express provision was added, the Explanatory Memorandum to the new Law indicates the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. This important recognition by the Indonesian government of the serious nature of the problem of unauthorized camcording must now be followed on with enforcement, including fostering greater cooperation with cinema owners to fully uphold and enforce the Law, and targeted enforcement actions, and where warranted, prosecutions against those engaged in this highly damaging activity.<sup>11</sup>

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

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

**Provisions in the New Law Raising Concerns:** IIPA has in the past raised, and once again raises, the following concerns with respect to the Law as enacted:

***Internet Exception:*** The Law provides a broad exception under Article 43(d) for “making and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating.” Both parts of this provision set a terrible precedent and would act to discourage and severely undermine legitimate business models built on the rights of authors, right holders, and related right owners to control the manner and means in which they authorize the making and disseminating of content through information and communication technologies. This provision would collide with Indonesia’s international obligations under TRIPS, the Berne Convention, the WCT, and the WPPT. For these reasons, it should be deleted in its entirety.

***Criminal Case Structure and Penalties Weakened:*** Under the new Law, criminal cases are now complaint-based. Right holders view this as an additional hurdle to effective enforcement; criminal cases should be prosecuted on an *ex officio* basis. In addition, the criminal provisions take steps backward from the previous law, in that they no longer provide minimum mandatory statutory criminal penalties. Without a minimum fine, right holders are concerned deterrent sentences will not be forthcoming. Specifically, some of the criminal penalties may be too weak to deter. For example, the maximum fine for TPMs/circumvention violations is US\$25,000, lower than that for many other offenses (and there is no multiplier if the violation is “done in the form of piracy” as for other offenses). Also, the landlord criminal liability provision (which we understand is now suspended pending a Constitutional review) is weak, with a maximum fine of only US\$8,260. Finally, Article 95 of the new Law creates a highly unusual provision which appears to mandate “mediation” (*mediasi*) before a piracy case (*pembajakan*) can be prosecuted. The purpose and operation of this provision in practice is highly unclear.

***Exceptions and Limitations/Compulsory License:*** Article 44 of the new Law contains a broad exception exempting a number of different uses for a wide array of purposes, ranging from education to criticism to “security and maintenance of government.” On its face, the broad scope of the uses and purposes contained in this exception appears to go well beyond what is permissible under TRIPS, the Berne Convention, the WCT, and the WPPT, despite a well-intentioned, but ineffective, attempt to narrow the provision through inclusion of part of the Berne three-step test:

“The use, consumption, reproduction, and/or alteration of a work and/or object of related rights, in whole or in part, shall not be deemed a copyright infringement if the source is indicated or listed in detail for the purposes of ... (a) education, research, scientific writing, report preparation, written criticism, or review on an issue without prejudicing the interests of the author or copyright owner...”

Subsection (a)’s reference to the three-step test omits the limitation to “certain special cases” and uses that do “not conflict with a normal exploitation of the work by the copyright owner.” The three additional subsections included in this exception do not contain any safeguards required under the three-step test. IIPA thus recommends that the Indonesian government clarify the application of the full three-step test to each use and purpose contained in this exception through implementing regulations. Furthermore, implementing regulations should provide guidance to help prospective users determine whether their use falls within the appropriate bounds of the three-step test.

In addition, Article 84 of the Law includes a compulsory license which has been narrowed from previous drafts IIPA reviewed. Nonetheless, the provision applies to “works” and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it does not collide with TRIPS, the Berne Convention, the WCT, and the WPPT.

***Termination of Transfers:*** Articles 18, 30 and 122 of the Law provide for a possible “termination” of transfers with respect to literary works (books), performances, and musical works, but only in undefined cases of “true sale agreements.” Under these provisions the termination occurs at “25 years,” with a two-year transition period for works already past the 25 year mark as of the date of entry into force of the Law; and two-year transition past the



25 years if not yet reached (i.e., 27 years from the agreement). It is highly unclear how these provisions operate; for example, it is assumed that an author needs to invoke the termination in order for it to be effective. This should be made clear. It is also unclear when there is (or is not) a “true sale” agreement (an undefined phrase). In any event, the implementing regulations should ideally ensure that these termination provisions do not apply to foreign works. In the very least, it should be confirmed that the system requires an opt-in by the author.

**RMI Violations:** In a somewhat perplexing development, the Law provides that RMI violations only occur when affecting moral rights. The WCT and WPPT clearly require “adequate and effective legal remedies against ... acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*.” (bracketed text in WCT only; emphasis added).

**Censorship Provision:** Article 50 of the Law contains a censorship provision which, while not necessarily denying copyright protection (as was the case in China and which was found to be in violation of China’s WTO obligations), is extremely open-ended and could be problematic.

**Registration, Invalidity, and Recordal Requirement:** While registration of copyright remains voluntary in the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another work previously registered as a grounds for refusal. There remains considerable concern about abuse of the voluntary copyright registration process in Indonesia, since apparently, many invalid copyrights get registered, including by IP infringers. It is hoped that through this new provision, the authorities will be able to review and invalidate false applications or registrations. We suggest that in implementing regulations, a more forceful deterrent be introduced, including fines and penalties, against anyone who knowingly files a false application. Also, nothing with respect to the registration or recordal system may create prohibited formalities. Article 83 appears to impose a requirement to record licenses, with lack of recordal meaning a license “shall have no legal effect on third parties.” This would seem to suggest a Berne-prohibited formality, if, for example, lack of recordal was used to deny the exercise of copyright from a particular licensor or licensee. It should be clarified in implementing regulations that in no way will a failure to record transfers and other changes deny copyright protection to the registrant.

**Provisional Measures:** Under Article 108 of the Law, it appears that preliminary (provisional) injunctions will take too long to obtain. It also appears the Article does not expressly provide for any *ex parte* procedure, which would make it in practice unworkable and would call into question Indonesia’s TRIPS obligations. The application for provisional relief is, according to the Article, not acted upon for “up to five days,” is “informed to both parties,” (i.e., not *ex parte*), with defendants appearing seven days thereafter, and a 30-day review process. This would clearly not provide for “expeditious” remedies as required by TRIPS.

#### **Other Needed Legal Reforms:**

**Strengthening the Organized Crime Statute:** While not included in the latest amendments, since it has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical discs are also involved in many other forms of crime such as trafficking in persons, illegal logging, and illegal gambling, copyright infringement should be included as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

**Strengthening the Optical Disc Regulations and Making them GATT/WTO-Consistent:** The Optical Disc Regulation (2005), a Ministry of Trade Regulation on the importation of machines and raw materials, and a Regulation on reporting by registered producers, address optical disc piracy. The Regulations need to be updated to: 1) prohibit the unlawful use of or manipulation of SID code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of production of pre-recorded or blank optical discs; 3) remove the requirement that imported, pre-recorded discs be marked with identification codes, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately ensure stampers and masters are subject to seizure; 5) expressly cover imports and exports of discs, equipment and raw materials; 6) expressly authorize entry for an

inspection in case a suspect target refuses entry (and penalties for such refusal); 7) require the government to keep records of “permits” and raids run; 8) permit only those industries directly related to the optical disc industry to import optical grade polycarbonate; 9) expressly impose corporate liability on individuals; and 10) provide clear enforcement authority or grounds for routine inspections on manufacturers’ or importers’ premises.

## **MARKET ACCESS AND RELATED ISSUES**

**Further Lift Prohibitions and Restrictions on Foreign Company Participation or Investment in Importation, Direct Distribution, Exhibition, or Retailing in Copyright Products in Indonesia:** Most media sectors remain on the Negative Investment List (NIL) in Indonesia, preventing direct foreign investment in the Indonesian media industries, and particularly harming the motion picture and music sectors in Indonesia.<sup>12</sup> For example, sound recording production, film production and distribution remain at a 100% local capital investment level. Although in 2014, the Indonesia Investment Coordinating Board (BKPM) announced some changes in certain areas, we have thus far been unable to confirm the changes in any corresponding schedules. Our understanding is that four aspects of film technical services (film studios; film processing laboratories; sound designing and dubbing facilities; and film printing and duplication services) are now open to direct foreign investment of up to 49%, and that film exhibition will also be opened to foreign investment as determined by the Ministry of Finance and BKPM, as long as the exhibitor is a publicly listed entity. These are helpful changes, but other market openings should be afforded to: radio and television broadcasting service providers; radio and television broadcasting subscription service providers; print media information service providers; film export and import businesses; film distributors; and foreign sound recording distributors.

IIPA notes the longstanding promise made by the Indonesian Government that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago). Broader investment in the distribution structure would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials.

**Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia:** A 2008 Decree would require the local replication of all theatrical prints and home video titles (e.g., DVDs).<sup>13</sup> While the Decree has been suspended several times (including again for 2015), it is past time to formally and permanently eliminate this requirement, which is opposed by local Indonesian filmmakers as well as by international producers and distributors. The specter of the Decree threatens to have serious negative consequences on the long-term viability of Indonesia’s film industry, threatens the continued development of local cinemas, and jeopardizes arrangements for local filmmakers to carry out post-production work overseas. If the Decree was ever implemented, it would negatively affect foreign motion picture companies’ release and distribution schedule for the country, and would raise concerns over existing local facilities’ ability to handle the volume and quality output requirements, as well as lab and duplication facility security issues.

**Eliminate Problematic Provisions from the Film Law:** The 2009 Film Law, which has not yet been implemented, contains provisions that would limit foreign participation in various aspects of the film businesses and as such would be inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The local filmmaking industry opposes the Law. The Law includes a 60% local content (screen) quota for local exhibitors, and a ban on the dubbing of imported films. Other restrictions include: 1) limits on the number of imported films; 2) Articles 10 and 20, which require the maximization of Indonesian resources (potentially including a local print replication requirement); 3) Article 17, which establishes a pre-production content review requirement that obliges filmmakers to notify the government of the title, story content, and production plan (this would be especially burdensome for co-productions); 4) Articles 26-28, under which distributors are required to provide “fair and right”

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<sup>12</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

<sup>13</sup>Ministry of Culture and Tourism (MOCT) *Ministerial Decree No. 55, PM No. 55/PW.204/MKP/2008 on Utilisation of Domestic Film Technical Services in Making and Duplicating Activities of Local Film and Duplication of Imported Film* (2008).

treatment to exhibitors and could be interpreted to mandate provision of prints to theaters on demand (a potential “must supply” obligation); 5) Article 40, restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses; and 6) Article 44, which bans dubbing of imported films.<sup>14</sup> The Law includes some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct such as restrictions on vertical integration that could have unintended consequences including restricting foreign participation in the market and curbing business efficiency. If implemented, the industry would expect the same repercussion as experienced in other markets with like provisions: limits on the local industry’s exposure to the expertise and skills of foreign producers, lost revenues to local theaters, and a huge opening to the purveyors of pirated content.

**Advertising Restrictions:** Indonesia’s Broadcasting Law (2002) includes a requirement that any advertising aimed at the local market must be locally produced. Although the requirements have never been implemented (due largely to concerns that the indigenous capacity to produce advertisements is insufficient to meet the demands of the market), and although regulations issued in 2007 provided a series of exemptions, recent public hearings organized by Indonesian regulators calling for its implementation have raised concerns about the possible deleterious effects of such a requirement.

**Customs Valuation:** In 2010, the Indonesian Government sought to impose a methodology for determining the customs duty on theatrical prints imported into Indonesia that would have sought to capture the royalties paid on the films. Not only was this formulation inconsistent with the WTO Customs Valuation Agreement, but U.S. industry believes that the regime which replaced this proposal may also be inconsistent. A new specific tariff that is based on the running time of the film has since been imposed, resulting in a new barrier to the Indonesian market in the form of a significant increase in the amount of customs duties paid for the importation of foreign films. The Indonesian government should properly apply the computed methodology, in which the valuation of film imports is made on a per-meter basis against the physical carrier medium, as is the norm in most markets around the world.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

On August 1, 2013, the GSP program expired, thus placing on hold the investigation into the country practices in Indonesia regarding intellectual property rights (which had commenced in July 2012). Once the program is renewed, it is expected that the investigation will continue into whether Indonesia qualifies for GSP beneficiary status. Under the statute the President of the United States had to consider for GSP beneficiary status “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 U.S.C. §§ 2462(c)(4) and (5). Countries like Indonesia should not expect to continue to receive trade preferences if they do not live up to their end of the bargain by providing adequate and effective protection for the intellectual property rights of U.S. creators, and/or if they fail to afford equitable and reasonable market access to U.S. creative products and services.

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<sup>14</sup>Dubbing of imported films into a local language is a commercial decision that should be based on business considerations.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2015.<sup>1</sup>

**Executive Summary:** As the U.S. Government noted in its “Report on Russia’s Implementation of the WTO Agreement” (December 2014), “the current IPR enforcement environment in Russia remains weak” and, more specifically, online piracy “has been, and remains, a significant problem in Russia.”

The Russian Duma enacted one noteworthy amendment in November 2014 (Federal Law No. 364 – in force May 1, 2015), expanding a 2013 law that provided procedures for complying with takedown notices directed at websites and hosting activities. The 2013 law was limited in its application to motion pictures and television programs. The 2014 amendment expands the 2013 law to cover all copyright subject matter, excepting photographs, and it would allow for website blocking in the event of repeat infringement. While the 2013 law has, thus far, been of somewhat limited effectiveness, its expansion to other types of copyright works is welcomed.

The Government of Russia is presently considering the adoption of an Internet tax paid by digital users, intended for distribution to rights holders in lieu of licensing, to compensate rights holders for massive online infringement of their works. While supporters of the proposal suggest it would “improve” the digital marketplace, we are concerned that such a levy would fail to generate fair or meaningful compensation for creators and producers of copyrighted material for the use of material, and would instead reduce competition between services that could expand the legitimate digital marketplace. This proposal would create a compulsory license for the distribution of copyright protected materials in violation of the requirements of the TRIPS Agreement and the WIPO treaties. Advocates of this proposal claim that it would provide a solution to the current market failure. However, the proposal would instead lock-in market failure, in perpetuity, eroding any basis for establishing conditions for healthy and legal competition. We urge the Government of Russia to reject this proposal, and instead focus on improving enforcement against infringing parties (and those who enable infringement), thereby promoting opportunities for voluntary licensing and the development of market conditions, and to use all other available tools to create a robust online marketplace.

It has now been two years since Russia completed its accession to the World Trade Organization, and agreed to a detailed IPR Action Plan with the U.S. Government. Neither the WTO obligations outlined in that Action Plan, nor in the 2006 U.S.-Russia IPR Agreement – both aimed at improving the marketplace for digital copyright materials – have been fully and properly implemented by the Government of Russia. Instead, enforcement has lagged. In the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined significantly, and, in the case of well-known large-scale infringers on the U.S. Government’s Notorious Markets List, these raids have been absent altogether. In part, this was the result of a 2011 major reorganization of the police force and a drop in resources. It also appears to be the result of a change in government priorities and an unwillingness to take action against online infringement. Effective enforcement in Russia should consist of the Government of Russia pursuing more, and more effective, criminal and administrative actions, and strengthening administrative penalties, particularly against large-scale enterprises.

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<sup>1</sup>For more details on Russia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Russia’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2015**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2015:

- Reject the proposed Internet levy (and focus instead on growing the legitimate online marketplace by fostering fair competition based on the rule of law).
- Undertake effective actions against Internet piracy – including unlicensed streaming services, pay-per-download websites, videogame hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and other commercial enterprises that provide services with the clear intent to promote or induce infringement, whether or not the servers are located in Russia.
- Properly staff and resource the Internet enforcement units in the Ministry of Internal Affairs (MVD) – such as Department K – and add copyright infringement work to their list of priorities.
- Increase the overall effectiveness and number of criminal IPR cases, and bring deterrent criminal actions against retail chains that sell pirated entertainment software, movies and music, and organized criminal syndicates involved in piracy.
- Amend the Civil Code, Part IV, to:
  - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
  - (b) better define the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities (also, develop a clear definition of the types of intermediaries entitled to the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits);
  - (c) implement injunctive relief and efficient and scalable notice and takedown procedures – applicable to all copyrightable works and recordings, as well as applicable to search engines and other service providers; and
  - (d) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including, for example, by clarifying the obligations of ISPs to comply with notice and takedowns under the 2013 law.
- Amend the Civil Code in Article 1299, and the Presidium Decision (March 2009), to provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to (the rare) instances where the devices are advertised (solely) as circumvention devices.
- Ensure fairness and transparency in collective administration of certain rights, while preserving the exclusive rights of copyright owners in Internet distribution.
- Amend the Criminal Code to establish criminal liability against principals in legal entities, including for IPR crimes.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Amend the Criminal Code to establish criminal liability for the importation and commercial trafficking in circumvention devices.
- Strengthen copyright liability under the Administrative Code by eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and by raising administrative penalties to deterrent levels, for example, by implementing: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); and/or (iii) penalties to disqualify from their managerial responsibilities, for one to three years, managers of legal entities.

- Establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA**

**Internet Piracy Enforcement:** Internet and wireless access by Russian citizens continues to grow rapidly and has resulted in Russia having one of the largest and most active online communities in Europe. As of November 2014, according to the International Telecommunications Union (ITU), over 61% of the Russian population now has Internet access, and wireless broadband penetration is at 60%. Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

Russia is host to a number of large-scale infringing websites, including web-based (and peer-to-peer) downloading sites, linking sites, and cyberlockers that offer access to pirated music and film materials. Because many of these sites cater to English-speaking (and other non-Russian) users they harm markets in many countries, in addition to Russia. Since the enactment of the 2013 law, many pirate sites that host unauthorized motion pictures or television programs have moved their sites to foreign hosting locations. Still, there is one notable exception: *vKontakte* (*vk.com*), the most popular online social network in Russia (with over 46 million visits per day) which remains the largest single distributor of infringing music in Russia as well as a hotbed for online piracy of movies and television programming. This site has been on the U.S. Government's Notorious Markets list since 2012. It is ranked 24 in Alexa's global top 500 most visited websites worldwide and is the second most visited website in Russia. *vKontakte* (now owned by Mail.ru) has a functionality specifically designed to enable its members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works. It is available in many languages, including English, and has a dedicated content search engine that enables other members to search and instantly stream infringing content. In addition, some third-party software developers have distributed "apps" to enable non-members to search, stream and download the content available on the site. *vKontakte* will generally take down specific content when notified, but that is not an adequate enforcement mechanism for a problem that *vKontakte* created. Russia's second largest social network site, *odnoklassniki.ru*, also operates an unlicensed music service similar to *vKontakte's* service. While *vKontakte* is by far the biggest impediment to the functioning of a legitimate online marketplace for music, the recording industry reports that paid download sites are still a source of piracy in Russia along with the peer-to-peer services and cyberlockers. There are over thirty *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to thirty different domain names for the same user interface.

Russia hosts a number of major BitTorrent indexing sites such as *rutracker.org*, launched in response to the takedown of *torrent.ru*. Other particularly problematic sites are *Torrent-Games.net*, a Russian BitTorrent tracker; the cyberlocker *rapidgator.net*, which has been on the U.S. Government's Notorious Markets list since 2012, and was hosting over 500,000 infringing video game files in 2014; *mygully.com*, a German language forum site, hosted in Russia, with over 2.5 million registered users; *rutor.org*, with over 1.5 million visits per day; *Kinozal.tv*, with over 370,000 visits per day; *tfile.me*, with over 335,000 visits per day; and *nnm-club.me*, with over 280,000 visits per day. Neither ISPs nor most website owners respond to takedown requests for these sites. There are a few exceptions; for example, the entertainment software industry reports a few sites even including *rutracker.org*, do comply with takedown notices, while others, such as *rutor.org*, never comply. Some sites operate regionally, such as *games.net*, which is hosted in Russia but administered from Georgia (making takedowns especially problematic). For the third consecutive year, Russia was first in the world by far in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks. In 2014, users with Russian IP addresses accounted for more than 32% of the global volume of detected infringements occurring on public peer-to-peer networks.

Russia is home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet (as well as sell illegal hard copies). The total number of sourced camcord pirate copies from within

Russia is down from a few years ago, with most of the activity in 2014 clustered in the Solntzevo district of Moscow. The illicit camcords that are sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates. Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The Government of Russia should propose (so the Duma can adopt) an amendment to Article 146 of the Criminal Code (an amendment was considered in the Duma in 2013, but stalled), as well as undertake effective enforcement against illegal camcording of motion pictures.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers partner with exclusively authorized local distributors to finance and distribute films and television programming. High quality pirated hard copies (DVDs) are routinely uploaded and offered for free online, destroying the legitimate market for these works. As a result, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy, such as worldwide same day release (referred to as “day-and-date” releases), since national distributors release films on their own schedules around the globe.

Book and journal publishers are also concerned by the prevalence of online piracy in Russia (consisting of books and other text), particularly on hosted-content websites that are locally designed. For example, a group of sites known as the “Library Genesis Project” (*libgen.org*) offers over 21 million journal articles and over 6 million books, all available for free. The site encourages the creation of mirror sites of all of its content, and there are presently 10 such mirror sites (including *bookfi.org* and *bookza.org*). A *libgen.org*-related, but rather specialized site, is *sci-hub.org*. *Sci-hub.org* enables unauthorized access to databases that host scientific, technical and medical (STM) articles published by journal publishers. The “sci-hub model” however, is more pernicious than other online pirate sites, because it facilitates unauthorized access using compromised log-in credentials issued by higher education institutions to their subscribers (i.e., students, faculty and other university personnel). Once the sci-hub operators have obtained a copy of an STM article, the same article is then cross-posted, or also made available, on *libgen.org*.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to infringing content, with many sites ignoring requests altogether. Peer-to-peer piracy providing free unauthorized access to e-books continues to be an issue as well.

In three separate bilateral and multilateral agreements over the past several years, the Government of Russia made commitments to take effective action against Internet piracy. In the 2006 U.S.-Russia IPR Agreement, Russia agreed to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites registered in Russia’s .ru domain name, or whose servers are situated in Russia) and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” As part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” In December 2012, in the U.S.-Russia Action Plan on IPR, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, inter alia: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content....Take actions against the creators and administrators of websites through which intellectual property crimes

are committed....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.” The Government of Russia, has to date, taken few of these steps.

In order to improve the digital marketplace in Russia, both strong criminal enforcement and better and clearer civil remedies and procedures are needed. For effective criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia. In addition to proper targeting, there needs to be more expeditious investigations and better law enforcement coordination.

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

One fundamental enforcement shortcoming is the lack of clear authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action in the past. At present, there is no Department K staff doing any IPR enforcement (that is left to the Economic Crime Police). Department K’s authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be properly staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers in how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, where there is no direct fee charged by the enterprise.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet operations. Changes to criminal procedure which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against owners of commercial Internet operations. One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes, so few such cases are ever brought and even fewer tried to a conclusion. The 2011 increase in the criminal threshold, without special consideration of its application to Internet offenses, has exacerbated this problem; this further underscores the importance of also using administrative authority in digital piracy cases.

The 2013 package of laws had two key features applying civil remedies against Internet piracy: (1) amendments to the Civil Code, Part IV – to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors; and (2) amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) that provide injunctions by court order (only) after notice and takedown to block infringing materials or limit access to infringing websites. In addition to expanding the scope of subject matter covered by the 2013 laws, the 2014 amendments also expanded existing procedures for court ordered site-blocking against repeat infringers. The motion picture industry reports that in 2014, about half of the ISPs in Russia voluntarily cooperated and responded to the Russian-Anti Piracy Organization (RAPO) cease and desist letters for their works, and the others did not respond. Efforts between the Ministry of Economic Development to



develop more comprehensive notice and takedown procedures between rights holders and ISPs were not successful. Overall, although some ISPs cooperate and take down infringing materials once identified (even for works other than films and television programs), most ISPs are not willing to cooperate, even with clear evidence of infringement. As of May 1, 2015 the law will cover all copyrightable subject matter (except photographs).

**Criminal Enforcement in General:** For both online and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. Russia's laws are generally adequate for addressing hard copy piracy although some gaps remain. As in years past, most criminal enforcement by the government in 2014 was aimed at physical piracy, but that form of piracy is declining as the marketplace moves online. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases and investigations commenced; however, the 2014 report was not available before the Special 301 filing deadline. The pattern in the past few years has been a significant decline in enforcement, especially due to severe cuts in police resources.

As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. The local motion picture industry (Motion Picture Association, MPA), noted two important cases, in particular: in November 2014, the two owners of the pirate site Interfilm were convicted and sentenced to four and half years imprisonment, which was one of three motion picture criminal convictions for Internet piracy in 2014. In the other case, a Moscow district court issued a verdict on December 29, 2014, regarding a major warehouse raid undertaken in September 2006. Eight years after the raid (which netted over 3 million pirated DVDs), the owner of the warehouse was given a two and half year prison sentence.

MPA reports that enforcement activity in 2014 was about the same as in 2013, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. The entertainment software industry, including the Association for the Prevention of Computer Crime (APCC), reports a very significant drop in police activity in Moscow and St. Petersburg in 2014, although there was active engagement elsewhere in Russia by the regional police.

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IPR violations, it should take measures to increase the number of experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. It is reported that some courts will accept private expert testimony, but a uniform rule would be more effective.

Improvements should also be made with respect to court procedure. The criminal procedures generally require that a rights holder request the destruction of the seized goods (or move for recovery of damages) in a separate proceeding before the Arbitration Court (court of general jurisdiction) – which unnecessarily lengthens the process and makes enforcement even more difficult. The copyright industries recommend clear and sensible guidelines on the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the (revised and increased) Art 146 of the Criminal Code.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia continue to work with IIPA members on future training programs, and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center) which opened in 2013 (with thirty trained judges) was a positive step; these courts should be created in other cities and regions across Russia to handle copyright, as well as patent cases.

Russia's current Criminal Code does not allow for corporate entities to be held criminally liable. Only a natural person (usually a corporation director) can be found criminally liable for infringement, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to make such a showing (for example, against the owners of a retail outlet selling pirated product or against a business using unlicensed software), so many cases are suspended without any penalty. Thus, verdicts are issued against only the retail staff found selling pirate products at the time of a seizure or raid, rather than against a manager or corporate owner, with little deterrence against the retail establishment.

Several copyright industries continue to report that raids against retail outlets, while undertaken, are not ultimately successful in stopping criminal activity because: (a) there is no criminal liability for corporate entities or principals in these entities; (b) the police fail to comply with the Criminal Procedure Code; and (c) prosecutors are generally reluctant to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow principals in corporate entities to be held criminally liable would help to correct this problem. There were no large warehouse raids reported in 2014.

**Civil Enforcement:** The commercial-scale piracy which harms all of the copyright industries can and should be addressed through enhanced administrative actions (and penalties), and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence against that type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries. However, in Russia, there are many civil enforcement inadequacies, including: remedies limited to the seizure of specific copies of works that are the object of a lawsuit; the failure to award preliminary injunctions (although some changes were made in 2013), or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements. In 2014 (as of December), there were 170 applications for preliminary injunctions in the Moscow city court against infringing sites, with a total of 140 actions filed, and several blocking orders issued by the court. But, the law needs more effective provisions against rogue websites, instead of its current focus on individual works on the sites. In addition, there is concern that now that the law is applicable to all works (excepting photographs) and recordings, the system may bog down in administrative proceedings.

One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures (consistent with the WTO TRIPS requirements).

**Administrative Enforcement:** The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles), and on legal entities themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons and juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed and the inability to reach commercial

enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, as on illegal websites).

In addition to the piracy problems, the music industry is also concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies for authors, record labels and performers, including VOIS, the sole state accredited collecting body for record labels and performers. We urge the Government of Russia to use its oversight authority to ensure that rights holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment was due in 2013. As the December 2014 U.S. Government WTO Report noted, what resulted instead (in August 2014) was “a 10-year re-appointment term of the existing collecting societies, which are unable or have failed to properly represent and compensate U.S. rights holders.” To develop legal music markets and protect legitimate licensed services, the Government of Russia must fulfill its WTO Working Party Report obligation and resolve the issue of the state accreditation of collecting societies in a manner that ensures that rights holders are able to control and manage their own societies.

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

Although Russia did make some progress on legal reforms as part of its WTO accession, many key elements of an effective legal regime remain absent or incomplete, especially with regard to effective Internet enforcement. The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (unclear ISP liability, no formal notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). While the 2013 package of laws and the 2014 amendments were a step forward, key improvements, detailed above, are still needed.

In the Civil Code, IIPA and its members have in the past commented on three major overarching concerns: (a) a lack of clarity on numerous provisions, especially exceptions; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement. The 2013 package of laws was intended, in part, to address this latter issue. But the law (even after the 2014 amendments) does not clearly define ISPs (and the various services they provide); nor does it link liability (and safe harbors) in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy – in civil and criminal law; last, it does not clearly define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement. Further, it is critical that Russia amend its regime to allow for injunctive relief – quickly and effectively, applicable to all works, and especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals in such enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.

For a detailed list of IIPA's comments specifically on the 2008 Civil Code (and some of the related laws), see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. Article 1299 of the Civil Code provides a cause of action against importers of circumvention devices, but there is an overly burdensome procedure to identify the importer (and include details of any seizure) that needs simplification and improvement. Plus, as noted, the liability should apply for commercial trafficking of all circumvention devices, not as at present, only in instances where the devices are advertised as circumvention devices. And, commercial trafficking in circumvention devices (including by importation) should be criminalized as well.

In addition to those already mentioned, we continue to recommend steps to ensure that remedies for IPR infringements required by treaties, found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code, continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.

There is one recent development of particular concern to the motion picture industry: a new law went in to force on January 1, 2015 that bans advertisements on pay cable and satellite channels. While the new law does not appear to effect state-owned television channels, it will likely have a significant impact on foreign cable and on-demand services, and will harm the overall marketplace for audiovisual content in Russia.

Last, on October 3, 2014, President Obama issued a proclamation removing Russia from eligibility for trade benefits under the Generalized System of Preferences (GSP) program, based "on a determination that Russia is sufficiently advanced in economic development and improved in trade competitiveness that continued preferential treatment under GSP is not warranted." As a result, the USTR closed the GSP country practices review of Russia's protection of intellectual property rights (which was originally launched in response to a petition filed by the IIPA). This means that removal of some or all of the GSP benefits for Russia, for failing to provide adequate and effective IPR protection or enforcement, is no longer possible.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Priority Watch List in 2015.<sup>1</sup>

**Executive Summary:** Addressing piracy in Thailand remains a key element to ensuring that legitimate services being launched in the Kingdom can flourish.<sup>2</sup> Online and mobile device (smart phone, tablet) usage in Thailand are proliferating at a rapid pace, with Internet usage now surpassing television viewing.<sup>3</sup> Due to increasing online and mobile piracy, along with physical piracy (mostly in malls and tourist areas),<sup>4</sup> unauthorized camcording (mostly focused on audio feeds), and market access barriers, the market for creative content in Thailand remains difficult.<sup>5</sup> In the first half of 2014, political unrest meant piracy went largely unchecked in Thailand. Online enforcement improved slightly in the second half of the year, due in part to the government delivering clearer messages to enforcement authorities to focus more attention on copyright piracy.

