

# **2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT**



Submitted February 5, 2016  
to the  
United States Trade Representative  
by the  
International Intellectual Property Alliance®



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for Intellectual Property and Innovation, Office of the United States Trade  
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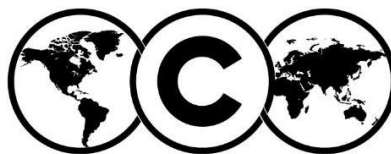
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February 5, 2016

*Submitted via regulations.gov Docket No. USTR-2015-0022*

Mr. Probir Mehta

Acting Assistant United States Trade Representative

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, 81 Fed. Reg. 1277 (Jan. 11, 2016)**

Dear Mr. Mehta:

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, physical and online. To do this, these markets need copyright laws that meet world-class standards, efficient copyright enforcement, sound legal structures for licensing, and elimination of market access barriers. Markets with these features 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 to help the U.S. Government identify “foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”<sup>2</sup> 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 vision. Changing market conditions and new technologies continue to create enormous opportunities, with huge potential to expand economic growth and creative activity in key foreign markets. Unfortunately, much of this potential for economic and creative growth has gone unrealized, because 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 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 create more

<sup>1</sup>IIPA will file under separate cover a Notice of Intent to Testify at the March 1, 2016 public hearing on Special 301.

<sup>2</sup>19 U.S.C. section 2242(a)(1).

good jobs, increase foreign direct investment, promote exports, and contribute generally to healthy economic growth in the U.S. and abroad. 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.

The historical record of the Special 301 process documents the significant progress made over more than a quarter century. 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, while some problems remain, 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 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, although they still present some challenges.<sup>3</sup>

This year's IIPA Submission includes this letter and two appendices. In it, IIPA recommends that 17 countries should be identified in the Special 301 report this year. These recommendations can be summarized in the following chart:

| IIPA 2016 Special 301 Recommendations |  |   |                     |
|---------------------------------------|--|---|---------------------|
| Priority Foreign Country              | Priority Watch List  | Watch List  | Out-of-Cycle Review |
| Ukraine                               | Chile<br>China<br>India<br>Russian Federation<br>Thailand<br>Vietnam | Brazil<br>Canada<br>Colombia<br>Hong Kong<br>Indonesia<br>Mexico<br>Switzerland<br>Taiwan<br>United Arab Emirates | Spain               |
| 1                                     | 6  | 9   | 1                   |

For some other countries that were identified in the U.S. Trade Representative's 2015 Special 301 Report, IIPA members were aware of no new developments that would lead us to revisit present designations under Special 301. Instead, we provide, in an Annex to Appendix A, short summaries regarding each country. IIPA does not recommend any change in the Special 301 status for these countries. The countries covered in this Annex are Argentina; Barbados; Bulgaria; Costa Rica; Ecuador; Guatemala; Jamaica; Peru; Trinidad & Tobago; Turkey; and Venezuela.<sup>4</sup>

## 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

<sup>3</sup>See Appendix B to this Submission for a historical chart of Special 301 lists.

<sup>4</sup>Argentina, Ecuador and Venezuela are currently on the Priority Watch List; all others are currently on the Watch List.

representations of 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 as a whole 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>5</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 have to face the additional hurdles and costs associated with obstacles such as copyright piracy and market access or discriminatory trade barriers.<sup>6</sup>

Content industries and their licensed partners continue to explore new modalities of delivering content to consumers, launching new legitimate businesses, services, or apps. The result: movies, music, TV shows, video games, and published materials are available to more people in more countries in more diversified and flexible ways than ever before.<sup>7</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

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<sup>5</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. The most recent editions of these studies include: Malaysia (2014), India (2013), Taiwan (2013), Shanghai (2012), Japan (2015), New Zealand (2012), Indonesia (2012), Thailand (2012), South Korea (2012), China (2015), Australia (2015), and Hong Kong (2015). 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), available 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), available 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>6</sup>In an increasingly digital, online, and mobile marketplace, the full costs of copyright piracy are difficult to quantify. 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, available 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. 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).

<sup>7</sup>For information on some of these proliferating services, 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).

services.<sup>8</sup> In this way, piracy and market access barriers not only damage existing authorized distribution channels, but also impede the evolution of new legitimate channels.

## **B. SUMMARY OF THE IIPA 2016 SPECIAL 301 SUBMISSION**

The IIPA 2016 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 to open markets to U.S. materials protected by copyright in key countries. Section C of this Submission 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 intellectual property rights (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, Trade Agreements, and Global Norms
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>9</sup> Appendix B to the Submission provides a chart of countries/territories’ placement on Special 301 lists by USTR since 1989.<sup>10</sup>

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

### **1. Positive Developments**

IIPA notes positive developments in the following markets in the past year, including for example:

- **Brazil:** In November 2015, federal police arrested the alleged operators of one of Brazil’s most successful illicit audio-visual streaming portals, *megafilmesHD.net*. Luxury cars and cash were seized and numerous search warrants executed. The site remains down as of this writing.
- **Canada:** In June 2015, Canada extended the term of protection for sound recordings to 70 years.
- **Chile:** In early January 2016, Chilean Police took action against one of the world’s largest release groups, which had been in operation since 2008. The VCD group was responsible for the release of at least 80 identified infringing copies of feature films made by camcording in a theater. They operated FTP servers in Chile, the US and Europe, and managed at least 10 different distribution websites.
- **China:** China’s National Copyright Administration (NCAC) took determined efforts against music piracy in 2015, beginning with the designation of this issue as its priority in Sword Net Action. NCAC issued a notice in June 2015 requesting all online music platforms to take down all unlicensed music tracks by the end of July. As a result, 2.2 million unlicensed music tracks were removed from 16 online music service providers. Subsequently,

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<sup>8</sup>See, e.g., USTR, 2015 National Trade Estimate Report on Foreign Trade Barriers, April 2015, at <https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf>, for the leading U.S. Government report on many market access and other trade barriers around the world.

<sup>9</sup>Country surveys were prepared by counsel to the IIPA, 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>10</sup>A number 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 USTR must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.” Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these countries/territories are particularly vulnerable.



after NCAC issued a second notice with an October 31 deadline, various major Chinese online music platforms claimed that they had already taken down all unlicensed material from their sites, while others stated that they had obtained licenses from various record labels for millions of tracks in their music libraries.

- **Italy:** In November 2015, an Italian court validated the legal tools for combating circumvention devices, such as game copiers and modification chips, by ruling that their primary purpose is to enable users to play pirated games on video game consoles, and that the security measures a company used to protect its consoles were proportionate and therefore protected under Italian copyright law. The government also continued to employ the antipiracy framework under the Italian Communications Regulatory Authority (AGCOM) to take positive actions against online infringers (including against some of the off-shore infringing torrent sites most popular in Italy), 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. Notably, at the end of 2015 the Italian Constitutional Court confirmed the legitimacy of the AGCOM regulatory framework.<sup>11</sup> Meanwhile, continued anti-piracy actions by the Fiscal Police included the seizure of the largest Italian streaming platform *altadefinizione.tv* (a top-100 site in Italy at the time), and removal of a major foreign-based infringing cyberlocker. While extremely high levels of piracy in the country still persist, and the efficacy of the AGCOM framework has room for improvement, Italy stands as a powerful example of effective coordination of administrative and judicial copyright enforcement in the digital era.
- **Russia:** While Russia continues to pose major challenges to the copyright industries, a few significant and positive developments should be noted. The 2013 anti-piracy law was extended to works other than audio-visual materials, and procedural improvements were also made, leading to a significant actions by the Russian regulator, including with respect to the USTR-identified Notorious Market *RuTracker.org*. The government also rejected a WTO TRIPS-inconsistent global license proposed by the Ministry of Culture. Finally, the Ministry of Communications developed a proposal to reform the system of collective management organizations (CMOs), an important step toward Russia finally implementing reforms to meet its WTO commitments on transparency and accountability, and to ensure that CMOs operate only on the basis of mandates from relevant rightholders.

While applauding these positive moves, IIPA emphasizes that, for each country listed above, serious issues remain to be addressed. For all but Italy, these are spelled out in the respective country surveys in Appendix A of this Submission.

## 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. 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>12</sup>

<sup>11</sup>Among the sites disabled through the AGCOM regulatory framework in 2015 were: *tubepius.me*, *robinfilm.me*, *film-italia.net*, *tantifilm.com*, *megashare.sh*, *stardelcinema.org*, *itastream.net*, *cinemalibero.net*, *streamingdb.co*, *yoostreaming.com*, *filmstreamitalia.org*, *guardarefilm.com*, *itvmovie.eu*, *rlsbb.com*, *mondostreaming.net*, *levidia.ch*, *filmsubito.tv*, *filmikz.ch*, *italian-stream.tv*, *film-stream.org*, *itafilm.tv*, and *vidics.ch*.

<sup>12</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 via <http://www.netnames.com/digital-piracy-sizing-piracy-universe>). 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, available at <http://documents.envisional.com/docs/Envisional-Internet-Usage-Jan2011.pdf>. While the recent strong growth of legitimate Internet delivery of content has doubtless impacted these figures, data published in 2015 estimates that traffic devoted to P2P, the vast

USTR correctly observed in its 2015 Special 301 Report that “piracy over the Internet has become the priority copyright enforcement issue in many trading partner markets.”<sup>13</sup> But in a broader perspective, the entrenchment of infringing services is the leading barrier impeding the full access of U.S. creators into markets worldwide. Online and mobile network piracy threatens the viability of licensed platforms,<sup>14</sup> and erodes the capacity of authors, artists, musicians, filmmakers, video game developers,<sup>15</sup> performers and songwriters to earn a living from their craft. To address these concerns, IIPA supports approaches such as:

- **Identification:** USTR’s “Special 301 Out-of-Cycle Review of Notorious Markets,” identifying key marketplaces that are involved in IPR infringements, has already made a significant contribution in combating systematic online copyright theft.<sup>16</sup> Listings by USTR have been followed by 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. In the most recent “Notorious Markets” filing in October 2015, IIPA members identified 99 notorious online markets, dedicated to infringement of every category of copyright work, and/or to trafficking in unlawful devices or services to circumvent technological protection measures (TPMs) used by copyright owners. Canada, India, Russia, Switzerland and Ukraine are among the leading jurisdictions where these services are hosted. We urge USTR to focus in its bilateral engagement with these countries on the immediate need to ensure that these services either convert to licensed dissemination of works, or else are shut down. In this regard, the first uses of Canada’s new “enablement” statute against a few of these services is a promising development.<sup>17</sup>
- **Incentives:** The goal is a legal framework that prevents the operation of services that promote or otherwise induce infringement, and that creates incentives for neutral network service providers to work with right holders to curb the use of their proprietary networks and services for infringing purposes.<sup>18</sup> Such a regime provides a full panoply of exclusive rights (implementing the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)); recognizes online piracy as a form of cybercrime; and fosters cooperation among all industry stakeholders (including Internet Service Providers (ISPs)) in the online supply chain, including by removing impediments to the collaboration needed to combat online infringements. While arrangements for notice-and-takedown of infringing materials are in place in many markets, clearer secondary liability rules are necessary to isolate outliers, improve efficiency and enhance predictability in the online marketplace. Besides countries reported on in this Submission, markets where these legal frameworks are still deficient or altogether lacking include the Philippines and Panama (where the failure to implement the ISP liability changes called for in the bilateral trade agreement with the U.S. is one of several open Free Trade Agreement (FTA) implementation issues). We urge the U.S. Government to build on the groundbreaking provision in the Trans Pacific Partnership

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majority of which is infringing, amounts to more than 6000 petabytes per month, representing 22 percent of all consumer video traffic on the Internet, and 18 percent of all consumer Internet traffic overall Cisco Visual Networking Index: Forecast and Methodology, 2014-2019, Tables 10, 12 and 13 (May 27, 2015), available at [http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white\\_paper\\_c11-481360.html](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html).

<sup>13</sup>USTR 2015 Special 301 Report, at p. 17 (April 2015), available at <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>.

<sup>14</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., Danaher, Brett and Smith, Michael D., *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales* (September 14, 2013). Available at SSRN: <http://ssrn.com/abstract=2229349> or <http://dx.doi.org/10.2139/ssrn.2229349>. (“we find that the shutdown of Megaupload and its associated sites caused digital revenues for three major motion picture studios to increase by 6.5-8.5%”). See also <http://idea.heinz.cmu.edu/2013/03/07/megaupload/> (blog post summarizing similar research).

<sup>15</sup>Online piracy of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in industry monitoring of P2P and direct download activity. For 2015, Russia, Brazil, Ukraine, Kazakhstan, and India were identified as the top five countries in terms of the number of connections by peers participating in the unauthorized file-sharing of video games for personal computers on public P2P networks, while Brazil, Russia, Italy and Spain were identified as the top four countries with respect to such piracy of games for console platforms.

<sup>16</sup>For the most recent report, see USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.

<sup>17</sup>For more details, see the Canada country survey in [Appendix A](#). Disappointingly, in Korea the Seoul Administrative Court recently reversed an earlier decision under which South Korean ISPs had been ordered to block access the site of a USTR-identified notorious market, *4shared.com*. We urge USTR to engage with the Korean Government to seek to correct this unfortunately development.

<sup>18</sup>Online piracy services often hide behind “virtual” servers hosted by 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, available at <http://www.theverge.com/2015/1/31/7956209/pirate-bay-back-online-seven-weeks-after-police-raid>.

(TPP) Agreement on criminal liability for aiding and abetting infringement,<sup>19</sup> by encouraging all our trading partners to adopt similar provisions, which should contribute to preventing services from basing commercial platforms on theft.

- **Inter-industry cooperation:** Combating systematic online infringement of copyright will require the active cooperation of all participants in the e-commerce ecosystem, including online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services)<sup>20</sup>; payment processors; hosting providers (including content delivery networks and related optimization services); and search engines. Governments in many countries, including for example Brazil, should be doing much more to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer, cleaner online marketplace.
- **Injunctive remedies:** Where notorious online marketplaces are hosted in one country but target consumers in another — or worldwide — the failure of the host country to take effective action against them imposes costs on and pollutes the markets of its neighbors and trading partners. Increasingly, responsible governments are pushing back against this “offshoring” of enforcement responsibility, by developing means and processes for restricting or blocking access from within their borders to these overseas pirate sites. Government agencies and courts from South Korea and Singapore to Western Europe are employing a wide spectrum of judicial and administrative means to impose such restrictions under defined circumstances when other domestic remedies are insufficient. So long as less responsible states fail to institute effective means to crack down on pirate operations based within their borders but readily accessible worldwide, this trend will continue and deserves the close attention of the U.S. Government.

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

In a growing and troubling trend, centered in Asian markets, devices intended to enable consumers to stream and/or download copyrighted content from online sources without authorization or license have proliferated. In China, Taiwan, Indonesia, Thailand, and Vietnam, as well as Malaysia, Hong Kong, and Singapore, and as far away as Spain and United Arab Emirates, these so-called Media Boxes, Set Top Boxes (STB), or Over-The-Top (OTT) devices can be found. The devices are primarily manufactured in China. They are part of an integrated ecosystem of hardware, “apps,” and networks that: 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, which is sometime pre-loaded before sale or added later as a “post-sale service.” Enforcement against these devices presents complex challenges; but unless effectively countered with vigorous action against those who make or sell the devices, and/or load them with pirated content or provide apps for consumers to access such content themselves, their impact on the legitimate market for digital delivery of copyright materials will be increasingly destructive.

**c. 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, which 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, Pay-per-View) are not easily stolen, and that pirate copies of video games are not playable on console platforms. Unfortunately, there are business models built entirely around providing services, and/or manufacturing and distributing technologies,

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<sup>19</sup>See TPP Art. 18.77.5

<sup>20</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).

software, devices, components, or tools, to circumvent TPMs in order to gain unlawful access to the content or to copy it without authorization. While legal protection of TPMs, 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.

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

A priority for the motion picture industry involves illegal recordings of movies in theaters. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both) from the theater screen and/or sound system. One digital (camcorder) copy, uploaded to the Internet and made available around the world, can undermine global markets and the huge investments needed to produce and distribute a feature film. 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 2015, the Motion Picture Association of America identified 369 total illegal recordings of its member company titles from cinemas around the world, including 247 video captures and 122 audio captures. These figures 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. This has been done in many foreign markets (including Canada, Japan, and Korea) with good results. However, enactment of criminal legislation is not by itself enough: for example, while the Philippines adopted a law in 2010, the number of illegal camcords forensically matched to the Philippines increased by 14% between 2014 and 2015. Enforcement of these laws remains critical.<sup>21</sup> It is heartening that the TPP Agreement obligates signatories to provide “appropriate criminal procedures and penalties” against camcording.<sup>22</sup>

**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, whose potential as a leading education publishing growth market in Southeast Asia has been undercut not only by widespread unauthorized photocopying of educational materials, but also by entities that engage in large scale unauthorized reproduction of academic textbooks for export, including to the U.S. via online vendors.

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<sup>21</sup>IIPA notes that the second known criminal conviction for camcording in the Philippines was achieved in June 2015, with a significant sentence imposed.

<sup>22</sup>TPP Art. 18.77.4. See further discussion of TPP below.

**f. *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 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 remains a severe problem in several countries in the Caribbean and Central and South America, including Antigua & Barbuda, the Bahamas<sup>23</sup>, 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 weed out unlicensed television distributors.

**g. *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-, or 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, especially in Asia, including the Philippines as well as several countries addressed in [Appendix A](#) (such as China, Taiwan, Indonesia, and Thailand).

**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, some located in old factories, warehouses, or “burn to order” shops, “burn” music, books and reference publications, video games, and movies onto recordable media. High-quality DVDs, Blu-ray discs, and box sets of music or audiovisual materials continue to be manufactured in China and find markets throughout Asia, the Middle East, and Africa. In the most recent filing cycle, IIPA members identified more than 30 “notorious” physical markets for the distribution of pirate hard goods, most of them in Mexico or India, as well as in Brazil, Ukraine, Thailand, and other countries.

**i. *Collective Management Organization Issues***

As the content industries, and the music sector in particular, undergo fundamental transitions from physical to digital and from ownership to access models, the ability to adequately monetize commercial uses and effectively exercise all of the rights granted by copyright has become more important than ever. While direct licensing by individual right holders should always remain the first option, certain rights and uses are most effectively exercised through CMOs. Public performance and terrestrial broadcast rights are good examples, because the users typically use large numbers of works and the value of individual transactions may be small. Income from these rights has become an increasingly important source of revenue for music right holders, particularly as the central economic model in the music sector is licensing of use rather than the sale of objects, physical or virtual; so the need for right holders to have access to efficient, transparent, and accountable collective management services has intensified worldwide. Right holders must be in a position to set up and govern their CMOs themselves with regard to these

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<sup>23</sup>The markets in Antigua and Barbuda, and in the Bahamas, continue to be plagued by broadcast piracy, both unauthorized retransmission by platforms, and the use of unauthorized decoding equipment; this piracy is found on free-to-air and premium services. Although the laws of these countries allow some of these activities without right holder authorization, they require that the platforms pay these right holders a remuneration. There has been no remuneration paid, so this is a violation of the copyright law of each country, as well as violating international norms.

rights, with government interference limited to ensuring efficient, fair and non-discriminatory operations (through enabling legislation combined with antitrust law, and other disciplines).

If specific CMO legislation is enacted it should focus on setting out rules for the establishment and basic operations of CMOs, including the principles that:

- Collective management should, as a general matter, always be voluntary;
- CMOs should be only be set up either by right holders or associations directly representing them;
- CMOs may not discriminate between right holders on the grounds of nationality or similar criteria;
- Right holders shall be able to govern their CMOs;
- Distributions should be based on actual use of works and made in a fair and transparent manner;
- A CMO's tariffs should reflect the fair market value of the use of the rights in the given commercial context, i.e., they should be set following a "willing buyer, willing seller" standard.

Country surveys in [Appendix A](#) detail serious concerns about these issues in Ukraine (failure to rein in blatantly rogue entities); Russia (serious problems with the operation of the sole government-appointed sound recording rights CMO); Canada (tariff rates set without regard to market benchmarks); Taiwan (similar); and Brazil (proposed regulations empowering CMOs to undermine direct licensing). IIPA is also concerned about developments in Korea, where the government attempts to extend the scope of mandatory collective management of rights and is introducing statutory license fees for digital music services; and in Malaysia, where the government intends to force music CMOs to operate through a government controlled collection body.

**j. *The Need for Deterrent Enforcement Responses to Copyright Infringement***

Finally, in each of the areas described above, IIPA seeks enforcement measures that effectively deter infringers. 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 TRIPS Agreement, through civil, administrative, and law enforcement channels, and effective adjudication in the courts<sup>24</sup>;
- update laws and enforcement tools to meet current infringement challenges, including pirate operations based online, cybercrime syndicates, and organized criminal enterprises; and
- implement (and accede to) the WCT and the WPPT, thus providing copyright holders a full panoply of exclusive rights, and an overarching commitment to deterrent levels of enforcement of those rights online as well as offline.

**3. *Implementation of Treaties, Trade Agreements, and Global Norms***

The growth of the U.S. copyright industries in recent decades — and their growing contribution to the U.S. economy — has been contemporaneous with the adoption of numerous bilateral and multilateral trade agreements. Each of these agreements contains enforceable provisions designed to open foreign markets to U.S. goods and services dependent on copyright protection, chiefly (though by no means exclusively) by mandating improved and modernized copyright laws, and in most cases higher standards for enforcement of these laws. These provisions reflect the long-standing and consistent position of Congresses and Administrations, of both parties, dating back

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<sup>24</sup> See WTO TRIPS Arts. 41, 61.

more than thirty years, that stronger copyright laws and enforcement worldwide serve the vital economic interests of the United States. As the global norms for copyright legal protections and enforcement standards have evolved and strengthened over time, those evolving norms have generally come to be reflected in our trade agreements. These agreements have not only helped U.S. copyright industries to compete fairly in foreign markets; they have also created the conditions in which our trading partners can develop their domestic copyright industries, a true win-win for all parties. In addition to the TRIPS agreement, to which 162 countries have now acceded, FTAs or Trade Promotion Agreements (TPAs) with 20 countries have entered into force, most recently with Korea, Colombia and Panama in 2012.

The recently concluded negotiations for a TPP FTA mark another important step forward in this market-opening strategy. The TPP hits important benchmarks for the U.S. copyright industries. While IIPA finds certain aspects of the TPP Agreement disappointing, on balance we believe that it will produce positive impacts for the U.S. copyright industries in a broad range of markets around the Pacific Rim, representing 40% of global GDP. These impacts will in turn contribute to more good U.S. jobs and a yet greater contribution from the copyright sector to U.S. economic growth and global competitiveness. But the full benefits of these positive impacts will only be realized if the obligations taken on by our TPP partners are promptly implemented in the statutes, regulations and policies of these countries, and if the U.S. Government maintains careful vigilance and active enforcement of compliance with these obligations. This is true both for the general market access obligations contained in the TPP chapters dealing with services, e-commerce, investment, and other topics, and particularly for the copyright and enforcement obligations of the IPR chapter of the agreement. The latter have the potential to ease the market barrier of piracy that impedes the ability of U.S. copyright industries to compete, particularly in the e-commerce marketplaces of these countries. IIPA looks forward to working with the U.S. Government to bring the TPP into force as promptly as feasible, and to encouraging our TPP partners to implement their obligations fully and expeditiously.

At the same time, it is critical that the U.S. Government place a high priority on ensuring that our trading partners fully comply with the obligations they have already taken on in bilateral, regional, and multilateral copyright agreements to which the U.S. is also a party. USTR, the Department of Commerce, U.S. Embassies abroad, and interagency members of the Special 301 Subcommittee should all focus on the significant gaps and shortfalls in compliance among our FTA and other trade agreement partners, including both those which are also TPP participants and those which are not. In the former category, Chile, Peru and Vietnam have all missed deadlines — in Chile's case by more than a decade — for the implementation of important copyright-related commitments, on topics such as protection of TPMs, effective ISP liability frameworks, and deterrent-level civil and criminal sanctions for copyright infringement.<sup>25</sup> Among FTA partners outside the TPP, Colombia and Panama stand out as similarly negligent in fulfilling their pledges to bring their copyright law and enforcement regimes up to the standards to which they committed.<sup>26</sup> While these countries are already enjoying the benefits of these agreements, including enhanced access to the lucrative U.S. market, the U.S. creative sector has yet to realize the full potential in terms of access to these markets.<sup>27</sup>

A more insidious and disturbing trend is the proliferation of proposals in national copyright laws of broadly drawn exceptions to copyright protection that threaten to violate a long-established global norm: that exceptions and limitations be confined to those that meet the familiar “three-step test.”<sup>28</sup> A recent iteration of this trend began with the

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<sup>25</sup>For further information on Chile and Vietnam, see the country surveys in [Appendix A](#). For further information on Peru, see the entry in the Annex to [Appendix A](#).

<sup>26</sup>Panama has missed the October 2015 extended deadline provided in its FTA to introduce compliant legislation on ISP liability. For further information on Colombia, see the country survey in [Appendix A](#).

<sup>27</sup>Another FTA compliance issue involves Singapore, whose law makes no provision for agents or authorized representatives acting on behalf of copyright owners to apply for pre-trial discovery in order to identify online copyright infringers. This legislative deficiency, as measured against Singapore's obligations under its FTA, was noted by Justice Woo Bih Li in the March 2008 *Odex* decision, and creates an as-yet-unaddressed obstacle to enforcement against online infringement.

<sup>28</sup>As articulated in Article 13 of the TRIPS Agreement, nearly every one of our trading partners is bound to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” See also Berne Art. 9(2) (same, as to reproduction right); WCT Art. 10 (same, as to all Berne exclusive rights and all exclusive rights granted under WCT itself); WPPT Art. 16(2) (same, as to all rights provided for under WPPT).



adoption in Canada of a sweeping “user-generated content” exception, along with a number of other questionable new or expanded incursions on exclusive rights, notably an undefined extension of the “fair dealing” exception to cover education. As detailed more fully in the Canada country survey in [Appendix A](#), the fair dealing expansion has already wreaked havoc on at least one well-established licensing regime (for educational use of published materials), and threatens to produce further instability. Some of the same proposals enacted in Canada then surfaced in Hong Kong, as “poison pills” aimed at torpedoing a copyright digital reform effort already almost a decade in process. Versions of some of the Canadian proposals also popped up last year in a draft copyright law revision floated in South Africa, which featured such a broad spectrum of vaguely delineated exceptions as to virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which do not. A robust legitimate marketplace for these works cannot develop in such an unpredictable environment. IIPA urges the U.S. Government to be vigilant regarding such proposals, and to insist that our trading partners respect global standards such as the three-step test as they modernize their copyright laws.

Our trading partners should also be urged to bring their laws into line with the evolving global trend with respect to duration of copyright protection. Setting the term of copyright protection at life of the author plus 70 years (or at least 70 years from publication for products whose terms are not measured by the life of the author) has become a *de facto* global norm. More than 80 countries, including our major trading partners in Europe and throughout the Americas, and all but a handful of developed economies in the OECD, already meet or exceed this norm for some or all categories of creative works. The remaining outliers risk creating unnecessary trade frictions and discouraging further investment in curation and re-dissemination of older works. IIPA is pleased that all our trading partners in TPP have agreed to bring their laws up to this standard for all copyright materials, and we urge other countries to do so.<sup>29</sup> In particular we encourage Israel to move forward promptly on pending legislation to extend sound recording protection to 70 years, in line with its major trading partners.

Finally, 2015 saw no resolution of the issues arising from the 2014 announcement that the Government of Antigua and Barbuda planned to revise its intellectual property laws to cross-retaliate against U.S. intellectual property rights worth \$21 million a year, citing a WTO-approved remedy (in an unrelated trade dispute). IIPA is pleased that the two governments met last July and publicly committed to reaching a final settlement as expeditiously as possible. We encourage them to do so, while reiterating that suspending intellectual property rights forms no part of any acceptable solution, and, if instituted by the Government of Antigua and Barbuda, should lead to appropriate, immediate and robust action by the U.S. Government to uphold U.S. trade laws.<sup>30</sup>

#### **4. 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;

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<sup>29</sup>TPP Art. 18.63.

<sup>30</sup>In addition, the ineffectiveness of Antigua’s anti-circumvention statute is apparent in the long-stalled Slysoft case (which was a company offering circumvention tools for DVD and Blu-ray discs, that even after being found in violation of the Antigua Copyright Law of 2003, remains in operation).



- 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);
- local print requirements for films; 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. 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.

#### **D. 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 businesses, 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 to 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,

/Steven J. Metalitz/

Steven J. Metalitz, Counsel  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY FOREIGN COUNTRY**

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be designated a Priority Foreign Country (PFC).<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. Almost three years after that designation, and two years after the completion of the U.S. Government investigation, the intellectual property rights (IPR) problems that resulted in the PFC designation remain wholly unaddressed. These IPR shortcomings continue to cause severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders. Correcting these problems would improve the local marketplace for the digital distribution of music, films, television programs, video games and books online to the benefit of Ukraine consumers and the local economy. IIPA urges the U.S. Government to work with the Government of Ukraine to address and correct these IPR deficiencies as quickly as possible (and as is appropriate under the current political and economic circumstances).

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 in 2013 was based specifically on three critical problems in Ukraine’s 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.”

It is time to re-designate Ukraine as a Priority Foreign Country. Last April, the USTR Special 301 Report acknowledged that “[t]he three problems identified in the 2013 Special 301 Report have not been resolved.” Other than some enforcement training by Ukrainian officials, the U.S. Government noted that there has been no significant effort to address the digital piracy problem, and that “Ukraine continues to host some of the largest pirate sites in the world.” One of the IPR shortcomings, the problems relating to collective administration, could be resolved quickly and with a minimum of effort, even with the political limitations of the current Government of Ukraine. The current situation is chaotic: there are 19 collective management organizations claiming to represent various (and, in some cases the “worldwide repertoire” of) authors and producers, when, in reality, only a handful of these organizations have any legal authority to collect for them in Ukraine.

Weak copyright protection has been a longstanding problem in Ukraine, but it has 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. Instead, Ukraine has become a safe haven for criminal syndicates involved in copyright

<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/2016SPEC301HISTORICALCHART.pdf>.



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 enforcement.

## **PRIORITY ACTIONS REQUESTED IN 2016**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2016. These priority recommendations are directly related to the designation of Ukraine as a PFC — they would improve online enforcement and address the failures relating to collecting societies:

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

- Owners and operators 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 (e.g., UPO Avtor and ARMA Ukraine) that offer illicit “licenses” to both online and physical businesses without authority from rights holders.
- Organized crime syndicates. In lieu of the current reliance on non-deterrent administrative penalties, criminal enforcement targets should include the syndicates operating websites and peer-to-peer (P2P) operations, hard-copy distribution centers, camcording operations, and Optical Disc media production facilities (including disc-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 2014, international IP experts prepared amendments (an anti-piracy draft law) to properly address the above problems (improving an earlier draft prepared by the State Intellectual Property Service of Ukraine (SIPSU)). Two drafts were presented to the Verkhovna Rada (Bill #3353 and Bill #3081-d) each containing antipiracy provisions.
- Amending the recently adopted e-Commerce Law (enacted in September 2015). The law as adopted has a number of shortcomings: in particular, it contains broad, and internationally inconsistent, exemptions from liability for service providers, including hosting service providers. These provisions should be narrowed and aligned with the proposed provisions in the Copyright Law amendments (Bill #3353). This would ensure that sites facilitating copyright infringement would not be able to apply the “safe harbor” provisions, and it would encourage cooperation by passive service providers.
- Adopting the Law “On Collective Management” (including the amendments provided by international experts in February 2015) to require relevant organizations to operate with proper transparency, accountability and rules of governance. In addition, any collective administration would be based on the basis of “volume of rights” (and also to be consistent with Article 168 of the EU-Ukraine Association Agreement requiring bilateral agreements with foreign organizations to operate transparently and effectively). The bill has broad support from international organizations (e.g., CISAC), but has been slowed by opposition in the Ministry of Economic Development and Trade (MEDT).
- 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) proper resources, especially for police enforcement personnel dedicated to IPR crime (the Economic Crime and Cyber Crime police units – which did in 2015 have increases in personnel), and including specialized IPR prosecutors within the General Prosecutors Office; 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.
- **Additional legal reforms** including:
  - 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. Bill #3081-d contains amendments to Article 176 to criminalize online infringements, and includes provisions pertaining to camcording.
  - 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); this was a requirement of 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. These two issues are treated in depth in this section.

**Internet Enforcement:** Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world's largest), located in Ukraine. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the current lawless situation. Many of these illegal services and sites target audiences throughout Europe and the United States. In 2015, Ukraine remained third in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks using PCs, up from 18th in 2011. Ukraine is also ranked sixth in the world for mobile piracy.

Two of these Ukrainian sites have been perennial notables on the U.S. Government's list of Notorious Markets as a part of an annual Special 301 Out-of-Cycle review. *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 18th most visited site in Ukraine). The U.S. Government has listed *ex.ua* every year since 2012 as a Notorious Market because of the site's ongoing illegal activities. In addition to *ex.ua*, the U.S. Government has also included *extratorrent.cc* on the Notorious Markets list for several years (although it is now no longer hosted in

Ukraine). As the U.S. Government noted in its report in December 2015, these two sites “continue to benefit from Ukraine’s status as a haven for online piracy.” The U.S. Government report continued: “[a]lmost 35 million users visit *ex.ua* every month to download and stream content including reportedly infringing music, videos, movies, TV series, e-books, and audiobooks, and software that one commenter alleges is uploaded by site administrators themselves. Similarly, *extratorrent.cc* allegedly has extremely high rates of piracy with more than 75 million visits a month and a 14 percent increase in August 2015 compared to August 2014.” In 2012, *ex.ua* was, for a short time, the focus of an enforcement action and preliminary criminal investigation. But, after what the U.S. Government characterized as “political criticism and [local] popular opposition,” the site was back in operation days after its suspension, and all enforcement actions and the criminal case were halted. Among the many pirate websites in Ukraine are torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites. Examples include: linking and streaming sites such as *kinogo.co*, *kkiste.to*, *kinofilms.tv*; P2P and tracker sites such as *oday.kiev.ua*, *pslan.com*, *torrentroom.com*; and sites offering unlicensed pay for download musical recordings, such as *mp3caprice.com*.

The recording industry reports that the free and paid download sites 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.com*, *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. One positive development: in 2015, there were three criminal case verdicts against the owners of pirated websites; there were no such cases in 2014. The three cases resulted in imprisonment (of five-year, three-year and two-year terms) against the site owners of: *see.od.ua*, *kinopab.net* and *imperia-kino.com.ua*. In addition, the owner of the torrent site *tr.vik.ua-biz.info* was fined 3400 UAH (US\$130) in a court decision in December 2015.

There were 31 criminal digital piracy investigations opened in 2015, compared with 71 in 2014. In 2015, there were 61 pirate sites targeted by anti-piracy organizations which were closed by the police or site owners (compared to 28 in 2014), although some were operational almost 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.

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 Internet Association of Ukraine (IAU), representing the ISPs, has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation, citing this statutory language.

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 P2P traffic, and some ISPs will delete links upon request. In 2015, there were several conferences and meetings organized to try to get ISPs, broadcasters, advertisers and rights holders (via the Ukrainian Anti-Piracy Association (UAPA)) together to cooperatively agree on procedures to respond to takedown notices, and take effective action, against unauthorized sites. The 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 2015, UAPA issued 3,602 takedown notices to ISPs and cease and desist letters to site operators in Ukraine (compared with 1,119 in all of 2014).

A 2015 draft law (Bill #3353) would have instituted notice and takedown provisions (and in a positive note, allowed rights holders to do so directly, as is the international standard, without the need for a state authority or court), and would have required that material taken down “stay down.” A version of this same bill is now pending in the Verkhovna Rada. 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. Unfortunately, the Internet Association Ukraine (IAU) is opposed to the current draft law.

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. In November 2015, there was a re-organization of the police, leaving many vacancies in enforcement agencies, including within the cyber crime unit (which currently has half the number of officers necessary to undertake their work).

**Collecting Societies:** The current collective administrative system in Ukraine, with 19 competing collecting societies, is chaotic, and will not be corrected until the accreditation procedures are fixed. The unfair and nontransparent administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. The U.S. Government acknowledged in its 2015 Special 301 report that there has been no progress on this issue since the PFC designation in 2013.

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. 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 is currently administered by the Ministry of Economic Development and Trade (after a 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 chaos 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. In addition, pirate websites such as *fs.ua* and *slavpeople.com*, which contain audiovisual material, claim to be “licensed” from the rogue collecting societies (for example, ARMA 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 and repertoire, as IIPA and other organizations have long suggested. IIPA's proposed solution is the enactment of a new Law “On Collective Management” consistent with the draft worked on by U.S. and EU experts (and consistent with all the major international rights holders organizations). Under that draft, the current accreditation system would be re-constituted,



and societies would be granted operational licenses provided they meet statutory criteria. Further, only one society representing the majority of commercially used rights and repertoire (in each sector or category) would be appointed as the collective management organization (CMO) benefiting from an extended collective license. 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.

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. The SIPSU “inspections” of the societies, undertaken in 2015, was political theater that did not properly identify and disqualify the rogue societies, such as UPO Avtor.

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; SIPSU should immediately revoke the authorization of VAAP.

**Criminal Enforcement:** The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. Amendments to the Criminal Code (Article 176) in 2005 lowered the high threshold for criminal prosecution. The current threshold is 13,780 UAH (or US\$532). The main concern with the threshold is that there is no unified approach on how to calculate a valuation of the copyright material in question, so the threshold acts as a bar to criminal enforcement, resulting in rights holders having to use 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, a criminal case does not proceed.

There are other criminal 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.

**Other Key Enforcement Issues:** Hard copy piracy, especially at outdoor markets, remains a problem. Several such markets have been designated in the past few years as Notorious Markets by the U.S. Government, although there have been improvements in enforcement at some of these markets, such as the Petrovka Market in Kiev. The so-called “7-Kilometer” open market in Odessa with over 5,000 stalls, and the Barbashovo Market in Kharkov, remain significant sources of illegal materials, especially for the motion picture industry. In 2015, the motion picture industry reports that the local anti-piracy organization seized 249,372 Optical Discs nationwide (not just at these markets) — most were seized at an Optical Disc plant in Kiev.

The 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. Currently, there is a draft bill being proposed by MEDT to repeal the holograms sticker system. IIPA recommends that this law be adopted and that the State Enterprise Intelzakhyst that administers the program, should also be abolished.

The camcording of motion pictures in theaters 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 2015, at least 13 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. There was only one audio recording sourced from Ukrainian theaters (down from five in 2014). Amendments to the Copyright Law and the Criminal Code are necessary to effectively enforce against illicit camcording, and there was no progress on this legislation in 2015. Bill #3081-d includes an amendment to the Criminal Code Article 176 to criminalize camcording.

The current Customs Code gives Customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the State Fiscal Service are not sufficiently engaged in enforcement measures, and thus under-utilize 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.

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

## **LEGAL REFORMS**

Here is a short summary of the recommended legal reforms needed in Ukraine (some of these have been briefly noted elsewhere in this filing):

**Copyright Law:** As noted, various proposals to amend the Copyright Law have been introduced in recent years including bills introduced last year (Bill #3353 and Bill #3081-d), that are pending in the Verkhovna Rada. Bill #3353 was approved by the Cabinet of Ministers after it was re-drafted (combining elements of the other bill) by the MEDT, and is currently pending for consideration. It is generally an improvement over prior drafts, although some additional improvements are needed before final passage; it is facing opposition from illegal website operators and ISPs. Bill #3081-d passed a first reading in the Verkhovna Rada on January 28, 2016, but it needs further amendments to comply with international norms on notice and takedown and with regard to third party liability.

The bills include amendments not only to the Copyright Law, but also the Law on Telecommunications, and the Code on Administrative Offences, intended to improve digital piracy enforcement. To be effective, notice and takedown should not (as earlier drafts of the bill proposed) create a highly bureaucratic set of procedures; these would 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).

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 (some parts of previous bills, never enacted) 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 proposal does include an anti-camcording amendment; it would specifically exclude camcording in movie theaters from the scope of the Copyright Law's private copy exception. The law would thereby prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption, and so, should be enacted.

**Law on Collective Management:** New law and subsequent regulations to govern the activities of Ukrainian collective management organizations are needed to improve the current 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 long-delayed draft Law on Collective Management, and that any such law incorporate the recommendations of European Union and U.S. experts in the music industry, including for provisions pertaining to extended collective management (for broadcasting, public performances, cable retransmissions and private copying levies). Collective administration should be based on transparency, good governance (established and controlled by rights holders), and on the basis of the volume of rights in active legal use in Ukraine.

**e-Commerce Law:** An e-Commerce Law was adopted in September 2015. As noted, it includes broad ISP liability "safe harbors" which are not consistent with international norms and far exceed U.S. law (as well as the Association Agreement with the European Union). The law should be amended to align with the provisions in the pending Copyright Act amendments (which are consistent with international norms, as well as U.S. and EU laws).

**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 – such a provision is contained in Bill #3081-d. 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 (including against optical disc producers or distributors). 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 WCT and the 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 has included some administrative improvements in recent years. But 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:** The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers were noted last year: (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. In December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films.

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, several years ago, 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, 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)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2016.<sup>1</sup>

**Executive Summary:** Online piracy and trafficking in circumvention devices in Chile continues unabated, owing to several major gaps in Chile's Copyright Law, including a lack of protections against circumvention devices, insufficient mechanisms for the removal of infringing content online, the lack of deterrent remedies against infringement, and overly broad exceptions to copyright. All of these deficiencies correspond to unmet obligations that Chile assumed under the U.S.-Chile Free Trade Agreement (FTA), which went into force January 1, 2004. In 2010, Chile adopted amendments to its Copyright Law addressing some of its FTA obligations, but left these issues to languish, glaringly unresolved. Ratification of the Trans-Pacific Partnership (TPP) will, like the FTA did in 2004, confer new benefits for the Chilean economy just as it introduces new benchmarks for Chile to meet the modern era's standards of protection and enforcement. One such standard that has been sorely lacking in Chile's laws is the criminalization of illicit camcording in theaters. 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. As Chile works to build its local creative industries<sup>2</sup> and its international reputation as a reliable trading partner, it can no longer ignore the basic needs of a robust digital economy.

### PRIORITY ACTIONS REQUESTED IN 2016

- Satisfy FTA and WIPO Internet Treaties obligations to adopt technological protection measures (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*.

Chile remains active in the sale of circumvention devices such as video game copier devices made available through online auction sites. The site *NeoGames.cl*, which is hosted and operated in Chile, continues to be

<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/2016SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Chile's Film Commissioner has indicated plans to introduce new incentives for local film production. See Anna Marie de la Fuente, "Cannes: Chile Hosts Diverse Productions, Incentives or No", *Variety* (May 18, 2015), available at <http://variety.com/2015/film/festivals/cannes-chile-hosts-diverse-productions-incentives-or-no-1201499441/>.



a leading purveyor of circumvention devices against which there are no means of enforcement. *NeoGames.cl* bills itself as an “authorized reseller” in Chile for handheld video game consoles and offers bundle packs, which are consoles pre-loaded with games. In 2015, Chile placed 21<sup>st</sup> in the world in terms of the number of peers participating in the unauthorized file sharing of select video game titles through personal computers on public P2P networks. Notably, Chile ranked tenth in the world in P2P infringement of console-based video games. When it comes to online marketplaces like *Mercado Libre*, Chile is identified as one of the top ten countries offering game copying devices in 2015.

The recording industry continues to be heavily affected by piracy via P2P exchanges, and links posted on blogs and social websites. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 33% of the total digital market.

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. In the second half of 2015, two full camcords and two audios were traced back to Chilean theaters. These copies were found online and distributed by a number of release groups. More support from local authorities is critical to addressing this problem.

**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>3</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 satellite signals to be captured, it is impossible to enforce the illegality of the devices alone. 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, and has undertaken efforts to raise public awareness about the negative effects of this and other forms of piracy.

## **COPYRIGHT LAW ISSUES IN CHILE**

With the negotiations for a Trans-Pacific Partnership (TPP) with Chile and many other nations complete, Chile’s failure to meet its existing obligations under its FTA with the United States, now twelve years outstanding, have taken on a new level of significance among Chile’s trading partners. The concerns that IIPA has voiced in past years with the deficiencies in Chile’s implementation of its copyright obligations under the FTA are as urgent as ever.<sup>4</sup> Six years after Chile adopted amendments to its Copyright law to implement a portion of its FTA obligations, significant gaps still remain in the following areas:<sup>5</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 and in specialty markets.

**No notice and takedown mechanism:** (See FTA Article 17.11.23.) The “notice-plus-notice” architecture under Chile’s Copyright Law, encouraging ISPs to engage with users regarding instances of infringement, lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that

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<sup>3</sup>Data from the Business Bureau (<http://businessbureau.com/bb-consulting/?l=en>).

<sup>4</sup>The U.S.-Chile FTA is available 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>5</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>.

fails to act after gaining knowledge of infringement outside of a court order.<sup>6</sup> The recording industry reports that its work with ISPs to send notices to P2P users who are engaged in the exchange of unauthorized music files continues, but the considerable resources that are devoted to initiating those notices have had no deterrent value whatsoever, and result in no sanctions against recidivists regardless of the number of notices sent. 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 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 Article 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. These include: 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 to protect rights management information (Article 17.7.6); and various border measures (Articles 17.11.17 through 17.11.21).

IIPA urges the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters and include 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**

In early January 2016, Chilean Police took action against one of the world’s largest release groups that had been in operation since 2008. The “VCD” group was responsible for the release of at least 80 identified infringing copies of feature films made by camcording in a theater. They operated FTP servers in Chile, the United States, and Europe, and managed at least ten different distribution websites.

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 National Institute of Industrial Property (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 and involve right 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>6</sup>The ISP liability provisions of the 2010 legislation provide a means by which right 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 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 impediments to effective criminal enforcement in Chile. First, the IPR Prosecutor's Office does not dedicate 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 inadequate punishments such as community service and probation for criminal penalties.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 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:** China's marketplace for creative content is developing rapidly, although for some industries, growth, particularly in the digital marketplace, is stunted. New generations of Chinese consumers are enjoying content in more ways than ever before. There are a growing number of services for licensed online delivery of music, movies, TV programming and other works, as well as expanded legitimate avenues for accessing content outside the online realm, including now 31,000 movie screens with many offering enhanced formats such as IMAX and 3D. Yet China's overwhelming legacy of piracy continues to distort the market, and has driven down the market value of creative works toward the vanishing point. As a result, China has far to go to become a market that produces licensing revenue on anywhere near the scale needed to sustain legitimate and innovative services.

IIPA is encouraged by some actions China took in 2015 to combat piracy, including the crackdown in July and October 2015 by the National Copyright Administration of China (NCAC) on unlicensed music platforms; the ban by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) on 81 third-party apps that facilitate media/set-top box piracy; a new watermarking requirement for film post-production units; and some steps by SAPPRFT to combat the problem of unauthorized camcording in Chinese cinemas. Nonetheless, the piracy landscape in China is changing, and Chinese authorities must adapt. For example, media/set-top boxes (STB) have become a key platform through which pirated materials are accessed in China. Dedicated piracy apps that run on multiple platforms, including STBs and mobile devices, are a relatively new challenge that must be met. Progress against piracy sites is being undermined by the emerging propagation of "do-it-yourself" piracy sites and the online ecosystem that supports them. China has yet to respond satisfactorily to online piracy of journals of scientific, technical, and medical (STM) materials, and new services facilitating unauthorized access to STM materials threaten the professional publishing market. Regrettably, no action was taken in 2015 to move forward amendments to the Copyright Law or to reform the Criminal Law to provide much needed tools to assist in combatting these problems.

China also needs to do more to remove barriers that prevent U.S. creative industries from fully accessing the Chinese market. For example, notwithstanding amendments to the Foreign Investment Catalogue, it appears China's restrictions on investment in online music distribution services may remain in place. SAPPRFT's 2014 Notice imposing onerous requirements and a cap on the online distribution of foreign films and TV dramas threatens the licensing market for audiovisual content, and follow-on measures issued in June 2015 did not alleviate concerns. China's reported clampdown on foreign DVD imports will further restrict foreign content to the detriment of China's audiovisual market.

IIPA seeks further reforms to improve access to China's growing theatrical film market for U.S. film producers. Completion of the "long form" agreement is a positive development. Now China must fully implement the 2012 U.S.-China Film Agreement by enabling competition in the distribution marketplace benefitting all producers. This implementation shortfall, combined with new barriers to authorized online distribution of imported films and TV programming, create a fertile environment for widespread piracy of films sought by Chinese viewers. In addition to immediate fulfillment of its commitments under the Agreement, improvements to the pact are needed as part of the consultations on the Agreement scheduled for next year.

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<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/2016SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2016**

### **Enforcement:**

- Take further action against websites offering infringing content, such as *LeTV*, *ColaFile.com*, and *Sohu*, and/or those deploying non-hosted platforms such as *Xunlei* (sued again over video piracy).
- Bring more targeted and deterrent actions, with transparency, against media box/set-top box (STB) piracy (including against dedicated piracy apps), “do-it-yourself” piracy sites and the Internet ecosystem that supports them, and unauthorized camcording.
- 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.
- Fully implement 2012 Network Rules with regard to liability, and have 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.
- Facilitate more efficient transfer of copyright cases between administrative and criminal authorities, and make clear that such transfers are required upon “reasonable suspicion” that the criminal thresholds are met.
- Follow through on US-China Joint Commission on Commerce and Trade (JCCT) commitments for transparent, comprehensive, and verifiable progress for strengthening intellectual property rights (IPR) 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, take further efforts to crack down on unauthorized camcording.

### **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., adopting rights of communication to the public and broadcasting for sound recordings; clarifying safe harbor requirements, extending term of protection in line with the international trend; and ensuring exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope).
- Include intellectual property provisions in the ongoing Criminal Law reform process, including: 1) lowering thresholds; 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; and 3) establishing the appropriate presumptions of copyright ownership in criminal proceedings.
- Enact a criminal prohibition on camcording in theaters.

### **Market Access:**

- Recognizing that the United States and China are set to engage in consultations on key elements of the U.S.-China Film Agreement in 2017, ensure full implementation of all commitments contained in the Agreement, including China’s commitment in the Agreement and at the June 2015 Security and Economic Dialogue (S&ED) to promote licensing of independent (private) national distributors in competition with State-owned China Film Group (CFG) and Huaxia. While China has made progress with the Agreement with respect to imported films that receive quota slots and share in box office revenue with CFG, no reforms have been made on “flat fee” imported films and no private Chinese national distributor has been licensed by the government to engage in national theatrical distribution of imported films independently of CFG.<sup>2</sup> In 2016, the U.S. Government should engage the Chinese to press for full compliance and transparent implementation that ensure China fulfills its promise to provide meaningful access for all U.S. film producers to China’s growing film market.

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<sup>2</sup>Films exported to China on a flat fee basis have steadily decreased since 2012 and opportunities for these films are disappearing quickly due to China’s maintenance of the barriers that it has committed to dismantle and remove in the Agreement and again at the 2015 S&ED.

- Revoke all measures, including the Notice and the Draft Measures, imposing registration requirements, onerous and opaque censorship, and strict quotas on foreign films and television programming for online distribution.
- Clarify that revisions to the *Catalogue of Industries for Guiding Foreign Investment* allow foreign investment in online music services and do not prohibit foreign investment in audio and audiovisual production and distribution activities.

## **COPYRIGHT PIRACY 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 Special 301 filing serves as a supplement to those, and is not meant as an exhaustive review of all issues.<sup>3</sup>

**Evolving Online/Mobile Piracy in China:** Online piracy in China is constantly evolving and takes a variety of forms, including illegal download sites, peer-to-peer (P2P) piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, and auction sites selling pirated goods and high quality counterfeits. Streaming sites have grown in significance. The music industry reports that, based on their monitoring, 77% of the infringing links they discovered in 2015 were to music streaming websites, 16% were to video streaming websites, and just 5% were to cyberlockers. Notorious websites offering infringing content include *LeTV*<sup>4</sup> and cyberlocker *ColaFile.com*, which operate unlicensed music and music video platforms, and *Sohu*, which operates a user-uploaded site "my.tv.sohu.com" for which the music industry reports a woeful takedown rate of only 31%. Mobile piracy has also become an increasing threat to all copyright sectors. In 2015 the music industry reported 261 infringing apps to mobile app marketplaces.

Moreover, in a virulent new form of piracy, those who visit piracy websites are enticed to create their own derivative sites to generate revenue for themselves and for the mother site. The network of such sites currently numbers in the thousands. The users download a proprietary video player (often malware, which links the user's computer to the website) to view the infringing content. A Content Management System (CMS) website helps users to easily create their own derivative websites embedded with the proprietary video player, and a Video Collection Resource (VCR) website provides these derivative sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the proprietary video player embedded into these website links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities must investigate and take action against this network of "do-it-yourself" piracy websites, with a particular focus on the producers of the proprietary video players and the CMS and VCR websites that are facilitating the expansion of this network.

**Media Box/Set-Top Box (STB) Piracy:** Media boxes or set-top boxes are proliferating throughout Asia. These devices can be used to permit users to access the Internet, and in many cases allow users to stream or download unauthorized motion picture and television content. China is a hub for the manufacture of these devices, which are not only distributed domestically but also exported to overseas markets, particularly throughout Asia (Hong Kong, Taiwan, Singapore, and elsewhere), compounding piracy problems in the region. 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 access unauthorized decrypted motion pictures or television programming; 2) facilitating easy access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming, video games, published materials and TV

<sup>3</sup>See, e.g., IIPA 2015, <http://www.iipa.com/rbc/2015/2015SPEC301CHINA.pdf>; IIPA, *China's WTO Compliance – Notice of Intent to Testify, Summary of Testimony, and Testimony regarding: "Request for Comments and Notice of Public Hearing concerning China's Compliance with its WTO Commitments"* (80 Fed. Reg. 47985, August 10, 2015), September 23, 2015.

<sup>4</sup>*LeTV* is not merely a network service provider offering storage space for users to upload content, but is directly making available infringing content; thus, any limitations on liability should not be applicable.

dramas; and/or 3) pre-loading the devices with hundreds of high definition (HD) motion pictures prior to shipment or allowing vendors to load content upon import and prior to sale, or as an “after sale” service.

STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The boxes are either pre-installed with “apps” that facilitate infringement or users are easily able to obtain apps required to access unauthorized motion picture and television content. Some STB manufacturers also produce the apps that facilitate piracy. These “apps” allow the user to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual content. Many of these piracy apps cross over to other platforms besides STBs, such as mobile phones and computers. SAPPRFT’s notices that led to the banning of 81 third-party apps that facilitate media/set-top box piracy is a positive development, but China must do more, including cracking down on box manufacturers who preload the devices with apps that facilitate infringement. Moreover, because 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 boxes that are being used illegally.

**Additional Online Piracy Problems:** Internet platforms that provide illegal content unfortunately continue to proliferate in China. Among the websites cited by IIPA members in their “notorious markets” Out-of-Cycle Review (OCR) filings to the U.S. Trade Representative in the fall of 2015, *Ebookee.org*, a top indexing site for pirated books, magazines, and other media, has connections to China. 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>5</sup> But, 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>6</sup>

As the leading exporter of video game circumvention devices, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass technological protection measures in a video game console in order to download and play illegal video games. Customs authorities in at least seven countries, including the United States, have seized tens of thousands of these devices originating from China in 60 separate seizure actions. The devices are sold by thousands of vendors in online marketplaces such as *Taobao*, *DHGate*, and *AliExpress*, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. These devices allow illegal games distributed over the Internet to be played on handhelds or consoles, and the harm they cause is not limited to console makers because almost all games developed for play on consoles can be illegally downloaded from the Internet.

The problem of online journal piracy in China unfortunately continues to be without a satisfactory resolution. The *KJ Med* entity, which offered scientific, technical and medical (STM) journal articles for purchase and delivery by e-mail without authorization from nor compensation paid to journal publishers, was first brought to the attention of Chinese enforcement authorities in 2006. After the original investigation languished, the current investigation began in 2011, but was not referred to criminal enforcement authorities until 2014. Despite the scope, scale, and clear criminal intention of *KJ Med*’s infringing activities, in December 2015, prosecutors declined to pursue a criminal case against its operators. This unfortunate development underscores the lack of effective criminal remedies against even the most egregious infringers in China, highlighting both significant limitations in evidence gathering by criminal law enforcement authorities and their unreasonably narrow interpretation and application of the law. Deterrence against copycat and similar services thus remains elusive, much to the detriment of STM publishers. In addition to entities like *KJ Med*, a new variation is a service that allows subscribers to “view” (without publisher permission) ebooks and

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<sup>5</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>6</sup>Motion Picture Association, *MPAA Studios File Civil Actions Against Xunlei for Mass Infringement of Copyright*, January 20, 2015, available at <http://www.mpa-i.org/wp-content/uploads/2015/01/MPAA-Studios-File-Civil-Actions-Against-Xunlei-For-Mass-Infringement-of-Copyright.pdf>.

journal articles. Known as “UReader”, this service reportedly has upwards of 167,000 ebooks available to its subscribers.