The establishment in 2012 by the Royal Thai government of the National Intellectual Property Committee chaired by the Prime Minister and the National IPR Center for Enforcement (NICE) under the Royal Thai Police bureau, the Department of Special Investigations (DSI), Royal Thai Customs, and the Department of Intellectual Property (DIP), was to usher in an era of enhanced enforcement.<sup>6</sup> Unfortunately, this has not occurred, as the group has only coordinated a small number of trademark infringement raids. From the industry's perspective, inherent hurdles to tackling piracy in Thailand include: lack of government will and prioritization of addressing copyright piracy (including by DIP); lack of recognition of the growth of online piracy and the need to rise to this challenge; the failure of authorities to engage in upstream investigations into organized criminal behavior behind piracy; irregularities in enforcement; and lack of deterrence in courts. In the online space, right holders have had to rely largely on voluntary cooperation of willing ISPs, and, in the absence of legal requirements to take down or disable access to infringements, they are developing Memoranda of Understanding (MOUs) with willing ISPs.

The copyright amendments passed by the National Legislative Assembly (NLA) were unfortunately a missed opportunity to establish adequate and effective measures to protect copyright in Thailand. Comments by copyright stakeholders, the U.S. government, and the governments of the EU and Japan were not duly taken into account. The amendments add difficulties with respect to addressing Internet piracy, and the proposed protections against the circumvention of technological protection measures (TPMs) (key protections that would enable Thailand to accede to and ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) fail to address trafficking in circumvention technologies and introduce over-broad exceptions. Piracy was included as a predicate offense under the Money Laundering Prevention and Suppression Act (2013), but has not yet been used effectively, and the draft Computer Crimes Act reportedly does not, but should, address IP crimes.

<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Thailand's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Legitimate services in Thailand for content include iTunes, Deezer, KKBox, Spotify, YouTube, AIS, Google Play Store, GTH Movie Store, AIS Movie Store, HTV (from True Visions), Hollywood HDTV, Clickplay TV, Doonung, and ZAB Movies, among others.

<sup>3</sup>In *Thailand, Internet Use Surpasses Watching TV*, The Nation/Asia One, June 26, 2013, at <http://news.asiaone.com/News/Latest%2BNews/Science%2Band%2BTech/Story/A1Story20130626-432391.html> (Thais spend on average 16 hours per week online, whereas they watch 10 hours of television per week, according to The Digital Advertising Association of Thailand (DAAT)).

<sup>4</sup>Of the stakeholder filings in the October 2014 "Notorious Markets" *Out-of-Cycle Review*, Thailand was the 6<sup>th</sup> most cited country for physical notorious markets, behind Mexico, India, China, Nigeria, and Uruguay. Thailand was also cited for having online notorious markets.

<sup>5</sup>In the music market as an example, physical sales declined in Thailand year-on-year from 2013 to 2014 by 54%, while there was no ground made up in the online marketplace, with virtually the same revenues year-on-year (actually, a 1% decrease).

<sup>6</sup>Enforcement coordination should include the Royal Thai Police, the Department of Special Investigations (DSI), Royal Thai Customs, and the Department of Intellectual Property (DIP).



## **PRIORITY ACTIONS REQUESTED IN 2015**

### **Enforcement**

- Have DIP coordinate negotiations between right holders, ISPs, and other third parties (e.g., payment processors and ad placement agencies such as The Digital Advertising Association of Thailand (DAAT)) to foster greater immediate cooperation against hosted and non-hosted piracy sites, inside and out of (targeting) Thailand users.
- Take targeted enforcement against notorious online piracy sites; establish (e.g., within Royal Thai Police) Internet piracy taskforce with dedicated expert IP officers to address Internet and mobile device piracy.
- Step up trainings to bring enforcement authorities up to speed on online piracy, including proper digital forensic and/or electronic evidence gathering particular to copyright infringement.
- Address camcording instances through greater enforcement as well as enhanced efforts of cinema owners.
- Use MLPSA in key cases of intellectual property infringement as a predicate money-laundering offense, enabling enhanced remedies including asset seizure.
- Close notorious piracy markets ("Red Zones" and "Yellow Zones") and prosecute uncooperative mall owners.
- Issue and implement sentencing guidelines in criminal copyright cases to provide deterrence.
- Ensure provisional measures are available without burdensome proof requirements or costs.<sup>7</sup>

### **Legislative**

- Make changes to copyright legislation passed by the NLA, to:
  - Ensure that measures addressing Internet piracy promote ISP responsibility and avoid: 1) a requirement to obtain a court order for ISPs to take down infringements; and 2) prohibitive costs or burdensome evidentiary requirements.
  - Include provisions to effectively address websites and services that facilitate infringement in Thailand, both hosted and non-hosted, and both domestic and foreign.
  - Ensure provisions on TPMs include coverage of access controls, prohibit trafficking in circumvention technologies, devices, components, and services, and do not permit overly broad exceptions.
  - Prohibit possession of an audiovisual recording device in a movie theater with the intent to make or transmit an audiovisual work, in whole or in part;
  - Ensure exception for visually, hearing, intellectually, or learning impaired does not run afoul of international standards, including the Berne Convention and TRIPS "three-step test."
  - Enact a landlord liability provision, such that there will be adequate civil, administrative, and criminal remedies against those whose premises are used to engage in commercial infringement of copyright.
  - Ensure copyright offenses are non-compoundable.
  - Extend the term of protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) 95 years from publication, or at least 70 years from publication.
- Add IP infringements to the Computer Crimes Act to create a more effective remedy against online infringement.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.

### **Market Access and Related Issues**

- Fix (or withdraw) the problematic Film Act, which potentially imposes a screen quota and uncertain censorship and ratings requirements.
- Relax investment/ownership restrictions that impede legitimate distribution channels for audiovisual content.
- Do not implement film quotas in Thailand.
- Ease television advertising restrictions.

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<sup>7</sup>Section 65 of the Thai Copyright Law states that " In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer's rights, the owner of copyright or performer's rights may seek the injunction from the court to order the person to stop or refrain from such act." But the measure is not effective and has created burdensome and costly hurdles to copyright owners applying for provisional measures.

## PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain more detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>8</sup> Overall, the enforcement situation in Thailand worsened in 2014, with the first half of the year characterized by almost complete inaction due to political instability. Right holders, however, continued good cooperation with willing Royal Thai authorities,<sup>9</sup> assisting with rights protection, and offering and participating in many trainings and IP-related events throughout the year.<sup>10</sup> During the second half of 2014, the government sent signals to enforcement authorities to focus more attention on copyright piracy, which resulted in improved relations, particularly with respect to online investigations. Yet, much more needs to be done, as indicated in the Priority Actions noted above.

**Internet and Mobile Piracy Proliferate in Thailand:** As broadband and mobile 3G and 4G services become more widely available, with faster speeds, growing infrastructure, and lower Internet subscription fees, there are opportunities for growth of a legitimate online and mobile marketplace for copyright works in Thailand. Reliable indicators suggest over 26 million people, or almost 39% of the population in Thailand, now use fixed Internet.<sup>11</sup> With well over 100% mobile penetration (over 96 million mobile subscriptions), roughly 70% of those accessing the Internet through their mobile devices, and smart phone sales on the rise (with more than 20 million reportedly registered for messaging apps),<sup>12</sup> clearly Thailand has become a “mobile first” market.<sup>13</sup>

While many legitimate services for music and audiovisual materials are launching in Thailand, most Thai users remain wedded to Internet piracy, and increasingly, mobile piracy of music, movies, video games, published materials, and all kinds of broadcasts. Services include streaming sites, now the most popular due to increasing broadband penetration and 3G and 4G telephony, BitTorrent index and tracker sites, social media sites (which are used to locate infringing files), cyberlockers, and BBS/forums. Motion picture industry investigators have reported recently that 13 rogue websites are among the top 200 most accessed sites in Thailand, according to Alexa. All of these sites specifically target Thai Internet users. These include *4shared* (the 56<sup>th</sup> most accessed site in Thailand), *kickass.so* (57<sup>th</sup>), *mastermovie-hd.com* (84<sup>th</sup>), *nungmovies-hd.com* (119<sup>th</sup>), and *tt-torrent.com* (214<sup>th</sup>). Other problematic sites include *todaybit.com* (534<sup>th</sup>) (a local Thai site identified in October 2014 industry filings on “Notorious Markets” for music piracy; in a positive sign, the site’s administrators are starting to cooperate with right holders), *zbbbit.com*, *siambit.tv*, *dedbit.com*, and *bit-th.net*. Illegal apps on smartphone devices, readily available from Apple iTunes and the Google Play Store, are increasingly popular among Thai consumers due to the vast amount of available pirated content either for free or at a very low cost.

The Royal Thai government has missed opportunities over the past couple of years to establish a suitable framework to address what is now rampant and growing online and mobile piracy in Thailand. The Copyright Act amendments create an unworkable approach that, if implemented, may shield ISPs from liability once there is a notice by a right holder, unless presented with a court order. This backwards approach should be rejected and reworked. Perhaps not surprisingly, given the lack of an adequate legal framework to address computer-related infringements, Thailand is reportedly also among the top ten hacked countries in the World, evidencing the need to

<sup>8</sup>See, e.g., IIPA, *Thailand*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301THAILAND.PDF>.

<sup>9</sup>For example, press reports indicate the Thai music market amounted to THB4.28 billion (US\$130.8 million) in 2013, down from 2012. Revenues from digital works were up to THB1.08 (US\$33 million), and now represent 25% of the total music market. Digital piracy causes immeasurable harm to the industry. Saengwit Kewaleewongsatorn, *Music Industry Benefits from Digital Beat*, Bangkok Times, August 8, 2014.

<sup>10</sup>For example, the music industry association TECA participated in Internet investigation trainings with law enforcement, WIPO sub-regional events on digital copyright protection needs, and an ASEAN Economic Community event on the “copyright environment,” among other activities.

<sup>11</sup>*Methods of Obtaining the Number of Internet Users in Thailand*, accessed January 20, 2015, at <http://internet.nectec.or.th/webstats/internetuser.iir?Sec=InternetUser>.

<sup>12</sup>Reportedly, 3 million smartphones were sold in just the first four months of 2014. Jake Maxwell Watts, *Thailand is Buying Record Numbers of Smartphones, But It's Facebook That People Really Want*, Quartz, June 2014, at <http://qz.com/98395/thailand-is-buying-record-numbers-of-smartphones-but-its-facebook-that-people-really-want/>. Reportedly, as of February 2014, there were 22 million registered users of Line (a popular messaging app), making Thailand second in number of registered users only to Japan. *Smartphones + LINE Drive Online Sales In Thailand*, Forbes, July 28, 2014, at <http://www.forbes.com/sites/susancunningham/2014/07/28/smartphones-line-drive-online-sales-in-thailand/>.

<sup>13</sup>Mobile statistics are available through The National Broadcasting and Telecommunications Commission, at <http://www2.nbtc.go.th/TTID/>. These statistics appear to suggest that many Thai have both fixed and mobile access to the Internet, and that many Thai citizens have more than one device.



take cybercrime issues in general more seriously.<sup>14</sup> In the meantime, right holders have been left largely on their own (particularly in the first half of 2014) seeking self-help and the good faith cooperation of ISPs. Takedown rates for hosted content remain relatively high (the music industry reports over 90% takedown rates with the 20 or so ISPs they work with, involving hundreds of notices), but the same cannot be said for non-hosted infringement, and IIPA is deeply concerned the new Copyright Act will make matters worse.

Government action is needed to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. The Electronic Transactions Development Agency (ETDA) (under the administration of the Information and Communication Technology Ministry) should help put into place MOUs with ISPs for voluntary cooperation to address hosted, non-hosted, and rogue foreign sites and services. The Copyright Committee of the Department of Intellectual Property should also bring stakeholders together, including right holders, ISPs (who resist cooperation on confidentiality/privacy, trade secret, or contractual grounds), ad placement agencies, and payment processors, on a regular basis to discuss better ways to cooperate. NICE should proactively spearhead more investigations, including upstream, encourage strengthening standards for computer forensics and electronic evidence gathering, and not simply wait for court orders regarding digital forensics involving third parties like ISPs or payment processors.<sup>15</sup> Further training and education for law enforcement authorities in these areas would also be welcome.

**Addressing Retail and Media Box/Set-Top Box (STB) Piracy:** Physical piracy has decreased year-on-year mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klong Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; Sukhumvit Road. Also noted for piracy are Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.<sup>16</sup> The Royal Thai government has itself listed “Red Zones” and “Yellow Zones” which it views as vulnerable to piracy activities. Pirated films (including Thai-dubbed versions of blockbuster titles), music, video games, and published materials remain available. The IT malls conduct hard disk loading of content onto any device.

IIPA has also reported the growth of media box or set-top box (STB) piracy. These STBs have multiple purposes, including converting unauthorized content (through the circumvention of TPMs) from the Internet to signals playable on TVs or computer monitors, or filling digital drives with hundreds of movies and other content. They often come preloaded with infringing content or with instructions on how to download infringing materials. These boxes sell at low prices at the malls, and while the boxes themselves may be advertised for legitimate purposes, often they are used or modified for use to infringe copyright, calling into question the responsibility of those who traffic in or provide services related to them.

To address hard goods piracy, industry reports that Royal Thai government authorities continued conducting raids, particularly in the second half of 2014.<sup>17</sup> These raids are generally not followed by upstream investigations, however. To the extent mall owners are uncooperative, the government has on prior occasions indicated that, even in the absence of landlord liability in the law (which was apparently not passed in the latest round of amendments to the Copyright Act), criminal action can be brought; however, we are unaware of action to date.

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<sup>14</sup>Thailand in Top Ten Most Hacked Countries Worldwide, CityNews Chiang Mai, Jun 30, 2014, at <http://www.chiangmaicitynews.com/news.php?id=4140> (the data is based on live tracking by NORSE).

<sup>15</sup>By contrast, we note the Korean Anti-Piracy Task Force boasts more than 30 expert officers undertaking *ex-officio* monitoring activities related to Internet piracy on a 24/7 basis, with the power to request takedowns.

<sup>16</sup>Many of these markets are notorious for availability of pirated materials. See International Intellectual Property Alliance, *IIPA Written Submission Re: 2014 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 79 Fed. Reg. 58026 (September 26, 2014), October 24, 2014, at [http://www.iipa.com/pdf/2014\\_Oct24\\_IIPA\\_NotoriousMarkets.PDF](http://www.iipa.com/pdf/2014_Oct24_IIPA_NotoriousMarkets.PDF) (citing member submissions).

<sup>17</sup>The Royal Thai Government reported that there were around 9,700 intellectual property cases (trademark, patent and copyright) in 2013, mostly made up of small-scale infringements. Around 80% of cases were initiated by IP right owners, thus, 20% were *ex officio* actions. The Royal Thai government is expected to report the number of raids in 2014 as part of its response in the Special 301 docket. It is critical that authorities maintain authority to, and increase the number of, *ex officio* raids in 2015. The music industry group TECA reports 32 total raids, with 21 on retail shops, 5 involving music piracy websites, and 6 involving public performance piracy.



**Camcorder Piracy Traced to Thailand Continues to Harm Film Market:** The problem of camcording of films in movie theaters in Thailand remains a concern of the industry in 2014. The rise in audio forensic matches in 2013 continued in 2014, suggesting that camcording remains prevalent in the country, driven in part by domestic demand for films dubbed in Thai, but also by the need for English audio to “marry” with video “cams” from other markets. In all, there were 42 instances of unauthorized camcording of major U.S. motion pictures detected between 2013 and 2014, with 40 being audio-only and 2 being both audio and video. Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet and 3G connections in Thailand mean faster uploads to the Internet of movies illegally camcordered there. These titles are then made available to the world through various Internet piracy rings, becoming pirated hard goods within a matter of days. The Copyright Act amendment deeming camcording an infringement of copyright might be helpful, notwithstanding it does not, as all other countries adopting laws in this area have done, create a “time-and-place” violation but expressly links the act of camcording to copyright infringement. There was one interdiction and arrest for unauthorized camcording in 2014, and it is hoped this is a positive indicator that enforcement will ensue to eradicate this problem from Thailand.

**Book Piracy Problems Abound:** The book and journal publishing industry continues to face photocopy piracy, especially in and around schools (and including by teachers), as well as unauthorized translations, print piracy, and increasing amounts of online piracy in Thailand. Copy shops continue to photocopy textbooks and coursepacks for students, primarily on a “print or copy to order” basis to avoid keeping infringing stock on site. Other pirated materials include academic journals, chapters of reference books, language dictionaries, travel guides, history books and foreign language newspapers. Thailand is considered an important market for publishers, but in the face of lack of Royal Thai government efforts to address the problem, the situation in Thailand is worse than in most of Asia. The Royal Thai government has yet to initiate efforts to encourage the adoption of policies that promote the use of authorized published materials in educational institutions.

**Pay-TV Piracy (Cable and Satellite) and Public Performance Piracy:** Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a problem in Thailand, especially outside of Bangkok. While the National Broadcasting and Telecommunications Commission (NBTC) was established in September 2011, and established a Broadcasting Committee to handle regulation of the broadcasting industry, there is not yet effective government supervision of pay-TV content. In recent years, unlicensed new operators of satellite channels (showing DVDs of recent films not yet released in Thailand) have entered the industry with business models based on stolen content, and have achieved substantial business success without any interference by Royal Thai government authorities. These channels make stolen content available not only in Thailand but to other countries covered by satellite transponder signals as well. Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>18</sup> Public performance piracy also continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. Bars and restaurants have added “private” rooms to screen motion pictures illegally.

**Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts:** While the establishment of the Thai IP&IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies have ceased being effective for most industries because civil damage awards are far lower than costs and attorney’s fees associated with bringing the case. Further, neither additional damages, punitive damages, nor pre-established (statutory) damages are available. Civil procedures are extremely lengthy with an average pendency of three years from filing to judgment. Plaintiffs also bear all the burdens of proof, from copyright ownership to losses and damages, which becomes burdensome but critical since damages and lost profits awarded in civil cases are so low in Thailand. Also, because there are no upstream investigations,

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<sup>18</sup>The industry association CASBAA has attempted to ensure that in broadcast regulations, an explicit condition for a broadcast license includes that “the operator must not commit, permit or suffer any conduct which is an infringement of any intellectual property right,” but to our knowledge, thus far, no such conditionality has been accepted.

many infringers appearing before the court are pirate vendors at the lower end of an organized criminal enterprise. In criminal cases, convictions almost always lead to suspended sentences.

The Money Laundering Prevention and Suppression Act (2013) now includes IP crimes as a predicate act for money laundering investigations, potentially leading to significant criminal fines, imprisonments, and asset seizure. It is time for prosecutors and judges to recognize this, and to build key cases involving copyright infringement to test this new tool. In addition, sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement.

## **COPYRIGHT LAW AND RELATED ISSUE UPDATES**

**Copyright Act Amendments Passed Without Changes Proposed by Copyright Stakeholders, Governments:** Amendments to the Copyright Act, B.E. 2537 (1994) were passed by the National Assembly on November 27, and they are believed to have been signed, awaiting only publication in the official gazette.<sup>19</sup> The intent of the amendments was laudable: 1) to address online piracy by providing a mechanism to address online infringements, including ISP liability; 2) to adopt prohibitions on circumvention of technological protection measures (TPMs), key obligations of the WCT and WPPT; and 3) to address unauthorized camcording of an audiovisual work in a movie theater. The amendments also provide for performers' rights, and set forth a new exception (which arguably is overly broad) to provide access to works for those who are "unable to access" a work due to visual, hearing, "intellectual" or "learning" disabilities. The amendments unfortunately omitted a landlord liability provision, and while the Royal Thai government has indicated it was studying whether it could prosecute cases under the Penal Code, there has been no progress on this issue.

It is highly unfortunate that the drafters did not take into account comments provided by stakeholders, including IIPA, or foreign governments, including Japan, the EU, and the United States. The following are critical issues that will need to be worked out in implementing regulations, or possibly in technical amendments, to ensure that the amendments achieve their stated purpose to modernize the law,<sup>20</sup> bring Thailand closer into compliance with its international obligations, and implement the WCT and WPPT.

- **Service Provider Liability Provisions Must Permit Efficient Notice and Takedown, Provide Approach for Non-Hosted Infringements:** Section 32/3 provides a rudimentary approach to addressing online infringements, but falls well short of global standards.<sup>21</sup> Positively, it provides first and foremost that an ISP that "controls, initiates or orders the causing of an infringement of copyright in the service provider's computer system" shall always be liable. However, in cases in which the ISP does not control, initiate or order the infringement, the ISP is essentially shielded from liability, even in the case of constructive knowledge of infringing activities on its service. In all cases, the ISP must only take down infringements upon a right holder obtaining a court order, and the evidentiary burden for right holders is substantial.<sup>22</sup> Thus, unlike most countries in the world, the Thai law does not provide an easy notice and takedown approach. Indeed, this approach is contrary to global best practices. IIPA members currently receive fairly good cooperation with respect to voluntary takedown of infringing content in the hosted environment. IIPA is deeply concerned that this cooperation from ISPs in Thailand will cease if these amendments are implemented. Further, the amendments do nothing to address non-hosted infringements, for which right holders currently receive little assistance. In technical amendments, a true

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<sup>19</sup>Suchit Leesa-nguansuk, *Copyright Act Will Get Amendments*, Bangkok Post, December 23, 2014, at <http://www.bangkokpost.com/business/telecom/451644/copyright-act-will-get-amendments>.

<sup>20</sup>We also note the drafters had discussed repealing Section 66 to ensure that copyright offenses are non-compoundable. The Royal Thai government should take this step.

<sup>21</sup>Normally the practice of notice and takedown is carried out between concerned copyright owners and ISPs, often on a voluntary basis. Both sides agree to be responsible as is comfortable for them. This usually amounts to copyright owners monitoring infringement and notifying ISPs, and ISPs removing (or removing access to) infringing content once notified by copyright owners. If not done in a reasonable time or refused, depending on the law, ISPs might be subject to liable for contributory infringement, but litigation against ISPs usually only occurs if cooperation is refused.

<sup>22</sup>For example, copyright owners have to present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, guarantees for any collateral damages; then an *ex parte* preliminary trial ensues until the court is satisfied with the copyright owners' claim. ISPs in the meantime have no responsibility except to wait for an order from the court.

notice and takedown process should be adopted in the hosted environment, and effective procedures to address non-hosted infringements, including repeat infringer policies and methods to address services built on facilitating infringement, whether located inside or outside of (but targeting) Thailand.

- **Technological Protection Measures Provision Should Cover Access Controls and Trafficking, and Should Not Permit Expansive Exceptions:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Therefore, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The amendments unfortunately fall short of providing adequate protection and fail to meet the requirements of the WCT and WPPT in critical ways.
  - **Access Controls:** First, Section 53/4 outlaws circumvention of a TPM only when carried out by someone “knowing that such act may induce or cause the infringement of copyright or performer’s rights.” The phrase “or may result in unauthorized access to a work or object of related rights” should be added. Otherwise the intention of the drafters to cover access controls in the definition in Section 3 will have been for naught.
  - **Trafficking:** Second, Section 53/4 of the amendments appear to cover only the act of circumvention (“avoidance”) of TPMs, and does not explicitly outlaw trafficking in circumvention devices, technologies, and components.<sup>23</sup> The trafficking offense should be confirmed in implementing regulations, through adopting a flexible definition of “avoidance”; otherwise, technical amendments should be added to ensure trafficking is covered. The WCT and WPPT require “adequate” and “effective” measures to protect TPMs, and such will not be the case with coverage of trafficking violations.
  - **Exceptions:** While some of the enumerated exceptions in Section 53/5 may be acceptably narrow, others need to be deleted or reworked in order to preserve the adequacy and effectiveness of protection. For example, Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and would undermine needed protections, especially for access controls. The exception in Section 53/5(7) should also undergo further scrutiny, since it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **Camcording Bill Could Provide Relief If Properly Implemented:** IIPA has reviewed the amendments intended to outlaw unauthorized camcording of motion pictures in Thailand. The amendments unfortunately fall well short of model approaches provided to the Royal Thai government on numerous occasions, because they restate what is already true, namely, that the reproduction of an audiovisual work in a movie theater is a copyright infringement. Notwithstanding this significant shortcoming, IIPA is still hopeful the law can be strongly implemented and provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of whole or part of a movie, whether audio or video, or both. Preferably, the amendment can be expanded through a technical amendment to prohibit ‘the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both).’ Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law and any unlawful copies made, as well as civil and criminal remedies. In particular:
  - The amendments only outlaw the actual “reproduction,” not the preparatory steps of possession or use of recording equipment, which in practice would be the basis for enforcement in many cases.

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<sup>23</sup>Preferably, the draft Section would outlaw anyone who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a TPM.”

- The amendments fail to authorize specific enforcement steps and spell out the conditions under which they could be taken, including: 1) entering and searching exhibition facilities; 2) searching suspects on site (and detaining them if necessary to carry out the search); and 3) seizing any audiovisual recording device or other evidence of an offense.
- The amendments do not expressly create appropriate presumptions of subsistence and ownership of copyright. In case either is placed into issue by a defendant, an affidavit by the right holder should create *prima facie* proof rebuttable only by evidence to the contrary.
- The amendments do not expressly empower courts to seize, forfeit, deliver up or destroy any unauthorized copy of audiovisual material and any audiovisual recording devices or other equipment in the possession of the alleged offender.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. Clarification in the law and implementing regulations for clear, fair, market-based, and transparent collection rules are overdue. We strongly suggest that the Copyright Act be further revised in this regard.
- **New Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The amendments contain a new exception allowing the “reproduction or adaptation” of a work for the visually, hearing, intellectually, or learning impaired. The international community at WIPO, in June 2013, adopted *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* to create a limitation and exception for the benefit of the blind, visually impaired and otherwise print disabled, which will be mandatory for individual WIPO members that ratify the Treaty. The new Thai exception goes well beyond the Marrakesh Treaty’s mandate. The exception must be further scrutinized, and in any event, must not be implemented in such a way that it would conflict with the Berne Convention and TRIPS “three-step test.”
- **Absence of Landlord Liability Provision:** It is highly unfortunate that the Royal Thai government did not take the opportunity to enact a landlord liability provision, to provide adequate civil, administrative, and criminal remedies against property owners who lend their premises to those who engage in commercial infringement of copyright. While a previous draft of copyright law amendments included a landlord liability provision imposing criminal liability on one who “provides physical or digital spaces for infringing activities,” in 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code.” DIP then commissioned a research team to conduct an in-depth study on this issue. The authorities indicated they may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing.<sup>24</sup> Such a test case would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, since in order to crack down on piracy in the malls.

**Computer Crime Act:** The Electronic Transactions Development Agency (ETDA) has reportedly drafted amendments to the Computer Crime Act B.E. 2550 (2007), but did not initially include IP infringements as crimes. Latest reports indicate the draft may have been revised to include IP infringements. This would be a positive development. DIP has been a proponent of adding IP crimes to the Computer Crime Act.<sup>25</sup> One change still being contemplated by the Royal Thai Ministry of Information and Communications Technology would be to draft and insert

<sup>24</sup>The Royal Thai government, in its February 2012 Special 301 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.” See *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, para. 3.2.2. The report indicated DIP would be working alongside the Royal Thai Police and DSI to bring an appropriate test case in a place where “tenants are large-scale infringers, and offences are committed repeatedly to prove negligence and illicit facilitation on the part of the landlords.”

<sup>25</sup>IIPA’s understanding is that IP could be included in Section 20, which provides in draft, “In case of the dissemination of computer data that is an offence under this Act or the computer data that related to the country’s security or the terrorism-related offences under the Criminal Code or the dissemination of computer data that is an offence under other laws required by the officials under the laws, the competent official shall file a petition and provide any proof and evidence to the court in order to gives an instruction to restrain the dissemination of such computer data.”

notice and takedown for computer crimes (which would include IP) into the Computer Crime Act. However, to our knowledge, to date, IP has not been included in the drafts.

**Customs Law:** Draft amendments to the Customs Act have been prepared to empower Royal Thai Customs to seize transshipments containing pirated goods. This would be very helpful. As of January 2015, the draft had not yet been submitted to the Cabinet for approval.

**Evidence Law:** IIPA recommends that the RTG amend the Evidence Law to allow the hearing and testimony of digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

**Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Copyright Act, which provides an exception to copyright protection which has been interpreted at times to allow wholesale copying of academic materials.<sup>26</sup> DIP has issued three sets of guidelines on fair use in recent years, namely, the *Fair Use Guidelines for News Reports*, the *Fair Use Guidelines for Education*, and the *Fair Use Guidelines for Software*. DIP has indicated that these *Guidelines* are intended to serve as manuals for users of copyright works, e.g., the education *Guidelines* are intended “to reduce risk of copyright infringement in books and other copyright works.” Affected publishers and stakeholders should be afforded the opportunity to provide input into the development of such *Guidelines* given their experience in helping formulate similar rules in other countries.

## **MARKET ACCESS ISSUE UPDATES IN THAILAND**

**Problematic Film Act Potentially Imposes Screen Quota and Uncertain Censorship and Ratings System:** The Motion Pictures and Video Act B.E. 2550 (2008) (effective July 1, 2008, but not yet implemented) potentially imposes quotas and potentially onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, and film/screen time quotas. The number of screens in Thailand (nearing 1,000 as of the end of 2014) is more than enough to have a free market for theatrical releases. At a time when most other countries are removing quotas, not putting them into place, these restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act also imposes onerous ratings requirements on films, music videos and live performances, and censorship requirements on films, audiovisual products, music used for karaoke, and video games. The concerns over this ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; 3) the severe consequences (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the requirement that the relevant rating or censorship code be “fixed” onto the container of films or audiovisual products as well as on the packages, and that the right holder “embed” the rating or censorship code into the content of films and audiovisual products so that the rating or censorship code appears on the screen or any media when broadcasted or displayed. The Royal Thai government should reevaluate this ill-conceived and outmoded legislation.

One positive aspect of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, and karaoke operators to acquire a “license to operate the business” in advance, with violators subject to criminal liability of up to BHT1 million (US\$30,000) or up to two years in jail. Industry has noted optimistically that the new law could be used to curb piracy in street stalls, shopping malls, complexes, and Internet cafés in parallel with Copyright Law.

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<sup>26</sup>A Supreme Court decision (No. 5843/2543 [2000]), on appeal of a criminal copyright case brought against a photocopy shop, did provide some helpful clarification of the research or study exception under Section 32. The Court held that the defendant's activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

**Ban on Investment/Ownership in Terrestrial Broadcast Networks:** Foreign ownership/investment in terrestrial broadcast networks is severely limited, to not more than 25% of the voting stock. This includes free to air, pay TV and channel content provider operators. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

**Potential Quota:** Section 9(5) of the Motion Picture and Video Act (MPVA) allows the Thailand Film Office to establish ratios and quotas applied to foreign films. If implemented, such restrictions would have a significant impact upon the theatrical sector, as local productions account for around only 25% of total films released.

**Television Advertising Restrictions:** Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six minutes in any single hour. This restriction should be lifted.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Vietnam should be elevated to the Priority Watch List in 2015.<sup>1</sup>

**Executive Summary:** The recommendation to elevate Vietnam to the Priority Watch List recognizes the need to: nurture opportunities to grow nascent legitimate copyright businesses including creative production activities,<sup>2</sup> and to enable online and mobile services to deliver copyright content; address high piracy levels which threaten these markets; and ease onerous market access barriers which exacerbate piracy concerns. The Vietnamese government has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”<sup>3</sup> In 2014, actions taken under a 2012 Ministry of Information and Communications (MIC) and Ministry of Culture, Sports, and Tourism (MCST) Joint Circular<sup>4</sup> demonstrated growing government recognition of, and will to address, the copyright piracy dilemma in Vietnam. These actions, importantly, sent signals to others in the online and mobile ecosystems that the rights of authors and stakeholders must be respected and fostered better cooperation and collaboration in addressing the challenge.

### PRIORITY ACTIONS REQUESTED IN 2015

#### Enforcement:

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

#### Legislation:

- Issue implementing guidance for the Criminal Code, confirming: 1) its application to online distributions and other violations of the IP Code; and 2) that “commercial scale” includes significant infringements without a profit motive.
- Make necessary changes to laws and implementing decrees to ensure Vietnam is in full compliance with its Bilateral Trade Agreement (BTA) with the U.S., and with other international obligations.
- Afford adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

<sup>1</sup>For more details on Vietnam’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Vietnam’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>The World Intellectual Property Organization (WIPO) organized “The National Workshop on Copyright for Film Industry Professionals” in October 2013, at which experts, Copyright Office officials, and private sector explored opportunities for growth of the film industry in Vietnam. The experts also explored the economic benefits of increased activity to Vietnam’s economy. See Copyright Office of Vietnam, *The National Workshop on Copyright for Film Industry Professionals*, December 31, 2013, at [http://www.cov.gov.vn/cbqen/index.php?option=com\\_content&view=article&id=826:the-national-workshop-on-copyright-for-film-industry-professionals&catid=53:cac-hot-ng-bo-h-qlq-qlq-ti-vn&Itemid=99](http://www.cov.gov.vn/cbqen/index.php?option=com_content&view=article&id=826:the-national-workshop-on-copyright-for-film-industry-professionals&catid=53:cac-hot-ng-bo-h-qlq-qlq-ti-vn&Itemid=99).

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

<sup>4</sup>Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks (in force August 2012) (“Joint Circular”).



- Extend term of protection in line with the international trend, to 70 years after the death of the author, or when term is calculated based on publication, 95 years, but in any case, no less than 70 years from publication.
- Amend the Criminal Procedure Code so as to permit *ex officio* criminal actions.<sup>5</sup>
- Clarify that Decree No. 85 measures imposing onerous collective management do not apply to foreign collective management organizations (CMOs) or to the administration of foreign rights.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.

### Market Access

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

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Prior IIPA reports on Vietnam contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>6</sup>

**Internet and Mobile Markets Face Opportunities, Challenges in Vietnam:** Almost 40 million fixed Internet users (nearly 44% of the population) and 33 million smart phones (36%) mean enormous new opportunities for legitimate services in Vietnam for creative content. These opportunities are evidenced by more licensed Internet content providers, e.g., 24H (*nhac.vui.vn*), NCT (*nhaccuatui.com*), and Viettel Media (*keeng.vn* and *imuzik.com.vn*), iTunes, and Deezer. Mobile applications like Pops TV are also trendsetting for availability of music and audiovisual content, using iTunes, Amazon MP3, Android, Windows Phone, and Samsung Smart TV vehicles for distribution of content, including local Vietnamese content.

With these enormous increased opportunities, however, have come enormous challenges of trying to fight online and mobile network piracy in Vietnam, including streaming and download sites, P2P networks, linking sites, video streaming sites, search engines, cyberlockers, and social networks. Sites like *Zing.vn* (6<sup>th</sup> most accessed site in Vietnam) and *chacha.vn*, while obtaining licenses with some record companies and having higher takedown rates, also provide access to unlicensed copies or streaming of music,<sup>7</sup> while sites like *nghenhac.in* (and related sites), *phim3snet.com* (72<sup>nd</sup>), *xemphim.com* (and related sites), *socbay.com* (and related mobile app), *hayhaytv.vn* (155<sup>th</sup>),<sup>8</sup> *HDViet.com* (156<sup>th</sup>),<sup>9</sup> *phim22.com*, *tamtay.vn* (318<sup>th</sup>), *viettorrent.vn* (423<sup>rd</sup>), and cyberlockers like *fshare.vn* (96<sup>th</sup>), and *4share.vn* (417<sup>th</sup>) remain of concern to the motion picture and television industry. Rogue sites like *kickass.so* (199<sup>th</sup>) also remain popular in Vietnam. Most of these sites generate revenue through advertisements or paid premium subscriptions. Online piracy is an increasing concern for the publishing industry, in particular the education sector. For instance, an unauthorized “pdf” version of an author’s book was freely available on the digital library site of Tuy Hoa Industrial College. Publishers have also traced operators of online sites engaged in the unauthorized sale of textbook solutions manuals to Vietnam. However, enforcement efforts have stalled as the information typically provided by the purported operators is false. The harm caused from online piracy is significant and makes it difficult

<sup>5</sup>Article 105 of the Criminal Procedure Code currently requires a formal complaint from a copyright owner as a condition for prosecution and acts as a disincentive to police and prosecutors, relative to other kinds of offenses.

<sup>6</sup>See, e.g., IIPA, *Vietnam*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301VIETNAM.PDF>.

<sup>7</sup>In October 2014, the recording industry noted both *Zing* and *Chacha.vn* in its submission to the U.S. Trade Representative in preparation of its “notorious markets” list of sites providing access to infringing materials. Although *Zing.vn* has negotiated licenses with some record companies for certain uses, it continues to provide access to infringing materials as a core part of its business. *Chacha.vn*, a free to use direct download site, has a large amount and wide variety of infringing music available on the site, including Vietnamese repertoire (approximately 60,000 tracks) and many popular international songs (approximately 30,000 tracks). 265 takedown notices have been sent to the site, which included 1,749 infringing files. While the site does remove content which has been notified, it takes an excessive amount of time, and notwithstanding its active engagement with, and organization of, infringing content, it does not employ any measures to address infringement, and its business model is dependent upon providing access to infringing content.

<sup>8</sup>*Hayhaytv.vn* has the tag line “View movies online, HD, constantly updated all genres, load super fast, super watch FREE!” Unauthorized audio files have been detected on the site.

<sup>9</sup>This site has the tag line “HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications.”



to impossible for legitimate online platforms to compete with pirated sites. For example, online piracy in Vietnam is directly impacting the motion picture theatrical sector, as new movies are frequently available online while they are still in their theatrical run.

The Vietnamese government has shown its willingness to act, and right holders report good cooperation and receptiveness to assistance in evidence gathering, and training and capacity building. In 2014, reportedly, two infringing mobile applications were shut down and administrative penalties were imposed on the developers/operators. In April 2013, MCST reportedly took administrative actions against three notorious piracy services, *phim47.com*; *v1vn.com*; and *pub.vn*, but two are back up and running (only *v1vn.com* is down) and are still providing access to infringing major motion pictures on the sites. Additionally, in September 2013, the Motion Picture Association referred another nine sites, four of which (*phimvang.com*, *vuighe.net*, *hayghe.com*, and *xemphim.tv*) are still up and providing access to infringing major motion pictures.<sup>10</sup> These actions mark a positive first step in combating online piracy in Vietnam. Vietnamese authorities including the MIC Inspectorate (which indicates it is authorized under *Decree 131* to address online infringement), MCST, and MPS, must take more effective measures in 2015 against notorious infringing sites whose business models are based on providing access to infringing content, employing the remedies set out in the MIC/MCST Joint Circular.<sup>11</sup> The Inspector of MIC should use the authority granted under the JC to enforce against these types of violations more effectively, particularly against those websites which are under MIC licenses. Unfortunately, industry notes the process of addressing infringements to date has taken too long on a case-by-case basis, and thus, offending rogue sites remain in operation and are growing in popularity.

Perhaps due to increased effort from government authorities, the level of cooperation with service providers improved incrementally in 2014. The music industry, for example, reports an improved takedown rate upon receiving a cease and desist notice, from 34% in 2013 to 82% in 2014. However, the number of notices is still very small in relationship to the scale of the problem (fewer than 3,500 total notices in all of 2013), and the absence of more effective means of encouraging responsible practices, including by taking enforcement actions against sites that knowingly distribute infringing music, or whose business practices are based on the distribution of infringing music and which therefore promote infringement, has left the online music market in disarray and dominated by piracy. The situation for motion picture companies is also extremely troubling. Among the significant ISPs, only VNPT (the largest ISP in Vietnam) is cooperating by not permitting pirated films to be placed on their video on demand (VOD) service. Most other ISPs' terms and conditions with websites they host make no provision for the termination of services due to copyright infringement. With rapid increases in the number of mobile phone subscribers in Vietnam, there has also been an increase in mobile network piracy over the past couple of years. Right holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto devices at the point of sale; and 2) illegal music channels or "apps" set up to be accessed on mobile networks. As an example of this phenomenon, Socbay developed a mobile "app" called Socbay iMedia which provides a variety of unauthorized entertainment content including music files.

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<sup>10</sup>The full list of sites sent to MCST for administrative referral includes: *phim47.com*; *v1vn.com*; *pub.vn* (now *pubvn.tv*), *phimvang.com*; *vuighe.net*; *coiphim.vn*; *maxphim.net*; *rapphim.vn*; *hayghe.com*; *phimphim.com*; *vtube.com*; and *xemphim.tv*.

<sup>11</sup>The Joint Circular (JC) imposes high standards of performance requiring "providers of intermediary services" to: 1) take affirmative steps to "[e]stablish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights"; 2) "[u]nilaterally refuse to provide a service that runs counter to the laws on copyright and related rights"; and 3) "[r]emove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other Government authorities in accordance with the law." Additional requirements are imposed upon social network operators to "send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights." The JC requires providers of intermediary services to be "[s]ubject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related rights." Finally, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for "[h]aving operations like a secondary distributor of the digital content generated from violations of the copyright and related rights."

**Ex Officio Enforcement Against Hard Goods and STB Piracy Needed:** While hard goods piracy has decreased in Vietnam, largely due to the onslaught of online and mobile network piracy, traditional CD/DVD piracy (e.g., high-quality counterfeits from China as well as home-made pirated optical discs), and set-top box (STB)/media boxes used to decrypt pay-TV content, download or stream pirate materials from favorite sites to view on a smart TV, or even store HD content, remain popular. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese government has yet to take *ex officio* actions. To the extent the Criminal Procedure Code does not currently make this avenue available, it should be amended to do so. In addition, since high-quality counterfeits are being imported into Vietnam (mostly from China), Vietnamese Customs authorities as well need to commence *ex officio* actions to intercept such infringing imports.

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers report unauthorized photocopying and some illegal print piracy, mostly of English language teaching (ELT) materials. Many students are reportedly photocopying entire textbooks. Fortunately, some professors buy books in bulk using university budgets and then sell them to their students or give them to the students for free to ensure they have their own copies. Bookshops, roadside vendors and copy shops routinely sell unauthorized copies of bestselling trade books, travel books, and academic textbooks, including ELT materials. Unlicensed print overruns also continue to harm foreign publishers. State-sector publishers (such as the Ministry of Youth and the General Publishing House of Ho Chi Minh City) also have an interest in making sure their licenses are not misused. However, there are currently no university or government efforts to address the endemic piracy on university campuses. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

**Court Reform and IPR Training Needed:** At present, the courts are not an ideal avenue for copyright owners. First, criminal cases are not proceeding to the courts in the area of copyright infringement. To IIPA's knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. There have to date been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors, as they play a very important role in bringing a criminal case to the courts. Industry and the U.S. government were working with the Supreme Court in drafting an "IP Manual for Vietnamese Judges," but IIPA understands that effort has stalled. The Manual should be concluded as soon as possible, and should include sentencing guidelines to create a level of deterrence in copyright cases. IIPA also recommends frequent outreach with judges (and prosecutors and police) as part of the judicial reform effort, to sensitize these officials to the commercial harm being caused by piracy and seek a mutual path forward toward successful resolution of claims involving infringement.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the *Intellectual Property Code* (as last amended 2009), the *Criminal Code* (as amended in 2009), the *Joint Circular* (2012), and the *Administrative Violations Decree (No. 131)* (2013).<sup>12</sup> The *Civil Code* (last amended 2011 by *Decree No. 85*) remains as a vestigial parallel law, implemented by *Decree No. 100*. The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, include a basic structure which, if fully implemented, can be used to successfully address online, mobile network, and hard goods piracy in the country. They also include measures that implement the WCT and WPPT. Vietnam should now be encouraged, as an immediate next step, to join those treaties.

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<sup>12</sup> *Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights*, entry into force December 15, 2013 (replacing Ordinances No. 47 and 109).

**Criminal Code Should Cover All IP Code Violations, Not Just Reproduction and Distribution, and Comply With BTA:** The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” While amended Article 170a improved Vietnam’s statutory framework in some respects,<sup>13</sup> it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.<sup>14</sup> Vietnam also appears by virtue of the changes to be out of compliance with its BTA commitments to the United States, in which it agreed to provide criminal remedies for all “infringement of copyright or neighboring rights on a commercial scale,” as well as for satellite signal (pay-TV) piracy.<sup>15</sup> The Vietnamese government should immediately issue implementing guidance for the Criminal Code to confirm that all infringement and signal theft can attract criminal liability, and to confirm that “commercial scale” infringements are not limited to those undertaken with a profit motive. Otherwise, the U.S. should commence consultations in accordance with Chapter VII, Article 5 of the BTA to resolve these violations.

**Administrative Enforcement Decree Must Be Implemented in Practice:** The *Administrative Violations Decree (No. 131)* reduced the maximum administrative fine for an individual to VND250 million (US\$11,800), and set the maximum fine for an organization at VND500 million (US\$23,600). The following fines are also set forth: 1) VND400 to 500 million against an organization that imports an unauthorized copy; 2) VND70 to 100 million against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million against an individual that reproduces unauthorized copies of phonograms or video recordings. In addition to these fines, infringers may face remedial measures, such as confiscation of infringing goods and any false registration certificates, as well as the forced suspension of business, consultancy, or service activities. Notwithstanding the reduction in the maximum, the government should employ these maximum fines to full and deterrent effect forthwith.

**Decree No. 85 Questions Remain:** *Decree No. 85 (2011)* amended certain provisions of the Civil Code.<sup>16</sup> While *Decree No. 85* contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam’s compliance with international norms and best practices. Most notably, *Decree No. 85* makes certain changes to Article 41 of *Implementing Decree No. 100* governing collective management which, if applied to foreign right holders, would be onerous and would conflict with the ability for collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>17</sup> It should also be clarified that the “Principles and methods of payment of royalty, remuneration and material benefits” which the Decree adds in a new Article 45a of *Implementing Decree No. 100*, are not compulsory.

**IP Code as Amended Remains Incompatible with the BTA and Vietnam’s International Obligations:** The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions with respect to Vietnam’s compliance with the BTA and other international obligations/standards. Among issues that should be resolved in the current Code are the following:

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<sup>13</sup>For example: 1) the phrase “and for commercial purposes” was removed from the Criminal Code, so the standard for criminal liability is now “on a commercial scale” and technically aligned with the TRIPS minimum standard; and 2) fines are increased to a range from US\$2,350 minimum to US\$23,500 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$18,800 minimum to US\$47,000 maximum.

<sup>14</sup>The 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of TPMs, decryption of encrypted satellite signals, and other acts. Please refer to IIPA’s previous submission on Vietnam for more detailed discussion.

<sup>15</sup>See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), chapter II, Art.14.

<sup>16</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

<sup>17</sup>For example, Article 41(4) of *Decree No. 100* as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

“amendments or supplementations to the operation charters or regulations; changes in the leadership; participation in international organizations; other external activities; rates and modes of payment of royalty, remuneration and material benefits; long-term and annual programs and plans; operations, conclusion of authorization contracts and use licensing contracts; collection, levels, modes and methods of dividing royalty, remuneration and material benefits; and other related activities.”

Such onerous provisions should be stricken from the law in order to allow right holders to freely exercise their rights in Vietnam. In the absence of immediate changes, it should be clarified that these provisions do not apply to administration of foreign rights.

- The IP Code does not provide a term of protection of 75 years from publication (or 100 years from fixation) for sound recordings (BTA Article 4.4).
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of “making available.”<sup>18</sup>
- An apparent inadvertent gap was created in the enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to works) was not made applicable to related rights.
- Articles 7(2), 7(3), and 8 of the IP Code appear to give the State power to remove copyright protection in ways similar to provisions in China’s Copyright Law, found by a WTO panel to violate China’s WTO obligations.<sup>19</sup>
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners.
- Certain exceptions and limitations in the IP Code may be overly broad and call into question Vietnam’s compliance with its international obligations.<sup>20</sup>
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for “non-commercial purposes,” rather than destroyed. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS Agreement obligations.

In addition to addressing these issues in the IP Code, IIPA also recommends adopting a measure outlawing the use of (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work, in whole or part.

## **MARKET ACCESS BARRIERS IN VIETNAM**

Vietnam generally restricts foreign companies from setting up subsidiaries to produce or distribute “cultural products.” The Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.<sup>21</sup> Unfortunately, their restrictions on foreign investment in cultural production undermine this objective, impoverishing the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials. The restrictions also fuel demand for pirate product, instigating a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam’s cultural sector, Vietnam should look to internationally accepted standards and practices which are premised on the understanding that constraining market access for legitimate products complicates efforts to effectively combat piracy.

### ***Barriers Specific to the Audiovisual Sector***

**Laws Leave Potential Quotas In Place:** The amended Cinematography Law created the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Ministerial *Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030”* set an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. While the Cinematography Law’s stated quota and *Decision* appear to be hortatory in nature, the Vietnamese government should confirm that it will not impose these quotas which would amount to a serious market access barrier. IIPA also

<sup>18</sup>At the least, Article 23(4) of the *Decree* should be made applicable, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of the WPPT.

<sup>19</sup>Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances. Article 7(3) permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights. Article 8 establishes impermissible content-based restrictions of protection under copyright.

<sup>20</sup>Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes” and Article 25(1)(e) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” remain problematic. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audio-visual recordings for commercial “broadcasting” violates international standards at least as to the works involved and cannot be remedied by the addition of three-step test language.

<sup>21</sup>See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, at [http://www.nhandan.com.vn/english/culture/171208/culture\\_v.htm](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

notes the hortatory preference to show “valuable” foreign films. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam. Certain articles of the Cinematography Law also endanger the television broadcast market. For example, Article 35(2) provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of *Decree No. 96* implementing certain provisions of the Cinematography Law requires that the proportion of Vietnamese films broadcast on TV must be at least 40%.<sup>22</sup> This quota should be lifted or eased significantly.

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

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

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

**Decree No. 72 Restricts Video Game Right Holders:** On September 1, 2013, *Decree No. 72 72/2013/ND-CP on the Management, Provision, and Use of Internet Services and Online Information* went into force. The Decree creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. However, foreign companies still seem to be held at arm's length, and there is a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. Article 31(4) provides, “[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam's law in accordance with this Decree and the laws on foreign investment.”

The Decree establishes four categories of games. In category G1 (multiplayer games in an interactive online environment) the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including many involving censorship of the content of video games in order for them to be approved; content within video games that is outright prohibited (see, e.g., Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; license duration limits; and other restrictions. The implementation of this Decree must not create structures which unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or which discriminate against them.

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<sup>22</sup>Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

## ***Barriers Specific to the Music Sector***

**Onerous Market Access Restrictions on the Music Sector:** Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, also inhibit anti-piracy efforts. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights of U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam,<sup>23</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

## **TRANS-PACIFIC PARTNERSHIP (TPP)**

The pending negotiations for a Trans-Pacific Partnership (TPP) FTA present an opportunity to expand the benefits of existing FTAs to a broad range of markets around the Pacific Rim, including Vietnam, namely, markets representing 40% of global GDP.<sup>24</sup> IIPA has long called for using TPP to bring enhanced copyright and enforcement standards, building upon those agreed to by TPP negotiating parties that are also current FTA partners, Australia, Singapore, Chile, and Peru, and found in the Korea-U.S. (KORUS) FTA, to other countries in the region. Such an outcome would contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the Administration's goals. Vietnam has taken strides in its substantive laws which will make meeting the legal and enforcement obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, some gaps remain, and some of the more recent changes noted above may have moved Vietnam further from those standards. In addition, Vietnam has some of the most restrictive market access barriers in the world. IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein. The TPP E-Commerce chapter and market access provisions for services and investment should require Vietnam not only to eliminate discriminatory taxes and policies, but also to open Vietnam's market to foreign competition including in the creative and cultural sectors. We remain hopeful that Vietnam's participation in TPP negotiations will aid in eliminating discriminatory barriers, as well as bringing Vietnam's copyright law and enforcement regime into alignment with evolving global norms.

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<sup>23</sup>The importation of cultural products like music is governed by *Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural* (promulgated together with the Government's Decree No. 10.V200/ND-CP of November 6, 2009). *Decree No. 103* provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level CST Departments. The Decree provides for application procedures. However, limitations on foreign companies' setting up subsidiaries to produce or distribute "cultural products" in Vietnam also thereby limit foreign companies' abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

<sup>24</sup>TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

# WATCH LIST

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2015.<sup>1</sup>

**Executive Summary:** Enactment of Marco Civil da Internet thrust Brazil onto center stage in Internet governance last year. The enacted bill preserves space for voluntary notice and takedown and other inter-industry cooperative efforts, but implementation must be carefully monitored in 2015. As Marco Civil left final resolution of the notice and takedown issue to future copyright legislation, the focus now shifts to long-delayed copyright reform efforts. Besides dealing effectively with online infringement and resisting excessively broad exceptions and limitations to copyright protection, copyright reform must also address the deficient laws against circumvention of technological measures used by copyright owners to restrict access and copying. This inadequacy, coupled with exorbitant taxes and escalating duties on legitimate imported video games and consoles, has stunted the development of a legitimate market for video games in Brazil. Proliferating market access barriers for the audio-visual sector, from the VOD tax to content quotas to threatened regulation of digital cinemas, should also be addressed.

The explosive growth of broadband access in Brazil has accelerated the migration to the Internet of pervasive piracy of all kinds of copyright works. Many notorious sites targeting the Brazilian market provide links to offshore pirate repositories, and illicit peer-to-peer (P2P) services continue to thrive. Criminal enforcement against online piracy remains stalled. In this environment, it is difficult for services that legitimately deliver copyright works online to gain further traction, though the legitimate sector is growing. Hard-goods piracy remains a serious problem for some sectors, including video games, though in decline for audio-visual. Systemic bottlenecks persist in investigation, prosecution and the criminal courts, and systemic reform is needed. Enactment of important but modest legislative reforms to streamline criminal copyright prosecutions, along with critical legislation to impose criminal penalties for camcording, are essential next steps.

### PRIORITY ACTIONS REQUESTED IN 2015

#### Enforcement

- As steps toward a deterrent enforcement system, implement a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.
- Ensure that the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has the resources and political backing to ramp up its efforts against hard-goods piracy, including continued expansion of the “City Free of Piracy” initiative.
- Bring CNCP resources to bear on encouraging cross-industry efforts to combat Internet piracy.
- Launch criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so, seeking strong penalties to raise awareness and foster deterrence.
- Effectively enforce the current Penal Code to address illicit camcording in theaters.

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<sup>1</sup>For more details on Brazil's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Brazil's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.





## Legislation and Regulation

- Monitor implementation of the “Marco Civil” Internet law to ensure there is no interference with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify criminal remedies, and to provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Advance copyright reform legislation that effectively addresses online infringement and explicitly outlaws circumvention of technological protection measures and trafficking in circumvention devices and services.
- Reduce high tariffs and taxes placed on video game products, thus enabling industry growth.
- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; restrain ANCINE (national film agency) efforts to regulate intrusively the digital cinema sector; and relax audio-visual quotas that discriminate against non-Brazilian content.

## COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. Piracy involving hard goods – mostly CDs, DVDs, and other media carrying pirate music, movies, TV programming and video games, but also devices that circumvent access controls on video game consoles – continues to be a concern for most copyright sectors. The book publishing industry still confronts widespread unauthorized photocopying of educational materials.

**Internet Piracy:** Internet access continues its explosive growth in Brazil. It ended October 2014 with 179 million fixed and mobile broadband connections, 46 percent more than a year earlier. The most rapid growth was in mobile broadband (54%), but fixed broadband connections also grew 10% from the previous year.<sup>2</sup> Over half of all Brazilians (53.1%) used the Internet in 2014,<sup>3</sup> and a remarkable 47% of the population had at least one social network account.<sup>4</sup>

As the potential market grows rapidly, legitimate services for online delivery of copyright materials are gaining an increasing foothold in Brazil. For example, there are at least nine free or low-cost online platforms that offer legal viewing options to Brazilian television and film audiences, including Crackle, Mundo Fox, and iTunes/Apple Brazil. Music industry digital revenues in Brazil increased 22.3% in 2013<sup>5</sup>, and some two dozen licensed services now deliver recorded music to Brazilian listeners at compelling price points (including for free, in the case of 9 ad-supported streaming services).<sup>6</sup> But the development of a robust legitimate online marketplace in delivering copyright materials to Brazil's growing population of Internet users continues to be stunted by the prevalence of online piracy. IIPA reported previously on a study conducted for the Brazilian Government showing that 81% of Brazilians who downloaded music or films from the Internet, including individuals from all economic classes, regions, age brackets, and levels of education, did so exclusively from illegal sources.<sup>7</sup> The Internet certainly remains Brazil's fastest-growing forum for copyright piracy, and the primary piracy challenge for most industry sectors.

Internet piracy problems in Brazil feature two main distribution channels. The first involves sites targeted to the Brazilian market that link to infringing distribution hubs (sometimes called “cyberlocker” services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare – although

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<sup>2</sup>See <http://www.telecompaper.com/news/brazil-ends-october-with-179-mlm-broadband-connections--1053378>, citing figures from telecoms operators association SindiTelebrasil.

<sup>3</sup>See <http://www.statista.com/statistics/292757/brazil-internet-user-penetration/>.

<sup>4</sup>See <http://www.statista.com/statistics/284424/brazil-social-network-penetration/>.

<sup>5</sup>IFPI, *Recording Industry in Numbers: 2014 Edition*, at page 34, available at <http://ifpi.org/recording-industry-in-numbers.php>.

<sup>6</sup>See <http://pro-music.org/legal-music-services-latin-america.php> (visited Jan. 24, 2015).

<sup>7</sup>See Comunicado do Ipea - 2012 - Maio - nº 147, “Download de músicas e filmes no Brasil: Um perfil dos piratas online”, at [http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=14071](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=14071) (unofficial translation on file with IIPA), summarized in IIPA's 2013 Special 301 submission, see <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> at 106 (“IIPA 2013”).

a number of sites selling infringing copies of video games, and devices for circumventing technological protection measures used to prevent the playing of those copies, are locally operated.) Link sites to infringement hubs account for the majority of online music piracy, and a comparable share of the Internet piracy cases involving audiovisual works like movies and TV programs. One very popular site in this category, *degracaemaisgostoso.org* ("free is much better"), has been in operation for eight years, and provides its 2.6 million monthly users links that are refreshed daily to infringing movies, music, video games and books. *MusicasparaBaixar.org* ("music for download"), which has a comparable volume of visitors and has been operating since 2008, is a blog site supported by advertising that specializes in links to infringing music albums but also distributes books, video games, movies, and concert recordings. The files to which such sites link are generally stored on offshore hosting sites such as 4shared.com, Uploaded and Bitshare. But the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively.

Other linking sites to infringement hubs that specifically cater to the Brazilian market include *teleona.org*, which features camcorder first run motion pictures, with Portuguese audio captured from a local theatre or with Portuguese subtitles added; *Megafilmeshd.net*, which provides links to streams of thousands of films, TV series, and concerts, much of it in Portuguese, and which ranks 61st in popularity among all Brazilian Internet users, according to Alexa (nearly 10 million monthly unique visitors); *Filmesonlinegratis.net*, active since 2009 and ranked 101st in Brazil by Alexa; *Baixeturbo.org*, with thousands of links to infringing music and other content, available only in Portuguese; *Hitsmp3.net*, with some 11,000 links to infringing albums; and *Sapodownloads.net*, another blog site specializing in links to infringing music. Such links also continue to be propagated massively through social networking communities. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and "captcha" technology to prevent rights holders from detecting links to infringing files through automated monitoring.

The second channel for Internet piracy is file sharing via illicit P2P networks, which stands out as a growing threat for the entertainment software industry in particular, making pirated video games widely available. The Entertainment Software Association (ESA) reports that in 2014, for the fourth straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file sharing of select ESA member titles on public P2P networks. Notably, if PC games are excluded from the calculation, Brazil ranked first in the world in P2P-based infringement of video games.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.<sup>8</sup> Similarly, while robust growth of the legitimate market for online music continues, the fact remains that this marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services.

**Hard Goods Piracy:** Even though Internet piracy is clearly growing faster than physical piracy in Brazil for films, TV programming and video games, these products demand high bandwidth. For the audio-visual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but these remain a significant issue in large cities, with their popular street markets; along the borders; and in small towns, where broadband penetration levels are low and even movie theaters are scarce. In the case of video games, pirate titles for console platforms like the Nintendo Wii are usually sold on discs that are locally burned and assembled (with inlay cards) on site. For handheld video games, the most common delivery medium is a memory card loaded with hundreds of titles downloaded from pirate Internet sites, bundled with a circumvention device, and sold by street vendors or via online marketplaces and shops. Piracy of entertainment software through the sale of pen drives loaded with huge quantities of pirate video games is also common, especially in the specialized pirate video game markets such as Santa Ifigenia

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<sup>8</sup>The uncertainties regarding the new video on demand tax, and other market access barriers discussed in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

Street in São Paulo. While some of this pirate product enters the Brazilian market through the nation's relatively porous borders and ports, it is becoming more common for it to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes. Vendors also burn discs on demand, or load memory cards, from a library of video game content stored on PCs.

Finally, a major feature of the piracy landscape for video games in Brazil is the prevalence of so-called game copiers and other circumvention devices aimed at nullifying access control technologies used by copyright owners, thus enabling the play of pirate video games on modified consoles (the great majority of game consoles in the country have been so modified). Most game copiers and mod chips are produced in Asia and flown into Brazil or delivered through the same channel as for modified game consoles. Santa Ifigenia Street in São Paulo is a leading retail venue for sales of these circumvention devices, targeting consoles such as PS2, Wii, 3DS and Xbox 360, and R4 devices and other game copiers. Typically, sellers of the game copiers also include a memory card with up to 500 game titles that were illegally downloaded from the Internet. Such a copier-and-card bundle can be purchased for about R140 (about US\$51). These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software.

As Brazil's largest city São Paulo is also a key hub of national piracy networks for hard goods. Not only are pirate products widely sold in the city, but distributors based there supply many similar retail operations in other parts of the country. The Galeria Page, with 170 vendors, some of them specializing in pirated video games, video game circumvention devices, modified video game consoles, and counterfeit DVDs, is the epicenter of hard goods piracy in São Paulo; but vendors in the nearby Shopping 25 de Março mall, and in other high-profile areas in that city, also participate. In Rio de Janeiro, the huge outdoor market in Camelodromo Uruguaiana includes scores of vendors of pirate products, especially on weekends. The Feira dos Importados (also called Feira do Paraguai) in Brasília is of similar size and is also rife with pirate hard goods.

**Camcorder Piracy:** Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcorders. In Brazil, the problem typically takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is married with high-quality video captures sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well being burned onto DVD-Rs and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 19 member company films stolen in this way from Brazilian theaters in 2014. While one arrest took place in 2014, no indictments, prosecutions or enforcement actions were undertaken. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Overview**

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings.<sup>9</sup> For 2014, there is little new to report.