**Next-Generation Pay-TV Signal Theft:** Pay-TV piracy is a growing concern in China, as is China’s role in the worldwide manufacture and export/distribution of pay-TV circumvention devices. 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 piracy must be addressed.

**Unauthorized Camcording Leads 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 film industry.<sup>7</sup> The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, Office of Anti-Piracy and Pornography (NAPP), and SAPPRFT, and with the China Film Distribution and Exhibition Association. The November 2014 criminal conviction of a Hefei camcording broker was a positive sign. In 2015, SAPPRFT issued notices that recognized the threat camcording poses to the film industry, calling for Chinese cinema owners to more effectively address camcording incidents, and requiring all film post-production units to enable digital watermarking to aid enforcement efforts. IIPA is encouraged by these developments, but a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility. In addition, although the SAPPRFT notices are an encouraging step, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

**Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain Problematic:** The copyright industries continue to report piracy of hard goods, which harm both the domestic Chinese market and markets outside of China. Pirate/counterfeit production of textbooks, consumer books, and trade books is a substantial problem. Reports indicate that pirated (largely consumer and religious) books printed in and exported from China are showing up in parts of Africa. China needs to 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. Although physical piracy at universities has declined over the years, the use of unauthorized services to access text books and journal articles has unfortunately grown. The Ministry of Education should do more to inform and educate university personnel, librarians and students regarding appropriate use of and legitimate sources of copyrighted content. Similarly, 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, often through e-commerce platforms.

## **ENFORCEMENT UPDATES IN CHINA**

IIPA is encouraged by certain positive steps China took in 2015 to combat piracy, which contributed to commercial gains in some creative sectors. But China still has significant work to do to overcome its historic lack of enforcement, which is why, notwithstanding recent actions, online piracy, and its negative impact on licensing negotiations between right holders and licensed platforms, remains the dominant issue in China. As of June 2015, China had the largest Internet user base in the world, estimated at 668 million users, including 594 million mobile web users. This creates the potential for enormous market opportunities for right holders, but they must swim upstream against a historical tide of toleration for piracy that has devalued creative content. Although the market for

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<sup>7</sup>As of November 2015, 9 forensic matches (3 video and 6 audio) of MPAA studio titles available online have been traced to camcording in Chinese theaters, with half originating in cinemas in Beijing.

legitimate content has improved, more progress must be achieved for this potential to be realized because piracy hinders the development of legitimate services.<sup>8</sup>

**Signs of Improved Enforcement, But Still Work To Do:** There were notable signs of progress in enforcement against online piracy in China over the past year, particularly regarding efforts to combat unlicensed music. In January 2015, NCAC, together with State Internet Information Office, MIIT, and Ministry of Public Security (MPS), jointly held a press conference to announce the results of the 2014 “Sword Network Campaign” against Internet piracy. Among other things, NCAC announced that the results of the Shanghai Cultural Task Force’s investigation of *Shooter.cn*, which was engaged in the flagrant mass dissemination of unauthorized copies of foreign films and TV shows with Chinese subtitles. *Shooter.cn* was shut down and the owner of the website, Sagittarius Technology Co. Ltd., was fined RMB100,000 (US\$15,203). This was one of a number of successful enforcement actions brought in China in 2014 against leading piracy services, such as QVOD, Yyets, and DY161, which IIPA noted in its 2015 submission.<sup>9</sup>

The 2015 version of China’s “Sword Net” anti-piracy campaign included a focus on unlicensed music. In June 2015, NCAC ordered all online music platforms to take down unlicensed tracks by the end of July 2015 and, reportedly, more than 2.2 million unlicensed works were taken down by 16 music platforms in response. NCAC gave a further transition period for the removal of all unlicensed material until the end of October 2015 to allow for cross licensing of rights. Various Chinese online music platforms including *Kuwo*, *Kugou*, *QQ Music*, *Xiami*, *TTPod* and *NetEase* have recently released statements claiming that they have taken down all unlicensed material from their sites, while *Kugou* and *QQ Music* stated that they have obtained licenses from various record labels for approximately 20 million and 15 million licensed tracks in their music libraries respectively. *Tencent* has also sublicensed several platforms including *NetEase* and was reported to be negotiating other sublicensing deals. NCAC is reportedly reviewing the results of this campaign to determine its next steps, which could include enforcement actions against noncompliant platforms. Also as part of “Sword Net” 2015, the local music industry informed NCAC of about 410 infringing websites. In response to the NCAC notifications, LCEAs from Fujian, Jiangsu, Hunan, Hubei, Shenzhen, Guangxi, Sichuan, Zhejiang, Anhui, Chongqing and Shanxi have contacted the industry for assistance, resulting in the closure of 42 websites, changes in business models for 32 websites (ceasing to offer music), and deletion of alleged infringing tracks on 129 websites.<sup>10</sup>

In October 2015 the NCAC issued a Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, including works that have been previously removed, works that are the subject of a notice and takedown, and works specifically listed by NCAC. The Notice also requires service providers not to provide any support for users to illegally share copyrighted works, and to require users whose accounts have abnormal activity associated with copyright infringement to provide reasonable explanations. IIPA is encouraged by this development.<sup>11</sup> Cooperation with authorities and some ISPs to take down infringing content had some effect over the past twelve months, as ISPs continue to be generally responsive to notices or cease and desist (C&D) letters. The music industry reports that the takedown rate of infringing links is

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<sup>8</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels and monetary thresholds triggering criminal liability are extremely difficult to reach.

<sup>9</sup>See IIPA 2015 at 17-18. As IIPA also noted in the 2015 report, the commencement of official operations of the National Leading Group (NLG) in July 2013 has been helpful in mobilizing greater resources to address copyright infringements throughout the country.

<sup>10</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.

<sup>11</sup>Since issuance of the Notice, 185,173 links were sent to *Baidu* and 177,588 links were taken down. 21,000 links were taken down by Sina Disk (a cyberlocker service provided by Sina) and Sina has stopped the streaming play function on Sina Disk and the function of uploading and downloading files larger than 100MB. NCAC also released a list of 131 movies and TV episodes that needed to be specifically monitored.



approximately 90%. Regarding the 261 infringing mobile apps noted above, mostly from the Apple Store, the takedown rate upon notice to Apple was 89%, while the takedown rate for infringing Android apps was 52%.<sup>12</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 such marked websites. The first stage of the action was launched in April 2014 and the action is still ongoing. According to the music industry, 2036 links have been reported to *Baidu* since the launch of Qingyuan Action, but, notwithstanding that *Baidu* has taken down all of its advertisements on the reported infringing websites, infringement on most of these websites still remains.

China has made significant progress in cracking down on many unlicensed music services,<sup>13</sup> which has contributed to an uptick in revenues for the music industry. In 2014 the total music market was US\$105.2 million, up 5.6% from the previous year, and revenues from digital sales were US\$91.4 million, up 11.2%.<sup>14</sup> Early indications are music revenues in 2015 will be significantly higher for both overall music revenues and digital revenues.<sup>15</sup> That said, the legitimate music market in China remains nowhere near its potential. Despite boasting the largest number of Internet users in the world, China's music market is ranked just 19th globally, behind much smaller markets such as Switzerland, Belgium and Austria. Revenues are a small fraction of what they should be even when compared to revenues seen in comparably developed markets.<sup>16</sup> And online music piracy sites and hard goods exports from China continue to negatively affect foreign markets, e.g., Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

**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). Criminal enforcement efforts are hampered by a lack of expertise among police throughout the country to effectively bring criminal piracy investigations, resulting in very few successful investigations and many cases that are not handled appropriately. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate piracy cases. Furthermore, as noted above regarding the growing problems of media box piracy and networks of "do-it-yourself" piracy websites, the piracy challenges in China are constantly evolving and becoming more complicated. Chinese enforcement authorities must adapt to keep pace with illegal piracy activity. As such, the Chinese Government should

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<sup>12</sup>The music industry reported 240 infringing apps to Apple, and 21 infringing Android apps to Chinese marketplaces such as *Baidu* and *Tencent*. Google Play is not yet available in China, although as of November 2015, reports indicated Google was working on entering the market by early 2016. See, e.g., Paul Carsten and Yimou Lee, *Google aims for China launch of Google Play app store next year: sources*, Reuters, November 20, 2015, available at <http://www.reuters.com/article/us-alphabet-china-idUSKCN0T91K420151120>.

<sup>13</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>14</sup>Total music revenues in 2013 were US\$99.6 million, and revenues attributed to digital sales were US\$82.2 million.

<sup>15</sup>Comparing revenues from the first half of 2014 to the first half of 2015, overall music revenue increased 38.5% with digital revenues increasing by 43.5%.

<sup>16</sup>On a per capita basis, in 2014, Chinese consumers spent only 7.8 cents each on recorded music, the lowest figure of any major market anywhere in the world. Even India (8.1 cents per capita), Indonesia (10.4 cents), and the Philippines (11.9 cents), countries that are much poorer than China with GDP per capita figures about half as large, spent more than China in 2014. The music markets in India and Indonesia were two-and one-half times larger than China's in terms of the percentage of GDP per capita devoted to recorded music. The Asian market with a per capita GDP closest to China's is Thailand, which has a per capita music spending more than eight times that of China's.



be encouraged to expand resources and capability at NCAC, local CAs, and LCEAs, commensurate with the scale and complexity 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.

## **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>17</sup> These reform processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Copyright Law Reform:** IIPA has serious concerns that no progress was made in 2015 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>18</sup> Many other important topics are taken up in the draft Copyright Law revision. In particular, the draft introduces rights of remuneration for producers of sound recordings for public performance and broadcasting, a much needed reform reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses.

Some of the current proposals, however, may require revisions before enactment to avoid conflicts with China’s WTO obligations, or inconsistencies with current international or best commercial practices.<sup>19</sup> For example, the ISP liability provisions should be revised to ensure only neutral intermediaries that do not contribute to infringing activities are eligible for the limitations on damages for infringements (i.e. safe harbor), and that the draft clearly state the safe harbor requirements, including the following: 1) ISPs cannot receive direct financial benefit attributable to the infringement; 2) ISPs either have not been notified of the infringement or, upon notice, promptly took reasonable steps to limit or stop the infringement, including expeditious takedown of infringing content; and 3) ISPs cannot modify the content or interfere with the technical protection measures used by copyright owners to protect their works.<sup>20</sup> In addition, IIPA is disappointed that the present draft leaves in place China’s inadequate term of copyright protection. China should extend its term of protection in line with the international trend (to 70 years after the death of

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<sup>17</sup>Previous developments included the National People’s Congress passing legislation to establish 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. According to the SPC, from November 2014 to November 2015, 8219 have been accepted by the Beijing IP court, with 3859 cases closed; 1488 cases have been accepted by the Shanghai IP court with 887 closed; and 4612 cases have been accepted by the Guangzhou IP court, with 2613 cases closed..

<sup>18</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.”).

<sup>19</sup>The 2015 IIPA submission identified a more comprehensive list of concerns and suggestions regarding the draft legislation including, notably, regarding the collective management provisions, which includes the fraught concept of “extended collective management” and improper limitations on right holder remuneration and compensation. See IIPA 2015 at 21-22. Also, as noted in the 2015 submission, copyright law revisions provide an opportunity to improve China’s civil compensation rules, which are riddled with uncertainties and often result in inadequate compensation to right holders. The legacy of years of toleration of piracy, referenced above, not only drives licensing revenues to exceedingly low levels, but also compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels and monetary thresholds triggering criminal liability are extremely difficult to reach.

<sup>20</sup>These safe harbor requirements are set forth in the 2006 Regulation on Protection of the Right of Communication Through Information Networks and the 2012 Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), and should also be clearly stated in the draft Copyright Law.

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), not only to provide greater incentives for the production of creative works, but also to provide producers with a stronger incentive to invest in local industry, spurring economic growth and tax revenues and enabling producers to continue offering content to local consumers in the latest formats.<sup>21</sup> It is also crucial to ensure that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope, and are otherwise consistent with the WTO TRIPS three-step test.

**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 Judicial Interpretations) 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>22</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 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), for example, circumvention of technological protection measures, or trafficking in circumvention technologies, software, devices, components, and services.
- Failure to establish appropriate presumption of copyright ownership.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.
- The jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

**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, requiring proof of illegal proceeds before transferring. However, administrative authorities do not employ investigative powers to ascertain such proof. The amended transfer regulations should expressly include the “reasonable suspicion” rule, and they should ensure this rule is consistently applied by both transferring administrative authorities and receiving criminal authorities.<sup>23</sup>

**Enhanced Administrative Copyright Enforcement:** The amended draft Detailed Measures on Implementation of Administrative Penalties for Copyright Infringement (Detailed Measures) could be a positive step forward for copyright administrative enforcement in China if brought into force. Although it remains to be seen how the Detailed Measures will be interpreted in practice, the amended draft, among other things, provides for punishment of Internet service providers for acts of infringement they know or should know about, and harmonizes administrative enforcement thresholds for “serious circumstances” with judicial opinions on thresholds for criminal

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<sup>21</sup>More than 80 countries protect some or all creative materials per the terms stated. 28 out of the 32 member countries of The Organization for Economic Cooperation and Development (OECD) and 9 out of the top 10 music markets (by total revenue in 2014) protect sound recordings for at least 70 years. The recently concluded Trans-Pacific Partnership (TPP) requires copyright terms to meet this minimum.

<sup>22</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. For musical works, IIPA urges the SPC to clarify that thresholds for infringing works are calculated by track rather than by album.

<sup>23</sup>Presently, even when administrative authorities do seek to transfer a case, the local Public Security Bureau (PSB) does not necessarily accept it. Practices vary among different PSB offices, but too often the PSB adopts strict acceptance criteria, effectively requiring all or nearly all the evidence that a crime has been committed rather than a reasonable suspicion standard.

liability to ease the evidentiary burden of proof. IIPA hopes the Detailed Measures are brought into force and implemented.

## **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 for any reason, 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, China has eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution.<sup>24</sup> In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China has also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were introduced for more film co-productions in China.

IIPA urges China to continue liberalizing its market for creative content. We are concerned that the amended Foreign Investment Catalogue, which Ministry of Commerce (MOFCOM) released in March 2015 and which lifts investment restrictions in many sectors, may not substantially ease restrictions for audiovisual products and services. Although the restriction on foreign investment for distributing and selling of audiovisual products has been removed, the amended Catalogue adds “network publication service” to the “Prohibited” list, raising questions regarding whether foreign investment in online music services will be allowed.<sup>25</sup> The recent launch of Apple Music indicates foreign investment in online music services is no longer prohibited, but IIPA urges the Chinese Government to provide written clarification of these investments. Additionally, a November 2014 draft of the Catalogue indicated that “publication and production of audio and visual products” would be moved from the “Prohibited” list to the “Restricted” list, but this change was not reflected in the final amended version.

In addition to these investment liberalization concerns, IIPA also remains concerned about the uncertainty regarding the decisions to allow foreign entities to choose their licensees for online music distribution and to allow foreign entities to engage in content self-review. In October 2015 the MOC issued a “Circular on Further Strengthening and Improving Online Music Content Examination” requiring all online music services to self-censor their music. Accordingly, it should no longer be necessary for MOC to require foreign entities to have an exclusive licensee for online music distribution, which was required under previous censorship procedures. IIPA urges China to formally revoke this requirement so that foreign music companies are free to designate licensees of their choosing.<sup>26</sup>

Furthermore, 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

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<sup>24</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>25</sup>Any such prohibition appears to be contradictory to the MOC’s Notice on amending the Interim Provisions on the Administration of Internet Culture, which stipulates that foreign entities may apply for Internet Cultural Publication Permit for online music distribution.

<sup>26</sup>The Chinese Government verbally indicated in 2013 that it is no longer necessary to appoint an exclusive licensee for online music distribution and the 2015 Circular did not distinguish between exclusive and non-exclusive licensees. However, to avoid any uncertainty, it is recommended that the Chinese Government formally revoke this requirement in writing.

engaged or involved in operation of online video games directly or indirectly.” Publishing likewise remains a prohibited investment category, with publishers unable to determine which works, and how many, to bring to market. 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>27</sup>

**U.S.-China Film Agreement Implementation:** Implementation of certain provisions of the February 2012 U.S.-China Film Agreement have progressed for those films that are awarded a quota slot available to share in box office revenue. With respect to those 34 films only, China has increased the box office revenue sharing participation from 13-17.5% to 25%. With the Agreement set to be reviewed and in its fifth year, China has not implemented key provisions of the Agreement that would bring broad reforms and introduce competition to the distribution marketplace benefitting more producers and increasing the export to China of “flat fee” films (films imported outside of the quota system that do not share in the box office revenue). China committed in the Agreement to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported flat fee films, independent of the State Owned Enterprise CFG and Huaxia. Despite the rapid growth of screens in China and the strengthening of local productions, the market is still deliberately distorted to limit the number and impact of imported films.

Commitments made by China at the conclusion of the S&ED to promote private distributors remain unmet. The Chinese Government has not officially posted or released in China anything about those commitments or publicized how it will implement the reforms, which would allow Chinese distributors to understand how licensing and distribution would practically work for imported films outside of the quota system. As a result, many U.S. producers (principally independents) have very limited export opportunities in China, and flat fee releases have seen a decline in revenues.<sup>28</sup>

In consultations regarding the Agreement in 2017, IIPA recommends that the following issues be at the forefront of the discussions:

- further relaxing the quota for revenue sharing films so filmmakers and audiovisual companies may enjoy the rapidly growing marketplace for films in China;
- increasing U.S. producers’ share of revenues from the current 25%;
- allowing U.S. producers more control over release dates to address the problem of the Chinese locking out U.S. films from the prime release dates and to end the practice of “double booking” theatrical releases; and
- ensuring U.S. producers have access to ticketing system information to ensure proper reporting of revenues.

**Unacceptable New Barriers for Online Audiovisual Content:** SAPPRFT published Draft Measures for the Administration of the Distribution of Audiovisual Programs over the Internet and Other Information Networks for public comment in June 2015. The Draft Measures describe the application process and eligibility criteria for service providers to show audiovisual content on the Internet and mobile platforms, following on the September 2014 SAPPRFT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas. That September 2014 Notice required online distributors of foreign films and TV dramas to obtain

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<sup>27</sup>For example, 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. According to Article 7 of the Management Rules for the Dissemination of Audiovisual Programmes through the Internet (2004), an IP-TV Permit is not available to any Operating Entity that is a foreign-invested enterprise. For imported music files, the relevant license holder also needs to obtain an import-related approval from MOC.

<sup>28</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. See IFTA Comments Concerning China’s Compliance with WTO Commitments filed September 23, 2015 in Docket USTR-2015-0010 available at <http://www.ifta-online.org/sites/default/files/IFTA%20Comments%20in%20response%20to%20USTR%20Request%20Concerning%20China%27s%20Compliance%20with%20WTO%20Commitments%202015-0010%20September%2023,%202015.pdf>

permits, submit content to SAPPRFT for censorship review, and register and upload relevant information by March 31, 2015 on SAPPRFT's official registration platform. The Notice also capped foreign content at 30% and declared that foreign films and TV dramas not registered by April 1, 2015 would not be allowed for online transmission.

The September 2014 Notice has had 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 serious concern that delays in clearing legitimate content will inadvertently result in a resurrection of rogue sites providing uncensored content. The Notice also 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; and imposes an unwelcome new quota that will do nothing but stifle the industry. Raising new market access barriers for online distribution of films and television programming impairs legitimate licensing relationships and revenue streams, and further limits opportunities in what is already an opaque marketplace that imposes burdens on U.S. productions.

The SAPPRFT Draft Measures could have a detrimental effect on China's audiovisual market, depending on how they are finally issued and implemented. For example, one of the basic conditions for a work unit to engage in online radio and television services is that it is an exclusively State-owned or State-held work unit. As another example, there are other provisions that appear to invite or even require approved work units to engage in all kinds of content review or censorship (for example, Articles 5, 21). It also appears (but is unclear) that foreign news organizations may be excluded by virtue of Article 22. Other aspects of the Draft Measures seem fairly positive, such as the ability to enforce against one who, without permission, retransmits, links to, compiles, integrates (Article 23), or inserts content into, withholds or modifies (Article 17) audiovisual programming.

Further, in November 2015 a news report indicated that China may cut import licenses for legitimate DVD imports in an effort to further restrict the online distribution of foreign movies and television shows.<sup>29</sup> China's lapse toward protectionism in the audiovisual sector is a mistake, and it is critical to send a strong message that these policies are unacceptable, particularly at a time when China's marketplace in this sector has the potential for explosive growth. China should instead focus its attention on complete implementation of the WTO market access decision, the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

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<sup>29</sup>According to a report, DVD imports affect online content because "[w]hen a distributor gets a government license to physically import a TV show or movie, usually in the form of DVDs and Blu-ray discs, it is also permitted to post the content online..." See *China to Tighten Limit on Foreign TV and Video Imports*, November 16, 2015 available at <http://www.wsj.com/articles/china-to-tighten-limit-on-foreign-tv-and-video-imports-1447672849>.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2016.<sup>1</sup>

**Executive Summary:** India, under the leadership of the Modi Administration, is poised to take some steps to protect its large and vibrant creative sector, which will benefit U.S. creators as well. The drafting of a National IPR Policy—a much-needed tool to coordinate and improve India's fractured system of State-level enforcement—is reportedly nearly complete after stakeholders provided recommendations to the Ministry of Industry and Commerce's Department of Industrial Policy and Promotion (DIPP), and should be released soon.<sup>2</sup> To be comprehensive, it is hoped the National IPR Policy in India will address growing online copyright piracy and vestigial physical piracy affecting some sectors. The National IPR Policy will not address the regulatory and market access barriers that inhibit the continued growth of domestic and foreign copyright stakeholders, including passage of the national Goods and Services Tax (GST) and more orderly State tax structures and market reforms in the television sector. The expansive growth of Internet availability, exemplified by India's current status as the second largest mobile Internet market in the world after China, should also translate into significant new market opportunities for right holders. Instead, due to the lack of enforcement, pirate online services, illegal textbook copying businesses, illegal camcording networks, and infringing cable operators undermine not only the local Indian market but also the vast potential export market for the Indian creative industries.

While there were some positive enforcement developments in 2015, on the whole India's judicial system is not up to the task of maintaining the rule of law against piracy over the country's rapidly expanding online space. Good cooperation is forthcoming against the hosting of unauthorized content online, but more must be done. IP-Specialized law enforcement should be put in place within the police, the Central Bureau of Investigation (CBI) and in India's courts. Changes to the Copyright Act, the Information Technology Act, and the Cinematograph Bill are needed to allow enforcement actions to be swiftly initiated and resolved with deterrent penalties. In order to fulfil the Indian Government's intentions of bringing the law into line with the international treaties and promoting growth in the Indian creative industries, India should accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and review and update the existing law to ensure full compliance with the international treaties.

### PRIORITY ACTIONS REQUESTED IN 2016

#### **Enforcement**

- Set up a National Copyright Enforcement Task Force, with duties to regularly consult with stakeholders toward effective remedies against online and mobile infringements.
- Introduce cybercrime law enforcement officers in all State police stations; add a centralized IP crime unit under CBI Cyber Crime Detective unit to ensure proper investigation of IP crimes, including Internet piracy, in a systematic, coordinated, and efficient manner.
- Establish uniform enforcement procedures within state enforcement agencies, under national coordination.
- Encourage establishment of special IP panels with expert judges, and IP-dedicated prosecutors, to accelerate effective and deterrent adjudication processes in both civil and criminal cases.

<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/2016SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>IIPA has commented on the First Draft (dated December 19, 2014) with various suggestions, largely consistent with this filing and IIPA's 2015 Special 301 filing on India, available at <http://www.iipa.com/rbc/2015/2015SPEC301INDIA.pdf>.



## Legislation

- Accede to WCT and WPPT at the earliest opportunity.
- 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, empowering authorities to order expeditious remedies against non-hosted online and mobile services built on copyright infringement.
- Enact the 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.
- Further amend the Copyright Act to ensure adequate protection against the circumvention of technological protection measures (TPMs) and trafficking in circumvention devices/technologies (to ensure full implementation of WCT and WPPT).
- Adopt regulations requiring domestic and imported Pay-TV set top boxes to adopt adequate TPMs.
- Establish enhanced penalties for “pre-release” piracy.
- Amend state organized crimes (Control of Goonda) laws to include book, music, and video game piracy.

## Market Access

- Eliminate significant market access barriers, including “must provide” rules in the pay-TV sector, and compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries.
- Subsume state level entertainment taxes, and other taxes into the proposed GST once implemented.
- Eliminate high tariffs on entertainment software and hardware products.

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

**Internet Connectivity Creates Opportunities but also Challenges:** The rapid expansion of broadband and mobile Internet access across both urban and rural India, under the Modi Administration’s “Digital India” initiative, represents an enormous market opportunity for the creation and consumption of copyright works among the world’s second largest population of Internet users. India’s Telecom Regulatory Authority of India (TRAI) has reported that in the single fiscal year from 2013 to 2014, the total number of Internet subscribers in India increased by 34%, and the number of broadband subscribers in India quadrupled.<sup>3</sup> As of November 2015, an estimated 375 million individuals in India have access to the Internet.<sup>4</sup> Of the more than 900 million mobile subscriptions in the country, more than 46 million have wireless broadband access.<sup>5</sup> 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.

Yet, the reality is that legitimate right holders face enormous challenges in the online marketplace which is crowded by illegal offerings. While some right holders have been able to get limited relief through court orders, by and large, online piracy and Internet-based sales of pirated Optical Discs dominate. There are numerous legitimate platforms online in India,<sup>6</sup> but overall, online piracy through illegal file-sharing, rogue websites, piracy based cyberlockers, and topsites is pervasive. Cyber linking sites (or sites that index links to infringing cyberlocker files for download), are widespread. As of this writing, some of the most accessed piracy sites in India include the BitTorrent-based sites *kat.cr* (26<sup>th</sup> most accessed site in India), *torrentz.eu* (42<sup>nd</sup>), *extratorrent.cc* (150<sup>th</sup>), and *thepiratebay.la*

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<sup>3</sup>Telecom Regulatory Authority of India (TRAI), 2013-2014 Report, pages 4 and 16 (December 2014), available at <http://www.trai.gov.in/WriteReadData/UserFiles/Documents/AnnualReports/TRAI-Annual-Report-%28English%29=01042015.pdf>. “The total broadband subscriber base of the country as on 31st March 2014 (as per the revised definition) is 60.87 million as per information available with TRAI, vis-a-vis 15.05 million as on 31st March 2013 (as per pre-revised definition).”

<sup>4</sup>*Internet World Stats*, available at <http://www.internetworldstats.com>.

<sup>5</sup>See the TRAI 2013-2014 Report, *supra* n. 3, at page 13.

<sup>6</sup>These include including Eros Now, Hot Star, Sony Live, Box TV, iTunes India, Yahoo India, You Tube India, Ditto TV, BSNL Hungama, Spuul, Google Play, Voot, Myplex, Amazon Live, Netflix, YuppTV, and Biscoot 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.



(247th); the streaming sites *movierulz.to* (367th, and *onlinemoviewatchs.com* (368th); and many others. Mobile phone downloading on memory cards and mobile apps for downloading and streaming and file-sharing through Bluetooth are also on the rise for tablets, smart phones, and other devices. The Entertainment Software Association (ESA) reports that India placed fifth in the world again in 2015 in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public peer-to-peer (P2P) networks, and India is second in the world when it comes to mobile piracy of games. The past year also was witness to a surge in the use of wireless application protocol (WAP) optimized sites, causing damage to the market rivaling other forms of online piracy. These sites typically store content directly on their servers and distribute files at very compressed sizes for older devices or slower Internet connections. Most of these sites rely entirely on advertising and use the India country code top level domain.