The CNCP, the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, has been led by a committed and energetic team, although there have been a number of leadership changes recently. Concerns persist about whether the CNCP will maintain the high level of participation and cooperation with industry groups that was its hallmark prior to its 2012 reorganization. Now that the national elections are over, newly appointed officials at the Ministry of Justice should take the necessary steps to ensure that the reorganized CNCP continues to work closely with industry, that it is adequately resourced to expand

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<sup>9</sup>See, e.g., IIPA 2013 at 109-112.

the “City Free of Piracy” program, and that it follows up vigorously on its initial steps to expand its work beyond its traditional focus on physical piracy.

### **Enforcement Against Hard Goods Piracy: Many Challenges Remain**

The news on the fight against hard goods piracy was mixed. Administrative changes in late 2014 to the Special IP unit in Rio de Janeiro led to some proactive enforcement efforts there; and some progress was reported in São Paulo in connection with the World Cup, continuing to repair the damage caused by the enforcement hiatus in 2013.<sup>10</sup>

However, even though the copyright industries in general enjoy good (in some cases, excellent) working relationships with enforcement agencies, and even though there have been some instances of constructive cooperation, little has been done to tackle the larger, systemic problems that render Brazil’s criminal justice system inadequate in deterring piracy. The main deficiencies have been described in detail in past IIPA reports. They include:

- Prolonged, inconsistent, and inefficient police investigations, sometimes taking years, during which right holders must push the process every step of the way. Among other detrimental impacts, the requirement to store all seized goods throughout the long pendency of the case drains away resources that could be better applied to running more enforcement operations.
- Criminal case experts can only be appointed by a judge, there are too few experts in the country, and there are no standard criteria for expert analysis of and reporting on seized materials. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint experts and specialized IPR experts should be appointed at the “*Instituto de Criminalística*” (CSI Institute of Brazil).
- Prosecutors and judges lack specialized training in IPR cases, and, although some training has been provided to municipalities participating with the CNCP in “Cities Free of Piracy,” there is no effective national program. Although currently most training for judges, prosecutors and police officers is organized and financially supported by the affected industries, the CNCP has actively stimulated, promoted and participated in such events at the national, regional, and state levels; but these efforts must be expanded considerably.
- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and São Paulo, would improve judicial expertise and help expedite case processing. The 1997 Industrial Property Law authorized the judiciary to create specialized IPR courts, and such courts exist for patent and trademark matters, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the other prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, sometimes conditioned on the defendant agreeing to provide minimal monetary compensation to the victim. All this contributes to a culture of impunity for copyright violations. A recent decision of the Brazil Superior Court of Justice provided a rebuttal to the notion that piracy is a socially acceptable practice; but this case was an exception, not the rule, and it is too soon to tell whether it will have any impact.

### **Internet Enforcement: Cooperation and Government Action Needed**

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among rights holders and ISPs. This cooperation is forthcoming in some areas. Purely on an informal

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<sup>10</sup>See IIPA’s 2014 Special 301 report on Brazil, at <http://www.iipa.com/rbc/2014/2014SPEC301BRAZIL.PDF>, at 90-91.

basis, a number of ISPs are responsive in a reasonably prompt fashion to requests from rights holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;<sup>11</sup> to delete advertisements for infringing copies; and even to shut down blogs, forums and social networking communities that are dedicated to disseminating pirate product. But clearly this ad hoc approach is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy carried out via P2P services. Brazilian laws and regulations provide no incentive for ISPs to pass on notices to their subscribers who misuse their access to engage in P2P piracy, nor to effectively deal with repeat infringers. Consequently, many ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, active government involvement could help to bring ISPs and right holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-09, the CNCP identified as a priority for its future activities the area of “Partnerships and Cooperation with Internet Service Providers,” and has made intermittent efforts since then to bring ISPs to the table for discussions, but without any success (in part, because of recurring opposition from other government agencies). A reported recent CNCP project to engage with payment processors to discourage use of their services by sites dedicated to piracy was similarly derailed; discussions continue, but without government support. IIPA urges the Brazilian Government to advance such initiatives instead of discouraging them, in order to send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil’s economic, technological and cultural development.

The situation is also discouraging with regard to criminal enforcement against serious online copyright crimes. Existing legislation already provides a framework for this, and some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes. But Brazilian authorities continue to take virtually no enforcement actions in Brazil’s fastest growing marketplace for copyright piracy – the Internet. In view of the significant damage that pirates inflict on Brazil’s economy and culture, authorities must accord a much higher priority to criminal investigations of online piracy.

## **LEGISLATION AND REGULATION IN BRAZIL**

**“Marco Civil da Internet” Internet Legal Framework:** A four-year project to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil” culminated last April in the enactment of the Marco Civil legislation, and its dramatic signing by President Rousseff at the podium of the Net Mundial Internet governance conference in São Paulo. Although IIPA has been concerned since the outset that the proposal did not recognize the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce, we are pleased that the final version of the bill was amended to exclude copyright cases from the blanket rule that “providers of Internet applications” cannot take down or remove access to material except in response to a specific takedown order issued by a court. This would have eliminated the voluntary notice and takedown activities engaged in by many Brazilian ISPs with regard to hosted infringing content today, a limited but critical example of the inter-industry cooperation against online infringement that is so essential to tackling pervasive online piracy. Fortunately, as enacted, Art. 19 of the Marco Civil legislation carves copyright cases out of the blanket immunity rule, calls for “specific statutory regulation” dealing with notice and takedown procedures for violations of copyright or related rights, and leaves the issue to be governed in the meantime by existing copyright law. This significant improvement preserves Brazil’s ability to design an effective and flexible legal regime for dealing with online copyright theft.

IIPA urges the U.S. Government to monitor developments in the implementation of Marco Civil (an implementing decree is reportedly due early in 2015), first to ensure that in fact there is no adverse impact on current

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<sup>11</sup> However, as noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there, and cooperation is much less frequent with regard to links to off-shore hosted material and other forms of online infringement.

or future inter-industry arrangements to combat online piracy (including but not limited to notice and takedown), as well as to encourage an appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace. Especially in view of Brazil's increasingly prominent role in global discussions about Internet governance, its handling of this critical issue in its national law demands careful scrutiny.

**Copyright Law Reform:** The final language of the Marco Civil legislation should bring back to center stage the pressing need to update Brazil's 1998 copyright law to reflect today's copyright protection and enforcement challenges. The most recent official draft amendments were released by the Ministry of Culture in March 2011. IIPA submitted detailed comments on the draft, which are summarized in previous IIPA submissions.<sup>12</sup> However, after undergoing further changes, the draft was returned for review by the new Minister of Culture in mid-2012, and no subsequent drafts have been publicly released since then.

Besides the notice and takedown issue left open by Marco Civil, and online copyright liability questions more generally, a comprehensive update of Brazilian copyright law will also need to address a number of other topics. The complete lack of effective legal prohibitions against trafficking in devices and services aimed at circumventing technological protection measures (TPMs) used by copyright owners to control access to their works has acted as an insurmountable obstacle to the healthy growth of a legitimate video game marketplace in Brazil, and has hampered the prospects for other copyright-intensive sectors that depend on TPMs. This big gap in Brazilian law should be filled by legislation that brings the law into alignment with global norms under the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and which promotes legitimate digital commerce by protecting TPMs. Additionally, any copyright law reform must avoid the addition of broad or vaguely worded exceptions to copyright protection (a pitfall to which the 2011 draft succumbed). IIPA urges the U.S. Government to continue to engage with Brazilian authorities to encourage copyright reform that enhances the protection of copyright and neighboring rights, and thus promotes production of new original works, in the face of technological developments that have effectively eroded the ability of rights holders to enforce their rights.

**Proposed Legislation Related to Enforcement:** A plethora of bills to improve copyright enforcement in Brazil have been presented to the legislature, but few have progressed. One important exception is Bill 2729/03, which is a product of cooperative efforts between the copyright industries and the CNCP. It includes a few vital reforms that would address some of the systemic enforcement impediments identified above. For instance, the bill would allow expert reports in infringement cases to be based on a sampling of the goods seized, and would authorize the destruction of all pirate product seized in a criminal case. Bill 2729/03 was approved by the House of Deputies in 2012, and was sent to the Senate (now labeled Bill 63/2012). It received committee approval over a year ago, and still awaits action by the full Senate. Once enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA commends legislators for advancing this legislation, and urges its passage as soon as possible. We would then encourage Brazilian legislators, with the leadership of the large, multi-party Parliamentary Front against Piracy (also known as the Congressional Anti-Piracy Caucus), to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 to expedite its passage.<sup>13</sup>

Throughout 2014, committees of Brazil's Senate continued to consider amendments to the Criminal Code (Bill 236/12) that would have significant impacts on criminal copyright enforcement. The most recent report, over the signature of Senator Vital do Rego, would create a new criminal offense for camcording (recording audio-visual works or soundtracks in movie theaters), thus giving law enforcement a necessary new legal tool for combating a serious piracy problem. IIPA strongly urges that this provision be retained as the legislation moves forward. The same report also corrects a problem in earlier versions of the legislation, by retaining the status of copyright offenses

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<sup>12</sup>See, e.g., IIPA 2013, at 112-13.

<sup>13</sup>Among other improvements, various pending bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; and facilitate removal of infringing material from Internet sites.

as public criminal actions which can be initiated *ex officio*. IIPA urges the U.S. Government to closely monitor further developments on this legislation as it moves toward action by the full Senate and then the House of Representatives, to preserve the progress made recently and to try to correct remaining negative aspects of the bill. These include repeal of the catch-all provision in the chapeau of Article 184, providing a penalty for criminal copyright violations that are not otherwise specified; this repeal could significantly reduce the effectiveness of criminal enforcement in a fast-changing technological environment. IIPA also remains concerned about reports that Bill 236/12 would substantially reduce penalties for some basic copyright violations, including unauthorized reproduction for profit and infringement on the Internet, thus sending precisely the wrong message to a Brazilian society that already deprecates the significance of copyright infringement, and to a legal system that in practice provides impunity from criminal penalties in most cases. We urge lawmakers instead to seek ways to support Brazil's creative economy by strengthening effective copyright enforcement.

## **MARKET ACCESS AND RELATED ISSUES**

**High Tariffs and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on video game products have long plagued the entertainment software industry, and remained a challenge in 2014. They are a significant barrier to legitimate market entry, a spur to the pirate market, and an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, benefit the national economy, create jobs, and generate tax revenues that are now being lost to piracy. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since, of course, pirate copies, whether smuggled across the border or burned within the country, do not pay these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this new interpretation be reconsidered. In addition, taxation on imported video game consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately.

**Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector (Law 12.485):** This law imposes local content quotas for pay television to be enforced by ANCINE, the national film agency, and it delegates to ANCINE unprecedented powers to limit advertising and to direct business activities. MPAA is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content. Under the implementing regulations, only works in which local producers own the majority share of intellectual property rights are included as Brazilian works; co-productions between Brazilian and foreign producers are excluded if they fail to meet this criterion. This exacerbates the harm inflicted on the Brazilian pay television market. Lawsuits challenging the constitutionality of the quotas and powers granted to ANCINE remain pending before Brazil's Supreme Court.

**Video on Demand (VOD) Tax:** The provisional measure which creates ANCINE also establishes the VOD tax, as part of a broader tax regime on film and television content called CONDECINE. The taxes represent a unique and serious threat to the growth of the VOD market. As set forth in Provisional Measures 2228/2001, the taxes apply to films, advertising, Pay-TV and "other segments" which ANCINE considers to be VOD content. Currently, the tax is assessed per title, varying from US\$100 to US\$3000, payable every five years during which a title remains in the VOD window (and when a title is licensed to multiple VOD outlets, the tax must be paid for each outlet). CONDECINE is burdensome, amounting to as much as US\$25 million in charges in the case of large collections of VOD titles, and will limit the choices available to Brazilian consumers in the nascent online content market and through other VOD services. We understand that ANCINE has acknowledged the threat this tax poses to the VOD market, and is engaging in discussions with industry stakeholders on possible changes to its approach. We encourage ANCINE to continue these efforts and to seek a reasonable solution that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers.

**Digital Cinema Regulation:** Yet another ANCINE regulatory initiative was launched in April 2014, when the agency announced its intent to regulate digital distribution of motion pictures for exhibition, including by forbidding non-Brazilian companies or companies affiliated with distributors or exhibitors from transferring or encoding digital content or monitoring digital projectors. The announcement was coupled with proposals to further expand the existing screen quotas to restrict the exhibition of non-Brazilian titles on multiple screens. As a first step, ANCINE demanded that film industry participants disclose their commercial terms for digital cinemas including their Virtual Print Fee agreements. This intrusion into legitimate commercial relations exceeds ANCINE's statutory authority, and its proposal for regulation creates debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. This initiative should be opposed.

**Screen Quotas:** On December 31, 2014, the Presidential Decree on Screen Quotas was published. The Decree provides for quotas in 2015 that largely track those for 2014, requiring between 28 and 770 days of screening, depending on the number of theaters in the theater complex, for between 3 and 24 national films. The Decree for 2015 also specifies that for a widely-released title exhibited in complexes with more than 20 theaters, the complex may limit the title to showing in only 30% of its theaters. Brazil's screen quota is facing a constitutional challenge at the Supreme Court. Quotas limit consumer choice, and have the adverse effect of pushing consumers toward illegitimate content sources. They should be relaxed.



# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Special 301 Watch List in 2015.<sup>1</sup>

**Executive Summary:** Despite some advances, Canada's strong potential to be a robust market for copyright materials is compromised by some problems that recent legislative advances have not adequately addressed, and others that this legislation (notably the Copyright Modernization Act) and its implementation have exacerbated. Canada's intent to change the country's reputation as a haven for technologically sophisticated international piracy operations has not been fully realized; notorious pirate websites hosted in Canada remain in full operation, undermining the growth of legitimate digital services around the world. Legal incentives for cooperation against piracy remain too weak; and the implementation of a "notice and notice" statutory system, while welcome, needs to be supplemented by notice and takedown, as well as by other measures to encourage all players to address online infringement in a timely and effective way. Enactment of Bill C-8 has modernized many aspects of Canada's deficient copyright enforcement regime; but until the non-legislative hurdles of insufficient resourcing and low prioritization of copyright by law enforcement, prosecutors and courts are surmounted, the legislation's promise is unlikely to be realized. Expanded copyright fair dealing exceptions in the new law, combined with problematic legal interpretations of the previous law, have left in shambles well-established markets for licensing educational uses of copyright materials; the damage to the publishing sector extends beyond collective licensing. In addition to doing more to prevail on Canada to address the situation as soon as possible, the U.S. Government should monitor other new and expanded Canadian copyright exceptions for market impact and compliance with international standards. Finally, Canada's long-delayed accession to the WIPO Internet Treaties has been tarnished by its decision to discriminate against U.S. performers and sound recording producers. IIPA urges that the U.S. Government remain extensively engaged with Canada on these and other issues in 2015, with the aim of making additional progress toward the goal of achieving a healthy marketplace for copyright works in our neighbor and largest trading partner.

### **PRIORITY ACTIONS REQUESTED IN 2015**

- Strengthen legal incentives for Internet Service Providers (ISPs), hosting providers, and other intermediaries to cooperate with copyright owners in combating online piracy, in accordance with international best practices.
- Take steps to repair the decimation of the educational collective licensing market arising from legislative changes and judicial precedents on fair dealing.
- Closely monitor the implementation of new or expanded copyright exceptions with regard to market impact and conformity with Canada's international obligations.
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes.
- Increase resources devoted to anti-piracy training and enforcement both at the border and within Canada, including retail and online.

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<sup>1</sup>For more details on Canada's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Canada's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



## INTRODUCTION

In many ways, Canada is a good export market for U.S. creative works. Canadians have a strong appetite for U.S. movies, music, video games and books, and high levels of disposable income to acquire them. For example, Canada represented the seventh largest national market worldwide for recorded music in 2013.<sup>2</sup> There are also good reasons to consider Canada as an attractive potential market for online commerce in copyright works. As reported by the Canadian Internet Registration Authority, “Canadians have long led the world in Internet usage.” CIRA points to the fact that in 2013, Canadians visited more web pages per month (3,731) than any other country’s Internet users. “They also ranked a close second behind the United States for the average number of hours spent online per user (41.3 hours per month).” Furthermore, CIRA notes that “Canadians also continued to be heavy consumers of online video, ranking second behind the United Kingdom for average hours per month (24.8 hours) and average number of videos watched per month (291).”<sup>3</sup> These trends help explain the growth of legitimate digital distribution of music in Canada, with more than thirty services now offering licensed downloads, streaming, or both.<sup>4</sup> Similarly, as studios and producers continue to work with a multitude of partners and platforms, some four dozen licensed services now offer Canadians movies, TV programming, or both, online.<sup>5</sup>

However, numerous countervailing factors prevent the Canadian market (online and offline) from realizing its full potential, and thus leave the market less than fully open to U.S. copyright owners. These include:

- (1) A defective legal framework for enforcing against online infringement, and insufficient incentives for inter-industry cooperation against this pervasive problem
- (2) Insufficient resources and political commitment for law enforcement efforts against piracy, along with some remaining legal shortfalls
- (3) Excessive and ill-defined new legal exceptions to copyright protection, which have already decimated some licensing markets and threaten to inflict broader damage
- (4) Unjustified discrimination that deprives U.S. performers and sound recording producers of revenue streams from public performance

We discuss each of these issues in turn below, and urge the U.S. Government to focus its continued high level of bilateral engagement with Canada on these topics.

### **1. Online Infringement**

Although there has been some improvement in recent years, Canada still has far to go to rectify its reputation as a safe haven for Internet pirates. Indeed, a number of the world’s most popular Internet sources dedicated to online theft of copyright material retain connections to Canada. These include at least three sites that appear on the most recent USTR list of online “notorious markets,” released in February 2014.<sup>6</sup> *Torrentz.eu*, one of the most popular and long-standing aggregators of third party BitTorrent sites, visited by over 7.6 million unique users per day, remains hosted in Canada. So is *kickass.to*, the 73rd most visited site on the entire Internet, visited by 16 million unique users per day to gain access to tens of thousands of torrents of infringing movies, TV shows, music, video games, books and apps. *Free-tv-video-online.me*, formerly known as *projectfree.tv*, specializing in links to illicit copies of first run motion pictures and TV content, has also been hosted in Canada.

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<sup>2</sup>IFPI, *Recording Industry in Numbers: 2014 Edition*, at page 9, available at <http://ifpi.org/recording-industry-in-numbers.php>.

<sup>3</sup><http://cira.ca/factbook/2014/the-canadian-internet.html>

<sup>4</sup><http://www.pro-music.org/legal-music-services-north-america.php>

<sup>5</sup>[www.wheretowatchincanada.com](http://www.wheretowatchincanada.com). Online video services that debuted in 2014 included Shomi (a Rogers/Shaw offering), Hollywood Suite, and Crave TV (from Bell).

<sup>6</sup> <http://www.ustr.gov/sites/default/files/FINAL-PUBLISHED%202013%20Notorious%20Markets%20List-02122014.pdf>.

Because Canada's legal environment provides inadequate tools to deal with the problem at its source, courts in many other countries, including Belgium, UK and Malaysia for torrentz.eu; Italy, Ireland and the UK for kickass.to; and UK for projectfree.tv, have had to order major ISPs to block access to these sites. In effect, Canada continues to outsource to other jurisdictions the burden of combating these online theft operations. As long as these sites continue to use Canada as a base, efforts to provide a space within which legitimate, licensed services can take root and grow are undermined, not only in Canada, but around the world. Other Canadian-connected sites nominated by IIPA members for inclusion on USTR's next notorious markets list include *solarmovie.is*, *sumotorrent.sx*, and *seedpeer.me*.

The same is true of sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works. Despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, many Canadian sites (such as *R4cardmontreal.com*, *gamersection.ca*, *ncardcanada.com*, and *r4itoronto.com*) continue to offer circumvention devices. Computer software that effects a "soft modification" of the security technology of game consoles, and thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. Some sites, such as *r4isdhc.ca*, offer counterfeit video games as well. Additionally, direct download (ROM) sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. Even those sites that have been terminated from payment processing services can generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content.

The 2012 enactment of the Copyright Modernization Act, with its new prohibition of online services "designed primarily to enable copyright infringement," was heralded by the Canadian Government as a critical step toward purging the Canadian online environment of these outlaw services that undermine legitimate digital markets for copyright materials worldwide. Thus far, at least, that potential has not been fully realized. Clearly the legal incentives remain insufficient for Canadian providers of hosting services to cooperate with right holders to deal with massive and flagrant infringements carried out using their services.

Previous IIPA submissions in the Special 301 process have provided detailed critiques of the overbroad safe harbors accorded to hosting services under the Copyright Modernization Act, as well as other shortcomings of the online liability regime established by that legislation.<sup>7</sup> The bringing into force, in January 2015, of the last element of that regime — Canada's much-touted "notice and notice" system — is unlikely to change the overall picture. As implemented, while the Canadian "notice and notice" system requires service providers to retain records on the identity of subscribers whose accounts have been used for unauthorized file sharing or other infringing behaviors, multiple repeat infringers will be delivered the same notice. Moreover, the system makes it impossible to identify serial infringers for whom some response other than receiving a letter might be appropriate.

The propensity of many Canadian consumers to patronize illegal online sources of copyright material has been well documented. A report released in September 2012 found that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country, and two-and-one-half times as much as Americans.<sup>8</sup> As noted above, recent growth in the Canadian market for licensed online music and audio-visual services gives hope that this propensity may be declining. Nevertheless, the digital music space continues to underperform in Canada: the uptake on legitimate subscription music services lags well behind the levels in comparable countries. While the gap is narrowing, deficiencies in Canada's online liability legal regime still tilt the field of competition against licensed services, and also continue to send the wrong signals to consumers about whether infringing activities are tolerated.

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<sup>7</sup>For IIPA's more detailed analysis of the Copyright Modernization Act, see our 2013 Special 301 submission on Canada at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at pp. 127-131, and other sources referenced therein.

<sup>8</sup>[http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries\\_n\\_1899752.html](http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html).

IIPA urges USTR to continue to press Canada to address these deficiencies in order to fully open its digital marketplace in copyright works. USG should encourage Canadian authorities to do what they can to give service providers greater incentives to come together with right holders to make meaningful progress against online copyright infringement; but further legislative change is likely to be needed.

## 2. Enforcement

In 2014, Canada's parliament finally took steps to address long-acknowledged gaps and shortfalls in its legal regime for copyright and trademark enforcement. Bill C-8, which received the Royal Assent on December 8, 2014, gives *ex officio* authority to Canadian Border Services Agency (CBSA) officers to seize suspected pirate or counterfeit imports or exports at the border, as well as to share information about suspect shipments with right holders upon request. The legislation also contains other important copyright enforcement improvements, including creating new offenses for export of infringing copies, and for possession of such copies for sale, rental, or distribution of public exhibition "by way of trade." However, Bill C-8 falls well short of providing a comprehensive upgrade to Canada's legal regime to enforce copyright. Notably, it denies CBSA agents *ex officio* authority with regard to in-transit goods; imposes on right holders the full costs of border enforcement enhancements; and fails to increase the maximum penalties for piracy. Overall though, enactment of C-8 is a significant and long-awaited step forward, and IIPA urges the Government of Canada to bring it into force as promptly as possible.

As IIPA has consistently pointed out in its annual Special 301 reports over the past decade, copyright enforcement problems in Canada are attributable only in part to the fact that enforcement agencies lack adequate legal tools. Now that enactment of Bill C-8 has addressed many (though not all) of these legal insufficiencies, it is critical that Canada turn its attention to the other half of the equation – the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. Nothing in Bill C-8 directly addresses this problem, and the new legislation will be unlikely to realize its potential without a clear change in direction on the importance of enforcing against copyright infringement.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general and copyright crimes in particular are neither a strategic nor an operational priority. Only a handful of copyright criminal investigations were conducted by the RCMP in 2014. On the local level, while police agencies have generally responded well to anti-piracy training programs offered by industry, they too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. For instance, Toronto police conducted only a few criminal investigations of audio-visual piracy in the Greater Toronto Area (GTA) in 2014, even though the illegal sale of counterfeit DVDs continues in a number of GTA flea markets. Criminal investigations of Internet piracy are even more rare in Canada than actions against sellers of counterfeit DVDs and similar hard goods. On the whole, the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority. In other words, while some of the statutory gaps identified in parliamentary reports going back almost a decade have been addressed, the non-statutory barriers to effective enforcement remain basically unchanged.<sup>9</sup>

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.<sup>10</sup> The weak penalties further discourage prosecutors from

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<sup>9</sup>For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/secup10/secup10-e.pdf>.

<sup>10</sup>While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so.

bringing cases, creating a vicious cycle that encourages recidivism. There have been exceptions to this trend, including the Audiomaxx case cited in IIPA's 2014 Special 301 report, and an Ontario case in which three men recently pled guilty to copyright and other offenses in connection with a large-scale online DVD burning and manufacturing operation targeting consumers in Canada, New Zealand, Australia and the United Kingdom.<sup>11</sup> They were sentenced to lengthy house arrest and probation along with fines and forfeitures of approximately \$500,000. IIPA hopes that these cases will be harbingers of similar results in the future, and that Canadian law enforcement, prosecutors and courts will extend their reach beyond retail hard goods onto the Internet, including sites on third party marketplaces such as kijiji.ca and ebay.ca. On such sites, devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention, remain readily available.

Bringing the legal reforms contained in Bill C-8 into force is necessary, especially at the border; but it will not be sufficient. We continue to urge the U.S. Government to press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include specialized training on the new prohibitions on circumvention of technological protection measures and its relationship to piracy. Since the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences, particularly jail time, Crown counsel should be encouraged to take on more copyright infringement cases, and should be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.

### 3. Excessive exceptions

During the years-long debate that culminated in enactment of the Copyright Modernization Act, most of the attention focused on provisions dealing with online liability and other topics closely linked to Canada's ability to accede to the WIPO Internet treaties.<sup>12</sup> But in fact, much of the legislation consisted of nearly a score of new or expanded exceptions to copyright protection. IIPA flagged several of these broad new exceptions in a succession of special 301 reports on Canada, and after enactment we urged USG to monitor their implementation closely, with an eye both toward their market impact and toward their compliance with Canada's international obligations. This year we can report that the damage inflicted by overly broad exceptions in Canadian law is current, concrete, and unremediated.

Prior to 2012, a well-established collective licensing regime was in place to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada, generating millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.-Canadian border. Today, that regime is on the brink of collapse, undermined by the combined impact of adverse judicial decisions and drastic legislative changes; and the revenue stream it long produced has slowed to a trickle.

The Copyright Modernization Act added "education" to the list of purposes (such as research and private study) that qualify for the fair dealing exception. Because "education" is not defined, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Even before the fair dealing amendment came into force, some of the decisions in the "pentology" of copyright decisions issued by Canada's Supreme Court in July 2012 posed a direct threat to the educational licensing market.<sup>13</sup> These decisions underscored, among other things, that Canadian courts are to treat fair dealing, not as an exception, but as a "user's right," subject to a "large and

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<sup>11</sup>See <http://www.theglobeandmail.com/news/national/ontario-police-bust-operation-selling-counterfeit-dvd-box-sets-worldwide/article11640091/>.

<sup>12</sup>Of course, some important copyright law issues were not even considered in the context of copyright modernization, notably the disparity of term of protection of copyright between the U.S. and its largest trading partner. Canada should join the growing international consensus in support of term extension.

<sup>13</sup>Of the five copyright decisions announced on July 12, 2012, the main rulings addressing the issues discussed in this submission were *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>.



liberal interpretation;<sup>14</sup> that the purposes of the putative user, not those of a commercial or non-commercial intermediary that actually makes the copy and supplies it to the user, are of primary relevance in determining whether a dealing is fair; and that factors such as the availability of a license to make the use, and even the overall impact of widespread unlicensed use on the actual or potential markets for the work, carry much less weight in Canadian law than they do in U.S. fair use jurisprudence.

Although the *Alberta Education v. Access Copyright* case in the Supreme Court's pentology directly affected only a marginal aspect of the educational copying collective licenses — reprographic copying of a few pages per student per year of short excerpts of already purchased supplemental texts by K-12 teachers for use in class instruction — its ultimate impact, combined with the recent statutory amendment, has been much more broadly destructive. Lawyers for primary and secondary school systems across Canada, giving both the precedents and the new fair dealing amendment the “large and liberal” reading that the pentology decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from a collecting society such as Access Copyright, including for uses such as copying of primary textbooks or of newspaper articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom. Consequently, as soon as the new Act came into force, virtually all K-12 school boards across Canada cancelled their licenses with Access Copyright. Anticipated 2013 annual licensing revenue of at least C\$12 million to right holders and authors — much of it destined for U.S. publishers, which enjoy a large market share in the educational sector — evaporated. Similar legal advice was provided to post-secondary institutions, and many of them have declined to renew their Access Copyright licenses as they expire. Universities that for years paid C\$26 per student for reproducing copyright material are now paying nothing. Once the withdrawal of the Canadian educational enterprise from collective licensing for copying is complete next year, the annual losses are projected to total C\$30.8 million (US\$24.7 million).

Nor is the damage confined to licensing revenue. As part of an overall attrition of revenues from the sale of educational works in Canada, textbook publishers report significant drop-offs in book orders from university bookstores, presumably because more of the demand is being met by uncompensated copying under the current fair dealing interpretation. Not surprisingly, some publishers that focus on the educational sector have begun to shutter their Canadian operations, specifically citing revenue losses flowing from copyright law changes as a reason for closure.<sup>15</sup>

The impact is even greater when foregone revenue is factored in. Access Copyright was just beginning the process of implementing new licenses for digital copying in Canadian schools when the “double whammy” of the 2012 Supreme Court decisions and the copyright modernization legislation hit them. The prospects for achieving any licensing revenue for digital copying, which is already becoming more pervasive than photocopying throughout Canadian educational institutions, now appear extremely bleak, because of the widespread belief in the education community that Canada's copyright law gives educators *carte blanche* for all uses of copyright works<sup>16</sup>.

Publishers received repeated assurances during the copyright revision process that the expansion of fair dealing would not cause a diminution in publishers' business. These assurances have proven false. We urge the U.S.

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<sup>14</sup>For instance, the Supreme Court ruled that that listening to a sample of a popular recording to decide whether or not to buy it qualifies as “research,” and that classroom discussion of a work qualifies as “private study.” This helps explain the trepidation about how broadly Canadian courts will define “education.”

<sup>15</sup>See L. Williams, “Copyright Changes Hit Canadian Publishers Hard,” *Publishers Weekly*, Aug. 8, 2014, available at <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/63630-copyright-changes-hit-canadian-publishers-hard.html>.

<sup>16</sup>The fair dealing amendment of the Copyright Modernization Act is not the only provision of the legislation that may be contributing to this belief. For instance, the broad new exception in section 30.04 would immunize nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a technological protection measure. The Act's extremely low C\$5000 cap on statutory damages for all infringements carried out by any defendant for “non-commercial purposes” — an undefined phrase sure to be interpreted expansively by advocates for educational institutions — renders that remedy virtually insignificant in any copyright dispute with a school, further discouraging enforcement of rights. Indeed, there is a pressing need to clarify the overall scope of the new statutory damage limitation, lest it act as a de facto compulsory license in which only the first copyright owner to sue can enjoy any meaningful monetary relief no matter how widespread the defendant's “non-commercial” infringements may be.