Given the scope of the challenge, it is essential for the Indian Government to establish proper prioritization of 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. While Indian courts have made some positive orders requiring Internet service providers to block users' access to some foreign websites, the scope of these actions remain unclear. The newly amended IT Act does not sufficiently clarify that copyright infringement is a predicate offence under section 69A. The IIPA would therefore recommend that the relevant statute be amended to add copyright infringement as a predicate offense, which will expressly allow actions to disable infringing websites located outside India. In addition to adequate enforcement tools, accountability among advertising companies (which provide much of the revenue generated by piracy sites that are not subscriber-fee based, often through high paying advertising, but also by enabling even reputable brands to appear, often unknowingly, on the sites) 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 take action in the courts in 2015 to obtain orders to address the most egregious instances of online piracy. The Delhi and Bombay High Courts have issued orders to disable access to over 180 copyright infringing websites of audiovisual materials, through separate John Doe orders in 2015.<sup>7</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. Including broadcast copyright owners wishing to halt the unauthorized retransmission of sporting events, the courts in India have disabled access to over 900 sites. Still, since the courts in India move at a rather slow pace, cases almost never come before the courts. In 2014, the music industry also settled over 50 cases through plea bargaining.<sup>8</sup> A more efficient and effective approach would be to amend the IT Act to add a specific measure to disable access to primarily infringing sites. IIPA suggests that, in addition to any changes to strengthen the current legal framework,<sup>9</sup> the Indian Government should convene regular meetings between right holders and major ISPs, to foster more voluntary cooperative efforts.

**Unauthorized Camcording Remains a Severe Problem:** According to the Motion Picture Distributors' Association (MPDA) India, more than 90 percent of infringing copies of new release titles in India originate from illegal camcording at cinemas, appearing online within a few hours of a film's release. As MPDA India points out, "This affects the performance of the film, the distribution cycle and jobs."<sup>10</sup> After a slight decrease from 2013 to 2014 in detections of major U.S. motion pictures camcorded off theater screens in India, 2015 saw a sharper reduction of

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<sup>7</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.

<sup>8</sup>Cases remain pending against *songsdl.com* and *mp3don.com*, reported in IIPA's 2014 Special 301 report, available at <http://www.iipa.com/rbc/2014/2014SPEC301INDIA.PDF>.

<sup>9</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>10</sup>Content theft negatively impacts profitability, thus resulting in less investment capital: Uday Singh, IndianTelevision.com (May 18, 2015), available at <http://www.indiantelevision.com/regulators/people/content-theft-negatively-impacts-profitability-thus-resulting-in-less-investment-capital-uday-singh-150518>.



41%, with the number of forensic matches down to 19 in 2015 from 41 in 2014.<sup>11</sup> Of the camcords detected in 2015, thirteen involved incidents of video camcords from India and six were forensic matches of audio captures in India. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. The incidents of illicit camcording have now shifted to theaters in new locations, although Ghaziabad has been and continues to be a difficult territory due to the prevailing notorious crime syndicates operating there, despite sensitization of the police.

On July 18, 2015, law enforcement officials in Jabalpur in the state of Madhya Pradesh, with assistance from the motion picture industry, and the Andhra Pradesh Film Chamber of Commerce, carried out a successful enforcement operation that resulted in the arrest of a major camcord broker Priyank Pardeshi, operating by the name Team Telly in Pune, state of Maharashtra. The accused was allegedly responsible for camcording and distributing illegal copies of both Hollywood and local Indian content through his associates nationally and through his links to international criminal camcording syndicates. Unfortunately, despite this arrest and enforcement operations in 2013, the lack of specific anti-camcord legislation and enforcement resources from the local authorities means India will inevitably remain a hotbed of camcording for the near future.

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:** The government should expeditiously roll out the National IPR Policy with a focus on the recommendations of the copyright industries, and with a clear view of inter-state operations of organized crime units engaged in piracy to ensure effective protection of intellectual property rights — both at source and online. There is an urgent need for setting up a National Copyright Enforcement Task Force, and enforcement task forces at State levels, to work together in a coordinated, systematic and efficient manner. While there are some positive developments to report in the area of enforcement, on the whole, India's fractured judicial system is still not up to the task of maintaining rule of law against piracy over the country's rapidly expanding online space.

Indian authorities in the states continue to run thousands of raids per year, and industry investigators report improvements in cooperation with authorities in the past year. There are various state enforcement cells in the state police headquarters, and states have appointed nodal officers to handle IPR related offenses. 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. IIPA would like to see books, music, and video games covered under these laws (to the extent they are not already). Without coverage, book publishers, for example, must lodge formal complaints with the concerned Police Department and failing action by the Police, have to approach the local Magistrate under Section 200 of the Code of Criminal Procedure to obtain directions for the Police to conduct raids.

Increasingly, IP infringements online are tied to organized cybercrime activity and require an enforcement approach that recognizes this connection. Unfortunately, the lack of attention to cybercriminal activity, and 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.

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<sup>11</sup>In all, a total of 68 forensic matches of camcorded copies have been traced to Indian theaters between 2011 and 2015.

Both cybercrime officers and the centralized unit should receive training in IPR, online transactions, cybercrime, 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, this better coordination should produce better results in both civil claims (including 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:** Because criminal enforcement in India is a state matter, and there is no enforcement coordination or standard operating procedures at the national level, right holders face a wide divergence in the capability of enforcement officials and outcomes throughout the country. 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. At the same time, police do not take *ex officio* actions and currently no dedicated police or prosecutors are involved in taking effective action against copyright infringers. Difficulties can also arise when police refuse to take action, citing lack of available personnel. 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. Where arrests are made, it can take police up to a year to prepare the charge sheet and the related post-arrest investigations are often cursory. 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 high risk that targets receive leaked information about forthcoming raids. 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. Finally, defendants can often resume business within three days — and in some states within three to six hours — of the initial arrest, with computers returned immediately to the returned for the resumption of business. If and when charge sheets are finally presented in court, cases are routinely dismissed.

**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”) have developed credible jurisprudence in civil cases involving copyright infringement, and most positive civil relief measures and court orders emanate from these courts.<sup>12</sup> However, civil claims are dismissed frequently enough to deter right holders from initiating cases. The experience in other regions, where district courts are the courts of first instance for piracy issues, is even spottier. It can take up to 12 years for a case to proceed to conviction in the overburdened Indian court system, with endemic factors that prevent effective judicial enforcement of copyright, including: clogged dockets; problems and delays especially with respect to retaining electronic evidence, including a lack of familiarity with the related evidentiary requirements; and difficulty with ultimately enforcing civil court orders. Civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the right holder for the injury caused or to deter further infringing activity. Injunctions against rogue infringing websites are inconsistent and rarely successful given the complex, time-consuming, and expensive court procedures called for under the Copyright Act and the Information Technology Act.<sup>13</sup> 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\$293,985), was introduced into Parliament in December 2014, per the recommendation of the Delhi High Court.<sup>14</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>12</sup>Innovative approaches have included Anton Pillar 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, requiring the disclosure of passwords for IT resources, etc.

<sup>13</sup>ISPs in India are likely to comply with take-down requests only for a short time, if at all, taking the view that they are licensees of the Department of Telecom and as such will take instructions only from that authority.

<sup>14</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 or even convictions, fines remain low and non-deterrent, with most falling under INR 1500, which is equivalent to US\$22. 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.

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.

**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 remains 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. Over the last 18 months, New Delhi has become the primary source of counterfeit knockoff U.S. editions, with thousands of books flowing from India into the U.S. market. This phenomenon also 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 just as it has done with imports at the border. Doing so will send a positive signal to all publishers, including 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 to which India must adhere under the TRIPS Agreement and Berne Convention. The court judgment in this case is still awaited.

Subscription fraud also continues to significantly harm publishers. Subscription agents continue to place a significant quantity of fraudulent print subscription orders for peer-reviewed scientific, technical, and medical journals, causing significant harm to publishers. Specifically, subscription agents are retained by institutional customers (such as universities, government agencies, corporations, and hospitals) to place orders on their behalf with publishers.

Instead of ordering subscriptions at the applicable institutional customer rate, the agents are fraudulently ordering subscriptions at the deeply discounted individual rates intended for students, retirees, members of learned societies, and individual practitioners, for illegal resale to the institutional customers. This unlawful arbitrage, i.e. subscription fraud, deprives the publishers of significant revenues, and threatens the continued publication of important scientific, technical, and medical research. The Industry urges the Indian Government to work with the Federation of Publishers' & Booksellers' Associations in India to expel agent members that engage in subscription fraud, and to increase transparency on the orders placed by government agencies through subscription agents.

**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; loading of illicit 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 TPM 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). India's own creators are affected: for example, the hard goods market carries not only Hollywood titles, but also Bollywood, Hindi, Tollywood, and South Indian movie titles, and titles in other regional languages. In 2015, IIPA members noted the following physical marketplaces in India as "notorious" for the availability of illegal materials: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); Bara Bazaar (Kolkata); Chandini Chowk, Palika Bazaar, and Sarojini Nagar Market (New Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur 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 experience signal theft by cable operators and under-reportage of actual subscribers where digitization has been completed. Local cable operators often steal and redistribute content signals. The approximately 40,000 cable systems in India often transmit MPAA member company products and other audiovisual content without authorization. These cable systems seriously affect legitimate businesses in India, including theatrical, home video, and legitimate television. 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 proven to be a deterrent. However, the constant monitoring and initiation of new criminal prosecutions for copyright violation and contempt of court proceedings is a costly and time consuming process. Industry urges the Indian Government to work with the private sector to ensure that set top boxes locally manufactured, and those imported into India, have adequate TPMs. This can be achieved through regulations implementing the existing TPMs provisions of the Copyright Act. Unauthorized camcords of motion pictures feed into this form of piracy, since the unauthorized camcords are often retransmitted by these rogue cable or pay-TV systems.

**Circumvention Services Proliferate in India:** Circumvention services, and activities that enable users to gain unlawful access to or unlawfully copy (or otherwise utilize) copyright materials, are flourishing in India. 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**

Together with the implementation of a nationally-coordinated approach to copyright enforcement, addressing key deficiencies in India's copyright and related laws is crucial to improving U.S.-India trade, for both of our nations: the U.S. International Trade Commission found in December 2014 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."<sup>15</sup> IIPA's legislative concerns in 2015 largely reflect those cited in recent years, as detailed below.

**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>16</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 is not in conformity with the standards set out in WCT and WPPT. To fulfil the Indian Government's commitment to protect the IPR of all innovators and entrepreneurs, and to promote growth in the Indian music industry, the Indian Government is urged to accede to WCT and WPPT, and to review and update the existing law to ensure full compliance with the international treaties. In summary terms, further changes to the Act are needed to:

- Amend ownership and assignment provisions that are harming and altering commercial arrangements in India.<sup>17</sup>
- Remove the broad compulsory license for broadcasters under Section 31D of the amended Copyright Act which undermines record producers' exclusive broadcasting right under the existing law.<sup>18</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 WCT and the WPPT.<sup>19</sup>

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<sup>15</sup>USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at <http://www.usitc.gov/publications/332/pub4501.pdf>.

<sup>16</sup>The Indian Broadcasting Foundation (IBF), as well as individual broadcasters and members of IBF challenged the constitutional validity of Sections 17, 18, 19, 31, and 33 of the amended Copyright Act before the Bombay High Court. Music company "Super Cassettes Industries Ltd.," along with the sound recording society, Phonographic Performance Ltd. (PPL), challenged the constitutional validity of the new statutory licensing provision, Section 31D before the Calcutta High Court.

<sup>17</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 IIPA's 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>18</sup>Under the current Copyright Act, Section 14, record producers are granted exclusive broadcasting rights. However, Section 31D introduces a broad "compulsory license" for broadcasters, where permissions are not necessary for broadcasters to use works. Not only is this provision unwise as it relates to traditional broadcasting given the growing reliance on licensing access to music rather than selling products, but the current definition of broadcast under the existing law may be broadly interpreted to include transmissions that fall under the right of making available, for which no statutory license is permitted under international law. This "compulsory license" should be deleted and the exclusive nature of broadcasting rights should be maintained.

<sup>19</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.

- Ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS. 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 statutory provisions regarding online infringements to permit expeditious takedowns without automatic put-back, and address both hosted and non-hosted infringing activities and services, within and outside India.<sup>20</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. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of illicit camcording have been reduced in several markets with relatively minimal enforcement or government expenditure. As Parliament chose not to include anti-camcording provisions within its Copyright Act amendments, the Special Committee overseeing the review of this legislation agreed to address the issue in the Draft Cinematograph Bill of 2013, which is currently being reviewed by the Ministry of Information and Broadcasting.

**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>21</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.

**Cable Piracy Legislation:** Section 18 of the Cable Television Networks (Regulation) Act 1995 places an unnecessary burden on criminal procedures, by providing that no court can recognize any offense under the Act except upon a written complaint by an Authorized Officer. The provision is problematic because criminal procedure requires the personal presence of the complainant at all relevant hearings throughout the subsequent prosecution, and as a result the Authorized Officers are reluctant to become complainants.

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<sup>20</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.

<sup>21</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.

**Provide Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building:** IIPA recommends that India 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>22</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>23</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>24</sup> Subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) would be preferred.
- 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 GST, which could help resolve issues related to entertainment taxes and high tariffs on entertainment software. The tax, estimated to be around 18% or less, 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 2015. The following are some illustrative examples:

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<sup>22</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 it 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 it will relax price controls as the U.S. FCC did when the U.S. deregulated cable TV rates.

<sup>23</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>24</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.

- In 2015, the Motion Pictures Distributors' Association (MPDA), with the Telugu Film Chamber of Commerce (formerly APFCC) continued the training of multiplex staff through the *Be A Movie Cop Quiz* platform launched in 2014. The quiz is an online training initiative 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 cinemas.
- MPDA participated in sensitization programs for law enforcement in the cities of Lucknow, Pune, and Hyderabad, in addition to supporting a Judges Training program organized by the United States Patent and Trademark Office at the Judicial Academy in Bhopal.
- Between September 12-13, 2015, the Telugu Film industry and MPDA collaborated to launch an interactive campaign through *Comicornor* to raise awareness on the threats of online piracy at Comic Con, 2015 held in Hyderabad. More than 25,000 comic fans and enthusiasts attended the event.

The IMI has recently conducted 4 training programs in Chennai, Madurai, Kolkata and Silliguri respectively. These training programs were conducted for police officers who are empowered to conduct action for copyright infringement.



# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 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 2016.<sup>1</sup>

**Executive Summary:** Legal reforms in 2013, 2014 and 2015 established procedures, for the first time, for websites and hosts of infringing content to comply with takedown notices from rights holders. These reforms have yielded some progress and a more streamlined process, and have also resulted in some sites being blocked to users within Russia. However, while these reforms have improved enforcement against online piracy within the Russian market, the Russian legal regime continues to make it difficult for rights holders to address the problem of sites operating inside Russia that target an international audience. In this respect, Russia remains a substantial copyright piracy problem internationally.

To have truly effective digital enforcement, Russian agencies should significantly enhance their *ex officio* activities. Effective enforcement would include both criminal and administrative actions, and strengthening administrative penalties, particularly against large-scale enterprises. Such action would allow legitimate markets to develop for film, music, entertainment software, and published books and journals, for the benefit of local and foreign creators and producers, and Russian consumers.

The U.S. Government concurred with this assessment in its April 2015 Special 301 Report on Russia: “[c]opyright infringement is a persistent problem in Russia, including, but not limited to, online piracy” because “Russia remains home to many sites facilitating online piracy” which harms both Russian and foreign markets. The U.S. Government also noted that even though there were (first ever) criminal convictions in 2014 for online piracy, there are no deterrents to the dissemination of infringing content, because suspended sentences are the norm. Separately, the U.S. Government placed several Russian online sites on its “Notorious Markets” list in December 2015 because of widespread dissemination of infringing materials.

Four years ago, Russia completed its accession to the World Trade Organization, and agreed to a detailed Intellectual Property Rights (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.

To properly implement its treaty obligations, IIPA recommends that Russia, first and most importantly, improve digital enforcement, a problem pervasive for all of the copyright industries. Second, Russia should finally address the collective administration woes that have thwarted music rights holders’ attempts to effectively license their works in Russia. The music industry remains concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies (and supports the proposals of the Ministry of Communications to address these problems). Third, it is imperative to address the ongoing problem of camcording motion pictures, an illegal activity which, after a few years in decline, was up sharply in 2015. Correcting this problem will require both legal reforms and effective enforcement.

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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/2016SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2016**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2016:

- Undertake effective and deterrent actions against Internet piracy — including streaming services (such as *vKontakte*), pay-per-download websites, video game hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official video game 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.
- Promote the development of the digital marketplace. One important step would be for the government to clarify that Russia will reject any proposal to create a compulsory license for Internet transmissions in exchange for an Internet levy — such a proposal would violate international treaties and practice.
- Resolve the confusion surrounding the operation of collecting societies by confirming that rights holders have the legal and practical ability to determine how to exercise their rights (including whether to choose to entrust licensing to any collective, and if so to choose that entity, and to delineate the rights for such collections).
- Further amend the Civil Code, Part IV, to:
  - a) 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;
  - b) clarify the definition of the types of intermediaries entitled to the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits; and
  - c) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with rights holders in fighting infringement taking place over their networks or platforms (and to clarify that information intermediary services that facilitate the widespread dissemination of unauthorized content cannot benefit from the liability privileges in Article 1253 of the Civil Code).
- Amend the Civil Code in Article 1229, and the Presidium Decision (March 2009), to provide civil liability for commercial trafficking of circumvention devices. Current law limits liability to rare instances where the devices are advertised (solely) as circumvention devices.
- 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 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, focused on digital enforcement.
- Increase the overall effectiveness 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.

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

**Internet Piracy:** Internet and wireless access by Russian citizens has grown rapidly in the past few years. In 2010, it was estimated that 43% of individuals in Russia were using the Internet. In 2014, that figure grew to 70.5%, including 65.9 per hundred inhabitants having active mobile broadband subscriptions — according to the

International Telecommunications Union (ITU) (December 2015 Report). Unfortunately, and notwithstanding recent efforts, effective copyright enforcement of digital piracy has lagged far behind the rapid growth of Internet and wireless access in Russia, stifling the development of legitimate markets for copyrighted content.

Russia is the home to many of the most “notorious” large-scale infringing websites, including web-based (and peer-to-peer (P2P)) downloading sites, linking sites, and cyberlockers that offer access to pirated music, film, video game and book materials. Many of these sites cater to English-speaking (and other non-Russian) users, so they harm markets in many countries. The 2013 and 2014 antipiracy laws have had some impact with respect to BitTorrent sites, and caused some pirate sites, especially those hosting unauthorized motion pictures or television programs, to move their sites to foreign hosting locations.

But, there are many sites still hosted in Russia, including three that feature prominently on the U.S. Government’s Notorious Markets List.

The first is *vKontakte* (*vk.com*), the most popular online social network in Russia (with over 35 million visits per day and 80 million registered users), 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 19 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* (with 43 million visits per day, and also owned by *Mail.ru*) also operates an unlicensed music service similar to *vKontakte*’s service and includes unauthorized motion pictures and television programming. These two sites alone host more than half of the unauthorized motion picture and television material in Russia.

Russia hosts a number of major BitTorrent indexing sites which contain a wide variety of infringing copyrighted material, especially motion pictures and television programs. Other particularly problematic sites are: the cyberlocker *rapidgator.net*, which has been on the U.S. Government’s Notorious Markets list since 2012, and hosts over 500,000 infringing video game files;<sup>2</sup> *myegy.to*, a linking and streaming site with video game materials; *Torrent-Games.net*, a Russian BitTorrent tracker; *mygully.com*, a German-language forum site, hosted in Russia, with over 2.5 million registered users; *Kinozal.tv*, with over 370,000 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, members of the Entertainment Software Association (ESA) report that a few sites do comply with takedown notices (and the new laws have helped), while others never comply. To frustrate enforcement, some sites operate regionally, such as *games.net*, which is hosted in Russia but administered from Georgia (making takedowns especially problematic). In January 2016, the Moscow City Court ordered the permanent blocking of thirteen pirate websites including *Kinozal.tv* and *rutor.org*.

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 video game titles on public P2P networks. Russia is first in the world when it comes to the unauthorized file-sharing of video games on PCs with more than four times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2015, users with Russian IP addresses accounted for more than 32% of the global volume of detected infringements occurring on public P2P networks.

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<sup>2</sup> For the most recent report, see USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>. *Rapidgator.net* was ordered taken down in late 2015, but was retained on the Notorious Markets list in December 2015 because it is still operational.

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 P2P 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. Some of the unlicensed pay-per-download sites include: *Soundlike.com*, *Payplay.fm*, *Mp3million.com*, *MP3skull*, and *Goldenmp3.ru*.

Russia remains the home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet (as well as selling illegal hard copies). The total number of sourced camcord pirate copies from within Russia rose significantly in 2015, after several years of declines; there were 26 camcords sourced from Russia in 2015, most from Moscow and Tatarstan. 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 address properly camcording in Article 146 of the Criminal Code. An amendment was considered in the Duma in 2013, but stalled; the Government should also 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 scientific, technical and medical (STM) journal articles), particularly on hosted-content websites that are operated by Russian residents. 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 several such mirror sites (including *booksee.org* and *booksc.org*). A *libgen.org*-related, but rather specialized site, is *sci-hub.io* (formerly *sci-hub.org*).<sup>3</sup> *Sci-hub.io* enables unauthorized access to databases that host STM articles published by journal publishers. The “sci-hub model” however, is more pernicious than other online pirate sites, because it facilitates unauthorized access to publisher databases 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* and its related mirror sites. Other major Russian book piracy sites are *freebookspot.es* and *freebookspot.com*. In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to

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<sup>3</sup>*Sci-hub.org*, the Library Genesis Project (*Libgen*), and its operator, were sued in the Southern District of New York in 2015 (by an AAP member company) for copyright infringement (for the unauthorized reproduction and distribution of journal articles), and violations of the Computer Fraud and Abuse Act (for *sci-hub*'s intrusions into publisher databases). On October 30, 2015, the court granted the publishers a preliminary injunction against *Sci-hub*, the Library Genesis Project, a number of mirror sites and its operators. The injunction prohibits the defendants from distributing plaintiff's copyrighted works, and also ordered the TLD registries for the defendants' websites to place the subject domains on registryHold/serverHold. The site then resurfaced under the *sci-hub.io* domain.

infringing content, with many sites ignoring requests altogether. P2P piracy providing free unauthorized access to e-books continues to be an issue as well.

**Enforcement Against Internet Piracy:** 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 not fully implemented any of these obligations.

For criminal cases, all of the agencies that can commence a case, including the Investigative Committee of Russia, the Investigative Department of the Ministry of Internal Affairs (MVD), the Federal Security Service of the Russian Federation (FSB), and Customs, should coordinate their efforts with 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 digital 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. IIPA continues to recommend that there should be a dedicated digital IPR enforcement unit within the Government of Russia to focus on this problem. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal P2P 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 no Department K staff are 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 (there are currently fewer than 10 staff), 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, even 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. The relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) need to 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. 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. There were only three criminal cases initiated against pirate Internet sites in 2015 (two are still pending, and one concluded with a one-year suspended sentence). One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (i.e., coming up with a unified formulation), so few such cases are ever brought and even fewer tried to a conclusion.

Civil judicial remedies have improved in the past two years. In November 2014, a new law was enacted (Federal Law No. 364), in force May 1, 2015, to expand the 2013 law that provided procedures for complying with takedown notices directed at websites and hosting activities. The 2013 law had been limited in its application to motion pictures and television programs. The 2014 amendment expanded the 2013 law to cover all copyright subject matter, excepting photographs, and allows for website blocking in the event of repeat infringement. RosKomNadzor, the Federal Service for Communications, the agency responsible for enforcement of these laws, has been effective and cooperative in implementing this law, along with the Moscow City Court. In October, the court ordered the permanent shut down of eleven Russian websites (including *rutor.org*) with infringing content, in response to a complaint filed by a Russian music label. As of October 2015, 280 preliminary injunctions were granted by the Moscow City Court against infringing sites, including several orders to block websites.

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 authorize judicial injunctions (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.

There have been some successful civil, but not criminal actions, including notable petitions by American film producers to get court-ordered blocking of infringing websites of films using the new (2013 and 2014) laws. For example, in August 2015, the Moscow municipal court blocked 16 websites for illegally distributing one American film, and in October 2015 other sites were blocked for the same reason for a different film. In addition, the same Moscow court permanently blocked access to *rutor.org*, the BitTorrent tracker and 10 other websites with unauthorized content. In September 2015, *vKontakte* was ordered by the St. Petersburg Regional Arbitration Court to use filtering technology to prevent infringement of unauthorized sound recordings by two record labels. This was the result of civil infringement suits brought by the labels in the Russian court in April 2014. In another lawsuit in October 2015, brought by a Russian record label, *vKontakte* was ordered to pay damages of 750,000 rubles (approximately US\$9,616) for 10 infringing songs. In a similar suit by another Russian record label, *vKontakte* was ordered to pay 600,000 rubles (approximately US\$7,687) for unauthorized uploading of musical recordings. These successful civil actions ironically demonstrate the inadequacies of the present legal structure, with limited injunctions and non-deterrent damages. For example, even after the October 2015 suit, *vKontakte* issued a statement praising the court for limiting damages as a result of *vKontakte*’s “intermediary” status in infringing conduct, even though it is blatantly offering thousands of unauthorized recordings through its service and has induced infringement by its users. So, while civil actions are a positive step, without criminal or administrative enforcement of the principals involved in running these lucrative illegal sites, or other deterrents, the civil laws alone will not significantly change the landscape for legal markets to develop in Russia.

The motion picture industry reports that in 2015, 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. The others either merely forwarded notices to users without taking down material, or did not respond at all. Efforts by the Ministry of Economic Development to develop more comprehensive notice and takedown procedures between rights holders and ISPs were not successful, even though a Memorandum of Understanding was signed with some of the ISPs, RAPO and the Government of Russia (RosKomNadzor) in 2013. Overall, although some ISPs cooperate and take

down infringing materials once identified, most ISPs are not willing to cooperate, even with clear evidence of infringement, and there has been no cooperation with advertising agencies and payment processors who financially support infringing sites. Despite these shortcomings, the motion picture industry reports that the number of users in Russia accessing legal content has increased to 18 million people, more than one and half times the number that did so in 2012.

**Criminal Enforcement in General:** Criminal enforcement in Russia is a priority for some of the IIPA members to deter digital, and hard copy, piracy. Russia's laws are generally adequate for addressing hard copy piracy although some gaps remain. As in years past, much of the criminal enforcement by the government in 2015 was aimed at physical piracy, but that form of piracy is declining as the marketplace moves online. For the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined significantly, and especially against large-scale online infringers. The decline in police activity in general is the lingering result of the 2011 major reorganization of the police force and the consequent drop in resources, as well as changes in government priorities and an unwillingness to take action against large-scale online infringers and a focus on hard copy piracy (which is naturally diminishing), rather than on digital piracy. 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 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. The Entertainment Software Association (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) Article 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 2015.

**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. There remain 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. 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, US\$20 to US\$26), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$130 to US\$260), and on legal entities themselves (30,000 to 40,000 rubles, US\$391 to US\$521), 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 lack of transparency and good governance in the collecting societies remain a major concern for authors, 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 and that there are no conflicts of interest in the governance structures, in accordance with commitments that it made to the U.S. Government and other trading partners who had expressed concern with the accreditation process. IIPA urges the government to introduce legislation increasing the accountability and transparency of collecting societies (and IIPA supports the proposals of the Ministry of Communications to achieve those goals).

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 U.S. Government WTO Report (2014) 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.” There has been no progress on this issue since that action. To develop properly functioning music broadcasting and streaming services (including proper public performance collections), 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**

Russia made progress on legal reforms as part of its WTO accession. The Civil Code, Part IV revisions, and the 2013, 2014 and 2015 amendments, for example, made some improvements, but left many gaps with either incomplete or inadequate reforms, especially with regard to effective Internet enforcement and full implementation of the digital treaties.

IIPA and its members have in the past commented on three major overarching concerns in the Civil Code, as amended: (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. Even after the 2013, 2014 and 2015 amendments, the law 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 that is quick and effective, 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 Civil Code (and some of the related laws), see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138.