Government to engage with Canadian authorities to ameliorate this threat to the entire educational publishing market in Canada, which is already having deleterious impacts on publishing revenue, royalty payments to authors, investments and jobs on both sides of the border. Nearly 41% of all revenue distributed by Access Copyright in 2013 went to authors.<sup>17</sup> Canadian authorities should be encouraged to communicate directly to the educational institutions and their representatives to reinforce the government's stated objectives for the fair dealing exception. Even if some expanded uses are permitted, the appropriate balance must still be struck so that educational publishers and authors are duly compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials. While the parliamentary review of copyright law mandated by Section 92 as amended by the Copyright Modernization Act is not scheduled to begin until late 2017, nothing prevents the government from accelerating its own review in order to ensure that the serious consequences for the publishing sector are addressed.

IIPA's frequently-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to the educational fair dealing context. In particular, new section 29.21, entitled "Non-commercial User-generated Content," allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (including a commercial intermediary), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision could substantially undermine the exclusive adaptation right that Canada is obligated under the WTO TRIPS Agreement (TRIPS) and the Berne Convention to provide, and its breadth raises serious questions of compliance with the 3-step test for permissible limitations and exceptions.<sup>18</sup> Although this exception may have been globally unprecedented at the time of its enactment, it has already spawned imitators, such as the proposal (thus far rejected) for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of close monitoring of how the Canadian UGC exception is applied in practice, including whether it leads to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing.

#### **4. Discrimination against U.S. performers and sound recording producers**

On May 22, 2014, Canada deposited with the World Intellectual Property Organization (WIPO) its instruments of ratification of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Three months later, Canada's accession to these treaties was formally completed.

In conjunction with its accession to the WPPT, Canada brought into force the provisions of the Modernization Act recognizing an exclusive making available right in sound recordings. At the same time, however, the Canadian Government exercised its prerogatives under the Copyright Act to deny all equitable remuneration to U.S. sound recording producers for recordings publicly performed in Canada through terrestrial broadcasting, and for any form of communication to the public by telecommunication of virtually all pre-1972 U.S. sound recordings (those first or simultaneously first published in the United States). Performers on these sound recordings were similarly denied remuneration.

While we welcome Canada's entrance into the community of nations that accord sound recording producers the broad scope of exclusive rights needed to manage digital dissemination of their products, IIPA also urges Canada to reverse its unfair and discriminatory policy embodied in Canada's implementation decision. We highlight that US law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights. The Canadian decision to exercise its prerogatives in a discriminatory fashion is inappropriate for its relations with its neighbor and largest trading partner, and should be reconsidered.

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<sup>17</sup>See "2013 Domestic Distribution," Access Copyright, available at [http://www.accesscopyright.ca/media/67163/2013\\_distribution\\_summary.pdf](http://www.accesscopyright.ca/media/67163/2013_distribution_summary.pdf) (last visited, Jan. 30, 2015).

<sup>18</sup>See, e.g., Article 13 of the WTO TRIPS Agreement.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2015.

**Executive Summary:**<sup>1</sup> Colombia is overdue to implement crucial intellectual property rights (IPR) obligations under the U.S.-Colombia Trade Promotion Agreement (TPA). This agreement contains a comprehensive chapter on IPR that will raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. But while those commitments go ignored, the levels of piracy in Colombia continue to grow, both in the streets and online. There is no serious effort on the part of Colombian law enforcement to prosecute administrators and owners of websites, blogs and “hubs” involved in the distribution of illegal files. Nor has Colombia’s Congress taken necessary steps to put forward new legislation since the failure of the “Lleras bills,” which would have implemented key copyright protection and enforcement obligations under the TPA, such as procedures for Internet Service Providers (ISPs) to assist in removal of infringing material online. As a vital trading partner of the United States in South America, Colombia should honor its TPA commitments and demonstrate the will to protect creative sectors by combatting the high levels of piracy that persist in throughout the country.

#### PRIORITY ACTIONS REQUESTED IN 2015

- Implement Colombia’s TPA obligations, including:
  - Addressing the scope of liability for ISPs in cases of copyright infringement;
  - Ensuring appropriate liability for circumvention of technological protection measures (TPMs);
  - Establishing exclusive rights for works and for performances and phonograms to bring Colombia’s copyright law up to date in the digital environment; and
  - Extending the term of protection for works and neighboring rights to bring Colombia into compliance with its TPA obligations.
- Increase the focus of law enforcement officials on needed anti-piracy actions on the streets of Colombia and online.

#### COPYRIGHT PIRACY IN COLOMBIA

The overall level of piracy in Colombia has worsened in recent years. Physical piracy plagues the “San Andresitos” flea markets, where vendors sell burned CD-Rs and DVD-Rs on the streets and distribution hubs supply pirate products for the rest of the country. Internet piracy of recorded music is now at 95% of the total market, typically taking the form of illegal links to cyberlockers via social networks, forums, blogs and hosted sites. Stream ripping from YouTube and other streaming sites is very common and growing in popularity.

The recording industry reports that there are fifteen legitimate online music services competing in the Colombian market, and the Colombian music market grew by 13% in 2013. While this is positive news, it is hardly cause for celebration or complacency as the Colombian music market is nowhere near its potential, and licensed

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<sup>1</sup>For more details on Colombia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Colombia’s Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.





services face unfair competition from unlicensed sources of music in an environment where online music piracy is on the rise. The physical market for recorded music decreased by 23% in 2013, a figure that is attributable both to the migration of customers to the Internet as well as the widespread piracy of physical CDs throughout the country, affecting legitimate sales.

## **COPYRIGHT LAW IN COLOMBIA**

Over the past four years, the Government of Colombia has attempted but failed to pass legislation for implementation of its TPA copyright obligations along two tracks. First, in 2011, Colombia's then-Minister of Interior and Justice Lleras (now Vice President) introduced Bill 241, which specified procedures and conditions under which rights holders could request ISPs to remove or block infringing content. The bill never made it out of the Senate that year, and TPA-compliant ISP provisions have not since been reintroduced. The TPA requires Colombia to establish ISP liability procedures of this kind under TPA Article 16.11.29(b)(ix) and the "ISP side letter." Since the failure of the first "Lleras Law," no new efforts to implement ISP liability have materialized. Yet, this commitment under the TPA was due to be adopted in May of 2013.

Second, the government prepared a package of remaining provisions addressing the digital environment and bringing Colombia in line with international norms for copyright protection. Those remaining TPA obligations include:

- Civil remedies for protections of TPMs. (While criminal remedies are available under Colombia's penal code, civil remedies are also required, under TPA Articles 16.7.4 and 16.11.15.)
- Exclusive rights for the protection of works, and for performances and phonograms, in the digital environment, such as temporary copies, and communication to the public including the making available right (required under TPA Articles 16.5.2, 16.5.4, 16.6.2, and 16.6.6(a)).
- Extension of the term of copyright for works for hire to 70 years (required under TPA Articles 16.5.5(b) (with respect to works) and 16.6.7(b) (with respect to performances or phonograms)).

The Congress attempted to adopt these in Law 1520 of 2012. However, the Constitutional Court struck down that law in 2013 for procedural failures during the congressional approval process. In May 2013, the Colombian Government presented Bill 306 of 2013 to the House of Representatives, largely incorporating the substantive provisions of Law 1520 of 2012. Subsequently, Senate Bill 306 of 2013 was archived due to time constraints during the legislative term.

By May 15, 2015, all of the obligations cited above will be overdue.<sup>2</sup> Colombia should take prompt action to revisit proposed amendments to its Copyright Law and bring its laws in line with its TPA obligations and international norms.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

The prosecution of piracy continues to be a weak point in Colombia's enforcement regime. Piracy is considered a minor offense by Colombian criminal judges and appellate courts. Despite the good efforts of the National Police (DIJIN) in conducting investigations and raids, there have been no significant efforts to take *ex officio* action against widespread piracy. Within the Attorney General's office, there is a National Unit Specialized in Prosecuting Crimes against Intellectual Property Rights and Telecommunications, responsible for investigating and prosecuting Internet piracy and crimes against intellectual property rights. They are currently investigating a significant number of cases involving copyrights violations, mostly related to TV piracy.

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<sup>2</sup>The U.S.-Colombia TPA went into force on May 15, 2012. ISP liability provisions under Article 16.11.29 were due one year after that date. Civil remedies for TPMs as provided under Articles 16.7.4 and 16.11.15 will be due to be adopted three years after that date. The remaining obligations cited herein were due upon the date of entry into force.

In a troubling development of 2011 that has yet to be corrected and indicates the low priority that the Colombian Government places on antipiracy efforts, the President failed to ratify the national anti-piracy agreement ("*convenio nacional antipirateria*") that had been in place for some time, in stark contrast to his predecessors. The agreement is largely symbolic but reflects the priority given by the government to the issue of protection of intellectual property rights.

Greater resources should be dedicated to permit proactive investigations by the National Police, and the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of antipiracy cases.

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be retained on the Watch List in 2015.<sup>1</sup>

**Executive Summary:** In 2014, there were some notable enforcement actions undertaken against hard goods piracy (including at the Tepito marketplace, notorious for its illegal stalls and warehouses), which resulted in the seizure of large quantities of illegal goods. This continues a longstanding pattern, where the Mexican federal authorities continue to engage in copyright enforcement efforts in good cooperation with rights holders against hard copy piracy, but efforts against digital piracy remain weak. In addition, state and municipal government anti-piracy efforts continue to be weak overall, with few local entities working on combating illegal trade and piracy.

Expanding the legitimate digital marketplace continues to be a priority for the copyright industries, especially now that nearly half of the Mexican population is online. Unfortunately, the Government of Mexico has been very slow to promote cooperation between rights holders and Internet Service Providers (ISPs) to combat online copyright infringement, which would allow the legal market to flourish. Any meaningful reform of the Copyright Law (especially digital enforcement reform) has stalled, awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). It is hoped that the TPP will enhance copyright and enforcement standards in Mexico and other countries in the region, building upon those agreed to by current FTA partners, and found in the more recent in-force agreement with Korea, to improve the digital marketplace.

In short, the Mexican legal regime for dealing with online infringement remains deeply deficient. Draft amendments circulated in 2013 failed to address third party (ISP) liability at all, and provided very weak notice and notice (instead of notice and takedown) provisions. A much more effective approach is available. Over six years ago, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the Coalition for the Legal Access to Culture (CLAC) to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CLAC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CLAC initiative provides a sound framework for needed improvements, including inter alia: (1) effective notice and takedown procedures; (2) rules that clarify the illegality of providing services intended to promote the infringement of copyright and related rights; and (3) injunctive relief and a duty on ISPs to provide information to law enforcement agencies.

Other key recommended legal reforms in Mexico include: full implementation of the WIPO Internet treaties, with proper protection for technological protection measures (an imperative for many copyright industries), including criminalizing the trafficking in circumvention devices; clarifying the making available right; criminalizing camcording; raising penalties to deterrent levels; and creating an effective warning system for online users and cooperation with ISPs.

Even with the large-scale enforcement actions in 2014, hard copy piracy persists, including CD-R and DVD-R burned discs of music, audiovisual and video games (as well as circumvention devices), all widely available in numerous street markets. In addition, major problems persist including the unauthorized camcording of films in theaters – over 24 American feature films were sourced from illicit camcords in Mexico in 2014, as well as the unauthorized photocopying of books at universities.

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<sup>1</sup>For more details on Mexico's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Mexico's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



The copyright industries recommend several enforcement measures (criminal, administrative and prosecutorial) as well as the legal reforms noted above, in order for the Government of Mexico to improve its IPR regime, led by the development and enactment of a high-level national anti-piracy plan to adopt a broad strategy against major targets, and to coordinate federal, state and municipal enforcement activities.

## **PRIORITY ACTIONS REQUESTED IN 2015**

The copyright industries recommend that the Government of Mexico work with them to promote better cooperation in the fight against Internet piracy. This includes adopting needed legislative reforms and best practices in accordance with Memoranda of Understandings (MOUs) with relevant stakeholders, as well as taking the following priority legal reform and enforcement measures:

### **Criminal Actions, Raids and Prosecutions**

- Implement a national *ex officio* anti-piracy campaign with a consistent year-round focus on major targets (e.g., online sources of infringing content, suppliers, traffickers and distribution chains), emphasizing coordination of the police and prosecutorial resources, and a strategic approach, with a prominent role for the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) within the Attorney General's Office (PGR).
- Provide UEIDDAPI with adequate resources, including support from other enforcement agencies, to undertake raids and seizures at major markets. "Pirate free" areas around legal vendors at markets should be maintained and expanded, in particular, in Mexico City, Guadalajara and Monterrey. Criminal actions should be taken against market owners for illicit activities.
- Provide Customs with adequate resources and *ex officio* authority to independently conduct seizures of infringing goods and components.
- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

### **Administrative Enforcement**

- Provide the Institute of Industrial Property (IMPI) with additional resources, encourage it to issue decisions more expeditiously, and allow IMPI regional officers to conduct local raids. In 2014, IMPI was able to use its administrative authority to take down an infringing website (*ba-k.com*), the first such action in Mexico; this should set a precedent for future infringement actions.
- Provide INDAUTOR (the author's rights institute) with more resources to conduct *ex officio* inspections related to copyright infringements, as well as the facilities to increase and strengthen its mediation capabilities.

### **Prosecutions, Judges and Courts**

- Encourage prosecutors to take *ex officio* actions against piracy (especially online piracy), to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time; in addition, increase IPR case training for prosecutors.
- Adopt mandatory sentencing regulations or guidelines to promote deterrent sentencing in piracy cases, and increase IPR judicial training, with an emphasis on technology, so that prosecutors seek, and judges impose, deterrent criminal penalties.
- Implement *ex parte* remedies, especially injunctive relief, for civil IPR infringement cases in order to fulfill Mexico's WTO TRIPS Agreement obligations.

- Encourage PGR to reverse its current refusal to investigate and prosecute IPR infringement cases absent proof of actual lost profits, rather than based on the harm to rights holders.

## Legal Reforms

- Fully implement the WIPO Internet treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedure Codes.
- Enact legislation to create incentives for ISPs to cooperate with right holders to combat infringement taking place over their networks or platforms (following the Coalition for the Legal Access to Culture (CLAC) initiative).
- Enact legislation to impose criminal penalties for the unauthorized camcording of films in theaters.
- Amend the Criminal Code and the Copyright Law to authorize criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Amend the Copyright Act or Industrial Property Law to remove the proof-of-profit standards (and onerous authorization standards) for infringements of the making available right.
- Amend the Copyright Act or Industrial Property Law to criminalize copyright infringement on a commercial scale, regardless of whether the activity was undertaken for profit-making purposes.
- Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates.

## COPYRIGHT PIRACY IN MEXICO

**Internet piracy:** There are now an estimated 59.2 million Internet users in Mexico, representing over 49% of the population, up from 2.7% in 2000 (as of June 2014, per [www.internetworldstats.com](http://www.internetworldstats.com)). Internet piracy, in the absence of effective enforcement, has grown rapidly in Mexico, including unauthorized downloads and illegal streaming. The copyright industries report a three-fold increase in digital piracy since 2010 (according to studies conducted by CLAC and the research firm IPSOS). The most prevalent digital platforms are peer-to-peer (P2P) file sharing services, and sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted in the U.S. and Europe, but administered in Mexico. Even though many sites and services are not hosted in Mexico, the Mexican authorities can use effective remedies and regulations against large-scale infringers, and can do so without unintended collateral consequences, in addition to adopting notice and takedown and other more effective measures for local sites. The BitTorrent tracker *demonoid.me* was taken down by the authorities in 2012, and remains down (although a new domain hosts a similar site at *demonoid.pw*). A criminal investigation is ongoing, and no criminal proceeding has yet commenced. One Spanish language website that is very popular in Mexico is *seriesyonkis.com*. This site provides illegal linking and streaming of motion pictures and television programs, and was designated by the U.S. Government as a “Notorious Market” in February 2014 (at the conclusion of the 2013 out-of-cycle review).

The most widespread source of music piracy is P2P activity with ARES, Gnutella and BitTorrent dominating, as well as “linked” piracy on blogs and forum sites. Blogspot, a Google service, has been widely used to provide these links. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide the revenue for financing the development of new creative works worldwide. The Entertainment Software Association (ESA) reports that in 2014, Mexico ranked 17th in the world in terms of the number of connections by peers participating in unauthorized file-sharing of select ESA-member titles on public P2P networks. Basic legal reforms and significantly improved enforcement are needed to address these forms of piracy in Mexico.

**Hard goods piracy:** Although there has been a significant decline in the sale of legitimate hard goods in recent years, hard goods piracy persists both in the manufacturing and distribution networks, and on the street and at markets. In 2012, the U.S. Government named three Mexican markets to its “Notorious Markets” list. Two of those same markets were included on the 2013 list (released in February 2014): (1) San Juan de Dios in Guadalajara, which the U.S. Government described as an “indoor flea market” with over 300 vendors selling pirated first-run movies, music, video games, software and other items; and (2) Tepito in Mexico City, “reportedly the main warehousing and distribution center for pirated and counterfeit products” sold throughout Mexico. In its February 2014 announcement, the U.S. Government said “[b]oth markets are rife with pirated and counterfeit goods, including music CDs, DVDs, video games, other software, clothing, shoes and electronics, are known throughout Mexico and the region as centers of counterfeiting and piracy, and exemplify the type of market that sustains counterfeiting and piracy around the world.” In addition, the U.S. Government cited reports that both markets have links to “transnational and domestic organized crime groups.” Pulga Rio (Las Pulgas) in Monterrey, the third market on the 2012 list, was described as a “major hub for counterfeit and pirated goods” in the state of Nuevo Leon; it was removed from the list in February 2014, after what the U.S. Government described as, “recognition of sustained efforts by Mexican authorities.”

The motion picture industry (the Association for the Protection of Film and Music (APCM)) reports that roughly 90% of film or television DVDs sold in Mexico are pirated. Eight raids in 2014 against Tepito (and nine in San Juan de Dios) were coordinated between APCM and UEIDDAPI, and resulted in significant seizures; but piracy remains strong even at those markets. All of the copyright industries report little overall progress against the other major distribution centers for optical disc piracy (CDs and DVDs) of music, film, and entertainment software in Mexico, which include: Lomas Verdes, La Fayuca, Plaza Meave, Juarez or Central Camionera, Toreo Subway Station (and market), Salto de Agua, La Cuchilla, Pulga Rio, Pulga Guadalupe, Pulga Mitras, El Parjan, Plaza Lido, Zona Rosa, Plaza Degollado, Las Brisas/La Mesa and Carpas Santa Fe. There are over 90 such markets operating across the country, many of which are well organized and continue to be politically protected. Over half of these markets are on public land, increasing the need for action by municipal and state authorities. One state government, Queretaro, is working with APCM to try to establish the first “pirate free” state, working with federal and municipal governments there.

Many of the street markets have discrete distribution chains and often involve organized criminal syndicates. IIPA continues to recommend focusing enforcement on these locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these markets. Such efforts should make use of the new forfeiture law, under which landlords aware of criminal activity on property they own must either stop the activity, notify the authorities, or face liability. In addition, labs and warehouses are located in many markets, including many in Mexico City, Monterrey, Guadalajara, Puebla, Veracruz, Toluca and Tijuana. One positive note in 2014: for the first time, enforcement authorities targeted labs and warehouses connected to some of the major markets, instead of only focusing on vendors.

APCM reported the following regarding raids and seizures in 2014: there were over 6.4 million CDs and DVDs seized, and over 8,590 burners seized, with over 1,506 actions taken in Mexico City alone. Almost all of the pirated disc product in Mexican markets is locally manufactured, so controlling blank optical media imports is very important. Mexico imports much of its blank media from Taiwan and China; the main ports of entrance are Manzanillo, Lazaro Cardenas, Matamoros, Reynosa, and Laredo.

Hard goods piracy remains very damaging for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory cards loaded with hundreds of video games downloaded from the Internet) found in many of the major markets cited above, particularly Tepito, San Juan de Dios, La Fayuca, Plaza Meave and Bazar Pericoapa. Industry enforcement efforts have uncovered multiple burning labs in Tepito capable of producing hundreds of thousands of pirated video games. The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of online piracy of entertainment software in Mexico.

Circumvention is accomplished by the installation of “modification chips” in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated video games, or by modifying the video game platform’s operating system to facilitate the play of pirated video games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces which are then assembled in Mexico. Vendors, and online marketplaces such as Mercado Libre, sell circumvention devices for approximately 350 to 500 Pesos (US\$24 to US\$34), often with memory cards containing up to 400 unauthorized copies of video games as part of the sale. Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not their distribution or sale.

**Camcord piracy:** Incidents of illegal recording of films in Mexican theaters increased significantly in 2014, with at least 24 stolen films being detected from Mexican theaters. In recent years there have been a few convictions in several highly-publicized cases, but only because prosecutors were able to prove not only camcording, but an array of other crimes. In Mexico, successful enforcement against camcord piracy requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. In order to do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. Mexico’s anti-camcording law must be strengthened to allow for enforcement without proof of a profit motive, to prevent further harm to the Mexican box office, as well to the other distribution channels for films in Mexico. Rights holders have been working with exhibitors to deter and combat camcording by conducting training programs for theater employees. In addition, investigators have identified suspects in the state of Puebla and are focusing on how recordings flow to release groups throughout Latin America, to try to crack the distribution chain.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

Three federal agencies take the lead in copyright enforcement in Mexico. The Attorney General’s Office (the PGR) is responsible for federal criminal enforcement. The Mexican Institute of Industrial Property (IMPI) takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR (the author’s rights institute) is responsible for registering copyrights, as well as enforcement. The Scientific Police of the Secretaria de Seguridad Publica have also assisted rights holders by providing information on illegal software websites, although following recent changes in leadership, the quantity of collaboration has somewhat declined.

### **Criminal Enforcement**

While cooperation between rights holders and the PGR is very solid, IPR prosecution is being hampered by insufficient resources, inadequate training to new agents (despite many programs), and the lack of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace. Additionally, some of copyright industries reported excellent cooperation with IMPI against hard goods piracy in inspection visits and *ex officio* raids in 2014. Lack of coordination between the government agencies (PGR, the specialized IP unit, and local police forces) has continued to stymie enforcement against the distributors of infringing entertainment software. On many occasions in 2014, the Specialized IP Unit obtained search warrants to raid premises known to harbor commercial-scale piratical operations but warrants were not executed (or were delayed) because police officers were not assigned to assist with raids. The entertainment software industry, along with the other copyright industries, recommends that prosecutors continue to focus their efforts on major sellers and repeat offenders, rather than on street vendors (further recommending that street vendor raids be used to investigate supply chains to target large-scale distributors, with follow-up criminal prosecutions).

**Structural reforms and jurisdictional issues:** IIPA continues to recommend several “structural” reforms or agency actions to improve criminal enforcement. An overarching recommendation is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies (including the Federal Police (PF), the Ministry of the Interior (Gobernación), and the Mexican Tax Administration (SAT), as well as

state and local police) that need to be involved in identifying and targeting individuals responsible for large-scale distribution and importation of pirated goods, including the major organized crime syndicates engaged in these operations. The campaign could also focus on well-known street markets, labs and distribution centers responsible for the sale of large quantities of pirated goods. In 2013, a national IPR enforcement plan was publicly released, and meetings were held with stakeholders in 2014, but the plan has never been implemented; it is a step in the right direction even if it does not have all of the recommended components for an effective plan. That said, joint implementation and monitoring of an IPR enforcement plan among PGR, SAT, IMPI, PROFECO and the Federal Police is required. Last year, SAT engaged with PGR to support enforcement actions related to audiovisual piracy, especially in cases where money laundering or tax evasion was suspected. The 2013 actions were focused in Mexico City. There were no reports of any additional such cases in 2014.

A second and related recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. In Mexico's 32 states there are 2,400 municipal governments, 190 of which have populations of over 100,000. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors; but even so, few local anti-piracy actions have been taken. Only five of Mexico's 32 state governments currently cooperate on IPR enforcement – the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. Besides improving cooperation in these states, coordinating federal-local efforts in Nuevo Leon, Morelos, Baja California Norte, Veracruz and Michoacán should be priorities.

A third recommendation is to significantly improve the PGR's criminal enforcement actions, especially outside of the main cities. Since 2010, the PGR has had the authority to take *ex officio* actions against copyright infringement. In 2013, a change in administration brought a change in the PGR's strategy that continued into 2014, which prioritized street raids instead of raids at laboratories and warehouses, resulting in a decrease in the overall number of actions.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, in digital piracy. The PGR has a special piracy unit, the "Subprocuraduría" Specialized in Investigation of Federal Crimes (SEIDF), which has worked effectively with industries and achieved significant results in some key markets (including in digital piracy cases). However, this unit is under-resourced to effectively dismantle organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have, including paid informants, wire-tapping authority and witness protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF, as well as additional resources and training.

Fourth, enforcement agencies should adopt clear and consistent policies for the expeditious destruction of seized infringing goods. The copyright industries have successfully applied the "Ley Federal de Extinción de Dominio" (Federal Law for Property Forfeiture) in piracy cases; but materials seized in the PGR enforcement raids continue to find their way back into the black market. Some rights holders continue to report problems, although there were a few instances in 2014 where rights holders were notified, and did cooperate in the destruction of confiscated goods. Article 75 of the Federal Law for the Administration and Alienation of Public Sector Goods requires a final court order to destroy goods, unless they are abandoned, and prosecutors need to wait 90 days to declare goods "abandoned" in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials are not returned into the stream of commerce.

Fifth, the Federal Bureau of Consumer Interests (PROFECO) should use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been ongoing training programs with different agencies undertaken by industry, but PROFECO still needs to be properly resourced to undertake action against street markets. Multiple changes in the leadership in PROFECO have complicated efforts to develop sustained and effective enforcement improvements.



A continuing weak spot in Mexican IPR enforcement is the judiciary – the need for training to improve IPR expertise by judges (especially training on technology, including circumvention devices, digital distribution, and online piracy); the lack of specialized IP judges and courts; the non-deterrent sentencing in many or most cases (criminal sentences are rare, given the number of raids and cases commenced); and persistent problems with civil litigation. IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (reparación del daño). That court should also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Judges should also be encouraged to treat copyright treaty obligations as self-executing (in accordance with 2010 constitutional amendments and Supreme Court decisions). Finally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

## Civil Enforcement

Mexico's three-tiered civil procedure system makes civil litigation too complicated, time consuming, and costly for rights holders. There have been some recent improvements: for example, the Copyright Law was amended in 2013 to allow rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. Mexican law now grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. The Civil Code was amended (in 2011) to provide *ex parte* measures to avoid the destruction of evidence; however, those provisions have still not been implemented. There were no reports of such closures in 2014, although IIPA members have reported in prior years that IMPI's business closures, for those opposing inspection visits, have been effective.

## Administrative Enforcement

**IMPI:** Statutory changes that took effect in 2012 increased the penalties IMPI could impose, and established a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called "door closures"). These changes have borne fruit, with IMPI undertaking actions against businesses, imposing fines, including immediate fines in door closure cases or against businesses who opposed inspection visits. Rights holder groups report significant cooperation and coordination with IMPI on enforcement actions (for example, against commercial establishments using unauthorized music), resulting in more and higher fines, and IIPA members were pleased with IMPI's (first) administrative takedown of an infringing website in 2014. Many of the copyright industries continue to recommend that investigations be conducted more rapidly (including faster issuance of decisions), and that evidence be preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order). Several copyright industries reported that IMPI inspectors in 2013 did gather more detailed evidence than in prior years, and that this resulted in better outcomes for infringement cases (including higher fines). IMPI needs more resources to carry out its enforcement mission, including recording equipment, personnel and training. IMPI should also be encouraged to waive or lower rights holder's deposit fees in instances of "obvious" piracy. It is also recommended that IMPI empower its regional offices to conduct raids and seizures.

**INDAUTOR:** IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy. INDAUTOR should be allocated more resources and facilities to increase and strengthen its mediation capabilities, as well as to conduct *ex officio* inspections related to copyright infringement. INDAUTOR also is responsible for supervising the collecting societies in Mexico. This includes the authority to issue tariff rates for the broadcasting of sound recordings in TV and radio stations.

## Online Enforcement

Several legal deficiencies hamper effective online enforcement. First, there is no specific Mexican legislation establishing liability principles for ISPs in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Without clear legal standards, ISPs claim uncertainty on how to react to Internet piracy and to notice and takedown notifications from the copyright industries. Some IIPA members report cooperation with hosted content takedowns, but more broadly, there is little or no cooperation with many local ISPs. Google Mexico has been blocking links in Blogspot in response to takedown notices sent by rights holders (including, in December 2014, allowing the video game producers to use bulk submissions). But, their takedown procedure has generally proven to be very time consuming for most of the copyright industries, and thus not a very effective remedy.

Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer's personal information to rights holders seeking civil recourse against alleged infringers (although Article 189 of the Telecommunications Law, as amended in August 2014, does allow an ISP to cooperate with an order from any judicial authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights.

Generally, file sharing committed through P2P networks is not considered a serious legal violation by Mexican courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result effective prosecutions in P2P cases are unavailable. APCM (the film and music association) reports only a single Internet piracy case (and not a P2P piracy case) filed last year, mainly due to the lack of adequate criminal provisions. For P2P file sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. In the past, proposals were introduced (for example, one in 2013) which would have instituted a weak notification system to infringers; but these were never acted on. As noted, on a positive note, IMPI did use its administrative authority in 2014, for the first time, to disable an infringing site (*ba-k.com*).

## Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

In 2006, the PGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Unfortunately, in 2011, PGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new "protocol" between the PGR and Customs officials. Imported raw materials – blank CD-Rs, blank DVD-Rs, jewel boxes and burners – are still widely used to produce pirate material in Mexico. These importations are not considered a crime, but coordinated administrative actions by the PGR, SAT and APCM have resulted in a few seizures of illegal imported raw material.

IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities, not only to prevent Mexican exports of pirate movies to the U.S. and Latin markets, but also to control blank media exports

from Southeast Asia that pass through the U.S. to Mexico (to avoid Mexican taxes). Mexico should also implement the recently enacted legislation to create a centralized customs registration database to assist with identification of infringing shipments. Other needed improvements include: adopting procedures to address changes in the size and frequency of shipments, and to deal with falsified documents; re-launching Customs' inspection program and its program for seizing goods arriving at local ports, destined for other countries; adopting a maximum quota on blank media importations used for the pirate market; and developing a strategy to identify infringers who import their goods using falsified information.

The Customs authorities have continued their anti-piracy initiatives with the support of the local American Chamber of Commerce, participating in regular training programs in conjunction with IMPI for Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product, and with regular meetings with industry members. ESA continues to report positive results from ongoing training efforts with Mexican Customs officials, including detention notifications and seizures of pirated video game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices, with thousands of video game components seized in 2014.

## **COPYRIGHT AND RELATED LAWS IN MEXICO**

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Law was last amended effective in 2003 (with implementing regulations in 2005). Mexico acceded to both the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002 (but never fully implemented the treaties, and did not publish the ratification of the treaties with the Agreed Statements). Draft laws to implement the digital treaties have circulated for years, but have never been enacted. Drafts that publicly circulated last year (2013) would fall far short of proper implementation on issues relating to technological protection measures, for example. One other component of digital treaty implementation that has been proposed in recent years, but never enacted, would enforce a rights holder's authorization for "making available" (i.e., for the distribution or commercialization of copyright material on websites). There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPS obligations), as well as those relating to full digital treaty implementation. For details see <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

In 2013, a new broadcasting and theatrical exhibition regulation went in to force that will be burdensome to implement for motion picture and television program producers. The regulation restricts the advertising of "junk food" and sugary beverages on television and in theaters, specifically during programming intended for children. In addition, some legislators have periodically proposed the adoption of screen quotas, which if adopted, would severely limit the exhibition of U.S. films in Mexico; these would violate NAFTA and should be opposed.

**Legislative Recommendations:** Other legislative reforms needed for effective enforcement (in addition to Copyright Law amendments, and the other recommendations already noted above) include:

- Amendments to the Criminal Code to punish – with a prison term (three to ten years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent.
- Amendments to the Criminal Code to eliminate proof of a profit motive as a prerequisite to criminal liability for large-scale copyright infringements.
- Amendments to the Copyright Law or Criminal Code to establish criminal sanctions for the distribution or trafficking of devices used for the circumvention of TPMs. This should include "acts" as well as devices, components and services. Mexico's existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices.

Since such devices are made abroad and imported into Mexico, there is no criminal enforcement against retailers of these devices.

- Amendments to the Customs Code to grant customs inspectors *ex officio* powers to detain and seize infringing imports.
- Amendments to strengthen administrative enforcement by: (1) providing tax crime prosecution of copyright infringement (when it implicates tax liability); and (2) increasing administrative sanctions.
- Ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that USTR place Switzerland on the Watch List in 2015 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.<sup>1</sup>

**Executive Summary:** Switzerland missed a crucial opportunity in 2014 to stem high levels of online piracy with quick action on the unanimous recommendations of the *Arbeitsgruppe Urheberrecht* 2012, or Working Group on Copyright (AGUR12), published in December 2013. Instead, in June 2014, the Federal Council instructed the Department of Justice to respond to those recommendations on a severely protracted schedule, with a bill not to be presented to the legislature until the end of 2015.<sup>2</sup> Any such proposed amendments would not become law before the end of 2018 (if at all). One recommendation of the AGUR12 that could have been actionable in the very near term, namely a public awareness campaign, has been wholly ignored. The Swiss music industry continues to attempt to navigate the increasingly narrowed evidentiary criteria that must now be met for prosecutors to take action against instances of online copyright crimes; but that effort shows little promise of bringing the existing enforcement standstill to resolution. All told, five years after the 2010 Logistep decision that led to an overbroad understanding of the type of public network data that is protected from collection by private parties for copyright litigation, online infringements continue to be met with no effective civil or criminal enforcement in Switzerland.

Switzerland remains a haven for existing and new services heavily engaged in infringing activity that have opened or moved headquarters or servers to Switzerland. From there, they provide a global service to export pirated content. This long-lasting and ongoing activity can be directly attributed to the reality that Swiss law enforcement still provides no effective consequences for online copyright infringement on any scale. The Swiss Government should take immediate action to clarify what evidence collection practices are or are not permissible for effective copyright enforcement under the Data Protection law. It should also revise the announced schedule for copyright law reforms so that the unanimous December 2013 recommendations of the AGUR12 may be incorporated into Swiss law on a fast-track basis, to enter into force by the end of 2016. Such amendments should include measures to fairly and effectively address websites providing access to both hosted and non-hosted infringing content and repeat infringers, as well as a civil liability limited to certain service providers hosting structurally infringing sites.

#### PRIORITY ACTIONS REQUESTED IN 2015

- Clarify permissible evidentiary procedures for civil and criminal online copyright enforcement to permit law enforcement to resume online copyright enforcement as soon as possible;
- Accelerate the introduction of a bill to incorporate the compromise recommendations of the AGUR12 as published in Section 9.3 of the final AGUR12 report dated December 6, 2013;
- Demonstrate a commitment to the reduction of pervasive piracy by participating with the private sector in a broad-based information campaign, as recommended in the AGUR12 report;
- Clarify Switzerland's exceptions to copyright to ensure that single copies for private use are permissible only as long as they derive from a legal source; and

<sup>1</sup>For more details on Switzerland's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Switzerland's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>See the press release of the Swiss Government at <http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=53259>.



- End the discrimination of neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act.

## **THE NATURE OF PIRACY IN SWITZERLAND**

Switzerland suffers not only from increasing domestic piracy rates for music, film, video games, and entertainment software, but also from a growing reputation as a safe haven for certain Internet service providers (ISPs) to base operations dedicated to piracy on a global scale.

Some of the world's most popular Internet services for the unauthorized sharing of copyrighted works have opened or moved headquarters or services to Switzerland, including the file storage service *Uploaded.net*, currently ranked number 411 of the world's most popular websites according to Alexa, and *Oboom.com*, an ad-based file storage service that fuels piracy by incentive programs and, as with *Uploaded*, through the sale of "premium accounts" permitting immediate downloads of multiple files at once. The hosting provider Private Layer (with data center and hosting operations in Switzerland and corporate operations in Panama) hosts a large number of illegal websites including the BitTorrent indexing site *Bitsnoop*, the linking site *Putlocker.is*, and the streaming cyberlocker site *Nowvideo.sx* (which offers uploaders rewards of about US\$20 per 100 downloads, and refuses to comply with takedown notices). These services have a worldwide clientele affecting Russia, Poland, the United States, the EU, and beyond, and are accountable for significant traffic of pirated content.

Swiss Internet users utilize a broad range of mechanisms to access pirated content online. Peer-to-Peer (P2P) BitTorrent activity for the purposes of sharing infringing material remains popular. Cyberlocker services for storage and sharing of illegal files are also still available, though with some decline in favor of BitTorrent networks since the closure of Megaupload in 2012. Stream ripping sites and applications, which permit a user to create a local copy of unauthorized streamed content, are still high in usage. Downloading and streaming for private use are widely viewed as legal, as long as there is no uploading.

## **ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND**

Copyright industries in Switzerland have kept up efforts to resume criminal and civil actions against online infringement under Swiss law, almost entirely ceased in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the Logistep case, which prosecutors have interpreted broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. This is despite a clarification from the Swiss Data Protection Authority (FDPIC) stating that under Swiss privacy laws, the decision only barred the specific data harvesting that was used in that case, and only from use in civil actions. In fact, the Data Protection Commissioner has opined that the anti-piracy activities of the type carried out by IIPA members, including the music and film industry, are compliant with the Data Protection Act, and is supportive of rights holders' best practices.<sup>3</sup> Yet rights holders are currently proscribed from analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement as part of a secondary liability claim, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks.

Subsequent to the 2010 Logistep decision, Swiss prosecutors halted all investigations of online copyright crimes until, on February 3, 2014, the Zurich Supreme Court remanded a case against a heavy uploader of pirated material via the "Gnutella" P2P file-sharing protocol. That case had been refused by the public prosecutor due to the fact that the relevant user data had been collected by a private entity, but now will be investigated by law enforcement and ultimately will require further court interpretation of the Data Protection Act. On a separate track, rights holders are pursuing a case of online piracy in which, as suggested by the courts, private parties collected no

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<sup>3</sup>More details about the Logistep decision and its political aftermath in Switzerland are provided in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.

user data (despite the fact that such data is publicly visible), but instead relied only on the presence of unauthorized files online. To do so, rights holders identified musical recordings of Swiss origin (with Swiss-German lyrics), so that Swiss uploaders could be certain to be implicated in the action handed over to the District Attorney's investigators. However, such an approach may not be practical with respect to non-Swiss materials—and as a general matter places a greater burden on law enforcement in conducting investigations—but appears to be the only enforcement path remaining in Switzerland's rocky copyright regime.

Although the existing Swiss Data Protection Act does not require such limited evidentiary rules, some have concluded that amendments to the law are the best way to move prosecutions forward. Unfortunately, the process of developing compromise recommendations and bringing legal changes into force is not set to be complete until late 2018 at the earliest—eight years after the Federal Supreme Court handed down the Logistep decision, a laughable delay given the fast-paced and ever-changing online environment at issue. It was nearly two years after the Logistep decision that the Federal Department of Justice and Police recognized at last the magnitude of this enforcement deadlock and other concerns, and agreed to set up AGUR12, a stakeholder working group made up of artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations, along with government participants and ISP representatives brought in as experts. After more than a year of deliberations, on December 6, 2013, AGUR12 published its unanimous compromise recommendations for reform — the significance of which cannot be overstated given the variety of viewpoints that were represented in the working group. The Federal Council considered the recommendations for six months, and on June 6, 2014, announced that it had tasked the Federal Department of Justice and Police with drafting a bill for legislative consultation by the end of 2015, drawing from the AGUR12 recommendations on copyright and “the conclusions of a working group that is currently examining the civil responsibility of providers in general.”<sup>4</sup>

Swiss rights holders have serious concerns about their government's will to accept and prioritize the implementation of AGUR12 package of recommendations. The Swiss Government should revisit its timeline for adoption of changes to the law, and prioritize quick implementation of the AGUR12 recommendations, including:

- Introduction of a fair and effective mechanism to address websites providing access to both hosted and non-hosted infringing content via a governmental body;
- Introduction of a simplified mechanism to deter repeat infringers, which ultimately leads to civil liability for the holder of an infringing IP address;
- Introduction of liability for certain hosting providers, similar to the form of liability known in German courts as “Störerhaftung,” leading to a take-down/stay-down obligation for certain providers; and
- A right of information for the collection and use of data (including IP addresses) for copyright enforcement purposes.

Until the situation in Swiss courts changes, as copyright owners are unable to enforce their rights online, Switzerland appears to be in violation of its obligation to “ensure that enforcement procedures ... are available under [its] law so as to permit effective action against any act of infringement of intellectual property rights,” under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 41.

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<sup>4</sup>For the full report of AGUR12 recommendations as well as the June 6, 2014 press release of the Federal Council, see <https://www.ige.ch/en/copyright/agur12.html>.

## **THE SWISS COPYRIGHT ACT AND RELATED LAWS**

In addition to the urgent developments regarding Internet piracy enforcement in Switzerland, IIPA continues to have other long-standing concerns with certain aspects of the copyright and related laws in Switzerland. These were explained in detail in IIPA's 2013 Special 301 submission on Switzerland.<sup>5</sup> In summary:

First, the private copy exception in Article 19 of the Swiss Copyright Act is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. According to the Swiss Federal Council's announcement, the Swiss Government intends to confirm that downloading from an illegal source is permitted. In addition, a new effort is underway to expand the private copy exception to include the ability to make copyrighted material available on a non-commercial website, as long as the site has a small amount of data traffic. Such an exception flies in the face of international copyright norms, and would certainly not meet the guidelines of the Berne Convention set forth under the three-step test of Article 9(2).

Second, Swiss law allows acts of circumvention of technological measures "for the purposes of a use permitted by law" (Article 39(a)(4)), an exception that is also far too broad, particularly given the inappropriately wide scope of the private copying exception. Taken together, these exceptions would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. As a consequence, devices and circumvention software are widely available in Switzerland.

Third, Articles 22(a) to 22(c) of the Copyright Act, regarding mandatory collective administration, provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fourth, Article 60(2) of the Swiss Copyright Act caps the remuneration payable to rights owners (collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring rights owners. This discrimination of the neighboring rights leads to poor revenues that are substandard in comparison to most European countries. In 2010, the Swiss performing artists and record producers collecting society "Swissperform" initiated arbitration proceedings against this cap. In 2014, the Swiss Federal Supreme Court has dismissed the case in the final instance. In its judgment, the Federal Supreme Court stated that the 3% and 10% caps serve as a rule of thumb for what is an equitable remuneration under collective rights management. It acknowledged that the remunerations for performing rights are in fact higher in other European countries, but was unable to intervene on the merits. Rather, it held that it is up to the Swiss legislature to set these caps based on a *political assessment*.<sup>6</sup> With this judgment, the Swiss Federal Supreme Court clearly shows the path for reform: The Swiss Government should now end this unusual and unjustified discrimination of the neighboring rights and provide for a fair and equitable remuneration for both performing artists and producers.

Fifth, there is a need for camcording legislation to combat the illicit recording of movies at movie theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world.

Sixth, although Article 12 Section 1*bis* of the Swiss Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right—e.g., if the audiovisual work is still in the theaters—an explicit criminal sanction for the violation of this principle is needed, in order to deal effectively with an influx of French-language DVDs imported from Canada and freely distributed while the motion pictures are still playing in Swiss cinemas.

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<sup>5</sup>See <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.

<sup>6</sup>FSC no. 2C/783, p. 16, cons. 6.6.



# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Special 301 Watch List.<sup>1</sup>

**Executive Summary:** The piracy situation in Taiwan worsened in 2014. Internet piracy remains the most urgent problem in Taiwan. A 2014 survey of Taiwan's Internet users by Sycamore Research and Marketing revealed that 73% of respondents admitted to having streamed or downloaded unauthorized content, even though 81% admitted piracy is wrong, 74% said the circulation of pirated content hurts Taiwan's creativity and adversely impacts local jobs, and 67% said the government should do more to halt such infringing activity (with 63% of respondents supporting disabling access to websites).<sup>2</sup> Taiwan remains without an effective mechanism to address foreign websites whose business models are built on piracy. Other piracy problems include rampant unauthorized photocopying of textbooks on or around university campuses, and growing media box/set-top box (STB) piracy.

The decision to reorganize the IPR Police (IPRP) into a new Criminal Investigation Brigade (CIBr) under the Second Police Special Headquarters (SPSH) of the National Police Agency (NPA), Ministry of the Interior (MOI) has resulted in lowering the priority for copyright cases. The number of CIBr officers has declined, and the bonus system for fighting piracy was dismantled. Amendments to the "Communication Security and Surveillance Act," which passed Taiwan's Legislative Yuan in January 2014, went into effect in late June 2014. The amendments further restrict police authority to undertake online investigations.<sup>3</sup> As a result, the CIBr has apparently withheld a number of right holder referrals. While the government held one meeting in September 2014 between right holders and ISPs to discuss graduated response, this is not nearly enough to encourage ISPs to more effectively cooperate with right holders trying to protect their rights. Judges still appear to view copyright piracy as a minor offense and sometimes lack the technical background to understand the scope of harm caused by Internet and new technology infringements, and in many of the most recent criminal cases, prosecutors have agreed to suspended sentences.

A study undertaken by Oxford Economics demonstrates what is at stake for one industry, as the local film and television industries directly contribute US\$5.5 billion to Taiwan's GDP, supporting 113,800 jobs and generate approximately US\$543 million in tax revenues. We urge the Taiwanese government to reinvigorate its commitment to protect this important contributor to Taiwan's economy and to address copyright industry concerns appropriately.

### PRIORITY ACTIONS REQUESTED IN 2015

#### **Enforcement :**

- Ensure that the CIBr is provided with sufficient manpower, funding, and resources.
- Reinstate award budget for major anti-piracy cases.
- Improve court practices, particularly among prosecutors, to reduce numbers of "suspension of indictment" cases, and increase convictions resulting in deterrent penalties.
- Increase trainings for judges and prosecutors on specific issues related to copyright infringement, including understanding the nature and seriousness of online piracy.

<sup>1</sup>For more details on Taiwan's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Taiwan's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup> Sycamore Research and Marketing, *Project Cate: Exploring Online Piracy Behaviour and Attitudes in Taiwan*, June 12, 2014, at [http://www.tisf.org.tw/press\\_releases/2014/Taiwan%20FULL%20PUBLIC%20DECK-%20English%20Version.pptx](http://www.tisf.org.tw/press_releases/2014/Taiwan%20FULL%20PUBLIC%20DECK-%20English%20Version.pptx) (cached).

<sup>3</sup>The amended law requires officers to obtain court orders before soliciting further information from ISPs such as IP address account information.



- Ease the process of obtaining search warrants by clarifying and making consistent (across the various offices) evidence collection procedures and threshold evidentiary requirements to initiate an enforcement action.
- Bring and conclude “media box” piracy cases under Articles 87(7) or 91 of the Copyright Law, as aiding or abetting cases under the criminal law, or through other measures.

#### Legislative:

- Implement the provisions in the Copyright Act dealing with ISP liability to provide appropriate incentives for expeditious removal of infringing materials, including forwarding notices to infringers and implementing repeat infringer policies.
- Ensure that the contemplated copyright law amendments:
  - introduce a clear legal basis and effective provisions for administrative and/or judicial remedies to address access in Taiwan to websites facilitating infringement in Taiwan/non-hosted infringements;
  - make Internet piracy a “public crime”;
  - fix copyright collective management provisions to remove the authority of the Taiwan Intellectual Property Office (TIPO) to set a “joint royalty rate,” appoint a “single window” for collection, and instead, incorporate a “willing buyer, willing seller” standard into rate-setting procedures, and also accord economic evidence in rate review procedures for public performance right tariffs due consideration;
  - make it an offense to use/attempt to use an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part;
  - do not relax or reduce criminal liability standards (including maintaining public crime for optical disc piracy);
  - do not unreasonably extend exceptions beyond what is permissible under Taiwan’s TRIPS obligations; and
  - extend the term of protection consistent with the global trend to 70 years from the death of the author, or for sound recordings (and performances) 95 years from publication, or at least 70 years from publication.

#### Market Access Issue:

- Cease setting a price ceiling on pay TV subscriptions given the upcoming digitization of the spectrum.

## PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>4</sup>

**Piracy Worsens, Including Rampant Internet Infringements and Growing “Media Box” Problem:** Market indicators suggest that the situation in Taiwan for copyright owners markedly worsened in 2014. In the Internet environment, foreign websites providing illegal content (including streaming sites and cyberlockers which are popular for audiovisual and musical content) remain a significant problem harming right holders’ ability to commercially operate in Taiwan. One particularly popular rogue site, *yny.com*, is the 14<sup>th</sup> most accessed site in Taiwan (and the 43<sup>rd</sup> most accessed site in Hong Kong) and has a worldwide Alexa ranking of 496 (much more popular than in 2013). Other particularly problematic sites include *VeryCD.com* (ranked 2,728<sup>th</sup> in Taiwan, and 234<sup>th</sup> in China) (noted for infringing music); and *TW116.com* (ranked 407<sup>th</sup> in Taiwan, 501<sup>st</sup> in Singapore, and very high in Hong Kong and Malaysia),<sup>5</sup> and *myvideos.com.tw* (ranked 911<sup>th</sup> in Taiwan) (both noted for infringing motion pictures). Particularly popular are the use of streaming, forum, blog,<sup>6</sup> deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites to infringe copyright in movies, music, video games, and books and journals. Mobile apps are a more recent but growing platform for disseminating illegal content. The music industry estimates the Internet piracy rate at roughly 85% in 2014 (up from roughly 82% in 2013). In addition to online piracy, sales of hard goods through Internet auction and e-commerce sites remain a problem. For example, pirate Blu-ray and DVD discs are being sold

<sup>4</sup>See, e.g., IIPA, *Taiwan*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301TAIWAN.PDF>.

<sup>5</sup>*TW116.com* is a notorious site built on, and commercializing, the infringement of others. The site primarily uses *Xigua Player* links.

<sup>6</sup>Forums are a serious problem, including *eny.com* and *ck101.com* (the 38<sup>th</sup> most accessed site in Taiwan), as just two examples. The flow of music and audiovisual content through these forums is large.

on e-commerce websites. Most of these hard goods websites are operated out of mainland China, which send the pirate discs into Taiwan in small packages.

The sale of media boxes or STBs facilitating piracy has increased considerably in Taiwan, and is now the fastest growing Internet-based piracy in Taiwan. Mostly originating in China and available throughout Taiwan openly, including at so-called “3D” shops that sell computers, software, and peripherals, and via online retailers, STBs facilitate unauthorized receipt of pay-TV content, allow users to organize pirate sites, and permit mass storage of pirated materials. Motion picture industry staff have detected more than 30 different brands of such devices now available in the marketplaces in Taiwan. These boxes can directly connect to foreign pirate sites (usually in mainland China), often contain a hard disk to store downloaded content, and often have an SD card slot which helps novices connect with foreign sites. TIPO has indicated in the past that STB piracy can be addressed through current provisions of the law and that one case was commenced in 2013, but we have no update on the outcome of this case.<sup>7</sup> It is also common knowledge and practice for consumers to make modifications on the box to allow users to access illegal content, apps, illegal transmissions, etc. which can be accessed on a smart TV, which would amount to a violation of anti-circumvention provisions in Taiwan’s Copyright Act.

**Internet Enforcement Largely Lacking Due to Lack of Sufficient Legal Provisions and Government Will to Effectively Tackle the Problem:** Regarding enforcement, while the takedown rate remains high for hosted content in Taiwan (over 90% for industries reporting, with good cooperation from ISPs), Internet users in Taiwan increasingly obtain unauthorized content from websites located overseas, particularly websites located in mainland China. Thus, while a remedy exists for domestically hosted websites (either civil or criminal), such is not the case for foreign-based infringing websites. As regards non-hosted forms of infringement, music right holders worked with one ISP in Taiwan, HiNet, to try a six-month test to see how implementation of the ISP graduated response would work in practice. Unfortunately, this process revealed flaws since a very low percentage (fewer than 30%) of the already-low number of warning messages were successfully forwarded by ISPs to their subscribers. This may be due to several factors, including that ISPs believe they are under no legal obligation to forward notices to infringers, there has been no implementation of the ISP rules, and ISP subscribers are not mandated to provide an email address. Because of the low success rate, TIPO was disinclined to maintain the program. Taiwan’s relative isolation from the international community, along with the existing Copyright Act and reluctance of TIPO to encourage or support strong action or change to the laws, has resulted in ISPs (especially those considering themselves to be ‘mere conduits’) demonstrating extreme reluctance to cooperate. There is no Memorandum of Understanding (MOU) in place, nor has there been any active negotiation underway. TIPO’s meeting in September 2014 between right holders and ISPs resulted in no consensus. Further regulations or legislation will be crucial to provide an appropriate response to Internet piracy in Taiwan and to effectively encourage ISP cooperation with right holders to educate and, under certain circumstances, deal with repeat infringers. As things stand, Taiwan is an outlier in Asia, since most other countries are taking active steps to address the growing online and mobile piracy problem.

The implementation of the amendments to the Communication Security and Surveillance Act has also negatively impacted government will to investigate online infringement because it restricts the information police can obtain from ISPs without a court order. In large part, as a result of these negative developments, the local motion picture investigators report that the number of successful raids throughout the first eleven months of 2014 decreased (year-on-year) to 37 in 2014 from 94 in 2013.

**IPRP Reorganization Into CIBr and Removal of Award Structure Have Resulted in Downgrading of Priority of Copyright Cases:** The IPRP, prior to its disbanding on January 1, 2014, was one of the more effective units in Taiwan in the fight against copyright piracy. Its reorganization into the CIBr has resulted in decreased human resources, funding, and prioritization of copyright infringement cases. In the transition to a CIB brigade (CIBr), a number of good IPRP investigators were ‘dismissed’ because they were not trained as “criminal police,” resulting in a down-sizing in the number of officers and squadrons (from five squadrons down to three squadrons; before the

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<sup>7</sup>In China, some STB companies have sought licenses from copyright owners, a positive sign that the raising of this issue, including in the cross-straits context, is helping. But much more needs to be done in Taiwan to curtail this activity.

reorganization, the IPRP had seven squadrons located in seven major cities). The CIBr also operates under a decreased budget but is expected to maintain nationwide coverage. At its peak, CIBr was supposed to have 218 officers. IIPA believes the CIBr needs to reinvigorate the human capital back to at least 185 officers, must keep IPR protection within the division as the most important mission, and must assign a commander and supervisors who understand IP and have the know-how to take effective action against physical and Internet/mobile piracy in the future. The budget must be increased to make it sufficient to effectively enforce against copyright infringement. Benchmarks must be maintained for copyright cases, both in terms of the numbers of cases heard, as well as reasonable targets for successful convictions. It is important that such targets are broken out by the type of piracy, e.g., Internet piracy, book piracy,<sup>8</sup> unauthorized camcording, media box/set-top box (STB) piracy, signal theft, and limited piratical imports. Finally, TIPO should continue in its advisory role.

**Award Budgets Must Be Reinstated:** It is critical to reinstate an award budget so that the CIBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. Unfortunately, the previous budget of NT\$4.5 million for awards for physical and Internet cases was entirely removed in 2014 because the Ministry of Economic Affairs (MOEA), responding to pressure from the Legislative Yuan (LY), eliminated TIPO's budget for such awards. IIPA recommends the reinstatement of reasonable awards. It is unfortunate that TIPO's role will be relegated to a training budget for IPR enforcement officers, and will no longer play an important role in the IPR police force as in the past.

**Improvements Needed for IP Courts:** Many reports from copyright and other IP right holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal procedures do not result in deterrence. In the criminal context, prosecutors usually settle for "suspension of indictment" in digital piracy cases. Regular training schedules should be established for judges and prosecutors on specific issues related to IP infringements, focusing on the technical particularities of Internet and new technology-based copyright infringement cases, aspects of the civil and criminal system that are not operating smoothly for right holders, and primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the online and digital environment.

## **COPYRIGHT LAW AND RELATED ISSUES**

IIPA expresses deep concerns over the continued lack of an administrative or judicial remedy against foreign piracy services targeting Taiwan users, the lack of cooperation from ISPs over such services and against repeat infringers, and the proposed (but now reportedly still-shelved) amendments to Taiwan's Copyright Act that included several unfavorable elements for right holders.

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements Emanating from Outside Taiwan:** Many of the online services built on infringing activities of others, and/or fostering or encouraging it, are located outside of Taiwan. Nonetheless, the infringing activities all happen within Taiwan and should create a nexus for action. Many jurisdictions in addition to Taiwan are working toward approaches to halt services from being accessed at their borders. We believe that all organs of the Taiwanese Government (TIPO, the Ministry of Justice/Judicial Yuan, and the Legislative Yuan) should remain steadfast in seeking an appropriate remedy that is narrowly tailored with appropriate processes to halt services which are built on, facilitate, and/or encourage infringement. However, no remedy has been proposed as part of the recent (but now shelved) copyright review process. This is unfortunate. Governments in the region, including recently in Indonesia and Singapore, have adopted and/or refined approaches that provide a mechanism for petitioning for orders instructing ISPs to disable access to rogue sites without regard to any liability of the ISP for authorizing or facilitating such infringement.

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<sup>8</sup>Unauthorized photocopying of books (particularly higher education and English language teaching materials (ELT) and journals remains the primary problem faced by the U.S. publishing industry in Taiwan. Publishers continue to find photocopy shops in and around university campuses engaging in unauthorized photocopying on a large scale. In recent years, publishers have also seen an increase in online piracy, particularly of textbooks and password-protected material, though the unauthorized copies of reading materials are being made available mainly from servers/sites in China.

**Full Implementation of ISP-related Provisions Needed:** The Taiwanese authorities have recognized that significant online copyright infringement occurs in Taiwan, including through services that are often offshore. To address this problem, it is necessary that a combination of approaches be implemented, including the proper implementation of the graduated response provisions already enacted in Taiwan's Article 90<sup>9</sup> applied to file-sharing of unauthorized content. In particular, it should be clarified that ISPs lose "safe harbors" under the ISP Law if they fail either: to forward notices to alleged infringing users; or to have and implement a termination policy for repeat infringers.

**Copyright Review, Now On Hold, Should Address Non-Hosted Infringements, and Avoid Weakening Criminal Liability, Creating New Broad Exceptions, and Adding Onerous Collective Management Provisions:** TIPO released a discussion draft copyright revision in April 2014, but shelved the draft during the summer after hearing from affected stakeholders. IIPA reviewed that draft and found it flawed in fundamental aspects.<sup>9</sup> First, the shelved draft failed to address the most pressing needs, including 1) addressing non-hosted infringements and foreign rogue websites targeting Taiwan users, 2) deeming Internet piracy a "public crime" (as was so successfully done regarding optical disc piracy), 3) making it an offense to engage in unauthorized camcording of motion pictures, and 4) extending term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Second, the draft as presented would have created numerous new problems, including 1) the introduction of new, overly broad exceptions to protection, some of which may have called into question Taiwan's TRIPS obligations,<sup>10</sup> 2) proposing the relaxing of criminal liability standards (e.g., removing the "public crime" designation for optical disc piracy),<sup>11</sup> and 3) making some fundamental changes to the treatment of related rights, particularly with respect to sound recordings,<sup>12</sup> among many problematic proposals. To the extent the drafters wished to tackle collective management issues, any forthcoming draft should allow the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establish judicial dispute resolution mechanisms in lieu of the requirement to have CMOs tariffs reviewed, revised, and approved by TIPO; and eliminate TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection.<sup>13</sup>

We applaud TIPO for listening to all stakeholders during the process of vetting the April draft and temporarily shelving the project until views can be heard and proper policies devised. We understand TIPO is working on a new draft amendment but there is no timeline at present, and IIPA looks forward to reviewing it in light of the above comments.

## **MARKET ACCESS ISSUE**

**Price Ceiling on Pay-TV Subscriptions:** The Taiwanese Government currently maintains a price cap on monthly cable television fees for analog cable television services, while monthly rates for digital cable television are not regulated. The price cap provides a disincentive for content providers to enter the market. While this situation should be changed with oncoming digitization (it should be easier for the government to support a "pay what you see"

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<sup>9</sup>There were some positive features including adding an Internet re-transmission right which would apply to all subject matter.

<sup>10</sup>We understand the drafters were looking at a distance learning exception, and the TEACH Act in the U.S. should act as a reference to provide guidance on the properly narrow scope of permissible distance learning activities.

<sup>11</sup>While industry reports indicate a decrease in the retail marketplace of pirated optical discs in Taiwan, this is mainly due to two factors: increasing online infringement, and the increasing availability of optical disc piracy through online channels. Another change would have unreasonably restrained and discriminated against copyright owners by making criminal remedies unavailable if the right owner is not members of a collective management organization.

<sup>12</sup>As examples of some changes initially contemplated, TIPO initially intended to introduce a "neighboring rights" system but decided to maintain sound recordings as works after industry opposition. In addition, the new Internet retransmission right was to be afforded to works, but sound recording right holders and performers would only have been entitled to a remuneration right. Third, moral rights would have been withheld from sound recording right holders. Other issues to be worked out include the possible joint collection by sound recording producers and performers of royalties for public performance of a phonogram to which the performance is fixed. Industry does not oppose this assuming that its main rights organization may undertake the collection on behalf of performers.

<sup>13</sup>The 2010 amendments to the Copyright Collective Management Organization Act leaves in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings and allows for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. The Act establishes a four-month time limit on TIPO approval of these rates and requires TIPO to reconstitute a special rate setting committee to include right holders as well as users and experts. The Act should be modified to favor a market-based approach, allowing for the establishment of fairer tariff rates, and eliminating the single licensing window. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

policy within a digitized environment), the Taiwanese government should ease any current price controls in this market.

## **TRAINING AND OUTREACH**

Right holders continue to work with the Taiwanese government, organizing dozens of campus outreach campaigns for students, as well as participating (in TIPO-led) and organizing training seminars for judges, police, prosecutors, customs officers, and other law enforcement units. Industry also provides assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from outside Taiwan, e.g., mainland China), and supporting raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors. The industries provide publicly available data (including the recording industry's website in Taiwan) with important information about anti-piracy actions and copyright protection campaigns. Industry remains available and interested in providing more of the same in 2015, including through the AIT, the European Economic and Trade Office (ECTO), ECCT, and the AmCham.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the United Arab Emirates be placed on the Watch List in 2015.<sup>1</sup>

**Executive Summary:** With an emerging legitimate marketplace for creative content, including the launch of legitimate online/mobile music services and sold-out concerts for many major music acts, the government needs only to approve the established collecting society under the UAE Copyright Law<sup>2</sup> for music right holders to be fairly compensated for the commercial use of their music. These payments are critical for U.S. right holders and also as a source of revenue for investment in local cultural production and the development of a robust local industry that can develop local talent. In the absence of a legitimate marketplace, Internet and mobile piracy have flourished, while re-exportation of counterfeits by Customs has had an adverse effect on legitimate markets in other countries in the Gulf and the Middle East, Africa, and even Europe.<sup>3</sup>

#### PRIORITY ACTION REQUESTED IN 2015<sup>4</sup>

- Take immediate action to allow the establishment and operation of a collecting society so that right holders can finally begin collecting royalties under the UAE Copyright Law.