Article 1229 of the Civil Code provides a cause of action against importers of technological protection measures (TPM) circumvention devices, but there is an overly burdensome procedure to identify the importer (and include details of any seizure) that needs simplification and improvement. In addition, 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, IIPA continues 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: in January 2015, a law went in to force that bans advertisements on pay cable and satellite channels. While the 2015 law does not appear to affect 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.

In 2014, the Government of Russia considered adopting an Internet tax that would have been 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. The proposal has, for now, been put on hold. It should not be allowed to move forward. Supporters of the proposal suggested it would “improve” the digital marketplace, but copyright creators and producers remain very concerned that such a levy would fail to generate fair or meaningful compensation for the use of their copyrighted material, and would instead distort the competitive environment for services that could expand the legitimate digital marketplace. In short, the proposal would have created a compulsory license for the distribution of copyright protected materials in violation of the requirements of TRIPS and the WIPO treaties. It would not, as some suggested, have provided a solution to the current market failure, but instead would have locked-in market failure, in perpetuity, eroding any basis for establishing conditions for healthy and legal competition. Instead of this proposal, the Government of Russia should 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.

Last, in 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, 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)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Priority Watch List in 2016.<sup>1</sup>

**Executive Summary:** The Royal Thai Government took a positive step in 2015 by enacting long-awaited copyright law amendments, which included an anti-camcording provision as well as measures that potentially could provide an effective remedy against online piracy. Although the legislation on its face may have shortfalls in its copyright protection framework, much will depend on how the law is implemented. It is critical for the Royal Thai Government to begin to effectively address its longstanding piracy problem in order to protect and nurture the Kingdom's fragile ecosystem for legitimate copyright works. Online and mobile piracy continue to proliferate, and are the most significant hindrance to the growth of legitimate digital platforms in Thailand. Physical piracy (mostly in malls and tourist areas) remains harmful, particularly because Thailand is one of the few remaining markets in Asia in which physical sales of legitimate works provide substantial revenues. Unauthorized camcording of films (especially audio feeds) and the chaotic panoply of music collecting societies continue to harm the market and need to be addressed.

IIPA is hopeful that the Royal Thai Government is beginning to recognize the seriousness of its growing online piracy problem and will explore creative and effective approaches to meet the challenge. For example, the copyright law amendments may afford the government a remedy to disable access to primarily infringing websites regardless of their server location. Other actions the government should take include: initiating upstream investigations that target the criminal organizations at the root of much of the piracy; eliminating irregularities in enforcement; and ensuring courts impose deterrent penalties against infringers.

IIPA urges Thailand to address deficiencies in the copyright law amendments through robust implementation and through further amendments. In particular, Thailand must ensure that the process for "notice and takedown" does not require a court order. Thailand should also ensure it adequately protects against the circumvention of technological protection measures (TPMs) and that it adequately protects rights management information (RMIs) in order to accede to and ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

## **PRIORITY ACTIONS REQUESTED IN 2016**

### **Enforcement**

- Ensure the amendments to the Copyright Act are implemented consistent with their intent to effectively address online infringement, including by ensuring an efficient and effective notice-and-takedown process that does not require a court order, and by disabling access to primarily infringing websites whether located inside or outside of (but targeting) Thailand.
- Work with the Electronic Transactions Development Agency (ETDA) to develop legislation to disable access to primarily infringing websites.
- Encourage the Department of Intellectual Property (DIP) to promote and 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.

<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/2016SPEC301HISTORICALCHART.pdf>.



- The National IPR Center for Enforcement (NICE) should initiate more investigations against Internet and mobile piracy, focusing on upstream criminal enterprises.
- Continue trainings for enforcement authorities on online piracy, including digital forensic and/or electronic evidence gathering particular to copyright infringement.
- Address camcording instances through enforcement of the new law and enhanced efforts of cinema owners.
- Use the Money Laundering Prevention and Suppression Act 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.

### **Legislative**

- Include intellectual property crimes as a predicate act under the Computer Crimes Act to create a more effective remedy against online infringement (previously provided in Section 20 of draft amendments to the Act).
- Make changes to Copyright Act amendments, 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 that both the TPM and RMI provisions 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 the exception for the 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) at least 70 years from publication.
  - Manage the collection activities of the multitude of collective management organizations currently active in the market.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.
- The Department of Intellectual Property (DIP) should formally publish a statement to the public clarifying that a public performance license is required.

### **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.
- Ease television advertising restrictions.

## 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>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2015. Right holders continued good cooperation with willing Royal Thai authorities, who assisted with rights protection, and offered and participated in many trainings and IP-related events throughout the year.<sup>3</sup>

**Internet and Mobile Piracy Continues to Proliferate:** 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.<sup>4</sup> Over 39 million people use fixed Internet in Thailand, and the mobile penetration rate is well over 100%, with over 83 million mobile subscriptions.<sup>5</sup> Illustrating the explosive growth of mobile Internet access, in 2014 nearly 80 percent of Thailand's population had mobile broadband subscriptions, up from zero percent just 4 years earlier.<sup>6</sup>

Notwithstanding the increasing availability of legitimate services for music and audiovisual materials, most Thai users choose to visit piracy sites, and increasingly, engage in mobile piracy of music, motion pictures and television content, video games, published materials, and all kinds of broadcasts. Services include streaming sites, which are 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. Free programs that allow users to download infringing content from YouTube are an increasing source of piracy. These include ssYouTube, YouTube Downloader YYTD, Keepvid, Clipconverter.cc, and Videograbby.com, as well as mobile apps such as Video Downloader Lite Super – Vdownload on iOS and TubeMateYoutube Downloader on Android. Due to the rise of this form of piracy, the popularity of peer-to-peer (P2P) networks, including BitTorrent, have declined. However, Internet Protocol Television (IP TV) has become a platform for increasing digital piracy.<sup>7</sup> Motion picture industry investigators have reported many piracy websites among the top 500 most accessed sites in Thailand, according to Alexa rankings. These sites specifically target Thai Internet users, and include Thai as well as foreign motion picture and television content. These include *movie2free.com* (the 40<sup>th</sup> most accessed site in Thailand), *4shared* (81<sup>st</sup>), *kickass.so*, *mastermovie-hd.com* (63<sup>rd</sup>), *nungmovies-hd.com* (76<sup>th</sup>), *seriesubthai.co* (107<sup>th</sup>), *037hd.com* (126<sup>th</sup>), *siambit.tv* (132<sup>nd</sup>), *dedbit.com* (135<sup>th</sup>), *tt-torrent.com* (160<sup>th</sup>), *newmovie-hd.com* (185<sup>th</sup>), *3.mampost.com* (286<sup>th</sup>), *subthaiseries.com* (301<sup>st</sup>), *jpplaybox.tv* (352<sup>nd</sup>), *series24hr.com* (385<sup>th</sup>), and *donang-hd.com* (476<sup>th</sup>). 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. This rampant piracy has taken its toll on the market for legitimate creative content.<sup>8</sup>

It is critical that Thai authorities implement the new Copyright Act amendments consistent with their intent to effectively address online infringement, including by ensuring efficient and effective notice and takedown procedures that do not require a court order. In the meantime, right holders have been left largely to rely on the good faith cooperation of ISPs. Takedown rates for hosted content remain relatively high (the music industry reports over 90%

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<sup>2</sup>See, e.g., IIPA, *Thailand*, 2015 Special 301 Report, February 7, 2015, at <http://www.iipa.com/rbc/2015/2015SPEC301THAILAND.pdf>.

<sup>3</sup>For example, the music industry association TECA participated in numerous public awareness campaigns in an effort to counter confusion relating to the new amendments to the Copyright Act. The movie industry also participated in public awareness events and trainings, including a cyber training course for officials in the DIP in Bangkok and 17 anti-camcording trainings for 544 theater managers and staff, among other activities.

<sup>4</sup>Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

<sup>5</sup>Mobile and Internet statistics are available through The National Broadcasting and Telecommunications Commission, at <http://www.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.

<sup>6</sup>See Measuring the Information Society Report 2015, International Telecommunications Union p. 224.

<sup>7</sup>IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed either using BitTorrent while collecting a monthly fee from subscribers, or through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace.

<sup>8</sup>For example, in the music market total revenues in Thailand decreased nearly 22% from 2013 to 2014, including a 20% decrease in digital sales.

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.

IIPA is encouraged by reports that government action is being considered to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. It is hoped that test cases will confirm that the newly-amended Copyright Act provides a remedy to disable access to websites that primarily infringe. Other avenues for Thailand to more effectively address online infringement include to amend the Computer Crimes Act to cover IP crimes, as discussed below; and for ETDA to develop legislation to authorize disabling access to primarily infringing websites. In addition, DIP should facilitate discussions between right holders and ISPs for voluntary arrangements to address hosted, non-hosted, and foreign piracy sites and services. In 2015, DIP organized a seminar for ISPs and right holders focused on improving cooperation, and right holders have had some positive follow up discussions with DIP and the IP&IT Court. More dialogue will be helpful, on a more regular basis and with additional stakeholders such as ad placement agencies (i.e., DAAT) and payment processors.

NICE should proactively spearhead more investigations, including into upstream criminal organizations.<sup>9</sup> NICE should also encourage improved standards in investigations for computer forensics and electronic evidence gathering so that investigations are not bogged down simply waiting for court orders for digital forensics request from third parties such as ISPs or payment processors. Further training and education for law enforcement authorities in these areas would also be welcome.

**Retail and Hard Goods Piracy Still Prevalent:** Physical piracy has decreased year-on-year mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy harms local and foreign creators alike. Such 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 Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.<sup>10</sup> The Royal Thai Government has itself designated many of these markets “Red Zones” and “Yellow Zones” to indicate that it views these markets 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.

To address hard goods piracy, industry reports that Royal Thai Government authorities continued conducting raids in 2015.<sup>11</sup> Unfortunately, these raids are generally not followed by upstream investigations to target the criminal organizations at the root of this piracy. 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 not included in the amendments to the Copyright Act), criminal action can be brought against mall owners; however, we are unaware of any actions to date.

**Media Box/Set-Top Box (STB) Piracy:** Media boxes or set-top boxes (STBs) are proliferating throughout Asia. These STBs have multiple purposes, including facilitating access to unauthorized content (through the circumvention of TPMs) from the Internet and converting to signals playable on TVs or computer monitors, or filling digital drives with hundreds of movies and other content. STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. They often come preloaded with infringing content or with instructions on how to download infringing materials. The boxes are either pre-installed with apps that facilitate infringement or users are easily able to obtain apps to access unauthorized motion picture and television content.

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<sup>9</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>10</sup>Many of these markets are notorious for availability of pirated materials and were identified as Notorious Markets by the MPAA. See MPAA *Written Submission Re: Request for public comment on the 2015 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2015-2016 October 5, 2015.

<sup>11</sup>The music industry group TECA reports 43 total raids in 2015, resulting in 21 arrests and 21 indictments.

These apps allow the user to connect to a supporting over-the-top (OTT) online infrastructure, including foreign piracy sites (usually hosted in mainland China), that provide users with instant access to infringing audiovisual content. These boxes sell at low prices at the malls, and although the boxes themselves may be advertised for legitimate purposes, they are frequently used or modified for use to infringe copyright. Consequently, Royal Thai authorities must ensure those who traffic in these boxes or provide services related to them are held appropriately liable for this infringement.

**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 2015. Audio forensic matches continued to rise in 2015, suggesting that camcording remains prevalent in the country, driven mainly by the need for English audio to “marry” with video “cams” from other markets, and by the ease with which audio cams can occur without detection or forensic tracing. In 2015, there were 12 instances of unauthorized camcording of major U.S. motion pictures detected, with 11 being audio only and 1 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. If strongly implemented, the Copyright Act amendment, which deems camcording an infringement of copyright, could help.<sup>12</sup> There was one interdiction and arrest for unauthorized camcording in 2014, but no arrests in 2015.

**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. A number of publishers have been pursuing a case against a known producer and exporter of counterfeit/pirate books for over 4 years. But the case has been bogged down by drawn out mandatory mediation sessions (often used by the defendant to further delay proceedings) and now protracted delays in court. Such delays, endemic to the system, underscore the lack of effective remedies against producers of counterfeit and pirated works.

**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.<sup>13</sup> Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>14</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

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<sup>12</sup>Unfortunately, as set forth below, the amendment is not as helpful as it could have been because it requires a link between the camcording act and a copyright infringement instead of establishing a “time-and-place” violation as all other countries adopting laws in this area have done.

<sup>13</sup>These unauthorized channels are well known to the government and also harm the local pay television industry; thus, there should be sufficient incentive to act against these illegal operators.

<sup>14</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.

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 are no longer 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 bear all the burdens of proof, from copyright ownership to losses and damages, which is extremely burdensome, especially since damages awarded in civil cases are so low. Provisional measures are very costly and require evidence that is overly burdensome to produce.<sup>15</sup> Also, because upstream investigations are rare, most 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. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement

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 tool, and use it to build key cases involving copyright infringement.

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

**Deficient Copyright Act Amendments Entered Into Force:** Amendments to the Copyright Act, B.E. 2558 (2015), fully entered into force in August 2015. 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) and protections for rights management information (RMI), key obligations of the WCT and WPPT, which Thailand has not yet acceded to or ratified; 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 may be 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 although the Royal Thai Government indicated it would study 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 implementation, or in technical amendments to ensure that the amendments achieve their stated purpose to modernize the law,<sup>16</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 of the amended Copyright Act requires service providers subject to a court order to stop infringing acts or to remove infringing works. This approach to addressing online infringements could permit a remedy against non-hosted websites if a court were to order an ISP to stop infringing acts, which could be executed through disabling access to infringing content. To date, however, the

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<sup>15</sup>Section 65 of the Thai Copyright Law states, “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.

<sup>16</sup>We also note the drafters had discussed repealing Section 66 of the Copyright Act to ensure that copyright offenses are non-compoundable. The Royal Thai Government should take this step.



law has provided little more than court-ordered notice-and-takedown (if that).<sup>17</sup> Helpfully, 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. Nonetheless, 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 remove infringing works or stop infringement upon a right holder obtaining a court order, and the evidentiary burden for right holders has proven to be substantial in the first test cases.<sup>18</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 expressed concern in last year’s filing that voluntary cooperation from ISPs regarding takedown of infringing content in Thailand would cease as these amendments were implemented, and that appears to be happening.<sup>19</sup> Notwithstanding these shortcomings, additional cases are moving forward under this provision, and if those result in disabling access to infringing content, the remedy under Section 32/3 could be workable. At a November 2015 seminar, DIP indicated that Section 32/3 is not merely a notice-and-take down provision, but that it can in fact be used to disable access to infringing websites. On the other hand, a case brought by the movie industry based on Section 32/3 resulted in an order to block the infringing content, but the ISP failed to execute the order and there was no follow up enforcement. Thus, there may be practical challenges in enforcing orders to disable access to infringing sites. IIPA urges Thailand to ensure this provision is implemented effectively. In any case, technical amendments could help to ensure an effective process 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. Accordingly, 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 obligations 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.” Technical amendments are needed to add the phrase “or may result in unauthorized access to a work or object of related rights”. Otherwise, the intention of the drafters to cover access controls in the definition in Section 3 is for naught.
  - **Trafficking:** Second, Section 53/4 of the amendments appears to cover only the act of circumvention (“avoidance”) of TPMs, and does not explicitly outlaw trafficking in circumvention devices, technologies, and components.<sup>20</sup> The trafficking offense should be confirmed in implementing regulations, through adopting a sufficiently broad definition of “avoidance”; otherwise, technical amendments should be passed to ensure trafficking is covered. Coverage of trafficking violations is found in U.S. law and

<sup>17</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, which usually means copyright owners monitor infringement and notify ISPs, and ISPs in turn remove (or remove 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 liability for contributory infringement, but litigation against ISPs usually occurs only if cooperation is refused.

<sup>18</sup>For example, copyright owners must present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, and 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. Industry is already finding this evidentiary requirement too burdensome. The movie industry reports difficulties in seeking a court order for ISPs to take down infringing content, with one request granted and two requests denied for insufficient evidence. Unfortunately, some ISPs subject to the granted order have not complied because they claim the infringing content is not hosted on their system. As noted above, it is critical for Thailand to ensure that the process for obtaining court orders for ISPs to remove infringing content is efficient and effective.

<sup>19</sup>Indeed, there are indications that this is already happening. As noted, above, the movie industry reports that some ISPs are refusing to comply with a court order to take down infringing content. Thailand must take steps to ensure there is cooperation between right holders and ISPs. DIP’s recent efforts to initiate a stakeholder dialogue to encourage cooperation is a good start, but more must be done.

<sup>20</sup>Preferably, this 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.

is necessary for “adequate” and “effective” measures to protect TPMs, which is required by the WCT and WPPT.

- **Exceptions:** Some of the enumerated exceptions in Section 53/5 may be acceptably narrow, but others must be eliminated or reworked 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 undermines needed protections, especially for access controls. The exception in Section 53/5(7) also risks undermining necessary protections because it appears to allow circumvention by educational, archival, library, or public broadcasting entities in fairly broad circumstances.
- **The Exception for Rights Management Information (“RMI”) Should Be Narrowed:** The exceptions to the protections for RMIs appear to be extremely overbroad, which risks undermining important protections for right holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties.<sup>21</sup> IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.<sup>22</sup>
- **Camcording Bill Could Provide Relief If Properly Implemented:** The amendments intended to outlaw unauthorized camcording of motion pictures in Thailand 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 to provide an avenue to eradicate all acts of reproduction or transmission (or attempts at the same) of all or part of a movie, whether audio or video, or both. Preferably, implementing regulations will ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited. 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 penalties.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. 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.<sup>23</sup>
- **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 needs further scrutiny, 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

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<sup>21</sup>Section 53/3(2) allows deletion or modification to the RMIs by any educational institutes, archives, libraries or public sound and video broadcasting organizations with no profit-taking purpose. Section 53/3(3) further allows communication to the public of works in which the RMI is deleted and modified under section 53/3(2).

<sup>22</sup>The IIPA understands that the DIP is now in the process of drafting a Ministerial Regulation to further clarify the exceptions for RMI infringement under Sections 53/3(2) and (3).

<sup>23</sup>IIPA understands that DIP is in the process of setting up a Working Group to review previously drafted legislation amending the Copyright Law to address this issue.

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> A test case under the existing law would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, which is necessary to crack down on piracy in the malls.

- **Inadequate Term of Protection:** Regrettably, the amendments also failed to extend Thailand’s term of protection in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years.

**Computer Crime Act:** Draft amendments to the Computer Crime Act B.E. 2550 (2007) now sit with the Ministry of Information and Communication Technology (ICT Ministry). The draft initially included IP infringements as a predicate crime in Section 20, but that section was removed. Right holders have urged members of National Legislative Assembly (NLA) and the Prime Minister to re-introduce this IP provision into the draft before passage.

**Evidence Law:** IIPA recommends that the Royal Thai Government 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 and has been interpreted at times to allow wholesale copying of academic materials.<sup>25</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.

**Clarify that a license is required for public performances:** In early 2015, as a result of two Thai Supreme Court judgments from 2010, widespread rumors spread in Thailand that the public performance of recorded music is not subject to the payment of royalties.<sup>26</sup> The Thai Government is urged to publish an official statement clarifying that the public performance of sound recordings is subject to a license and the payment of royalties.

## **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

<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>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.

<sup>26</sup>In the two cases that resulted in the Supreme Court judgments, charges were apparently brought under provisions of law that were inapplicable, which led to findings of non-infringement.

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, 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 long time frame (15 days) for obtaining ratings or censorship approval, allowing pirates (who do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, 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 onerous requirement that the relevant rating or censorship code must be "fixed" onto the container of films or audiovisual products and on the packages, and that right holders "embed" the code into the content of films and audiovisual products to appear 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 is it 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 in parallel with the Copyright Law to curb piracy in street stalls, shopping malls, complexes, and Internet cafés.

**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.

**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 undermines the economic viability of licensing of content for broadcast, and should be lifted.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2016.<sup>1</sup>

**Executive Summary:** IIPA's recommendation again this year to elevate Vietnam to the Priority Watch List reflects the growing unrealized potential of Vietnam's market for legitimate creative goods and services, the ineffective response by Vietnam's government to address its enormous piracy challenges, and Vietnam's market access barriers. Vietnam's government has indicated that it recognizes the "sophisticated" nature of its piracy problem and has shown a willingness to begin to address it, including recent administrative enforcement actions against Internet piracy sites; but actions taken thus far have been inadequate. Vietnam must take more effective enforcement actions, including issuing deterrent administrative penalties against infringers and initiating criminal prosecutions. Vietnam's piracy problems would also be reduced if the country removed its highly restrictive market access barriers, which limit Vietnamese consumers' access to legitimate content. The conclusion of the Trans-Pacific Partnership (TPP) negotiations and the upcoming implementation process represent critical opportunities for Vietnam to eliminate these discriminatory barriers, and to bring its copyright law and enforcement regime into alignment with evolving global norms.

### PRIORITY ACTIONS REQUESTED IN 2016

#### **Enforcement:**

- Take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report.
- Have the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate and Ministry of Public Security (MPS) IPR/High-Tech Police run more raids, issue deterrent administrative penalties, and bring 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, and to prepare for TPP implementation.
- 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/2016SPEC301HISTORICALCHART.pdf>.



- Extend term of protection in line with the international trend and consistent with the TPP, to 70 years after the death of the author, or when term is calculated based on publication, at least 75 years (or 100 years from fixation) as provided for in the BTA.
- Amend the Criminal Procedure Code so as to permit *ex officio* criminal actions.
- Clarify that Decree No. 85 measures imposing onerous collective management restrictions do not apply to foreign collective management organizations (CMOs) or to the administration of foreign rights.
- Adopt legislation providing for criminal procedures to deter unauthorized camcording in movie theaters.

## 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>2</sup>

The Vietnamese Government has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”<sup>3</sup> Yet, thus far, Vietnam’s actions to combat piracy, including actions taken pursuant to a 2012 Ministry of Information and Communications (MIC) and Ministry of Culture, MCST Joint Circular<sup>4</sup>, have been inadequate to address its piracy challenges, including those identified below.

**Internet and Mobile Markets Face Opportunities, Challenges in Vietnam:** With over 48% of the population using the Internet as of 2014, and 31% having a mobile broadband subscription (up from less than 8% just 4 years earlier), Vietnam offers enormous new opportunities for legitimate services for creative content. And, indeed, a growing number of licensed Internet content providers are taking advantage of these opportunities, including 24H (*nhac.vui.vn*), NCT (*nhaccuatui.com*), Viettel Media (*keeng.vn* and *imuzik.com.vn*), iTunes, and Deezer. Mobile applications like Pops TV are also pioneering the availability of music and audiovisual content, using iTunes, Amazon MP3, Android, Windows Phone, and Samsung Smart TV vehicles for distribution of content, including local Vietnamese content.

As these opportunities increase, however, Vietnam faces the mounting challenge of combating online and mobile network piracy, including via streaming and download sites, peer-to-peer (P2P) networks, linking sites, video streaming sites, search engines, cyberlockers, and social networks. One example is the site *chacha.vn* (7th most accessed site in Vietnam), which makes available a significant amount of infringing music, including both Vietnamese and popular foreign music.<sup>5</sup> Another popular music site in Vietnam, *chiasenhac.com*, allows users to stream unlicensed Vietnamese and international music.<sup>6</sup> *Zing.vn* provides access to unlicensed music for download and streaming.<sup>7</sup> Sites such as *nghenhac.in* (and related sites), *phimmoi.net* (38th most accessed site in Vietnam), *hdonline.vn* (80th), *phim14.net* (128th), *phim3s.net* (107th), *xemphim.com* (and related sites), *socbay.com* (and

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

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

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

<sup>5</sup>*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). 3505 takedown notices were sent to the site in 2015, which included 2652 infringing files. While the site does remove content of which it has been notified, it takes an excessive amount of time, and notwithstanding its active engagement with, and organization of, infringing content, it does not employ any measures to address infringement. Its business model is dependent upon providing access to infringing content.

<sup>6</sup>*Ciasenhac.com* which has an Alexa ranking of 205 and receives 3,400,000 monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC.

<sup>7</sup>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.

related mobile app), *HDViet.com* (136<sup>th</sup>),<sup>8</sup> *phim22.com*, *tamtv.vn* (718<sup>th</sup>), *viettorrent.vn* (423<sup>rd</sup>), and cyberlockers like *fshare.vn* (97<sup>th</sup>), and *4share.vn* (351<sup>st</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. In addition, a couple of notorious infringing sites that primarily target the global market, *putlocker.is* and *itemvn.com*, are operated in Vietnam.<sup>9</sup> Most of these sites generate revenue through advertisements or paid premium subscriptions. The harm caused from online piracy is significant and makes it difficult 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, because new movies are frequently available online while they are still in their theatrical run.

Vietnam has taken some important steps in its enforcement against online piracy over the past few years, demonstrating a willingness to cooperate with right holders in enforcement actions and training and capacity building.<sup>10</sup> Unfortunately, industry notes the process of addressing infringements is cumbersome and is done on a case-by-case basis; thus, many offending rogue sites remain in operation and are growing in popularity. For example, the movie industry reports that the site *hayhaytv* removed infringing motion picture and television content in 2015 as a result of administrative sanctions issued by MIC; however, the site was not in fact shut down and currently shows unauthorized movie trailers. Vietnamese authorities including the MIC Inspectorate (which indicates it is authorized under *Decree 131* to address online infringement), MCST, and MPS, are currently being asked to take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content, employing the remedies set out in the MIC/MCST Joint Circular (JC), including bringing criminal prosecutions.<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 that are under MIC licenses.

Perhaps due to increased effort from government authorities, the level of cooperation with service providers improved incrementally in 2015. The music industry, for example, reports an improved takedown rate from 82% in 2014 to 85% in 2015. However, more must be done to effectively address Vietnam's online piracy problem. The absence of a more effective means of encouraging responsible practices, including by taking enforcement actions against sites that knowingly distribute infringing music, or whose business practices are based on the distribution of infringing music and which therefore promote infringement, has left the online music market in disarray and dominated by piracy. The situation for motion picture companies is difficult. 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

<sup>8</sup>This site has the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications."

<sup>9</sup>The movie industry noted *putlocker.is* in its submission to the U.S. Trade Representative (USTR) in advance of its 2015 out-of-cycle review of "notorious markets". USTR recognized *putlocker.is*, one of a number of notorious sites hosted in Switzerland, in its 2015 list, noting that its operator is located in Vietnam. The recording industry noted *itemvn.com*, an unlicensed music service entirely in English that is operated in Vietnam, in its 2015 notorious markets submission to USTR.

<sup>10</sup>For example, in 2014, reportedly, two infringing mobile applications were shut down and administrative penalties were imposed on the developers/operators. In April 2013, MCST reportedly took administrative actions against three notorious piracy services, *phim47.com*; *v1vn.com*; and *pub.vn*, but two are back up and running (only *v1vn.com* is down) and are still providing access to infringing major motion pictures on the sites. Additionally, in September 2013, the Motion Picture Association referred another nine sites, four of which (*phimvang.com*, *vuighe.net*, *hayghe.com*, and *xemphim.tv*) are still up and providing access to infringing major motion pictures. The full list of sites sent to MCST for administrative referral includes: *phim47.com*; *v1vn.com*; *pub.vn* (now *pubvn.tv*), *phimvang.com*; *vuighe.net*; *coiphim.vn*; *maxphim.net*; *rapphim.vn*; *hayghe.com*; *phimphim.com*; *vtube.com*; and *xemphim.tv*.

<sup>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."

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.