#### PIRACY AND ENFORCEMENT ISSUES IN UAE

Prior IIPA reports on UAE contain detailed discussions of piracy and enforcement issues, including with respect to some of the past priority actions. This report serves only as an update on the collective management issue and is not to be considered an exhaustive review of other priority issues.<sup>5</sup>

**Allow Legitimate Collection of Royalties for Uses of Phonograms:** Broadcasting and public performance (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.) constitute increasingly important uses of recorded music globally, and of course in the UAE. Revenue collected from such uses, estimated to be in the tens of millions of U.S. dollars if collection is allowed, is an essential element for the UAE to develop local artists and to become a hub for the production of music in the region. Yet virtually nothing is being collected today, completely undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. The UAE Copyright Law provides the relevant rights. Specifically, Article 18 of the Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights states that producers of phonograms enjoy rights to any

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<sup>1</sup>For more details on United Arab Emirates' Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of UAE's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights.

<sup>3</sup>According to a European Commission study, the UAE was fourth, after China, Hong Kong, and Turkey, in seizure/detention of suspect infringing IP goods in the EU in 2013 (2.49% of all infringing goods seized in the EU were sourced from the UAE). See European Commission, *Report on EU Customs Enforcement of Intellectual Property Rights Results at the EU border 2013*, July 2014, available at [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2014\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2014_ipr_statistics_en.pdf).

<sup>4</sup>Prior years' filings have also identified the following priority actions, which also largely have not changed:

- Have Ministry of Economy (MOE) take proactive enforcement against Internet piracy, including properly instructing the Telecommunications Regulatory Authority (TRA) with respect to Internet sites involved in the distribution of infringing copyright materials and circumvention tools.
- Cease the practice of re-exporting seized counterfeit goods, potentially in violation of TRIPS.
- Modernize the Copyright Law to ensure adequate protection against circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, devices, components, or services.
- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit products.

<sup>5</sup>See, e.g., IIPA, *United Arab Emirates*, 2014 Special 301 Report, February 7, 2014, available at <http://www.iipa.com/rbc/2014/2014SPEC301UAE.PDF>.



exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms. Article 37 of the Law provides that anyone who engages in such exploitation without permission from the right holder infringes copyright and is made subject to criminal penalties and civil remedies. In addition, Section 16 of the Law enables the creation of collecting societies and provides for the undertaking of collective rights administration. Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighbouring Rights established the basis on which licenses permitting collective management activities would be granted by the Ministry of Economy (MOE). Based on the Law and Ministerial Decision, in 2004, the recording industry took steps to establish Emirates Music Rights Society (EMRS) in the UAE to serve as a collecting society.

Now more than a decade later, right holders still find themselves without the ability to license on a collective basis. The MOE has not yet promulgated regulations that would permit the approval of a collecting society. Without such approval, there is no practical way for right holders to enforce their rights. This needed development cannot happen quickly enough, since every day the losses mount to performers, producers of phonograms, songwriters, composers, and music publishers, and we call upon the government to take action to finally resolve this longstanding issue.

**Other Issues:** In the absence of collective management, and due to the lack of a proactive approach of the MOE with respect to copyright concerns, Internet piracy has proliferated.<sup>6</sup> In addition, re-exportation of counterfeit/pirated goods began to occur in 2013, representing a major setback to right holders.<sup>7</sup> Some retail piracy also continues in the malls, especially outside major metropolitan areas in the Emirates. These problems should be addressed.

## **COPYRIGHT AND RELATED LAW UPDATES**

**Amendments to the UAE Copyright Law:** IIPA understands the MOE plans to enact amendments to the UAE Copyright Law to make certain needed changes, following a study by the Abu Dhabi Technology Development Committee. The plans reportedly include tougher policing and the establishment of specialized intellectual piracy courts, but further changes are also needed.

The current Law contains only rudimentary protections against the unauthorized act of circumvention of technological protection measures (TPMs) and against the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs. The following should be prohibited: 1) the act of circumvention of a

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<sup>6</sup>According to the Telecommunications Regulatory Authority (TRA), as of October 2014, Internet broadband penetration in the UAE had increased to more than 1.1 million subscriptions (an almost 15% jump from the previous year), and nearly 13.1% of the population. The UAE also boasts nearly 17 million active mobile users, meaning roughly 88% of the population now uses the Internet. These numbers mean enormous opportunities for growth in legitimate copyright distribution services, as demonstrated by the Anghami app and the launch of *Digital Music Services* in the Emirates in 2013. Unfortunately, online and mobile device piracy in the UAE remains a problem, including websites that provide illegal access to pre-release music, movies, television content, games, reference books, online journals, and trade books of top publishers. Several notorious sites are among the top sites accessed in UAE, including *kickass.so* (the 36<sup>th</sup> most accessed site in the UAE) and *Torrentz.eu* (64<sup>th</sup>). The TRA took action with respect to over 100 websites several years ago, including online piracy sites as well as sites making available circumvention devices for console-based videogames, but in 2012, the MOE stopped issuing such directives, and enforcement ceased. Piracy and illegal circumvention activities online have increased since then, although the Cybercrime Department of the Dubai Police has stepped in during the lapse in enforcement.

<sup>7</sup>In 2013, UAE Customs apparently decided to start re-exporting seized counterfeit goods rather than destroying them. Exacerbating this problem is a lack of transparency on Customs actions. The re-exportation of counterfeits sets a bad example for other countries, puts other markets around the region at risk, and may be a violation of the UAE's TRIPS obligations. Authorities are encouraged to cease this policy immediately and to create public-private partnerships with right holders to prevent wrongful re-exportation of illegal goods. The draft Anti-Commercial Fraud Law, which was approved by the Federal National Council on March 4, 2014, reportedly amends the prior draft by distinguishing between "fraudulent and corrupt commodities" which may be re-exported back to the country of origin, and counterfeit goods, which must be destroyed. However, there are questions as to whether pirated goods (e.g., that do not contain a false trademark) could be considered "fraudulent and corrupt" but not "counterfeit" which would be problematic. Reportedly, further amendments will seek to clarify that as long as a good is "counterfeit" it must be destroyed even if it also qualifies as "fraudulent and corrupt." The drafters should ensure that pirated materials also fall within the category of goods that must be destroyed, and never re-exported. Rob Deans and Harriet Balloch, *Key Amendments to Anti-Commercial Fraud Law*, June 2, 2014, International Law Office, available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=2587c727-a8fd-4e98-81e2-269be61c8441>.



TPM that effectively controls access to copyright-protected materials,<sup>8</sup> or the exercise of exclusive rights; and 2) the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs (independent of the existence of any infringement). It should be made clear that violations involving TPMs are subject to both civil and criminal remedies.

Other changes that should be made in any amendments going forward include: 1) removal of unreasonable restrictions on the ability to freely contract;<sup>9</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention Appendix;<sup>10</sup> 3) ensuring TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; 9) raising minimum and maximum fines for copyright infringement (Article 37); and 10) adding provisions specifically related to Internet infringements, including notice and takedown, as well as effective measures to deal with repeat infringers and non-hosted infringements on services with business models based on providing access to copyright infringing material.

**Cyber Crime Law Should Include IP:** The Cyber Crime Law was recently updated to include, among other things, a specific provision on ISP liability. However, the Law does not cover ISP liability in connection with IP infringement. It would be useful if the Law could be clarified in implementing regulations to apply in cases of IP infringement.

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<sup>8</sup>It should be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM “for preservation of specific standard of quality of the copies,” which does not seem to cover all access control TPMs).

<sup>9</sup>For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid “any action” with respect to “more than five” of an author’s works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted as they are here by statute.

<sup>10</sup>Article 21 of the law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See Berne Convention Members, World Intellectual Property Organization, at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

# **SPECIAL ENGAGEMENT**

# ITALY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA asks that USTR monitor Italy through special engagement in 2015 for full resolution of key enforcement challenges.<sup>1</sup>

**Executive Summary:** The first year of implementation of Italy's Internet anti-piracy regulations has resulted in positive actions against harmful online infringers, making use of a fast-track procedure to address large-scale piracy and underscoring the value of procedures to handle illegal linking sites and repeat infringers. During 2014, several of the most popular infringing torrent search engines used in Italy, located abroad, were subject to enforcement measures through the antipiracy framework under the Italian Communications Regulatory Authority (AGCOM) that went into effect in March 2014, and by the Fiscal Police. Continued anti-piracy actions by the Fiscal Police included the removal of a major foreign-based infringing cyberlocker. Yet overall, extremely high levels of piracy in the country persist. IIPA asks the U.S. Government to continue to monitor Italy's anti-piracy actions closely, toward ensuring that the efforts of AGCOM and the Fiscal Police continue at full strength, and that legal loopholes in Italy's copyright and privacy laws are closed to prevent infringers from developing new business models that skirt enforcement anew. We also highlight the importance of removing IPR offenses from the scope of present draft decriminalization legislation, which could undermine much of the progress made in recent years.

#### PRIORITY ACTIONS REQUESTED IN 2015

- Maintain full support for the AGCOM process and encourage the Authority to ensure that remedies authorized under the regulations are as effective as possible against massive infringers, while minimizing unintended collateral consequences
- Coordinate government bodies at a high level, and encourage cooperation to continue important criminal actions and injunctions against illegal P2P and linking services.
- Amend current draft decriminalization legislation to remove IPR offenses from its application.
- Provide the legal tools and resources for specialized judges and staff within the specialized corporate judiciary section to effect more timely resolution of IP cases.
- Raise awareness among enforcement authorities to effectively enforce the Anti-Camcording Law against the increasing problem of illegal camcording in theaters and theft of dubbed soundtracks.
- Eliminate legal obstacles for rights holders to take civil actions for the protection of their rights online, including by gathering non-personally identifying IP addresses and, consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, identities of infringers, to establish underlying infringement in cases against major infringing web operators.
- Promote respect for legitimate content through an effective public awareness campaign.

#### AGCOM PROCEDURES TO COMBAT INTERNET PIRACY

IIPA members report positive results from the first year of operation of Italy's antipiracy procedures, which came into force on March 31, 2014. As a result of the procedures, several important infringing sites are no longer

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<sup>1</sup>For more details on Italy's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Italy's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.



operating in Italy, while others have removed infringing material in response to administrative orders or even begun voluntarily to cooperate with rights holders.

The regulations under the Italian Communications Regulatory Authority (AGCOM) establish a procedure by which rights holders may submit complaints to an authority (the "Authority") requesting removal of infringing activity online. The Authority passes complaints on to the relevant ISPs and, where possible, to website managers and uploaders. If recipients do not comply with the request, the Authority initiates a review of the case that must be concluded within 35 days or, in the case of "serious" piracy, within a 12-day expedited process. The Authority may order the hosting ISP to remove or disable access to the infringing files (or, if the files are hosted on a server outside of Italy, it may order ISPs to disable access to the website) within three days. Importantly, the procedures may be applied to linking sites, and provide specific actions against repeat infringers. The AGCOM process is subordinate to a judicial process; therefore, any AGCOM case will be deferred to the Court if the interested parties appeal to a court of law.

Since the AGCOM regulations' entry into force (as of November 30)<sup>2</sup>, the Authority has received 142 complaints. There were 95 proceedings (some involving multiple cases), on behalf of photographic works, visual works, sound recordings, publishing texts, literary works, audiovisual works, and video games. Among these, 71% proceeded according to the "ordinary" procedure and 29% through the "expedited" procedure upon the demonstration of massive infringement. As a result of the procedure, 62% of the subject service providers voluntarily responded to notices; 29% resulted in take-down orders from the Authority; and 9% were dismissed.

As of December 31, 2014, the Authority issued orders against several noteworthy websites dealing in unauthorized files of the copyright works of IIPA's members, namely: *torrentz.pro*, *torrentdownloads.me*, *cineblog-01.net*, *torrentvia.com*, *movie4k.to*, *movie2k.tv*, *puntostreaming.com*, *tantostreaming.com*, *putlocker.is*, *watchseries.ag*, *solarmovie.is*, *watchserieshd.eu* and *liberostreaming.net*. The fact that nearly a third of the cases before the Authority were conducted through the fast-track procedure, and that nearly two-thirds resulted in voluntary take-downs of infringing material, are important factors in the regulations' success in 2014. Experience suggests that any effective response to Internet piracy must take place in Internet time, and expedited processes are therefore greatly welcomed.

For example, the site *vstau.info* responded to industry's complaint to the Authority by immediately beginning to collaborate with the local film industry association to remove illegal content. This type of voluntary result is a welcome outcome to the establishment of the procedures, that permits quick and cooperative removal of infringing material. We highlight that this process is intended to operate alongside present notice-and-takedown arrangements, and remedies through the Authority are aimed at sites that do not generally respond to notices.

## **COPYRIGHT PIRACY IN ITALY**

Levels of piracy improved in 2014 for some sectors, including the film and music industry. Initial surveys indicate that visits to the websites targeted by AGCOM in the past year have dropped significantly. However, significant problems remain in the online environment, in addition to other issues. Unauthorized copying of textbooks is common across school campuses. The large-scale importation of circumvention devices, contributing to Italy's status as having one of the world's worst video game piracy rates, originates from the land-locked microstate of San Marino where adequate anti-circumvention laws are not in place. Illegal camcording in theaters and broadcast signal piracy are still major problems for the film industry.

**Online and mobile device piracy:** All of IIPA's members are dramatically affected by online piracy in Italy. The most prevalent forms of piracy in Italy today have arisen where the current legal regime has been unable to

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<sup>2</sup> Fully updated official data are available at <https://www.ddaonline.it/interventi.html>.

reach them. Cyberlocker platforms are currently the most popular source of illicit content among Internet users in Italy. Peer-to-peer (P2P) bitTorrent platforms dedicated to infringement are also seeing an increase in use. Both of these formats are facilitated by a growing base of web sites providing links to illegal material, many of which are small enough to nimbly relocate and proliferate before lengthy litigation can even be initiated against them. However, even the mainstream search engines in Italy provide results linking to illegal files when, for example, book titles followed by “pdf” are entered as search terms. The major cyberlockers and torrent search engines where these materials sit are primarily operated outside of Italy, thereby complicating criminal enforcement in Italy. Mobile device piracy of music, films, and video games is also growing rapidly via applications that share links to infringing content.

According to the study “Sala e Salotto” released in September 2014 by ANICA, Italy’s motion picture association, every day in Italy there are 1,239,000 unauthorized views or accesses of audiovisual content. Infringement of books and journals via P2P networks also continues to be a problem. The Entertainment Software Association (ESA) reports that Internet piracy remains a serious problem for its members in Italy, which in 2014 placed fourth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.<sup>3</sup> The local recording industry associations, FIMI and FPM, report that more than six million people were using P2P networks for illegal uploading and downloading of music files in 2014.

The prevalence in Italy of circumvention devices such as video game copiers is a severe problem for ESA members, who report that many of the devices originate from San Marino (where local law enforcement lacks the legal tools to address circumvention of technological protection measures, or TPMs) and facilitate much of the illegal video game downloads in the country. Circumvention devices are found both in retail stores and on e-commerce sites. Because circumvention devices enable users to play pirated copies of games that are downloaded from the Internet, hard goods piracy of video games themselves is on the decline in favor of online piracy.

**Camcorder Piracy:** Illegal camcording in Italy is a very serious and growing problem for the motion picture industry, for which enforcement is sorely lacking. Much of the illicit activity involves the recording of Italian language audio tracks in theaters immediately following a film’s release, which are then added to good quality pirate video found on the Internet. This form of piracy accounts for 71% of the pirate movies available in Italy. Video captured in Italian theaters is also increasingly appearing in illegal copies online.

**Signal Piracy:** Suppliers of illegal television programming operate in Italy by selling subscriptions to Pay-TV “card-sharing” groups, at a price of 15 euros per month, for access to an average of 20 European channels. Other operators illegally offer Pay-TV broadcasts through streaming live sites located on servers abroad, including in Ukraine, Russia, Romania, and Germany, at a price of eight euros per month. In March 2014, Italian police dismantled a card-sharing network located between Naples and Caserta that was illegally connected to SKY and Mediaset platforms.

**Textbook piracy:** Educational publishers, in particular, report persistent problems with infringing content in the form of unauthorized photocopying of textbooks, print piracy (from printing presses and reprints), and online piracy, all of which stifle the market for legitimate materials.

**Optical disc piracy:** Hard goods piracy of audiovisual products continues in Italy, but is on the decline. Naples serves as a production hub, with the highest number of DVD-R burners seized. Palermo and Catania have recorded the highest number of DVD-Rs seized, indicating that Sicily is a primary retail market, even if the grand total of activity is on a steady decline. Seizures of pirate hard goods are still recorded on the Adriatic coast during summer, but only in trivial amounts.

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<sup>3</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

While the passage of the AGCOM Regulations was a significant advancement in Italy's anti-piracy regime, certain law reform needs still have not been addressed, and instead legislators have again in 2014 made proposals that would undermine copyright enforcement rather than strengthen it.

**Weakened criminal remedies:** Draft legislation was introduced in April of 2014 (decreto legislativo recante disposizioni in materia di non punibilità per particolare tenuità del fatto, a norma dell'articolo 1, comma 1, lettera (m), della legge 28 aprile 2014, n. 67. Atto n. 130) which permits prosecutors to drop cases for "criminal liability for conduct punished with monetary sanctions or imprisonment not exceeding a maximum of five years, when demonstrating the tenuous nature of the offense and when it is not a habitual behavior." This measure, through the use of the phrase "tenuous nature of the offense," would allow the Public Prosecutor to close proceedings on a highly subjective basis. Bearing in mind that all crimes against copyright protection, even the most serious (including massive piracy for profit purposes), shall be punished with a maximum 4-year sentence, and therefore meet the threshold condition of this provision, this provision is problematic and subject to abuse. Dismissal in all copyright cases would depend wholly on the prosecutor's attitude, and the impact of the legislation on the criminal enforcement of IPR could be lethal for rights holders. We urge the Government of Italy to address the issue and reaffirm the commitment against copyright infringement by removing the IPR violations from the list of crimes included in the draft.

**Evidentiary Hurdles in Internet Piracy Enforcement:** Amendments are needed to enable the collection of evidence needed for civil enforcement against operators of infringing P2P services. Limitations on monitoring and collecting Internet piracy data exist under Italy's Privacy Code, the Rome High Court's interpretation of Italy's Privacy Code in the famous Peppermint cases,<sup>4</sup> and the March 2008 ruling of the Data Protection Authority, resulting in a lack of civil enforcement against file-sharing of infringing content. Italian jurisprudence still appears to limit the ability of rights holders to use collected data in actions against individual infringers. Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement in P2P piracy cases will, as a practical matter, be impossible.

**Lack of ISP liability provision:** Italy's laws do not yet firmly establish fundamental liability when an ISP fails to take action in response to a notice of infringement provided by a relevant rights holder. Italy's Legislative Decree #70 of April 9, 2003, implementing the e-Commerce Directive, requires judicial or administrative authorities to issue notices upon ISPs before they are obligated to remove infringing material. Until recently, this prevented voluntary take-downs on the part of ISPs. However, rights holders report that the steady processing of complaints under the AGCOM regulations has prompted better cooperation among hosting sites in Italy in response to initial complaints to the Authority. Difficulties still remain with some less cooperative ISPs, who face no negative consequences for failing to publicly provide identification and contact details in accordance with Article 5 of the E-Commerce Directive.

## **COPYRIGHT ENFORCEMENT IN ITALY**

Problems in Italy's judiciary continue to pose major obstacles to general copyright enforcement, both in criminal and civil cases. But in 2014, the overall picture for copyright enforcement in Italy has improved thanks in large part to the efforts of the *Guardia di Finanza* (Fiscal Police).

**Action Against Illegal Cyberlocker:** During the month of July 2014, the Fiscal Police announced the conclusion of the operation "Italian Black Out," leading to the closure in Italy of *ddlstorage*, at the time the most popular cyberlocker in the country, operated out of Luxembourg with more than 120 servers. The operation was a

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<sup>4</sup>The Peppermint case is detailed most recently in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301ITALY.PDF>.

collaboration between the Fiscal Police of Cagliari and the Technological Fraud Special Unit - Fiscal Police of Rome (GAT), with the technical support of the local music industry and the cooperation of the local movie industry. The business collected subscription fees that, in its last 15 months of operations, amounted to over one million euro with 460 million files downloaded.

**Actions Against Distribution of Circumvention Devices:** In May 2014, criminal proceedings concluded with convictions against two individuals providing TPMs circumvention devices/services for consoles, one of three such results in 2014. The video game industry reports a strong working relationship with law enforcement, which has a record of carrying out *ex officio* actions in cases of video games piracy.

**Civil Enforcement:** Despite some positive results in recent years, for the average copyright infringement case, severe delays make effective civil enforcement impossible. It is extremely important that competent new judges are allocated to the specialized courts with jurisdiction over IP, to avoid creating further delays in civil proceedings.

Italy's criminal provisions are effective only against commercial scale piracy committed for the demonstrated purpose of gain, criteria that prevent deterrent action against illegal downloading and streaming. For quick action, plaintiffs need to turn to injunctive measures, but these are largely unavailable in the absence of identifying information of the infringers. Italy's privacy laws are among the strictest in Europe, preventing any chance of identifying the name of on-line infringers outside of a criminal trial. Italian law provides rights holders with the ability to obtain a preventive attachment (seizure order) against foreign sites, and rights holders have done so, for example with respect to Pirate Bay and BTjunkie. But the process through the courts is lengthy and results are isolated, making the actions of Italian police forces and the AGCOM regulations indispensable to an effective antipiracy program in Italy.

**Criminal enforcement:** Public prosecutors do not inform injured parties of pending criminal proceedings, and prosecutors and judges continue to show a lack of interest in criminal enforcement of IPR violations. Many of the Fiscal Police's high-profile online cases resulted in success due to preliminary remedies. In some cases, however, preliminary *ex parte* searches are undermined by judges who fail to see the risk in alerting defendants of a scheduled raid. Cases requiring full proceedings face a multitude of procedural difficulties and members of the judiciary lack the resources to properly handle copyright cases. "Specialized" sections handle a variety of cases in practice, and are only "specialized" to the extent that a portion of their day is allotted to IPR crimes. In reality, these sections often fail to prioritize copyright cases. Severe delays in the judiciary ultimately undermine effective enforcement.

**Illegal camcording:** An area that is in need of more coordinated law enforcement attention is illegal camcording in theaters. IIPA encourages law enforcement to prioritize these cases and cooperate with the local industry group, FAPAV, to address the problem.

**Book piracy:** Neither the Ministry of Education nor Italian law enforcement authorities are engaged in combatting unauthorized photocopying or other activities involving infringing books and journals in and around schools. IIPA recommends the adoption of appropriate use and copyright policies within educational environments to promote use of legitimate content.

## **TRAINING AND TECHNICAL ASSISTANCE**

During 2014, anti-piracy organizations took part in training programs planned with Fiscal Police offices in Latina, Rome, Napoli, Olbia, Cagliari, Gorizia, Novara, Padova, Vicenza, and Bologna that were attended by a total of about 500 officers. Topics addressed the efforts of a variety of creative industries with a primary focus on online piracy of copyrighted works, and included basic "computer forensics" training for law enforcement officers.

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA asks that USTR monitor Spain through special engagement in 2015 for full resolution of key enforcement challenges.<sup>1</sup>

**Executive Summary:** In October 2014, Spain adopted long-awaited amendments to its Intellectual Property and Civil Procedure Laws that seek to address major gaps in the country's legal infrastructure to fight Internet piracy. The legislation came into force on January 1, 2015, and its success will rest on the will of the government to vigorously enforce its provisions, on the interpretation of the courts and administrative bodies charged with copyright enforcement, and on the strength of further amendments to the Criminal Code that Spain's Congress could adopt as early as mid-2015, in a companion effort to reform Spain's IP enforcement regime. But the significance of the recent amendments, clarifying the scope of administrative actions regarding linking activity, liability for inducing infringement, and other important areas, cannot be overstated. Nonetheless, it would be premature to proclaim that Spain has lifted itself from the grip of severe piracy levels, or that Spain's administrative, civil, and criminal enforcement infrastructure have implemented the needed changes to a degree commensurate with the importance and influence of this developed market.

Spain has a history of support for high international standards of copyright protection, and yet it is home to levels of street and online piracy on par with the most entrenched piracy cultures in the world. In 2012, Spain finally put itself on the online enforcement map with the establishment of the Second Section of the Intellectual Property Commission (IPC), an administrative body intended to address cases of Internet piracy quickly and effectively. Unfortunately, despite the good intentions underlying the establishment of the IPC and its personnel, the work of the IPC is neither quick nor effective, with an average case response time of 400 days just to begin a case. Compounding Spain's overall piracy problem, law enforcement bodies lack the resources and legal certainty to address forms of piracy that are not within the IPC's scope, such as peer-to-peer (P2P) piracy and circumvention devices. USTR opened a Special 301 out-of-cycle (OCR) review of Spain in 2013, "focused in particular on concrete steps taken by Spain to combat copyright piracy over the Internet." At that time, IIPA made several recommendations to improve the effectiveness of the IPC's activities, strengthen law enforcement actions, and close gaps in the laws so that cases can move forward. In this report, we review those recommendations and describe developments in 2014 along with remaining elements still to be addressed, and highlight the following priority actions for 2015.

#### PRIORITY ACTIONS REQUESTED IN 2015

- Quickly adopt needed reforms to the Criminal Code and Law of Information Society Services and Electronic Commerce (LSSI), so that criminal and civil actions may proceed against all forms of piracy and the manufacture and sale of circumvention devices.
- Provide adequate resources to the IPC to dramatically improve its operations and response times for more effective enforcement in actions against infringing web-hosting, linking, indexing, and torrent sites.
- Prosecutors and courts should take action wherever possible under the law, taking their cue from Spain's policymakers that the country's anti-piracy efforts must press forward without delay.
- Establish clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement.

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<sup>1</sup>For more details on Spain's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Spain's Special 301 placement, see <http://www.iipa.com/pdf/2015SPEC301HISTORICALCHART.pdf>.





- Provide government support for agreements between rights holders and major online advertising services toward removal of ads from websites offering illegal material.

## **COPYRIGHT PIRACY IN SPAIN**

Already dramatically more widespread in Spain than in so many neighboring countries in Western Europe, piracy over the Spanish Internet is still on the rise, devastating the markets for music, film, video games, and books. Research conducted by The GfK Group (GfK) and the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) (the GfK study),<sup>2</sup> shows that in 2013, there were more than 724 million illicit audiovisual files acquired, causing 450 million euros (US\$506 million) in lost profits. The volume of physical and online pirate music products in 2013 amounted to 1.982 billion files, causing an estimated 513 million euros (US\$577 million) in lost profits. Pirated books in Spain, where online piracy of textbooks is a growing problem, totaled 302 million files in 2013, causing 79 million euros (US\$88.85 million) in lost profits. Altogether, the GfK study found a total loss in Spain of potential earnings due to piracy of 1.326 billion euros (US\$1.49 billion).<sup>3</sup>

According to the GfK study, 70% of Spanish Internet users proclaim that they would not pay for something they could get for free, while 56% argue that they should not have to pay for content that they may not like later. These attitudes are fueled by an environment where there are no real deterrents against online piracy, and have contributed to Spain's status as a global hub for digital piracy. The video game industry saw its Spanish market value peak in 2007 and has since faced steady declines. At the same time, Spain is increasingly becoming a hub for illicit activity.

Piracy leads to shrinking revenues for Spain's creative sectors and its government. The independent sector of the film industry, for example, has been especially hard hit – where they once could receive as much as 10% of a production budget from a minimum guarantee of an exclusive license fee in Spain, surviving Spanish distributors reportedly may only be able to guarantee a mere two to three percent of a film's budget, if any. The GfK study shows that in 2013, because of piracy the potential for more than 25,000 new jobs went unrealized in the creative sectors. The revenue lost across these sectors also accounts for a loss in government revenue (including taxes and social security income from unrealized new jobs) of an estimated 526.2 million euros (US\$600.13 million).

**Online Piracy Generally:** Digital piracy accounts for the lion's share of the problem in Spain. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers," BitTorrent networks, P2P networks (such as *Edonkey*), and increasingly via streaming sites. The incidence of digital piracy is generally evenly split between P2P and non-P2P formats. Within the P2P categories, piracy via BitTorrent networks is by far the most favored for pirated music, audiovisual, and video game content, particularly since the closure of *MegaUpload* led to a notable migration from cyberlocker activity to P2P networks of all kinds. Among non-P2P formats, unauthorized files stored on cyberlockers account for the majority of music piracy, but that activity is diminishing as the growth of stream-ripping is mushrooming. Smartphone apps that facilitate piracy are increasingly worrisome in the Spanish market.

BitTorrent trackers and sites that index files on hosted servers are critical tools for users to locate infringing material; without them, the scale of online piracy that occurs in Spain would not be possible. These indexes and trackers are also often the only point of attachment for the jurisdiction of Spain's authorities, since they are frequently located within Spain, but they direct users to files located in other jurisdictions. Websites such as *exvagos*,

<sup>2</sup>See <http://lacoalicion.es/observatorio-de-la-pirateria/observatorio-de-la-pirateria-2013/>. A new GfK report will be published in the coming weeks.

<sup>3</sup>GfK estimates that the total value of pirate content among IIPA's membership (the sectors included in the GfK study), accessed online from Spain in 2013, reached 16.136 billion euros. Together with physical piracy, the value of illicit material totaled 16.279 billion euros. The study found that the "conversion" rate of illicit product value to lost profits—or in lay terms, the percentage of the value of illegally obtained material that consumers responded they *would* spend on legitimate goods if illicit goods were not available—varies from sector to sector. Illicit audiovisual products were valued at 3.8 billion euros (US\$ 4.4 billion), with a conversion rate of approximately 11.7%, thus producing the 450M euro lost profits figure cited in the text above (11.7% of 3.8B euros). Illicit music products were valued at 6.099 billion euros (US\$ 6.859 billion), with a conversion rate of approximately 8.3%. Illicit digital books were valued at 1.837 billion euros (US\$2.066 billion), with a conversion rate of approximately 4.3%.

*downtwarez*, and *argentinawarez*, for example, are operated in Argentina, but are hosted out of Spain, and are very popular among Spanish users for the wide selection of Spanish content they offer.

Mobile piracy compounds the already severe problems for creative sectors in Spain. Mobile phones have entered the vast majority of Spanish households, and among mobile users 47% use their phones to access the Internet for the express purpose of listening to digital music. Yet only 12.7% of Internet users report going online to acquire legitimate music or films—a figure that illustrates how far illegitimate activity is outpacing the legitimate market. Piracy of video games on smartphones has also increased in the past year.

In another growing trend, business operators are using hard drives and massive storage devices for background music in entertainment premises, especially those whose activity is mainly based in music, such as night clubs, discotheques, clubs, etc. In as many as 90% of these types of establishments, music is accessed and stored illegitimately from a growing number of companies providing black market services without any kind of authorization from music producers.