**Ex Officio Enforcement Needed Against Hard Goods and STB Piracy:** Although hard goods piracy has decreased in Vietnam, largely due to the onslaught of online and mobile network piracy, and is not as commercially devastating as online piracy, traditional CD/DVD piracy (e.g., high-quality counterfeits from China as well as home-made pirated optical discs) remains a real threat. In addition, set-top box (STB)/media box piracy is also growing in Vietnam as it is elsewhere in the region. STBs are used in conjunction with apps that permit users to access unauthorized content over-the-top (OTT) and/or through piracy web services. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions, and has done nothing to stop STB piracy. To the extent the Criminal Procedure Code does not currently make it possible to take *ex officio* actions or address STB piracy, it should be amended.<sup>12</sup> In addition, because high-quality counterfeits are being imported into Vietnam (mostly from China), Vietnamese Customs authorities as well need to commence *ex officio* actions to intercept such infringing imports.<sup>13</sup>

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers report unauthorized photocopying and some illegal print piracy, mostly of English language teaching (ELT) materials. The proliferation of small ELT schools makes enforcement against widespread use of unauthorized reproductions of ELT materials at such institutions extremely difficult. Many students are reportedly photocopying entire textbooks. Bookshops, roadside vendors and copy shops routinely sell unauthorized copies of bestselling trade books, travel books, and academic textbooks, including ELT materials. Unlicensed print overruns also continue to harm foreign publishers. In 2015, AAP ran a cease-and-desist campaign in Ho Chi Minh City, resulting in multiple copy shops and book stores agreeing to cease producing unauthorized copies of books from U.S. publishers. Unfortunately, the enforcement environment in Vietnam remains challenging for right holders. The agency tasked with administrative IPR enforcement has little experience or expertise, and there is presently no accredited authority to issue expert opinions on copyright infringement. Local publishers (such as the Youth Publishing House and the General Publishing House of Ho Chi Minh City) have an interest in making sure their licenses are not misused. Yet efforts by universities and the government to address the endemic piracy at university campuses have not been nearly commensurate with the magnitude of the problem. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

**Court Reform and IPR Training Needed:** As reported, the 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 that effort stalled. The Manual should be concluded as soon as possible, and should include sentencing guidelines to create a level of deterrence in copyright cases. IIPA also recommends frequent outreach with judges (and prosecutors and police) as part of the judicial reform effort, to sensitize these officials to the commercial harm wrought by piracy, and to seek a mutual path forward toward successful resolution of claims involving infringement.

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<sup>12</sup>Article 105 of the Criminal Procedure Code currently requires a formal complaint from a copyright owner as a condition for prosecution and acts as a disincentive to police and prosecutors, relative to other kinds of offenses. IIPA encourages Vietnam to ensure its criminal enforcement authorities are able to take *ex officio* action, because this is a TPP requirement that Vietnam will need to address as part of implementation. See TPP Art. 18.77.6(g).

<sup>13</sup>IIPA encourages Vietnam to take the immediate step of ensuring its customs officials have *ex officio* authority because this is a TPP requirement that Vietnam will need to address as part of implementation. See TPP Art. 18.76.5.



**Increase Efforts Against Camcording:** A vast number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These illicit copies are then distributed to pirate “dealers” throughout the world and over the Internet. Illegal camcording destroys entire windows for distribution of audiovisual works, and damages not only the U.S. film industry, but also local cinema businesses. In 2015, Vietnam’s Ho Chi Minh City Police initiated its first enforcement action against camcording, issuing administrative sanctions against a professional camcorder for camcording in a CVG cinema. The perpetrator also admitted that he had recorded and uploaded additional films<sup>14</sup>. Although this is a good start, more needs to be done to address this insidious problem, including adopting a measure providing for criminal procedures to deter unauthorized camcording in movie theaters, as is required by TPP Art. 18.77.4.

## **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>15</sup> The *Civil Code* (last amended 2011 by *Decree No. 85*) remains as a vestigial parallel law, implemented by *Decree No. 100*. The laws, while not entirely in compliance with Vietnam’s international or bilateral obligations, include a basic structure that, if fully implemented, can be used to successfully address online, mobile network, and hard goods piracy in the country. They also include measures that implement the WCT and WPPT. IIPA encourages Vietnam, as an immediate next step, to join those treaties, especially considering this is a TPP requirement.

To implement the TPP, Vietnam will be required to improve its framework for protection and enforcement of copyrights. Vietnam has taken strides in its substantive laws that will make meeting the TPP standards less challenging. At the same time, some gaps remain, and some of the more recent changes noted below may have moved Vietnam further from those standards. With a view towards TPP implementation, we are hopeful that Vietnam will raise its standards for copyright protection and enforcement to meet the TPP requirements as quickly as possible including, at a minimum, addressing the following deficiencies in its current legal framework.

**Criminal Code Should Cover All IP Code Violations, Not Just Reproduction and Distribution, and Comply With BTA:** The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” As reported previously, while amended Article 170a improved Vietnam’s statutory framework in some respects,<sup>16</sup> it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.<sup>17</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>18</sup> Again, we request that the Vietnamese Government immediately issue implementing guidance for the Criminal Code to confirm that all infringement on a commercial scale 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.

<sup>14</sup>Six other titles were found on his laptop including “Mad Max: Fury Road”, “Pitch Perfect 2”, “She’s Funny That Way”, “Helios”, “Lat Mat”, and “Spy”.

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

<sup>16</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>17</sup>The 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of TPMs, decryption of encrypted satellite signals, and other acts. Please refer to IIPA’s previous submissions on Vietnam for more detailed discussion. See e.g., IIPA, Vietnam, 2009 Special 301 Report, February 17, 2009, available at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

<sup>18</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.. These are also TPP requirements. See TPP Art. 18.77 and 18.79.

**Administrative Enforcement Decree Must Be Implemented in Practice:** As reported previously, the *Administrative Violations Decree (No. 131)* reduced the maximum administrative fine for an individual to VND250 million (US\$11,800), 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 (US\$18,100 to \$23,600) against an organization that imports an unauthorized copy; 2) VND70 to 100 million (US\$3,160 to \$4,520) against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million (US\$680 to \$1,580) 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>19</sup> While *Decree No. 85* contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam's compliance with international norms and best practices. Most notably, *Decree No. 85* makes certain changes to Article 41 of *Implementing Decree No. 100* governing collective management that, if applied to foreign right holders, would be onerous and would conflict with the ability of collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>20</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 regarding Vietnam's compliance with the BTA and other international obligations, and with Vietnam's ability to meet the standards set forth in the TPP. Among the issues that should be resolved in the current Code are the following:

- The IP Code does not provide a term of protection in line with the international trend (and consistent with the TPP), to 70 years after the death of the author, or when term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of "making available."<sup>21</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>22</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>23</sup>

<sup>19</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

<sup>20</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.

<sup>21</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. Accession to the WPPT is required by the TPP.

<sup>22</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>23</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'

- 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, as well as the requirements of TPP Art. 18.76.7.

In addition, in accordance with TPP Art. 18.77.4, IIPA also encourages Vietnam to quickly adopt a measure providing for criminal procedures to deter unauthorized camcording in movie theaters.

## **MARKET ACCESS BARRIERS IN VIETNAM**

It continues to be the case that Vietnam generally restricts foreign companies from setting up subsidiaries to produce or distribute “cultural products.” The Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.<sup>24</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, including the standards set forth in the TPP, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. To implement the TPP, Vietnam will need to address the significant market access barriers identified below. Although it is unfortunate that some of these protectionist barriers may be covered by Vietnam’s Annex of Non-Conforming Measures, most of these impediments are clearly inconsistent with provisions in the TPP that liberalize trade for creative content, including: the market access protections for services, including the prohibition of numerical restrictions, such as quotas, on the supply of services;<sup>25</sup> the most-favoured-nation protections for services and investment,<sup>26</sup> the ban of performance requirements for investments, including local content requirements;<sup>27</sup> and the prohibition of discrimination against trade in digital products.<sup>28</sup> Considering that a primary goal of the TPP is to liberalize trade and investment between the parties and with TPP implementation on the horizon, IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

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

**Laws Leave Potential Quotas In Place:** The amended Cinematography Law created the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Ministerial *Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030”* set an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. Although the Cinematography Law’s stated quota and *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 and would clearly be inconsistent with TPP’s market access protections for services. IIPA also notes the hortatory preference to show “valuable” foreign films. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese Government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam. Certain articles of the Cinematography Law also endanger

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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. These provisions are also inconsistent with TPP Art. 18.65.

<sup>24</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).

<sup>25</sup>See TPP Art. 10.5.

<sup>26</sup>See TPP Art. 9.5 and 10.4.

<sup>27</sup>See TPP Art. 9.9.

<sup>28</sup>See TPP Art. 14.4.

the television broadcast market. For example, Article 35(2) provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of *Decree No. 96* implementing certain provisions of the Cinematography Law requires that Vietnamese films must be at least 40% of those broadcast on TV.<sup>29</sup> This quota should be lifted or eased significantly.

**Regulatory Intervention in the Pay-TV Sector:** A draft *Decree on the Management, Provision, and Use of Broadcast Services (No. /2014/ND-CP)* would, if implemented, place undue and excessive regulatory control into the hands of MIC, including allowing it to set prices for pay-TV services, extend foreign translation requirements beyond those already in place, and impose a further quota on foreign programming and additional fees on the pay-TV industry. Regulations for the pay-TV industry enacted in 2011 require foreign channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Most foreign programming is required to be edited and translated by an approved licensed press agent. 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. IIPA understands that MCST is planning to introduce a film classification and rating system. Easing these restrictions, and 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: restrictions that involve censorship of the content of video games in order for them to be approved; outright prohibition of content within video games (see, e.g., Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; and license duration limits. The implementation of this Decree must not create structures that unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or that discriminate against them.

### ***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

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<sup>29</sup>*Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.*

sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, also hinder anti-piracy efforts. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights related to U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam,<sup>30</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

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<sup>30</sup>The importation of cultural products like music is governed by *Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural* (promulgated together with the Government's Decree No. 10.V200/ND-CP of November 6, 2009). *Decree No. 103* provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level 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.

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2016.<sup>1</sup>

**Executive Summary:** As broadband access in the country continues to grow, progress is being made toward the development of a legitimate Internet marketplace for copyright materials in Brazil. However, pervasive piracy operations that target the Brazilian market continue to hamper the healthy growth of e-commerce in creative works. The first criminal prosecutions against significant online pirates was an encouraging development in 2015. The challenge for 2016 is to build on this first sign of progress to institute a more comprehensive and coordinated effort, including both broader criminal enforcement against well-established pirate operators, and active government encouragement for voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. The National Council to Combat Piracy and Intellectual Property Crimes (CNCP) is an underutilized resource that could make an important contribution this year on both these fronts, as well as continuing its efforts against the still significant problems of hard goods piracy. Courts should be encouraged to continue to implement their own solutions to some of the systemic bottlenecks in the enforcement system, in default of effective legislative responses. While the Marco Civil da Internet (“Marco Civil”) legislation, as enacted in 2014, preserves space for voluntary notice and takedown for copyright infringement and other inter-industry cooperative efforts, its implementation remains in doubt and must be carefully monitored. Although 2015 was a year of legislative stasis on copyright issues, legislative issues need more attention in 2016, including completion of action on long-delayed enforcement reform legislation (including criminal penalties for camcording), and scrutiny of long-delayed copyright reform efforts; the latter must fill the serious gaps in Brazil’s current law and deal effectively with online infringement, while resisting excessively broad exceptions and limitations to copyright protection. Exorbitant taxes and escalating duties on legitimate imported video games and consoles continue to stunt 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.

### PRIORITY ACTIONS REQUESTED IN 2016

#### **Enforcement**

- 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.
- Bring the resources of the CNCP to bear on encouraging cross-industry efforts to combat Internet piracy.
- Ensure that CNCP has the human and financial resources, and political backing, to ramp up its efforts, including extending its training and coordination activities to the fight against Internet piracy.
- As steps toward a deterrent enforcement system, implement a national program to train judges, prosecutors, and police officers on intellectual property rights (IPR) law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact
- Effectively enforce the current Penal Code to address illegal 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/2016SPEC301HISTORICALCHART.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.
- Ensure that any copyright reform legislation proposed is consistent with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), to which Brazil should accede, and effectively addresses online infringement and explicitly prohibits circumvention of technological protection measures and trafficking in circumvention devices and services.
- Reduce high tariffs and taxes placed on video game products, to enable industry growth.
- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; restrain national film agency (ANCINE) 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:** Internet access continues to grow in Brazil. According to the International Telecommunications Union, 57.6% of Brazilians used the Internet in 2014, and there were 89.6 broadband subscriptions (the vast majority of them for mobile access) per 100 inhabitants.<sup>2</sup> As the potential market grows rapidly, legitimate services for online delivery of copyright materials are gaining an increasing foothold in Brazil. Music industry digital revenues in Brazil increased 30.4% in 2014, enough to offset a steep decline in sales of physical product and accomplish modest overall growth in the Brazilian recorded music market, the world's ninth largest. Major international digital music subscription services such as Deezer and Napster have partnered with Brazilian telecommunications companies, media conglomerates, and banks to deliver recorded music to Brazilian listeners at compelling price points (including for free, in the case of advertising-supported streaming services, by far the fastest-growing segment of the digital music marketplace).<sup>3</sup> Similarly, there are at least twelve free or low-cost online platforms that offer legal viewing options to Brazilian television and film audiences, including Crackle, Netflix, HBO, Globo Video, Mundo Fox, and iTunes/Apples Brazil. Online access to legitimate video game play is available through Xbox Live, PlayStation Network, and Nintendo eShop. But despite all this progress, 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.

A new study quantifies how deeply entrenched one form of digital piracy has become in the Brazilian online environment: unlicensed downloading of copyright material via peer-to-peer (P2P) traffic. This global study measures by country the retail value of content exchanged via BitTorrent networks, nearly all of which is unlicensed. Brazil topped the list with almost US\$100 billion of such “unmonetized demand,” far ahead of more populous markets such as India, or those with higher levels of Internet penetration, such as the U.S. or Western Europe. The 1.17 billion Brazilian downloads measured, and the 71.2 million Brazilian IP addresses engaged in this activity, both ranked second to the U.S., a far larger market. In particular, the study highlights the voracious appetite of Brazilian users of the BitTorrent protocol for free copies of video games: some 373 million P2P downloads of game titles were observed in 2014, involving 52.5 million IP addresses, far more than for any other country in both metrics. But the problem is not confined to the games market; Brazilian IP addresses ranked second worldwide in the ranking of those engaged in unlicensed P2P downloads of TV content, third for movies, and third for music.<sup>4</sup> This data buttresses earlier studies, including one conducted for the Brazilian Government showing that 81% of Brazilians who

<sup>2</sup>ITU, “Measuring the Information Society Report 2015” (Dec. 2015), at 222, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>.

<sup>3</sup>IFPI, *Recording Industry in Numbers: 2015 Edition*, at page 103, available at <http://ifpi.org/recording-industry-in-numbers.php>; IFPI, *Digital Music Report 2015*, at p. 27, available at <http://ifpi.org/digital-music-report.php>.

<sup>4</sup>See TruOptik Data Corp., “Digital Unmonetized Demand and Peer-to-Peer File Sharing Report: 2014 Review,” available at <http://truoptik.com/digital-media-unmonetized-demand-and-peer-to-peer-file-sharing-report-2014>.



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>5</sup>

Internet piracy problems in Brazil feature two main kinds of distribution channels. The first involves sites targeted to the Brazilian market that link to infringing distribution hubs (sometimes called “cyberlocker” services). While these sites are nearly all hosted outside Brazil, many appear to have local operators, and are clearly targeted to the Brazilian market. Link sites to infringement hubs account for the majority of online music piracy, and a comparable share of the Internet piracy cases involving audio visual works like movies and TV programs. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audio visual material.<sup>6</sup> One very popular site in this category changed its name from *degracaemaisgostoso.org* (“free is much better”) to the terser *degraca.org*, but maintains the same basic business model it has followed for nine years: providing unauthorized access to infringing copies of international and local music repertoire, as well as books, games and movies. Links are refreshed daily and the audience for this Portuguese-language site is overwhelmingly Brazilian. A similar Portuguese-language site, *sobaixar.com* (formerly known as *Baixeturb.org*), is even more popular, and boasts 53,000 “likes” on Facebook. Both these sites harvest revenue from advertising and from the sale of premium accounts. The files to which such sites link are generally stored on offshore hosting sites such as *4shared.com* (itself the 75th most accessed site by Brazilian users), *Mega*, and *uploaded.to*.

Other linking sites to infringement hubs that specifically cater to the Brazilian market include *teleona.org*, which features camcordered first run motion pictures, with Portuguese audio captured from a local theatre or with Portuguese subtitles added; *Filmesonlinegratis.net*, active since 2009 and ranked 101<sup>st</sup> in Brazil by Alexa; 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. These 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. (As discussed more fully below, exemplary efforts of Brazil’s Federal Police led to the shutdown in 2015 of *megaafilmeshd.net*, which had provided links to thousands of films, TV series, and concerts, much of it in Portuguese.)

Infringing linking sites for illegal video games available for download in Brazil, which each may reach as many as 500,000 users monthly, mostly monetize using online payment services and/or advertisements. These site operators also generate revenue through the resale and distribution of online video game accounts. There has also been an increase in the number of Brazilian-based sites offering free direct downloads across multiple platforms of current and legacy games. Brazilian sites that offer free direct downloads of games (from off-shore cyberlockers) generate monthly revenue ranging from US\$4,000 to US\$30,000 from donations and/or advertising revenue. Examples of these types of sites include: *roxdownload.net*, *roxroms.net*, *mundoemu.net*, *emulator.info*, and *romsup.com*. The majority of the above-mentioned sites are in Portuguese.

An increasing number of Brazilian sites offer so-called video game copiers and other circumvention devices, aimed at nullifying access control technologies used by copyright owners. These devices enable the play of pirate video games on modified consoles (the great majority of game consoles in the country have been so modified). Examples of sites offering circumvention devices include: *r4ds.com.br*, *modplay.com.br* and *aogao.com.br*.

The second main channel for Internet piracy in Brazil is file sharing via illicit P2P networks, which as noted above stands out as a growing threat for the entertainment software industry in particular, making pirated video

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<sup>5</sup>See Comunicado do Ipea - 2012 - Maio - nº 147, “Download de músicas e filmes no Brasil: Um perfil dos piratas online”, available 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, available at <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> at 106 (“IIPA 2013”).

<sup>6</sup>NetNames Ltd., “South American Television Piracy Landscape for Alianza Contra La Pirateria de Television Paga,” at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

games widely available. The Entertainment Software Association (ESA) reports that in 2015, for the fifth straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file-sharing of video games on public P2P networks. Notably, among illegal downloads to consoles only (excluding PC games), Brazil once again ranked first in the world. The most popular torrent sites for Brazilian gamers in search of illegal content include *torrentz.eu*, KAT (KickAss torrents), and The Pirate Bay, with growing levels of access to other P2P services such as *cpturbo*, *vitorent*, and *bj2*. At least nine other torrent sites receive more than half a million visitors from Brazil each month. The recent NetNames report found that “the Brazilian peer-to-peer landscape attracts 32.89 million of the country’s 109.77 million Internet users,” including some using “dedicated Portuguese language sites.”<sup>7</sup>

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 remains an issue. In the case of video games, pirate titles for console platforms like Nintendo’s Wii are usually sold on discs that are locally burned and assembled (with inlay cards) on site.<sup>9</sup> 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, in shops, or via online marketplaces such as Mercado Livre.<sup>10</sup> 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 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 game copiers and mod chips. These devices for circumventing access controls and enabling the play of pirated copies of games 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 BRL140 (about US\$35). 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 specializing in pirated video games, video game circumvention devices, and modified video game consoles), 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.

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<sup>7</sup>*Id.* at 33.

<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.

<sup>9</sup>Industry efforts in 2015 resulted in two criminal raids and the seizure of over 5,500 burned Wii game discs.

<sup>10</sup>For example, a Nintendo Sky3DS is typically offered for sale on Mercado Livre with 20 infringing games pre-loaded for BRL279.99 (US\$70).

**Camcord Piracy:** Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem also 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 35 member company films stolen in this way from Brazilian theaters in 2015. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films and television programming, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms. An encouraging development was the arrest by the Civil Police of Mato Grosso do Sul state of five members of the CorumbaFTP criminal group, a clearly commercial camcording operation. Over 200 DVD-R burners were seized along with 18,000 DVD-R discs with infringing content. The case is still pending.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Overview: Online Piracy**

For many years, there has been virtually no criminal enforcement against serious online copyright crime in Brazil. Even though some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes, they have left Brazil's fastest growing marketplace for copyright piracy — the Internet — almost completely undisturbed. In 2015, a few cases provided reason to hope that this policy of seeming indifference to the widespread and economically damaging digital theft that distorts Brazil's Internet marketplace might be ending. The challenge for 2016 and beyond will be to build on these isolated steps forward and to institutionalize a governmental commitment to get off the sidelines and take the field against online criminal copyright enterprises in a significant way.

The first case was brought in the federal courts in Vitoria, capital of Espirito Santo state in 2014, though it was not publicly disclosed until 2015. Using online search tools as a key part of the investigation, authorities arrested, charged and convicted the operators of music piracy linking sites *cdportatil.com* and *baixarcdmp3gratis.org*. These were the first such criminal infringement cases ever successfully prosecuted in Brazil's federal courts that did not involve delivery of physical products. A second successful case led to the sentencing, in July 2015, in the federal court in Sorocaba, São Paulo state, of defendants related to the website *filmescomlegenda.net*. This case took five years to conclude.

In November 2015, federal police arrested the alleged operators of one of Brazil's most successful illicit audio visual streaming portals, *megafilmesHD.net*. Luxury cars and cash were seized and numerous search warrants executed. The site remains down; the federal judge assigned to the case ordered the Federal Police to retain custody of it. With 12 million unique visitors monthly, and monthly revenue estimated at BRL80,000 (US\$20,250) from advertising alone, the shuttering of this site removed a major piracy player from the marketplace. The well-publicized enforcement action was recognized in USTR's 2015 Out-of-Cycle Review of Notorious Markets, where the site had been listed the previous year.<sup>11</sup>

While these federal actions are encouraging, they remain isolated bright spots in an otherwise bleak landscape. Clearly, before a more meaningful criminal enforcement effort can be mounted in this sphere, much more needs to be done in terms of training, dedication of resources, and infusion of political will among police, prosecutors and judges determined to crack down on widespread online piracy. Indeed, an overall national strategy for combating this form of cybercrime is sorely lacking.

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<sup>11</sup>USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), at 3-4, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>

One potential new route for mobilizing the needed political, fiscal and other commitments presented itself last year. A new investigative commission, the CPI do CiberCrime, was formed in the legislative branch in July 2015. It quickly spotlighted the problem in a public session focused on how the government and the private sector could join forces to exclude rogue sites from advertising networks and disrupt their funding structures. A sustained focus from this commission on these issues could lead not only to needed legislative reforms, but also to progress on practical enforcement issues, such as deconfliction of overlapping jurisdictions of enforcement agencies.

Civil enforcement should also be part of the solution. In 2015, the recording industry body in Brazil (ABPD) filed civil actions against eight notorious Brazilian pirate sites offering thousands of links to unauthorized music files. The actions, filed in Rio de Janeiro, seek compensation and injunctive relief against massive violations of copyrights committed through those sites. However, the cases are still in the judicial queue waiting for resolution by a first instance judge.

The logical forum for implementing a coordinated national effort against online piracy is the long-standing National Council to Combat Piracy and Intellectual Property Crimes (CNCP), in which both government and private sector players participate. Unfortunately, the CNCP seems never to have fully recovered the vigor and resources that marked some of its initiatives prior to a 2012 reorganization, and 2015 was no exception. The year ahead presents an opportunity for CNCP to reverse this trend, and to ensure that its next multi-year strategic plan (the current one expires in 2016) fully reflects the need to give top priority to combatting widespread online enterprises dedicated to copyright infringement. For example, as the CNCP's "Cities Free From Piracy" initiative gradually approaches its goal of signing up all major municipalities, it is time for it to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which it has long helped to train in enforcement methods against physical piracy, become fully versed in the techniques and priorities for combating online infringement.

Perhaps more crucially, CNCP should revive its long-dormant priority of encouraging cooperation and partnerships among rights holders and other players in the Internet ecosystem, including ISPs, hosting providers, search engines, and the like. While CNCP efforts to provide a forum for inter-industry discussion have foundered in the past, such a forum is needed now more than ever, since so much of the piracy that the council was set up to combat has migrated from street corners and shopping malls to the Internet.

A significant level of informal cooperation already exists, including in the voluntary notice-and-takedown policies that were spared threatened extinction when crucial amendments to the Internet civil rights bill (Marco Civil) were adopted. Many international companies operating in Brazil are cooperative, and some local ISPs and online marketplaces also have open communication channels and some level of technology to support IPR protection. But many of these players lack the procedures and interfaces to enable processing of high volumes of infringement notices; even the international companies are less responsive in Brazil than they may be in European or North American markets. In any case, 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.

Active government involvement could help to bring industry players together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. Whether through the CNCP vehicle or otherwise, this is the year for Brazil's government 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.

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

A couple of promising developments in 2015 in efforts against physical piracy are worthy of mention.

While the problem of storing vast quantities of seized pirate product throughout the protracted pendency of criminal cases remains a huge impediment to effective prosecutions, some proactive local courts have fashioned at

least a partial solution. In Recife (Pernambuco state), where the anti-piracy police chief threatened to deposit future seizures in the courthouse unless he was allowed to conduct forensic analyses on a sample of seized items and destroy the rest, the state court ruled unanimously that such samples could be used to prove infringement. Since then, authorities in Recife have followed this practice (sampling, and destruction of the remainder) and have been able to manage storage of seized material in a way that does not impede new enforcement actions. This example makes clear that the courts have the authority to manage the storage issue more rationally (as the National Judicial Council has encouraged them to do), and courts in other jurisdictions are considering taking similar steps. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence.

A pending case before the Supreme Court could open the doors of the federal courts to more copyright infringement cases. The case arose from importation of DVD-Rs containing infringing material, and the lower court held that Brazil's international obligations under WTO TRIPS are sufficient to establish a federal jurisdictional nexus for infringement cases. The challenge of proving such a nexus in domestic infringement cases has been a significant barrier to the federal courts, and the case has the potential to establish federal jurisdiction over copyright infringement cases with an international component, including those arising from Internet piracy.

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 — including inefficient and prolonged investigations; bottlenecks on appointments of “experts”; inadequately trained police, prosecutors and judges; and grossly insufficient sentencing practices — have been described in detail in past IIPA reports.<sup>12</sup> In particular, the disappointing drop-off in government enforcement activity in São Paulo has continued, although some success has been reported in civil suits brought against market landlords to evict pirate tenants.

## **LEGISLATION AND REGULATION IN BRAZIL**

Although 2015 saw the launching of at least two legislative caucuses with copyright piracy in their purview, very little progress was made on enactment of any relevant legislation. Brazil's 1998 Copyright Law remains seriously outdated and needs updates to reflect today's copyright protection and enforcement challenges. But since the most recent official draft amendments were released by the Ministry of Culture in March 2011, on which IIPA submitted detailed comments, no further progress has been reported.<sup>13</sup> Similarly, although a plethora of bills to improve copyright enforcement in Brazil have been presented to the legislature, few have progressed.<sup>14</sup>

The most important recent legislative development was the enactment in 2014 of the Marco Civil, an ambitious project to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil.” As described more fully in IIPA's 2015 report, the legislation was amended before enactment 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.

As could be expected for such sweeping legislation, many critical details remain to be spelled out in implementing decrees. Some of these details have the potential to undercut the clear legislative intention to leave existing voluntary cooperative measures against piracy undisturbed, pending the possibility of disposition through

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<sup>12</sup>See, e.g., IIPA 2015 report, <http://www.iipa.com/rbc/2015/2015SPEC301BRAZIL.pdf> at 76.

<sup>13</sup>See, e.g., IIPA 2013 report, <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> at 112-13. The key issues were also summarized in IIPA 2015 at 78.

<sup>14</sup>Some of the most salient proposals are summarized in IIPA 2015 at 78.

future amendments to the copyright law. For example, care must be taken to avoid the risk that implementing regulations regarding net neutrality provisions under Marco Civil could undercut voluntary security measures against well-known illegal sites and networks. A similar risk exists with regard to data protection and retention requirements; the ability of criminal enforcement authorities and civil stakeholders to obtain access to information needed for their legitimate efforts must be preserved. Careful review is thus required, both of proposed implementing decrees to be presented to the President under Marco Civil, and of any ancillary legislation, including but not limited to data protection measures such as the pending Privacy Protection Bill (PLS 181/14), to ensure that voluntary cooperative efforts to keep Brazil's Internet environment free of organized piracy are not thwarted. IIPA urges the U.S. Government to monitor these developments, first to ensure that, in fact, there is no adverse impact on current 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.

**Proposed Legislation Related to Enforcement:** Bill 2729/03 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 two years ago, and still awaits action by the full Senate, with no progress reported in 2015. 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 continues to urge its passage as soon as possible. IIPA would then encourage Brazilian legislators 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>15</sup>

Throughout 2015, 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 final Senate report on the legislation incorporates important improvements. One amendment 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. A second amendment in the same report corrects a problem in earlier versions of the legislation, by retaining the status of copyright offenses 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.

**Proposed Regulation of Collective Management Organizations (CMOs).** Brazil's Ministry of Culture is seeking to introduce new regulations to empower CMOs to establish new rates for digital music services. Such authority would undermine direct licensing and unnecessarily interfere with the commercial aspects of rights licensing. This intervention in the market is not justified.

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<sup>15</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.

## **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 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. Finally, a bill recently approved by the House of Representatives (366/2013) would have included digital content services, including games distributed online, as subject to taxes on services under the 2003 ISS law (116/2003). If enacted, this measure would further discourage development of the legitimate market for online video games in Brazil.

**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-TV 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. Industry continues to oppose this initiative and to seek to reclaim its legitimate rights.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas imposes quotas for 2016 similar to the last year: it would require between 28 and 800 days of screening of local content, depending on the number of theaters in the theater complex. The Decree also continues to specify that a widely-released title exhibited in complexes may be limited to exhibition on 30% of the screens. Brazil's screen quota is facing a constitutional challenge at the Supreme Court, and exhibitors have separately brought litigation against it. 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) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Special 301 Watch List in 2016.<sup>1</sup>

**Executive Summary:** One year after Canada's Copyright Modernization Act has come fully into force, its positive and negative impacts are becoming clearer. The new "enablement" provision is starting to fulfill its potential to make Canada somewhat less attractive to international online piracy operations. But the new law still falls well short in providing incentives (including, but not limited to, meaningful conditions on liability safe harbors) for more legitimate Internet intermediaries to cooperate with right holders to detect and deal with the widespread online infringement that remains a prominent feature of the Canadian marketplace. The new copyright amendments have led directly to the decimation of Canada's educational publishing market, vital collective licensing revenue streams have vanished, and other forms of return on investment are imperiled, largely because the undefined expansion of the fair dealing exception has created an atmosphere of impunity across Canada's educational establishment. Mobilizing the federal government to respond to this crisis and restore a more balanced approach must be a top priority, before the situation deteriorates further. Completing the task of harmonizing duration of copyright protection in Canada with that of its major trading partners, and providing resources and training to make copyright enforcement a priority for police, prosecutors, and courts, are other needed steps. IIPA urges that the U.S. Government remain extensively engaged with Canada on these and other issues in 2016, with the aim of making additional progress toward the goal of achieving a healthier marketplace for copyright works in our neighbor and largest trading partner.

### PRIORITY ACTIONS REQUESTED IN 2016

- Make it a government priority to address the crisis in the educational publishing market, including by accelerating the review and clarification of the fair dealing amendments in the Copyright Modernization Act that have contributed fundamentally to it.
- Seek to make further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- 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 online, and to seek deterrent penalties against those convicted of these crimes; and provide police, prosecutors and courts with the resources and training required to do so.
- Complete the process of bringing the duration of protection for copyright into conformance with evolving global norms.

### INTRODUCTION

Throughout the extensive reports on Canada that IIPA has filed in each of the past dozen Special 301 cycles, one theme predominates: the need for Canada to modernize its copyright law to confront the challenges of

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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/2016SPEC301HISTORICALCHART.pdf>.



today's digital networked marketplace. After years of consideration and several false starts, Canada enacted its Copyright Modernization Act in 2012, and finally completed the task of bringing all of the legislation's provisions into force in January 2015. Now, a year later, it is possible to provide an initial reckoning of how these extensive statutory changes have changed the environment for the copyright industries in Canada.

It is now clear that some of those effects have been profoundly negative, with the decimation of the market for educational publishing in Canada as exhibit A. At the same time, other and more positive changes are beginning to emerge, notably the impact of the "enablement" provision on some of the most egregious Canadian-based services dedicated to online infringement of audio-visual works. Finally, the assessment identifies important areas of Canada's copyright regime where the 2012 legislation has had relatively little impact, because its provisions were simply not designed to address serious problems, or side-stepped important issues altogether. This year's submission spells out this mixed preliminary verdict in more detail, and recommends steps that Canada's Government should be encouraged to take to improve the balance of gains and losses from the decade-long copyright modernization project.

## **EDUCATIONAL PUBLISHING: COPYRIGHT "MODERNIZATION" PRODUCES MARKET DECIMATION**

Although much of the public attention to Canada's copyright modernization project was focused on issues of response to online piracy in particular, in fact the bulk of the legislation consisted of a score of new or significantly expanded exceptions to copyright protection. IIPA has previously sounded warnings about potential problems with several of these changes.<sup>2</sup> To date, none has had a more concrete and negative impact than the addition of the word "education" to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

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. This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.-Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver textual materials to students.

Today, that system has been all but destroyed. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.<sup>3</sup> "Licensing income from the K-12 sector has been all but eliminated," PwC found, with a similar fate expected this year at the post-secondary level once current licensing agreements expire. The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.<sup>4</sup> A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

The 2012 "education" amendment to fair dealing is one of the root causes of this market decimation. 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>5</sup> Although

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<sup>2</sup>For detailed analysis of the concerns raised by some of these new exceptions, see e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013, available at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at 130-31.

<sup>3</sup>Pricewaterhouse Coopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at [http://accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://accesscopyright.ca/media/94983/access_copyright_report.pdf) (hereafter "PwC").

<sup>4</sup>PwC at 6, 7.

<sup>5</sup>Of the five copyright decisions announced on July 12, 2012, the most impactful rulings for these purposes 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-...continued>

the *Alberta Education v. Access Copyright* case in the Supreme Court's pentalogy directly affected only a marginal aspect of the educational copying collective licenses, the subsequent statutory amendment poured gasoline on a smoldering fire. The resulting conflagration has virtually destroyed the market.

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 pentalogy decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from the collecting society for authors and publishers (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 (excluding Quebec) cancelled their licenses with Access Copyright. As the PwC study concludes, "[t]he education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the 'fair dealing' exception in the Copyright Act.... [L]icensing income from the K-12 sector has been all but eliminated.... A similar outcome is expected in the post-secondary market once current licensing agreements expire at the end of 2015."<sup>6</sup> In fact, 80% of post-secondary institutions did not renew their licenses, and Access Copyright royalty collections from this sector are projected to decline more than 90% by next year (from C\$11.1 million (US\$8.05 million) in 2015 to C\$1 million (US\$725,000) in 2017).

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. The PwC study found that "[f]ewer publishers are responding to requests for proposals to produce [new] textbooks,"<sup>7</sup> and that sales of digital content and publisher investment in digital resources will be adversely affected.<sup>8</sup>

The impact on Canadian publishers and authors has been particularly devastating. One of the top two educational publishers in Canada was forced into bankruptcy (it has since emerged); two significant Canadian publishers stopped producing new content for the educational market; and a leading international publisher (Oxford University Press) exited the K-12 market altogether.<sup>9</sup> The damages inevitably spill down to authors and illustrators. The PwC study predicts that "approximately one in three creators will produce fewer works and will reduce focus and time spent on creating content for the education sector."<sup>10</sup> Payments from secondary licensing (such as in the educational market) accounted for 20% of the total income of Canadian authors; these revenues to creators are plummeting.<sup>11</sup> Because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector, the fallout from the fair dealing amendments creates similar repercussions in the U.S. creative sector.

All expectations are for the problems to worsen unless promptly addressed. 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

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(...continued)

[csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB](http://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>. Their impacts are discussed in IIPA's 2015 Special 301 submission on Canada, at pages 85-86.

<sup>6</sup>PwC at 6.

<sup>7</sup>PwC at 9.

<sup>8</sup>PwC at 71.

<sup>9</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>10</sup>PwC at 8.

<sup>11</sup>H. Menzies, "The copyright act needs to be edited – for writers' survival," *The Globe and Mail*, Jan. 14, 2016, at <http://www.theglobeandmail.com/globe-debate/article28197828/>

education community that Canada's copyright law gives educators *carte blanche* for all uses of copyright works. Educational publishers report that parts of books and entire articles are frequently copied without permission and posted behind university firewalls, while unauthorized copies of complete textbooks are often shared online among K-12 teachers and students. As the PwC study describes it, Canada's educational sector is now characterized by "an atmosphere where unlimited copying has become commonplace, while content producers are unable to assert their intellectual property rights in any meaningful way."<sup>12</sup> And this atmosphere is at risk of spreading to other sectors. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing favored by Canadian courts, 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).

Nor is the educational fair dealing amendment the only Copyright Modernization Act provision that may be contributing to the sense of impunity that Canada's educational establishment increasingly displays. For instance, the broad new exception in section 30.04 of the Copyright Act 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.<sup>13</sup>

Canada's central government is well aware of the dire state of its educational publishing market, and of the fact that government actions at the provincial level are among its immediate causes — specifically, the adoption by the Council of Ministers of Education, Canada<sup>14</sup>, of the sweeping "fair dealing guidelines" that provide the legal justification for the cessation of licensing royalty payments. We urge the U.S. Government to continue to engage with their Canadian counterparts to encourage meaningful action. Canadian federal 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, and to urge colleges, universities and K-12 authorities to negotiate and implement acceptable use policies that advance those objectives and curb the excesses that now prevail. The goal should be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials. To ensure that the serious consequences of the Copyright Modernization Act for the publishing sector are addressed as expeditiously as possible, the government should accelerate its review of at least this aspect of the legislation, instead of waiting until the parliamentary review of copyright law mandated by Section 92 of the Copyright Act as amended begins in late 2017.

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>15</sup> Although this exception may have been globally

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<sup>12</sup>PwC at 94.

<sup>13</sup>Indeed, there is a pressing need to clarify and narrow 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.

<sup>14</sup>Council of Ministers of Education, Canada is an intergovernmental body founded in 1967 by ministers of education of all 13 Canadian provinces and territories. See <http://www.cmec.ca/11/About/index.html>

<sup>15</sup>See, e.g., Article 13 of the WTO TRIPS Agreement.

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 user-generated content (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.

## **ONLINE PIRACY: COPYRIGHT MODERNIZATION PROVIDES A NEW TOOL, BUT FALLS SHORT ELSEWHERE**

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. As reported by the Canadian Internet Registration Authority (CIRA), “Canada continues to be one of the most wired countries in the world, with nearly 87 percent of Canadian households connected to the Internet.” CIRA calls Canadians “voracious consumers of online media, watching 43 percent more minutes of video online than their American counterparts.” Almost three-quarters of the Canadian population stream TV, movies or video, and almost 40% of them devote at least 5 hours a week to doing so. The majority of Canadians stream radio online.<sup>16</sup> These trends help explain the strong growth of legitimate digital distribution of creative content in Canada. Nearly thirty music services now offer Canadians licensed downloads, streaming, or both,<sup>17</sup> with revenues from digital delivery of music outperforming all other sources combined for the first time in 2014 (the most recent year for which complete data are available).<sup>18</sup> Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Currently, more than 50 licensed services now offer movies, TV programming, or both, online to Canadians.<sup>19</sup>

At the same time, 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. This includes the biggest BitTorrent<sup>20</sup> site in the world in terms of visitors and popularity, *Kat.cr*, along with the various other incarnations that the so-called “Kick Ass Torrents” operation has assumed in its domain-hopping peregrinations over the past eight years. *Kat.cr* attracts more than 25 million unique visitors per month seeking access to its six million torrent files that are verified and available for download, representing tens of thousands of infringing movies, TV shows, music, video games, books and apps. *Kat.cr* is the 75<sup>th</sup> most visited site on the entire Internet, and monetizes its illegal conduct by selling advertising space throughout the site, including adjacent to posts of torrents relating to infringing content. Since 2012, it has been the subject of blocking orders in five European countries as well as in Malaysia, but continues to be hosted in Canada as well as in other jurisdictions. The site operators also have entered into affiliate agreements with companies that produce software designed to hide users of BitTorrent from detection by ISPs and monitoring companies. All this earned *Kat.cr* a listing in USTR’s 2015 Out-of-Cycle Review that identifies notorious markets that fuel online piracy.<sup>21</sup> Other leading bit-torrent sites based in Canada include *Sumotorrent.sx* and *Seedpeer.eu*. A disturbing recent trend is the emergence of stand-alone BitTorrent applications that employ an attractive, user-friendly interface that enables users to illegally stream and download infringing movies and TV programs; these applications are available in Canada both online and pre-loaded onto set-top boxes.

Online piracy operations using other forms of technology besides peer-to-peer protocols like Bit Torrent have also managed to shelter in the Canadian Internet. USTR’s list includes *zippyshare.com*, a cyberlocker which is the world’s leading source of illicit recorded music files available before authorized release. Its domain name is registered with a Canadian company although the site appears to be hosted in France. This advertising-supported

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<sup>16</sup><https://cira.ca/factbook/current/the-canadian-internet.html>

<sup>17</sup><http://www.pro-music.org/legal-music-services-north-america.php>

<sup>18</sup>RIN 2015 at 64.

<sup>19</sup>[www.wheretowatchincanada.com](http://www.wheretowatchincanada.com).

<sup>20</sup>BitTorrent is by far the leading protocol used by unlicensed Peer-to-Peer (P2P) file sharing networks.

<sup>21</sup>USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), at 14, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.



site responds to take down notifications, usually within 24 hours, but the same infringing content that is taken down is regularly re-uploaded to the site. The publishing industry is plagued by the activities of *tuebla.ca* (also operating as *tuebl.com*), a Canadian-operated site which serves both as a cyberlocker for infringing ebooks and as a compendium of links to similar infringing material stored elsewhere, all catalogued by author and genre. While *tuebl.ca* complies with take down requests and provides a form for takedown purposes, re-uploading of content, sometimes mere hours after removal, remains extremely problematic. A linking site focused on first run motion pictures and television content, *solarmovie.is*, is also hosted in Canada. On this site, each infringing title is offered with dozens of links from multiple sources that are graded by users for quality. *Solarmovie.is* and related sites have been the subject of judicial blocking orders issued in Italy, Denmark, the U.K. and Romania.

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 *r4toronto.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, such as *gamersparadise.ca*, which bills itself as “Toronto’s Ultimate Mod Shop” and offers both physical and soft modification services. Several circumvention device sites have Canadian hosts, including the popular ISPs Hawk Host and Crocweb. 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.

As the *solarmovie* and *kat.cr* examples indicate, because Canada’s legal environment provides inadequate tools to deal with the problem at its source, courts in many other countries have had to order major ISPs to block access to these sites. However, in 2015, there were encouraging indications that a provision of the Copyright Modernization Act may help end Canada’s practice of outsourcing to other jurisdictions the burden of combating these online theft operations. In October 2015, a Canadian Federal Court issued a sweeping injunction against the Canadian developers of PopcornTime, a computer application using an interface modeled on Netflix to enable one-click access to on-demand streaming of infringing motion pictures, shutting down the *PopcornTime.io* website where the most popular version of the application was available for free download. The court relied, in part, on claims that the defendants had provided services primarily for the purpose of enabling acts of copyright infringement, in violation of the newly enacted provision, section 27(2.3). Movie industry investigators also relied on this new “enablement” prohibition in successful efforts to shut down two globally popular Canadian bit-torrent sites. These developments suggest that this provision of the Copyright Modernization Act is finally beginning to realize its potential value as a tool to help purge the Canadian online environment of these outlaw services that undermine legitimate digital markets for copyright materials worldwide.

In other respects, however, the Copyright Modernization Act simply fails to respond adequately to the challenge of online piracy.<sup>22</sup> In particular, Canada’s “notice and notice” system, which came into force in January 2015, does not change the overall picture of inadequate legal tools. While we endorse the concept of ISPs sending notices to their users to alert them that their accounts are being used for infringing purposes, simply sending notices to ISP subscribers that their infringing activity has been detected is not the most effective approach, especially when multiple notices may be sent without any further consequences. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system. Even where notices are sent, there are reports that multiple repeat infringers will be delivered the same notice, and service providers have indicated that they do not track the number of notices sent to particular subscribers. Some rights holders have further reported that some ISPs have arbitrarily decided to limit the number of notices sent to repeat infringers within a certain window of time, and thus deem notices outside these limits to be erroneous. Moreover, there are insufficient incentives for ISPs

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<sup>22</sup>These shortcomings are detailed in IIPA’s more detailed analysis of the Copyright Modernization Act, see e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013, available at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at 127-131, and other sources referenced therein.

to respect the legislated “notice and notice” system, because their failure to forward notices from right holders does not affect their exposure to copyright infringement liability. Data from Canadian ISPs could be useful in assessing the overall effectiveness of the “notice and notice” regime, and in encouraging cooperation for enhancements to the program.

The Canadian law also inadequately addresses hosting service providers who fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. While “notice-and-takedown” (which the Canadian law lacks) is far from a panacea for online piracy, it does, at a minimum, provide some incentives for cooperation. Canada’s steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting providers leaves it an outlier in the global environment, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread infringement online. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft complete the picture of a system that is still not up to the challenge. Canada should review the effectiveness of its current regime, and consider alternatives to remedy its shortcomings and the current lack of incentives to stimulate full inter-industry cooperation against online piracy.

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>23</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. Another discouraging factor arises from the Copyright Board’s decision to set tariff rates for webcasting at a small fraction of the rates negotiated in the marketplace or those applicable in neighboring markets. The Board’s decision on “Tariff 8” in 2014, rendered after a six-year proceeding, falls far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery.

IIPA urges USTR to continue to press Canada to address these deficiencies in order to fully open its digital marketplace for global copyright works. The U.S. Government 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. In this regard, it is truly unfortunate that Canada negotiated for itself an exemption within the Trans Pacific Partnership (TPP) Agreement that seems designed to permit it to retain its current inadequate system. Specifically, it is exempted from the requirement, accepted by all eleven other TPP partners, to condition liability safe harbors on the obligation to take down infringing material of which the hosting provider is aware, or of which it is notified.<sup>24</sup>

Finally, some key areas of needed modernization of Canadian copyright law simply were not addressed by the Copyright Modernization Act. A notable example is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed with the vast majority of OECD economies. IIPA applauds Canada’s action in June 2015 extending the term of protection for sound recordings to 70 years after publication, or 100 years after fixation, whichever comes first. It is now time for Canada to join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. IIPA is pleased to note that this is an obligation that Canada agreed to accept in the TPP Agreement.<sup>25</sup>

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<sup>23</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).

<sup>24</sup>TPP, Chapter 18, Annex 18-E.

<sup>25</sup>TPP Art. 18.63.

## **ENFORCEMENT**

The entry into force in 2015 of Bill C-8 (the Combating Counterfeit Products Act) significantly upgraded Canada's copyright and trademark enforcement regime, notably by giving *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. However, some shortfalls remain, notably the denial of *ex officio* authority with regard to in-transit goods.<sup>26</sup>

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 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. Indeed, in the past year, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy. On the whole, because the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back nearly a decade, remain basically unchanged.<sup>27</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>28</sup> The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism.

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 must take on and fully prosecute more copyright infringement cases, and should be provided with the training and other support needed. Right holders remain at the ready to assist and have extended offers to provide such training. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.

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<sup>26</sup>In another disappointing feature of the TPP Agreement, Canada will apparently be allowed to continue to leave this gap unplugged. See TPP Art. 18.76.5.c, n.123.

<sup>27</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>28</sup>This is another long-standing deficiency. The Industry, Science and Technology Committee of the House of Commons opined as long ago as 2007 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. There is no evidence that this has been done.



IIPA urges Canadian law enforcement, prosecutors and courts to extend their reach beyond retail hard goods onto the Internet, including sites on third party marketplaces such as *kijiji.ca* and *ebay.ca*. Set-top boxes pre-loaded with infringing BitTorrent applications used to stream movies and television programming without authorization are readily available on such sites. So are devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention. Canada has been identified as one of the top three countries in the world for circumvention device listings on online marketplaces.<sup>29</sup>

Finally, the Canadian Government should consider establishing an industry/government task force on intellectual property, to ensure that relevant, real-time information flows to government officials in all relevant departments (including but not limited to Public Safety, Trade, Industry, and Heritage). Improved current information awareness should contribute to improved decision making, both at the political level and among the civil servants with responsibility for these issues.

## **DISCRIMINATION AGAINST U.S. PERFORMERS AND SOUND RECORDING PRODUCERS**

In conjunction with its copyright 2014 accession to the WIPO Performances and Phonograms Treaty (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 U.S. 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>29</sup>In the last 9 months of 2015, almost 900 devices pre-loaded with infringing games were taken down from *kijiji*, and more than 1900 such listings were removed from eBay.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2016.

**Executive Summary:**<sup>1</sup> As of May 2015, all of Colombia's intellectual property rights (IPR) obligations are now overdue for implementation under the U.S.-Colombia Trade Promotion Agreement (TPA), signed into force in 2012. 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 Colombia's commitments go ignored, the levels of piracy there 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 any 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. Now that all of the transitional deadlines for Colombia's TPA obligations have passed, IIPA urges the U.S. Government to prioritize its dialogue with Colombia, and encourage this vital trading partner to honor its TPA commitments and demonstrate the will to protect creative sectors by combating the high levels of piracy that persist throughout the country.

### PRIORITY ACTIONS REQUESTED IN 2016

- 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 gotten worse 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 occupies the vast majority 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 linking/streaming site *pelis24.com* is one notorious infringing site that has set up operations in Colombia. Individuals are utilizing social media to promote and sell infringing copies of movies in Colombia. In addition, two full motion picture camcords were sourced from Colombian theaters in 2015.

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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/2016SPEC301HISTORICALCHART.pdf>.



In 2015, Colombia ranked among the top 15 countries in the world in the number of peers discovered in peer-to-peer (P2P) swarms in which illegal copies of console games were being distributed. Colombia is also listed as one of the top 25 countries in the world when it comes to mobile piracy of games.

The recording industry reports that there are several legitimate online music services competing in the Colombian market, and the Colombian music market has grown slightly in recent years. 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 services face unfair competition from unlicensed sources of music in an environment where online music piracy is on the rise.

## **COPYRIGHT LAW IN COLOMBIA**

It has been nearly three years since the Government of Colombia made any attempt 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." This requirement was due to be adopted in May of 2013. However, since the failure of the first "Lleras Law," no new efforts to implement ISP liability have materialized.

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.

As of May 15, 2015, all of the obligations cited above were 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 is generally a weak point in Colombia's enforcement regime. It is considered a minor offense by Colombian criminal judges and appellate courts. Despite the good efforts of the National Police (DIJIN) in recent years conducting investigations and raids, there have been no significant efforts to take *ex officio*

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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, were due to be adopted three years after that date. The remaining obligations cited herein were due upon the date of entry into force.

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. 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.

In 2015, a national group of right holders (APDIF Colombia) went before a civil judge in Bogota to seek injunctive relief against the *Pirate Bay*. The outcome is still pending, and as such it is unclear whether backlogs in the court or other legal obstacles will prevent an ultimate decision.

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place Hong Kong on the Watch List in 2016.<sup>1</sup>

**Executive Summary:** Hong Kong's inability, over the period of almost a decade, to enact legislation to modernize its Copyright Ordinance to reflect the realities of the 21st century digital marketplace is not only an embarrassment; it is also an impediment to full access to this highly connected market for legitimate services providing access to creative works. U.S. engagement with Hong Kong should focus on ensuring that the territory's copyright law drift does not continue for a tenth consecutive year, and, even more disturbingly, that it does not reverse course into a legislative dismantlement of effective copyright protection.

### PRIORITY ACTIONS REQUESTED IN 2016

- Notwithstanding some defects and limitations of the present bill, which we hope will be addressed shortly, enact Copyright (Amendment) Bill 2014 without further amendment.
- Then open a full review to further update Hong Kong's copyright law for the digital age.

### LEGISLATIVE ISSUES

Almost a decade ago, authorities in the well-wired, tech-savvy Hong Kong Special Administrative Region (HKSAR) recognized that Hong Kong's Copyright Ordinance needed updating for the digital networked environment. In December 2006, an extensive public consultation was launched to identify what changes were needed. Further consultations, public hearings, and drafting exercises followed. An amendment bill was finally presented to the Legislative Council (LegCo) in 2011. But the legislation became mired in controversy over whether criminal copyright liability could arise from parodies, and further consideration was suspended. Following an additional public consultation exercise on the parody issue, new provisions on that topic were incorporated in a revised version that was presented to the LegCo once again in 2014. But despite strong support among legislators to finally update Hong Kong's outmoded law, the LegCo has become paralyzed by a guerilla campaign from anti-copyright interest groups. Hundreds of amendments have been offered; procedural gambits have been employed to delay consideration; and a filibuster has been mounted to try to prevent the majority from adopting the legislation. A strong push to complete enactment at the end of 2015 failed, and as of this writing the LegCo remains hamstrung.

Opponents are not simply seeking to tweak the parody amendments brought into the bill two years ago; they want to dismantle effective copyright protection in Hong Kong by pressing for broad exceptions to exclusive rights. The first harbinger of this broader agenda surfaced in the 2013 public consultations on parody, which some groups seized upon to propose an ill-defined exception to the exclusive rights of copyright owners, modeled on the user-generated content exception recently enacted in Canada. Hong Kong's Administration wisely disapproved this proposal, based on an analysis that cast grave doubt on whether the proposal would be consistent with Hong Kong's international obligations to confine exceptions and limitations to those that satisfy the familiar and globally accepted "three-step test."<sup>2</sup> But efforts to try to keep the process focused on the actual legislation before the LegCo have so far proven unavailing.

From the perspective of the copyright industries, the Copyright (Amendment) Bill 2014 is certainly far from perfect. Past IIPA filings identified some problems with the 2011 legislation, and most of these were carried forward

<sup>1</sup>For more details on Hong Kong's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Hong Kong's Special 301 placement, see <http://www.iipa.com/pdf/2016SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>See WTO TRIPS Agreement, Article 13.



into the 2014 version. But the overriding concern is that Hong Kong has simply been unable, over the past decade, to bring its laws into sync with realities of the digital networked age. Thus, the overriding priority must be to enact the Copyright (Amendment) Bill 2014 without any further changes. Only then should Hong Kong turn to a full-scale review of whether its copyright law needs further updates to ensure that the territory can properly protect copyright in the online space, and does not fall even further behind the rapid pace of technological and market change.

This is not simply a theoretical or abstract argument. The developments at the LegCo have much larger implications for the future of Hong Kong's creative economy. Online and mobile piracy is a serious and growing problem in Hong Kong. The territory's enforcement authority (Hong Kong Customs & Excise Department (HKC&E)), and its prosecutors and courts, have formed strong relationships with copyright owners, and their effort have produced remarkable success in reducing and marginalizing physical forms of piracy (such as the sale of illicit optical discs). But these authorities simply lack the legal tools to combat digital piracy as effectively. Enactment of the Copyright (Amendment) Bill 2014, which explicitly recognizes an exclusive "making available" right for on-demand dissemination of copyright works, and provides criminal remedies for violations of this right in appropriate cases, would help to fill this enforcement gap.

A growing number of legitimate services are already available to Hong Kong residents to enjoy digital delivery of music, movies, TV programs, and other products and services based on copyright.<sup>3</sup> But these will not be able to compete so long as Hong Kong's online marketplace also presents consumers with a plethora of options for obtaining unauthorized access to creative content. These unlicensed options include well-established cyberlocker services and illegal streaming sites; peer-to-peer (P2P) services; and forum sites that offer links to unauthorized music and other content. A wide array of mobile apps stream music, movies and other content without authorization to the millions of smartphone owners in the territory.<sup>4</sup> The operators of the platforms hosting these apps are either seemingly indifferent, or at best dilatory in responding to complaints from rights owners. The Hong Kong marketplace is also replete with unauthorized Media Boxes or Set Top Boxes (STBs) that undermine the market for legitimate pay-TV and streaming services, by facilitating multiple unlicensed pathways to the content such services provide.

All these developments have sped past Hong Kong's outdated copyright legal regime, leaving right holders and law enforcement alike with inadequate tools to combat online piracy, and providing insufficient incentives to service providers and other actors in the Internet marketplace to cooperate to the extent necessary to combat the problem. Consequently, the legitimate online and mobile services, while they have gained a foothold, are handicapped in their efforts to compete against pirates. Enactment of the pending legislation is an essential first step in changing this picture.