**Hard goods piracy:** Across Spain, physical piracy remains a highly visible and unabated problem, particularly for the book, music, and film industries. For the music industry, illegal CD sales in 2014 amounted to 15% of the legal market. The film industry reports that hard goods piracy in Spain has not subsided, incorporating organized DVD-R labs, distribution centers, and street vendors. Physical piracy has not subsided in the touristic cities of Seville, Madrid, Granada, Murcia, Barcelona, Alicante and Valencia, which serve as outlets to the main operational centers for the organized pirate networks that produce pirate CDs and DVDs for all of Spain. Also affected are the coastal cities in Andalucía, Comunidad Valenciana, Murcia and Cataluña. There is strong demand for hard copies of pirate DVDs across Spain, and the result is a decimated legitimate retail market. The most representative trade association for video distributors, UVE, reports that in 2013, the legitimate home video market declined by 23% compared to 2012.

**Camcording piracy:** Camcording in theaters is particularly damaging in Spain because it fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution services. Spanish-sourced copies routinely appear in other markets, particularly in Latin America. Even illegally exchanged P2P movies are sourced locally via camcording in Spanish theaters. Despite the commercial damage of such camcording and the clear evidence of the organized criminal nature of such piracy, prosecution of camcorders in Spain remains quite difficult. Independent producers are less likely to have the resources or ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from illegal camcords in the markets of initial release.

**Circumvention devices:** The video game industry also continues to suffer from the availability (primarily online) of circumvention devices for video game consoles. Online vendors and e-commerce sites conduct sales of circumvention devices, such as mod chips and game copiers, through highly sophisticated and professional-looking online services. The widespread availability of these tools to bypass technological protection measures (TPMs) is central to the overall piracy problem for the local and international video game industry, as these devices are needed to play unauthorized copies of video game software.

## **COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN**

The Spanish Copyright Commission, approved by law in 2011 to be set up within the IPC, (herein, the IPC) issued in 2014 a small number of orders against online infringers that could mark a new effort to address the web's worst piracy offender; but the IPC has yet to remedy its extremely slow response times to rights holders' complaints. Some tweaks were made to the IPC's authority in the recent IP Law amendments, and there should now be no question that the IPC has the legal tools necessary to begin to take expeditious and deterrent actions against online piracy. Representatives of the IPC recently assured industry representatives that under the new legislation the procedures will be shortened to about two or three months; however, even two months is still an unreasonable delay

when dealing with illegal online activity. Under the amended IP Law the IPC must issue a decree setting forth an updated procedure, but government officials have stated that instead, the IPC is expected to continue to operate under the old decree, despite the fact that it is no longer compatible with the terms of the new law. Meanwhile, some of the most harmful infringing websites that had closed just before the new law entered into force, are now back up and operating again.

For matters that fall outside the IPC's scope, Spain's police, prosecutors and judges pointed in the past to Spain's laws as the reason for their inaction against pirates and sellers of circumvention devices. Yet even before the October 2014 amendments had come into force, Spain's courts in the past year have already begun to bring final judgments against the operators of infringing linking sites. Clarifications and amendments are still needed in Spain's laws to permit court actions to go forward against other online infringers, and against manufacturers and distributors of circumvention devices; these are explained in detail below under "Copyright and Related Laws in Spain." The following four action items are needed to ensure that Spain's IP Commission and the country's law enforcement authorities have the resources and coordination mechanisms necessary for effective copyright enforcement:

**ACTION ITEM: Improve the efficiency of the Spanish IP Commission by providing adequate resources to facilitate effective enforcement of the Law on the Sustainable Economy against web-hosting of pirated content and linking, indexing, and torrent sites.**

The establishment in 2012 of Spain's administrative body for the notification and removal of online infringements, Section 2 of the IPC, brought much international praise as a major step in the fight against piracy. But gaps in the IPC's scope of authority and severe delays have plagued its first three years of operation. Adopted amendments to the IP Law resolve some concerns, but the success of the IPC still largely rests on the institution itself to improve its response times.

**Since its inception, the IPC has been plagued by delays.** Because of inordinate delays, only a small portion of the infringing material that has been referenced to the IPC has been removed. The IPC takes on average more than 400 days to initiate an investigation into a site after receiving a rights holder complaint. The recording industry reports that as of December 2014, since the IPC began operations, just 50 albums and 6833 songs have been voluntarily or compulsorily removed (of these, 6819 correspond to one site, *Goear*, which is also the subject of a lawsuit currently pending for judicial review of the measures ordered by the IPC). Just a handful of small-scale websites have closed down in response to IP Commission activities, although the IPC has not issued any decision obliging the closure of any website. Altogether, the IPC has issued a removal order in response to only three of the 46 complaints the recording industry has filed in the past three years. The anti-piracy organization in Spain for the audiovisual and video game industries reports that of the 80 cases it filed in 2014, only two have resulted in the removal of infringing material – and those occurred voluntarily. To date, the *Goear* case is the only instance in which complaints of recidivist infringing sites submitted by IIPA's affiliates resulted in IPC actions – and this includes two complaints that were filed as far back as September 2012. A number of factors contribute to these delays.

**The bureaucratic makeup of the Commission:** Under the IPC's procedures, each case must be reviewed by a panel of inter-ministerial government officials. The October 2014 amendments to Article 158 of the IP Law codify the placement of government officials from multiple ministries on the Second Section's Committee; however, there is no expectation that this will take place in the near future. While the law as amended requires the appointed members of the Committee to have IP expertise, a helpful provision, it also reaffirms the bureaucratic and slow nature of the IPC's deliberating process.

**The scope of the IPC's authority:** Certain of the adopted changes, specifically to Article 158<sup>ter</sup> of the IP Law, appear to be aimed at streamlining or prioritizing the types of cases subject to IPC procedures. Helpfully, the amendments clarify that "ISPs that actively facilitate the localization of copyright protected works made available without rights holders' consent" are included within the IPC's scope. Time will tell whether the overall result will be

more efficient processing of cases, or if excluded categories of ISPs (for example those that directly infringe only a small number of works, or that have a smaller audience) are significant omissions in the anti-piracy effort.

**New pre-requisite to apply for IPC action:** In another change that could further delay anti-piracy actions, Article 158ter(3) now requires rights holders to provide, along with an application for the IPC to take action in a particular case, proof of the rights holder's prior attempt to request by email that the ISP in question remove the allegedly-infringing material.

**Spanish authorities have failed to carry out IPC orders to sanction sites linking to infringing material.** Spain's Secretary of State for Telecommunications and the Information Society (SETSI) is the administrative body charged with sanctioning websites that do not comply with the LSSI, for example with the law's requirements of providing contact information for website operators. Rights holders report that SETSI failed to issue sanctions against any of the more than 40 cases regarding linking sites reported by the IPC in 2014.

**IPC action over cases involving foreign jurisdictions.** In November, 2012, the recording industry (*Asociación de Gestión de Derechos Intelectuales* (AGEDI)) filed a complaint with the IPC regarding the notorious BitTorrent tracker *The Pirate Bay* ([www.thepiratebay.se](http://www.thepiratebay.se)). The IPC initiated proceedings in June 2014, appointing the website's owner, Neij Holdings Ltd, a Swedish entity, as the responsible party in the case. On September 11, 2014, the IPC adopted a Final Resolution declaring that Neij Holdings Ltd committed copyright infringement, but subsequently observed that *The Pirate Bay* had not removed the infringing content, and on October 28th 2014 requested an Authorization from the Administrative Judicial Court to take further action. If the Judicial Authorization is granted, ISPs based in Spain will have three days to comply with orders to eliminate links to the infringing sound recordings made available by *The Pirate Bay*, and to block access from Spain to the domains belonging to *The Pirate Bay*. The case will set an important precedent about whether the IPC can be effective in taking action domestically against online infringers that inflict significant damage from outside Spain's borders.

Together with the changes that have been made to the laws governing the IPC's procedures, the IPC should use its existing tools to their maximum effect. Simply stated, the IPC must work faster and focus on linking sites in order to be effective. Moving the existing complaints through the due process steps provided for and removing unnecessary procedural hurdles will not only demonstrate the fairness of the system for addressing online infringement, but will also allow Spain to move toward meeting its key obligations under the World Intellectual Property Organization (WIPO) Internet treaties to "ensure that enforcement procedures are available ... so as to permit effective action against any act of infringement of rights ..., including *expeditious* remedies to prevent infringements and remedies which constitute a deterrent to further infringements" (Article 23 of the WIPO Performances and Photograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT) (emphasis added).

**ACTION ITEM: Coordinate Internet piracy enforcement at the national level, and ensure allocation of adequate resources for investigation of Internet and computer crimes within the Ministry of Interior, the Guardia Civil, and the Cuerpo Nacional de Policía (National Police), the Criminal Courts, and Commercial Courts (Juzgados de lo Mercantil) that have jurisdiction over IP cases, to avoid unnecessary delays.**

There have been some noticeable improvements on the part of Spain's law enforcement against Internet piracy in 2014. Still, important steps remain to be taken in 2015 to ensure that police forces and prosecutors have the resources and legal foundation needed to take comprehensive action. Enforcement against physical piracy remains insufficient to tackle the rampant street piracy across the country.

**Internet piracy enforcement:** There has still been no correction to the 2006 Attorney General instructions that effectively decriminalized organized online file sharing of pirated content.<sup>4</sup> Subsequent to the 2006 Circular and

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<sup>4</sup>For background on the 2006 Attorney General Circular, see <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

various ensuing court decisions, the police, prosecutors, and the National Police Technology and Internet Division (the BIT) significantly reduced work on Internet piracy cases. During 2014, public prosecutors showed an increased willingness to take on Internet piracy cases, and rights holders report good cooperation with Spanish police forces on criminal Internet piracy cases when industry representatives initiate investigations. For instance, the National Police in late 2014 arrested the operators of the linking site *SeriesPepito*, a possible indication that Internet cases will be more of a priority going forward. In 2014, there were several notable convictions (including prison terms, fines, and damages) against administrators of infringing sites, including the video game circumvention website *crackmanworld*; linking and streaming site *divxonline.info*; and linking site *bajatetodo.com*. (These decisions are described in greater detail below, under “Copyright and Related Laws in Spain.”) Prosecutors have begun to file cases against administrators of linking websites under charges of unauthorized communication to the public of copyrighted works. Draft amendments to the Criminal Code now being reviewed by the legislature (also detailed below) could permit prosecutions to more fully resume in cases currently hindered by the 2006 Circular. Still, criminal court procedures suffer from lengthy delays, lasting on average 18 months, and many appeals are unlikely to result in deterrent sentences. Industry groups continue to report little IP awareness in the judiciary in the digital realm.

For the video game industry, enforcement remains a severe challenge, particularly in clamping down on the distribution of circumvention devices – an area in which Spanish police forces conducted no new actions in 2014. For years, court decisions have been mixed regarding proceedings against sellers of circumvention devices, some rejecting cases due to an interpretation of the Criminal Code that the “specific” purpose of the device must be its exclusive purpose. IIPA looks to pending amendments of the Criminal Code to assist the judiciary in interpreting the existing anti-circumvention provisions in the Criminal Code, to promote more effective action against Spain’s distributors of circumvention devices.

**Physical piracy enforcement:** Police agencies take *ex officio* actions in criminal copyright actions mainly in cases of physical piracy. The vast majority of these are carried out by local police, as the Central Units of the National Police and the Guardia Civil have greatly reduced their investigation activities.

Police raided 18 labs and distribution centers during 2014, seizing more than 54,000 pirate optical discs and arresting 200 street vendors. The local film industry estimates that street vendors sold 10 million pirate DVD-Rs during 2014. In actions against illegal camcording, police arrested four individuals, and one individual was convicted in 2014 for illegal camcording. However, judges do not authorize residential searches to prove that recordings are intended to be uploaded on the Internet. In June 2014, the police, acting on information provided by the local reprographic rights organization, CEDRO, arrested three people who were suspected of illegally scanning, then printing books on a large scale. That investigation turned up eight large-capacity photocopying facilities in Madrid and Seville, where over 1000 unauthorized copies of books and 10 computer hard discs full of scanned texts (for printing) were seized.<sup>5</sup> A similar action was conducted in December 2014, where 5 copy shops were raided, resulting in the seizure of stockpiles of unauthorized photocopies of books as well as several digital storage devices containing electronic book files.<sup>6</sup> The video game industry reports that police forces conducted seven raids against an Internet seller of physical pirate video game products.

But, despite the fact that physical piracy has not abated in Spain, the total number of actions has declined sharply since 2012, from 834 actions that year to fewer than 200 in the first 11 months of 2014. Rights holders suspect that limited storage facilities and the failure to destroy seized goods could be partly to blame, in addition to a lack of sufficient funding for enforcement activities and the failure of some judges to authorize search warrants for the seizure of goods. As we have reported in the past, cases against street piracy defendants face a number of obstacles, including the heavy burden placed on local police, and changes to the Criminal Code in 2010 that reduced crimes to minor offenses where the profit valued is below 400 euros (US\$ 445). IIPA’s members are unaware of any

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<sup>5</sup>See <http://www.theguardian.com/world/2014/jun/22/spain-police-arrest-three-illegal-book-publishing>.

<sup>6</sup>See [http://www.cedro.org/prensa/noticiasderechosdeautor/noticiasderechosdeautor\\_/2014/12/17/operaciones-policiales-contra-la-fotocopia-illegal-de-libros](http://www.cedro.org/prensa/noticiasderechosdeautor/noticiasderechosdeautor_/2014/12/17/operaciones-policiales-contra-la-fotocopia-illegal-de-libros).

judicial proceedings having been initiated *ex officio* by the General Prosecutor's Office, and the anti-piracy cases that have moved through the courts rarely produce deterrent sentences, even in the most serious cases.

**Civil enforcement:** The book publishing industry recently won a key case against several universities for digitizing and making available online the plaintiff's copyrighted texts, for which the court issued a fine of 250,000 euros (US\$278,000).<sup>7</sup> However, in general, rights holders continue to encounter obstacles in civil courts that IIPA has detailed in the past, including that the Commercial Courts handling copyright cases are overloaded; cases suffer from lengthy delays of six to 18 months (and appeals that can take over a year); rights holders lack needed evidence due to data retention laws; and courts misinterpret Spain's IP laws with regard to injunctions.

**ACTION ITEM: Attack piracy at the payment level and in cooperation with tax authorities, by establishing clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement, and by working with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.**

Rights holders report that the Tax Agency and specifically the Customs Department have shown some interest in the possibility of addressing IP crimes through tax fraud and smuggling charges. However, to date IIPA is not aware that any steps have been taken to assign investigation and coordination units specialized in this field.

Adopted amendments to Article 158ter5 of the IP Law empower the IPC to require payment and advertising services to collaborate with the Commission and potentially suspend services against infringers. However, representatives of the IPC have expressed fear that this measure could be rejected by the courts, which risks that the provision will not be implemented.

**ACTION ITEM: Seek agreements between rights holders and major online advertising services toward the removal of advertising from websites offering illegal material.**

Expanding on a 2013 agreement between the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*, or Coalition) and the Spanish Advertisers' Association (*Asociación Española de Anunciantes*), in early 2014, the parties reached an agreement on self-regulation with Google and the Interactive Advertising Bureau of Spain (IAB Spain - an association that represents the digital publicity sector in Spain). The aim is to adopt a good practices code in the field of advertising that supports the legal offer of digital content and protects IP rights on the Internet. Unfortunately, while an important goal of bringing all these players to the same table was met, bureaucratic delays under the competing oversight of the Ministries of Culture and Industry have prevented the agreement's full implementation.

Setting an important example for all content providers, PRISA, one of the major communication groups in Spain, and Gol TV, a TV station retransmitting football games, have signed an agreement with the main media agencies in Spain to remove advertising from websites offering illegal content.

## **COPYRIGHT AND RELATED LAWS IN SPAIN**

Following the conclusion of the 2013 Special 301 cycle, the Government of Spain began developing a number of important initiatives to close many loopholes that have made copyright enforcement actions incredibly difficult in Spain. Since that time, IIPA has closely monitored the legislative process in Spain for several priority legislative changes that are crucial in the effort to develop an effective anti-piracy program, which IIPA included in the Priority Action Items of its 2013 and 2014 Special 301 submissions on Spain.<sup>8</sup> On October 30, 2014 the Spanish Congress passed Law No. 21/2014, amending the consolidated text of the Law on Intellectual Property, approved by

<sup>7</sup> See <http://www.ifro.org/content/cedro-wins-case-against-university-uab-illegal-digital-uses>.

<sup>8</sup> See <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF> and <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

Law of Royal Legislative Decree No. 1/1996 of April 12, and Law No. 1/2000 of January 7, 2000 on Civil Procedure. The amendments made headway in the areas of the IPC's scope of authority, liability for inducing infringement, and the right of information for infringement cases, as required under article 8.1 of the EU Enforcement Directive. However, the changes are not complete in their response to the gaps in Spain's copyright regime, and additional issues remain to be handled in amendments to the Criminal Code that are currently pending and expected to be voted in Spain's Congress in mid-2015. The following is a brief summary of the legislative issues for each priority item along with any relevant progress made in 2014.

**ACTION ITEM: Clarify that linking sites are infringing and can be prosecuted through amendments to the Intellectual Property Law.**

Although the adopted IP Law amendments fell short of explicitly clarifying that linking sites may infringe copyright, which IIPA recommended as a top priority and necessary criterion under USTR's Special 301 out-of-cycle review of Spain, the past year has brought some constructive court decisions against infringing linking sites.

The need for this clarification in Spain's laws is rooted in the many difficulties rights holders have faced in obtaining judgments or administrative actions against Internet sites that link to and index infringing content, which are arguably at the root of Spain's current digital piracy epidemic. The amended Article 158<sup>ter</sup> of the IP Law authorizes the IPC to apply an administrative procedure against certain linking sites, and the civil procedure law has also been amended to permit certain remedial measures against Internet linking sites. However, it is not clear how these provisions will be interpreted, as the IP Law has not been amended to declare that linking sites are infringing.

Many judges in the past have not considered linking activities to violate the making available right under copyright law, and as a result, police have been unable to initiate the necessary raids. However, courts in 2014 have issued important convictions in cases against sites that link to infringing material, affirming that the activity constitutes communication to the public under the making available right. For example, the Castellón Court of Appeal upheld a conviction of the operator of the linking site *Bajatetodo*, finding that the operator was engaged in unauthorized communication to the public by providing links to infringing content hosted in P2P networks; the court rejected the claim that the activity was protected under Spain's safe harbor laws.<sup>9</sup> Notably, the ruling cites the recent *Svensson* decision of the European Court of Justice<sup>10</sup> as grounds that linking to infringing material amounts to an act of communication to the public. Similarly, the Valencia Court of Appeal upheld a conviction of the operator of the streaming and linking site *Divxonline*.<sup>11</sup> Spain's Audiencia Nacional (a high court with national jurisdiction) upheld decisions of the IPC that ordered two linking torrent websites (*elitetorrent* and *multiestrenos*) to remove certain links to protected works, also citing the ECJ decision in *Svensson*. Draft amendments to the Criminal Code would make certain linking activities a crime where they are operated for direct or indirect profit, and could allow future cases move more swiftly through investigation and prosecution in Spain's courts.

**ACTION ITEM: Amend the Criminal Code to provide criminal remedies and allow prosecutions to resume in cases of P2P piracy.**

Draft amendments to the Criminal Code that were adopted by Spain's lower house and are now before the Senate would allow Spanish law enforcement to take criminal actions in important areas of copyright piracy that currently go unprosecuted. The amendments as currently drafted address the need for criminal liability for commercial scale infringement over P2P networks, although further modifications may prove necessary. They also, as mentioned above, would provide criminal remedies for certain instances of linking to infringing material.

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<sup>9</sup>Decision of November, 2014, upholding the decision of the Criminal Court (judgment 453/13 Juzgado de lo penal nº4 of Castellón, October 30, 2013). The sentence included 18 months of prison, a 7,200 € fine and damages awarded to the rights holders who brought the action.

<sup>10</sup>Judgment of 13 February 2013 (C-466/12).

<sup>11</sup>Decision of February 2014. The sentence consisted of 19 months of prison, a 7,560 € fine and damages awarded to the rights holders.

The amendments are critical because instructions to prosecutors issued by the Attorney General in its 2006 Circular, which still have the effect of de-criminalizing infringing distributions of content by P2P networks, have resulted in a cessation of criminal enforcement actions against illegal file sharing.

**ACTION ITEM: Empower rights holder-submitted notices of infringement to establish ISP liability, by amending Spain's laws to clarify that these notices are an effective means of providing ISPs knowledge that infringement is occurring on their services without court orders.**

Decisions issued by the Spanish Supreme Court confirm that Article 16 of the Law of Information Society Services and Electronic Commerce (LSSI) must be construed to provide that any effective notice to an ISP regarding infringing activity suffices for the knowledge requirement in a copyright liability action, without requiring that such notice be served by a government authority, in accordance with the EU Directive of reference. However, clarifications to the LSSI are needed to prevent lower courts from ignoring this important jurisprudence, and to encourage cooperative anti-piracy communications within the private sector.

Adopted amendments to Article 158ter3 of the IP Law amendments require that, before initiating the IPC's administrative procedures, a rights holder must show a prior attempt to request directly from the ISP the removal of the infringing material. This provision includes a helpful clarification that such an attempt on the part of the rights holder can serve to establish actual knowledge of infringement, with reference to the safe harbor provisions within Articles 16 and 17 of the LSSI. However, local experts anticipate that the effect of that actual knowledge will be limited to the administrative procedure under the IPC, and not applicable generally. In illustration of the type of positive cooperation that can be achieved, the film industry reports that it has had some success in sending cease and desist letters to cyberlockers; in 2014, rights holders sent nearly 1,500 letters, and more than 108,000 links were removed. An amendment to the LSSI is still needed to include rights holder notices as a means to establish effective knowledge of infringement as an element of liability, so that cooperation in removing infringing material can be more widespread.

**ACTION ITEM: Establish legal incentives for ISPs to cooperate in efforts to stem infringing file sharing activities.**

Adopted amendments to Article 138 of the IP Law hold parties responsible for infringement where they induce infringement, cooperate and know or have reason to know of the offending activity, and have a direct financial interest in the infringement. However, Article 138 references the Spanish E-commerce Law (LSSI), which limits liability for ISPs, and courts have had conflicting interpretations of the combined provisions, allowing the safe harbors to swallow the liability provisions of the IP Law. Further, the LSSI does not explicitly require ISPs to remove illicit content absent a court or administrative authority order. It may be too soon after the amendments have entered into force to know whether the changes to Article 138 will accomplish the intended goal of incentivizing ISPs to cooperate in antipiracy measures by establishing clear guidelines of liability for inducing infringement. IIPA urges the U.S. Government to continue to monitor Spanish court interpretations of these provisions and future voluntary cooperation on the part of ISPs.

SETSI could further encourage service providers to act legitimately by enforcing the requirements of Article 10 of the LSSI to make the identity and address of website operators available, and to cooperate with judgments handed over by the IPC. Rights holders have submitted nearly 200 complaints to SETSI regarding websites that do not provide the required contact information, but SETSI has responded regarding only one of these. As a result, bad actors in the Internet space are able to remain anonymous and avoid the reach of plaintiffs and prosecutors.



**ACTION ITEM: Permit rights holders to obtain identifying information of infringers, in a manner that respects rights to data privacy consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae v. Telefonica*, for purposes of bringing civil and criminal copyright actions,**

***and***

**Correct Spain's implementation of the right of information as provided in Article 8 of the Enforcement Directive in the Civil Procedure Law (Ley de Enjuiciamiento Civil) so the "commercial scale" requirement is only applicable to intermediaries, not their clients, as set out under the current Spanish Law.**

Adopted amendments aimed at addressing these concerns appear to fall short of the needed clarity to meet these goals. The "right of information" provided in Article 8 of the EU Enforcement Directive requires Member States to make available procedures for rights holders to obtain court orders for ISPs to disclose an infringer's identity where it appears a website or a user has committed copyright piracy. Unfortunately, the "right of information" in Spain suffered from a burdensome dual commercial scale requirement, applying to both the services provided by the ISP and to the infringements committed by the direct infringer. Adopted amendments to Article 256.1(11) of the Civil Procedure Code will permit rights holders to seek user data from ISPs for purposes of infringement actions; but the new provision excludes cases involving end users who act in good faith or who lack a motive of commercial gain. This language, unfortunately, solidifies the existing status quo in Spain, under which infringing online users are guaranteed impunity for copyright infringement. The elements could also continue to present an obstacle in cases against sites and services engaged in secondary or indirect infringement, which depend on proof of the underlying end-user infringement, including end-user identity.

**ACTION ITEM: Ensure that the existing provisions of the Criminal Code (as amended) are applied correctly against commercial dealing in circumvention devices.**

Spain must address significant gaps in its legal structure for the protection of copyright works that are protected by TPMs. Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention of TPMs are lawful when capable of some ancillary non-infringing use. While these courts arguably are improperly interpreting the law, legislative amendments would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices. Draft amendments to the Criminal Code that would bring the definition of circumvention devices in line with the EU Copyright Directive, if adopted, could lead to more effective interpretation by the courts.

**ACTION ITEM: Ensure that authors and publishers receive fair compensation for reuse of their works.**

In December 2012, Spain's Council of Ministers amended the Copyright Act to eliminate the existing system of levies, under Article 25, which applied to equipment for making private copies, and provided compensatory remuneration to authors and publishers. In place of the levy system, the amendment provided for payment out of the central government's budget. This change obligates all Spanish tax payers, rather than linking the payment of fair compensation (to the rights holder) to the act of private copying (by a consumer). Since the enactment of this amendment, remuneration for private copying has fallen dramatically for reprographic rights organizations (RRO), due to reduced payment from the government.<sup>12</sup>

Unfortunately, the October 2014 amendments to the Copyright Act are not expected to improve the likelihood of fair compensation for authors and publishers, despite such compensation being a requirement under

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<sup>12</sup> For example, in 2013, the government set the total compensation to be distributed among all collective management organizations in Spain at less than 10 % of the compensation previously raised through the levy system. See, Raquel Xalabarder, "A Bill to Amend the Spanish IP Law," (Jul. 10, 2014) available at <http://kluwercopyrightblog.com/2014/07/10/a-bill-to-amend-the-spanish-ip-law/#private>.

Directive 2001/29/EEC. These amendments also included two new exceptions for educational uses, one allowing “regulated” educational institutions to make uncompensated use of portions of works, the other creating a compulsory license to ensure that universities and research centers compensate rights holders (via payments to RROs that will distribute the revenue collected). It is unclear whether these new provisions will effectively encourage universities to obtain, or whether the exception for uncompensated uses will lead to continued resistance by universities to obtain repertoire licenses for educational uses. It is clear, however, that the current remuneration scheme for private copying in Spain has reduced compensation to local industry, and that this harm also extends to “authors and publishers from other countries [who] are being discriminated against by Spain because they are not remunerated for the reuse of their works in [Spain].”<sup>13</sup> IIPA encourages Spain to revise its existing remuneration scheme for private copying, and to monitor the implementation of the educational exceptions to ensure that authors and publishers of any work reused in Spain receive fair compensation.

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<sup>13</sup>See Resolution Adopted by the IFFRO Annual General Meeting (Oct. 29, 2014) [http://www.ifro.org/sites/default/files/ifro\\_resolution\\_re\\_spain\\_agm\\_2014\\_1.pdf](http://www.ifro.org/sites/default/files/ifro_resolution_re_spain_agm_2014_1.pdf) (noting a number of legal infirmities in the law).

# **APPENDIX B**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2014) & IIPA'S 2015 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2014)  
AND IIPA 2015 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																											
COUNTRY	IIPA Recommendation February 2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Algeria		PWL	PWL	PWL	PWL	PWL	PWL	WL																			
Argentina		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
Armenia														WL	WL	WL											
Australia																	WL	WL	WL	WL		WL	PWL	PWL	PWL		
Austria																		OO	OO								
Azerbaijan											WL	WL	WL	WL	WL	WL											
Bahamas										WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain																		WL	WL	WL	WL						
Barbados		WL	WL																								
Belarus		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO								
Belize									WL	PWL	WL	WL															
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO						
Brazil	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei				WL	WL	WL	WL																				
Bulgaria		WL	WL							WL	WL	WL						PWL	WL	OO	OO						
Canada	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL
Chile	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
China (PRC)	PWL	PWL+306	PWL	PWL+306	PWL	PWL	PWL	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Colombia	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia										WL	WL	WL	WL														
Cyprus																			OO	OO	OO	WL	WL	WL	WL		
Czech Republic						WL	WL	WL	OCR							WL	WL	WL	OO								
Denmark																WL	WL	WL	WL								
Dominican Republic		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt		WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
El Salvador			OCR																	WL	WL	WL	WL	WL			
Estonia																		OO									
European Union										WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
Fiji							OCR																				
Finland		WL	WL	WL	WL	WL	WL																				
Georgia															OCR												
Germany																		OO	OO	OO	OO	OO		WL	WL		
Greece		WL	WL	WL	WL	WL	WL	WL						WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras																		WL	WL	OO	OO	OO					
Hong Kong																	OCR	WL	WL	OO							
Hungary							WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
India	PWL	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	PWL	PWL	PWL+GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Ireland																WL	WL	WL	WL	OO							
Israel			WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL + OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy			WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL									
Japan															OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan																	WL	WL	WL	OO	OO						
Kazakhstan											WL	WL	WL	WL	WL	WL		OO									
Kuwait		WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						

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COUNTRY	IIPA Recommendation February 2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Kyrgyz Republic															OCR												
Latvia										WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon		WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
Lithuania									WL	WL	WL	WL	WL	WL	WL	WL											
Luxembourg																			WL								
Macau															WL	WL	PWL	PWL									
Malaysia					WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova																WL											
Netherlands																		OO									
New Zealand														WL	WL		WL							WL	WL		
Nicaragua																		OO	OO								
Norway				WL	WL	WL	WL	WL																			
Oman																WL	WL	WL	WL	WL	OO						
Pakistan		PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority																OCR											
Panama																		OO	WL	OO		OO					
Paraguay		WL+306 +OCR	WL	306	306	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL		
Peru		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	
Philippines			WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland							WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal																				OO							WL
Qatar														WL		WL	WL	WL	OO	OO	OO						
Romania		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
Russian Federation	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino																			WL								
Saudi Arabia							WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
Serbia and Montenegro																									WL	WL	WL
Singapore																WL	WL	WL	WL	WL	WL	OO					
Slovak Republic											WL	WL	WL	WL	WL												
Slovenia																OCR											
South Africa																	WL	WL		OO	WL						
South Korea								WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain		OCR	OCR		WL	WL	WL	WL								WL	WL	OO					WL	WL	WL	WL	WL
Sweden																	WL	WL	WL								
Switzerland	WL																										
Taiwan	WL							WL (then OFF due to OCR)	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL				OO	WL	WL	PWL	PFC	WL	PWL
Tajikistan		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
Thailand	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Trinidad & Tobago		WL	WL																								
Tunisia																		OO									
Turkey		WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
Turkmenistan		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
UAE	WL														WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	301	301	PFC	PWL+GSP	WL	WL	WL	WL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay											WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
Uzbekistan		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											

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COUNTRY	IIPA Recommendation February 2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Venezuela		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	<b>PWL</b>	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
Yemen																		OO									

301: 301 Investigation  
 PFC: Priority Foreign Country  
 PWL: Priority Watch List  
 WL: Watch List  
 OO: Other Observations (an informal listing formerly used by USTR)  
 SM: Special Mention  
 OCR: Out-of-Cycle Review to be conducted by USTR  
 GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.  
 DS: Dispute Settlement