Once enactment is accomplished, right holder organizations are eager to participate in a public consultation to develop further needed improvements to Hong Kong's Law. Issues that should be considered there include (but are not limited to) extension of copyright term to conform to evolving global norms; providing a judicial website blocking remedy as part of injunctive relief for right holders seeking to address piracy from websites based outside Hong Kong's jurisdiction; specific measures combating P2P infringement; clarifying that safe harbors apply only to truly neutral Internet intermediaries; provision of additional damages and statutory damages; recalibrating the scope of the exclusive communication right<sup>5</sup>; providing a more efficient and cost-effective means of identifying serious online infringers; and further clarification on secondary liability and action against repeat offenders. But consideration of these complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill. Until enactment of that legislation, without further changes, is achieved, Hong Kong should return to the USTR Watch List.

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<sup>3</sup>For instance, 22 different licensed services are available for recorded music downloading, streaming, or both. <http://www.pro-music.org/legal-music-services-asia.php>

<sup>4</sup>Astonishingly, there are over 14.1 million 2.5G, 3G or 4G Hong Kong mobile customers in a territory of only 7.3 million residents. See [http://www.ofca.gov.hk/mobile/en/media\\_focus/data\\_statistics/key\\_stat/index.html](http://www.ofca.gov.hk/mobile/en/media_focus/data_statistics/key_stat/index.html).

<sup>5</sup>Proposed new section 28A in the pending legislation includes a problematic carve-out from the scope of the communication right that could potentially constitute a breach of Hong Kong's international obligations under, e.g., the WTO TRIPS Agreement. IIPA urges the government to act promptly to clarify the scope of this provision to ensure effective protection consistent with its obligations.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia be moved to the Watch List in 2016, in recognition of positive efforts on the part of the Indonesian Government in 2015. IIPA further recommends that the U.S. Government develop steps for engagement with the Indonesian Government that would result in the termination of the current Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns.<sup>1</sup>

**Executive Summary:** Indonesia is an important emerging market for the creative industries, and thus developments there will have reverberations within the creative community for years. IIPA welcomed the adoption of the Copyright Law in October 2014, and the subsequent passage of Regulations No. 14 and 26 of 2015 in July 2015. Following on important new protections in the Copyright Law regarding online infringement and the circumvention of technological protection measures (TPMs), the implementing regulations specify new administrative remedies in response to websites that facilitate infringement in Indonesia, and have already produced positive results. This and other announcements in 2015 indicate a new dedication to anti-piracy efforts within more than just one of Indonesia's Ministries. Yet, despite these many positive developments, the levels of Internet piracy in Indonesia are damagingly high for the creative industries. IIPA is concerned about the possible resuscitation of deleterious aspects of the 2009 Film Law, such as a proposed 60% local screen quota, as well as pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry. We ask the U.S. Government to engage the Indonesian Government to maintain focus in the coming year on: effective actions under the law to address primarily infringing websites; the setting of enforcement benchmarks (including judicial reform); expanded cooperation to address the concerns of all of the copyright sectors; and legislative challenges including permanent removal of the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.

### PRIORITY ACTIONS REQUESTED IN 2016

#### **Enforcement:**

- Ensure continued enforcement of the Copyright Law under Regulations Nos. 14 and 26 of 2015, such that there are effective actions against primarily infringing websites.
- Address with urgency the problem of advertising by high-risk industries on primarily infringing websites.
- Combat the unauthorized trafficking, dissemination, decryption, or receipt of pay-TV (or related technologies).
- Institute comprehensive enforcement reforms establishing resources, benchmarks, and specialized forces, where necessary, for the National Police, the Penyidik Pegawai Negeri Sipil team, the Directorate of Special Crimes (Ditreskrimsus) and "Type A" Police Commands, prosecutors' offices, and National IP Task Force.
- Commit to judicial reforms in Jakarta and other commercial centers, and establish special IP criminal courts.
- Combat illegal photocopying, print piracy, and unauthorized translations, and legitimize use of published materials at schools and universities.

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<sup>1</sup>For more details on Indonesia's Special 301 history, see 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/2016SPEC301HISTORICALCHART.pdf>.





## Legislation:

- Seek immediate repeal of the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws.
- Complete the relaxation of the Negative Investment List (NIL) to allow greater foreign direct investment in all aspects of the motion picture industry and other media sectors.
- Repeal the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law including local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry.
- Repeal the Broadcasting Law requiring any advertising aimed at the local market to be locally produced.
- Reduce the import tariff rate on films to pre-2010 levels.

## THE NATURE OF PIRACY IN INDONESIA

Indonesian creators are suffering losses from high levels of piracy in the country, in a market that is just as difficult for U.S. book, film, music and video game creators. The Indonesian Association of Artists, Singers, Composers and Recording Businessmen (PAPPRI) estimates that, as of 2013, pirated music causes the industry losses of Rp 4 trillion (US\$291 million) annually. The Association of Indonesian Film Producers estimates that losses approach Rp 4.3 billion (US\$317,092) per film.<sup>2</sup> Local industries report that in a given month, 18 million copies of pirated films, music, and software are circulating in the Indonesian market — mostly online but also appearing in shopping malls and markets.<sup>3</sup>

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** The Indonesian Government should be commended for its actions to address Internet piracy in 2015. Nonetheless, cyberlocker and direct download sites with pirated content harm the market in Indonesia, inhibiting the growth of legitimate distribution in creative output of foreign and local rights holders. Money from high-risk advertising from gambling services, malware providers, transactional sex offers, and pornography sites, makes offering pirated content a lucrative and low-risk enterprise. Broadband Internet access in Indonesia is still nascent compared to other emerging markets, but is sharply rising, while mobile penetration has exceeded 100% for several years.<sup>4</sup>

In August 2015, the Indonesian Government commenced administrative enforcement against primarily infringing websites. Several significant infringing sites continue to operate in Indonesia, including the streaming/downloading site Stafaband (*stafaband.info*), identified by RIAA in the fall of 2015 as a notorious market for infringing sound recording files. Other significant online markets for infringing content that have been linked to Indonesia (either because they are located there or are extremely popular in the country) include *4shared.com* (86<sup>th</sup> most accessed site in Indonesia),<sup>5</sup> which is hosted by Webzilla, and *subscene.com* (54<sup>th</sup>).<sup>6</sup> The music industry reports that in 2015, cease and desist notices involving 34,705 infringing links were sent in Indonesia, with a takedown rate of 86.73%.

**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

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<sup>2</sup>See "Indonesian music sales now 95.7 percent piracy," Jakarta Post (Sept 18, 2015), <http://www.thejakartapost.com/news/2015/09/18/indonesian-music-sales-now-957-percent-piracy.html>. See also "Piracy is now a massive issue in Indonesia," Daily Seni, Astro AWANI (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>3</sup>See "Filmmakers, musicians join forces with police," Jakarta Post (September 19, 2015), <http://www.thejakartapost.com/news/2015/09/19/filmmakers-musicians-join-forces-with-police.html>.

<sup>4</sup> International Telecommunications Union, *Measuring the Information Society Report* (2015), available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>.

<sup>5</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. It also has an unfiltered search function.

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



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 text books, 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. The Ministries of Education and Culture should be encouraged to do more to help right holders groups better address the problem of unauthorized photocopying. 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. 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. Local industry reports that illegal television channels host up to 100 pirated films at a time.<sup>7</sup> It is critically important, with oncoming convergence of online networks and advances in digital technology, that the government take an active 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).

**Retail, Mall, Physical, and Mobile Device Loading Piracy Remain Rampant:** Retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia.<sup>8</sup> USTR named Harco Glodok a Notorious Market in its 2015 out-of-cycle report, for its role as “the retail distribution point for a complex piracy and counterfeiting network.”<sup>9</sup> While the physical market becomes less significant with digital distribution (and, e.g., theatrical distribution and pay-TV), unauthorized CDs and DVDs pervade the physical market for music, movies (including those pirate movies in or claiming to be in Blu-ray format), and video games. Print piracy in Indonesia threatens the market for legitimate book publishers, and 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. In 2013, the Governor of Jakarta issued a decree that malls prohibit the sale of counterfeit and pirated materials on their premises (which was sent to the mayors of five municipalities of Jakarta), but the decree is not being enforced strictly and there are no consequences for non-compliance.

## **ENFORCEMENT UPDATES**

The enforcement environment in Indonesia has improved in 2015 with implementation of the new copyright law and implementing regulations, leading to the shutdown of 25 major piracy sites, and the blocking of 22 pirate music sites in November of 2015. To ensure that there is a significant positive impact on online infringement, and to give legitimate online distributors the opportunity to increase their market share, the government should successfully conclude additional enforcement rounds in 2016. Some industries report a greater need for the government to maintain or establish regular channels of communications with all of the affected industries.

**Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo):** On July 2, 2015, these two ministries passed a Joint Regulations No. 14 and 26 of 2015, implementing provisions of the 2014 Copyright Law that address infringing websites. Under the new

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<sup>7</sup>See Daily Seni, “Piracy is now a massive issue in Indonesia,” Astro Awani, (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>8</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials.

<sup>9</sup>See USTR, *2015 Out-of-Cycle Review of Notorious Markets* (December 2015), available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.

regulation, copyright holders may report complaints electronically and/or by writing to Kominfo, for review by a verification team formed by the Director General of Intellectual Property. The verification team then makes recommendations to the Director General of Informatics Applications for the partial or full shutdown of infringing content. Kominfo maintains a public database of the targeted websites, and in August, took actions to shut down 25 illegal websites offering free movie-download services. Further, in November, based on evidence collected by the music industry and submitted to the government by the local music industry association, the Indonesian authorities blocked 22 infringing sites including *laguhit.com*, *mp3days.com*, *weblagu.com*, *wapkalagu.com* and *iozmusik.com* in Indonesia.

**Public-private anti-piracy taskforce, collaboration with the National Police:** In September, the National IP Task Force of the Creative Economy Agency, a group of officials from within the agency and several film and music associations, including the Film Producer Association (APROFI), Indonesia's Sound Recording Industry Association (ASIRI) and PAPPRI, announced plans to collaborate with the National Police's detective division on anti-piracy actions. The Task Force will assist with reports filed with the police, monitor actions, and conduct a public awareness campaign on the importance of copyright for the creation of original works. IIPA encourages the Task Force to include other affected industries, such as book publishers, which are damaged by piracy but to date have not received as much attention as other industries.

The Creative Economy Agency had announced plans to launch an online piracy alert system in January 2016. The system is designed to notify users engaged in the download of illegal content with information on the relevant laws and potential sanctions for violations, as well as links to sources for legal downloadable material.<sup>10</sup> However, the system has yet to launch and its prospects are uncertain. The IIPA encourages the government to proceed with its announcement.

**Comprehensive Enforcement Reform:** The National IP Task Force has taken the first steps toward the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. Under the direction of the Task Force, and with the oversight of the Anti-Corruption Commission, 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 IP Office's civil service investigators (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 2016 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>11</sup>

**Judicial Reform:** IIPA encourages judicial reform in Indonesia, including:

- The Anti-Corruption Commission should work with the Supreme Court Ethics Committee to appropriately draft guidelines for the court.
- Court decisions should be published to improve transparency.

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<sup>10</sup>See "Indonesian music sales now 95.7 percent piracy," Jakarta Post (Sept. 18, 2015), <http://www.thejakartapost.com/news/2015/09/18/indonesian-music-sales-now-957-percent-piracy.html>.

<sup>11</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.

- Training should ensue on IPR cases, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. Training should not be limited to Jakarta, but extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar.

Despite the 2009 Attorney General letter categorizing IP cases as “Important Cases ... to accelerate case prosecutions,”<sup>12</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**

IIPA congratulates the Indonesian Government for passage of the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and for Regulations Nos. 14 and 26 of 2015, which implemented key provisions of the law regarding online and digital forms of infringement, including provisions in line with Indonesia’s international obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).<sup>13</sup> However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations. In several cases, critical changes were omitted.

**Unauthorized Camcording of Movies.** While no express provision was added, the Explanatory Memorandum to the 2014 Copyright 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 should be followed on with enforcement, including fostering greater cooperation with cinema owners to fully uphold and enforce the Law, targeted enforcement actions, and where warranted, prosecutions against those engaged in this highly damaging activity.<sup>14</sup> MPAA reports that an audio camcord for a major film was traced to a local cinema in Jakarta, demonstrating the important role that this type of enforcement could play to stem online piracy.

**Provisions in the New Law Raising Concerns.** IIPA 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

<sup>12</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, available at <http://www.regulations.gov>, under document ID# USTR-2010-0037-0059.

<sup>13</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>14</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.

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 TPM 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 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, WCT, and WPPT, despite a well-intentioned, but ineffective, attempt to narrow the provision through inclusion of part of the Berne three-step test:

“The 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 provision that 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 is consistent with obligations under TRIPS, the Berne Convention, WCT, and 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 rights management information (RMI) violations only occur when affecting moral rights. 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 [for 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 recordation 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 recordation 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.<sup>15</sup> For example, sound recording production, film production and distribution remain at a 100% local capital investment level. In 2015, however, the Creative Economy Agency announced that foreign investment restrictions for all sectors of the film industry including film distribution, exhibition and production will be removed and are expected to be introduced in 2016. These are helpful changes that also should be afforded to the radio and television broadcasting service sectors.

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 requires the local replication of all theatrical prints and home video titles (e.g., DVDs).<sup>16</sup> While the decree has been suspended several times, it is still pending official confirmation of suspension. 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 is 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. Notably, 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" 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>17</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.

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<sup>15</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

<sup>16</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).

<sup>17</sup>Dubbing of imported films into a local language is a commercial decision that should be based on business considerations.

**Advertising Restrictions:** Indonesia's Broadcasting Law (2002) includes a requirement that any advertising aimed at the local market must be locally produced. IIPA has received reports that this requirements is now being enforced, 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 film content as opposed to the physical medium. 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)**

In July 2012, USTR initiated an investigation into the country practices in Indonesia regarding intellectual property rights and market access, and whether Indonesia still qualifies for beneficiary status under the Generalized System of Preferences (GSP). Under the statute, the President of the United States must consider, in making GSP beneficiary determinations, "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 U.S.C. §§ 2462(c)(4) and (5). IIPA recommends that the U.S. Government develop steps for engagement with the Indonesian Government that would result in the termination of the GSP investigation.



# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be retained on the Watch List in 2016.<sup>1</sup>

**Executive Summary:** Mexico faces significant impediments to the development of a vibrant and legal digital marketplace for Mexican consumers of music, films, video games and books online. First, Mexico is hampered by an antiquated legal regime in key spots pertaining to digital protection (Mexico, for example, has not even fully implemented the 1996 digital copyright and neighboring rights treaties). Second, although some Mexican federal authorities remain very cooperative with rights holders, and have begun to develop infrastructures for addressing Internet piracy, the government has largely focused its enforcement efforts on hard copy, not digital, piracy. These shortcomings have hurt effective digital enforcement, which is a necessary ingredient to allow a legal marketplace to grow and thrive.

Meaningful reform of the Copyright Law (especially digital enforcement reform) has been long-stalled, most recently, awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). Now that the TPP has concluded, Mexico has a long list of reforms in order to comply with the Intellectual Property chapter in the TPP. It is hoped that the Government of Mexico will move forward quickly to both implement the TPP, as well to fully implement the WIPO Internet treaties. Proper implementation would include: adding protection for technological protection measures (an imperative for many copyright industries) and criminalizing the trafficking in circumvention devices; clarifying the making available right; criminalizing camcording; raising civil penalties to deterrent levels, since current Mexican law has neither statutory damages nor “additional damages”; amending the Criminal Code which currently requires a profit motive as a prerequisite, so that no proof of financial gain is needed for criminal infringement; and, creating an effective warning system (including notice and takedown) for online users and cooperation with Internet Service Providers (ISPs).

Expanding the legitimate digital marketplace continues to be a priority for the copyright industries, since Mexico, like other countries, has moved quickly into the digital age in recent years; at present, almost half of the Mexican population is online. One important bright spot in 2015, was the creation of an IP crime unit to focus on improving digital enforcement. This new sub-unit with five public prosecutors, was formed within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) in the Attorney General’s Office (PGR), and is a promising development. The unit needs to be properly trained and resourced (some of the copyright industries are already partnering with them on training programs).

Unfortunately, the Government of Mexico has been very slow to act on creating incentives to promote cooperation between rights holders and ISPs to combat online copyright infringement, which would allow the legal market to flourish. Draft amendments in the past (for example, those circulated in 2013) failed to address third party (ISP) liability at all, and failed to create incentives for the kind of active participation between the various actors in the Internet ecosystem necessary that would expand opportunities for a robust and legitimate online marketplace to develop. A much more effective approach is available. Over seven 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,

<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/2016SPEC301HISTORICALCHART.pdf>.





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 (some of which is provided in the 2014 Telecommunications Law in Article 189).

As in years past, in 2015, there were some notable enforcement actions undertaken against hard goods piracy, which resulted in the seizure of large quantities of illegal goods. While hard copy piracy is an ongoing problem, digital piracy is significantly worsening. In addition, state and municipal government anti-piracy efforts continue to be weak overall, with few local entities working on combating piracy. Even with the large-scale enforcement actions in 2015, hard copy piracy persists, including CD-R and DVD-R burned discs (and usb drives) 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 40 American feature films were sourced from illicit camcords in Mexico in 2015, as well as the unauthorized photocopying of books at universities.

## **PRIORITY ACTIONS REQUESTED IN 2016**

The copyright industries recommend that the Government of Mexico work with them to promote better cooperation in the fight against Internet piracy. This should include 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. There are needed legislative reforms as well as best practices that should be adopted in accordance with Memoranda of Understandings (MOUs) with relevant stakeholders. Here is a list of 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 UEIDDAPI, within the PGR.
- Provide UEIDDAPI with adequate resources, including ongoing training and implementation of best practices against digital copyright infringement, and support from other enforcement agencies, to undertake investigations against alleged infringing websites.
- Provide UEIDDAPI with the proper resources to continue to conduct raids and seizures at major (physical piracy) markets and to create or expand “pirate free” areas around legal vendors at markets, in particular, in Mexico City, Guadalajara, Puebla and Monterrey. Criminal actions should be taken against the supply chains in order to dismantle the manufacturing of pirate material sold to market owners.
- 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. IMPI used its administrative authority to take down an infringing website (*ba-k.com*) for the first time in 2014; a criminal case is now being prepared for trial by prosecutors.
- Support the CLAC initiative to create an environment of active cooperation between Internet services and rights holders, including, but not limited to, an efficient notice and takedown system with ISPs.

- 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, additional damages and 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 Law, and the Industrial Property, Criminal and Criminal Procedure Codes, and the new TPP obligations (detailed throughout this report).
- Enact legislation to create incentives for ISPs to cooperate with right holders to combat infringement taking place over their networks or platforms (following the CLAC initiative).
- Enact legislation to impose criminal penalties – with a prison term (three to ten years) and fines – for the unauthorized camcording of films in theaters, eliminate any required proof of commercial intent.
- Amend the Criminal Code and the Copyright Law to authorize criminal sanctions for the importation and distribution of devices used for the unauthorized circumvention of technological protection measures (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 these devices are often made abroad and imported into Mexico).
- Amend the Copyright Law 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 Law or Industrial Property Law and Criminal Code to eliminate proof-of-a-profit motive as a prerequisite to criminal liability for large-scale copyright infringements.
- Amend the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe within Mexico.
- Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates.
- Amend the Customs Code to grant customs inspectors *ex officio* powers to detain and seize infringing imports.
- Amend the Administrative Code, Tax Code and Criminal Code: (1) to provide tax crime prosecution of copyright infringement (when it implicates tax liability); and (2) increase 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.

## **COPYRIGHT PIRACY IN MEXICO**

**Internet piracy:** There are now an estimated 77.9 million Internet users in Mexico, representing about 46.8% of the population, up from 2.7% in 2000 (as of November 30, 2015 according to [www.internetworldstats.com](http://www.internetworldstats.com)). Internet piracy has grown rapidly because the legal regime and enforcement have lagged far behind the rate of Internet access by Mexican consumers. In addition, a study by the Mexican Institute of Competitiveness (IMCO) noted, that in the last 10 years, the copyright industries and distribution networks were responsible for close to 7% of

the Mexican GDP. At the same time, the copyright industries report an exponential growth in digital piracy, especially streaming (as downloading becomes somewhat less popular). The most prevalent digital platforms are stream-ripping 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 only a few of them are 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 most widespread source of music piracy is stream-ripping (for example YouTube-MP3.org), as well as “linked” piracy on blogs and forum sites. Blogspot, a Google service, has been widely used to provide these links. The Motion Picture Association (MPA) reports almost 90 websites harming the Mexican market, including *Pelis24.com*, one of the largest sites, which is a popular streaming linking site that currently offers more than 80,000 links to more than 8,000 illegally reproduced titles including films and television series. The site has been active since February 2008. 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. In 2015, Mexico ranked 18th overall in the world in terms of the number of connections by peers participating in unauthorized file-sharing of select video games on public P2P networks. Mexico ranked sixth in unauthorized file-sharing using consoles, 13th using mobile devices, and 20th using PCs.

**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 December 2015, the U.S. Government named two Mexican physical markets to its “Notorious Markets” list. These same two markets have been on the U.S. Government list every year since 2012: (1) San Juan de Dios in Guadalajara, which the U.S. Government has 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, which the U.S. Government has called “the main warehousing and distribution center for pirated and counterfeit products” sold throughout Mexico. There were reports of some positive enforcement activity at Tepito in 2015 which resulted in the seizure of large quantities of pirated and counterfeit goods, including eight million units (CD-Rs, DVD-Rs and Blu-Ray discs). The copyright industries, in their 2015 filings to the U.S. Government on Notorious Markets, listed over two dozen additional physical markets throughout Mexico (for example, in Mexico City, Monterrey, Puebla, Guadalajara, Merida, Veracruz and Toluca). Many of these markets are well-organized and on public lands, highlighting the need for cooperation by municipal and state authorities.

The motion picture industry reports that roughly 90% of film or television DVDs sold in Mexico are pirated. Eight raids in 2015 against Tepito (and nine in San Juan de Dios) were coordinated between the motion picture industry and UEIDDAPI, and resulted in significant seizures; but piracy remains strong even at those markets. 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, and should remain a focus of enforcement activity.

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. Industry enforcement efforts have uncovered multiple burning labs 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\$19 to US\$28), 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 2015, with at least 40 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, now a requirement of the TPP, 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.

## **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 of 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. A formal coordination process between the government agencies (PGR, the Mexican Tax Administration (SAT), IMPI, and local police forces) would improve the government’s ability to efficiently address the distribution of infringing content. One very positive note has been the increasing cooperation between rights holders and IMPI and PGR. On some occasions in 2015, 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. A complicating element in combatting video game piracy in Mexico is the cumbersome requirement that each copy of an infringing game must be accompanied in prosecution files by a copy of a legitimate original for comparative examination by experts (*perritos*). Under this system, when the comparison involves multiple copies of the same infringing game, rights holders must submit an equal number of legitimate game copies for the experts for comparison. IIPA members encourage Mexican IPR authorities to create a reference library of legitimate originals to be used by the experts. IIPA members also recommend that prosecutors continue to focus their efforts on major sellers and repeat offenders, rather than on the highest priority targets, and that they work to identify these targets in collaboration with rights holders. In 2015, the Association for the Protection of Film and Music (APCM) reported over 14.6 million items were seized in 776 raids.

**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 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. Three years ago, a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. It is now reported that PGR will re-energize an effort to implement a national plan with the various agencies. The plan released a few years ago was a step in the right direction, even if it did not have all of the recommended components to be more effective, and it now needs to be updated to reflect commitments from various authorities on digital enforcement. What is required is the joint implementation and monitoring of an IPR enforcement plan among PGR, SAT, IMPI, PROFECO and the Federal Police. SAT remains engaged with PGR in support of enforcement actions related to audiovisual and music piracy, especially in cases where money laundering or tax evasion was suspected. In 2015, PGR did organize the destruction of seized goods on several occasions.

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.

A third recommendation is to significantly improve the PGR’s criminal enforcement actions, especially outside of the main cities. The PGR has the authority to take *ex officio* actions against copyright infringement; for the past few years, PGR has prioritized raids at laboratories and warehouses. In actions aimed against digital piracy, there was one positive step in 2015: it was the creation of a specialized IP sub-unit within UEIDDAPI (in PGR) to undertake criminal investigations of digital piracy. This sub-unit has already had some training programs with the music, film and video game industry experts; these programs should continue, and the sub-unit should be properly resourced.

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 have been instances 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 now (since 2013) allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. Mexican law also grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. The Civil Code (since 2011) provides *ex parte* measures to avoid the destruction of evidence; however, those provisions have still not been fully implemented.

### **Administrative Enforcement**

**IMPI:** Since 2012, IMPI has been able to impose more severe penalties and has been able to apply 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. In 2015, the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM) brought a case against [www.mymusiic.com](http://www.mymusiic.com) seeking an IMPI order against the website; the case is on appeal. In the first half of 2015, the motion picture industry reported over 2,500 IMPI inspection visits were undertaken, including 1,877 *ex officio* visits, seizing 4.3 million pirated goods and resulting in 10 closures; the music industry reported that it made 1,440 inspection visits. The IMPI inspection figures were slightly higher than the activity reported in 2014. 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). 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 and should 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. In December 2015, the Mexican Congress approved the creation of a new Ministry of Culture to oversee cultural policy and funding; INDAUTOR will now be a part of that Ministry.

## Online Enforcement

One of the biggest obstacles to effective online enforcement is the absence of law that directly establishes liability principles for ISPs. Instead, 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. Some copyright industries report that Google Mexico does respond to takedown notices filed by rights holders to block access to links in *Blogspot*. In general, the takedown procedure has proven to be very time consuming for most of the copyright industries, and 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 2014, does allow an ISP to cooperate with an order from any competent authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights.

Generally, file sharing committed through online 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 Internet file sharing cases are unavailable. After the *demonoid.me* case against a BitTorrent operator stalled, there have been no new Internet piracy criminal cases to report (there were none filed in 2015). For 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. The proposals offered in recent years for a "notice and notices" system would have instituted a weak notification system to infringers.

## 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). In addition, IIPA recommends coordinated meetings on this issue with the PGR Intellectual Property inter-agency committee and U.S. rights holders (and the U.S. Embassy). Mexico should also fully implement the legislation that created 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. The video game industry 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. However, the industry has observed importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. For several years, there were improvements in the level of support from Customs in dealing with shipments of circumvention devices, with thousands of video game components seized in 2014, but, there was a sharp decline in 2015. In 2013, 2,718 game copiers (circumvention devices) were seized by Mexican customs authorities; in 2014, 2,673 were seized; in 2015, only 100 of these circumvention devices were seized.

## **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. However, Mexico has never fully implemented the treaties, and did not publish its ratification of the treaties along with the Agreed Statements. Draft laws to implement the digital treaties have circulated for years, but have never been enacted, and those that did circulate (for example, in 2013) would have fallen 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), digital treaty obligations, and now also including Trans-Pacific Partnership obligations, that will need to be corrected. Mexico has a three-year transition period for TPP implementation, but only with regard to the ISP issues (Section J) according to the agreement. The legal reform deficiencies and failure to implement treaty obligations are long-standing, (see, e.g., <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>), so it is hoped the Government of Mexico will move quickly to implement them. Doing so will benefit Mexican and foreign rights holders.

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.



# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that USTR place Switzerland on the Watch List in 2016 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.<sup>1</sup>

**Executive Summary:** Six years after the *Logistep* decision effectively brought online copyright enforcement in the country to a halt, a clear mandate to resume civil and criminal cases does not appear imminent. Although the Intellectual Property Institute has opened a public comment period for a project of law revising the Swiss Copyright Act to address some of the current gaps in enforcement, the contemplated revisions are on track to enter into force no sooner than the end of 2018, if at all. At the end of this process, in the best case scenario, right holders will have gone eight years without remedy to enforce their rights in the online marketplace. Such delays might be expected from governments of developing or emerging markets, but Switzerland makes no claim that it lacks the resources or technological expertise to make swift change. Nor is there a need for prolonged debate over the changes needed to combat online piracy; the multi-stakeholder *Arbeitsgruppe Urheberrecht* 2012, or Working Group on Copyright (AGUR12), met regularly for more than a year before publishing its unanimous recommendations on the topic in December 2013. The fact that online piracy continues to escape any liability in Switzerland, and that downloading from patently illegal sites is considered legal, can only be attributed to a reluctance on the part of Swiss leadership to live up to its obligations under international agreements to provide remedies that prevent and deter infringements.<sup>2</sup> IIPA urges the U.S. Government to send a clear message that this is unacceptable, particularly within the context of our otherwise strong bilateral trade relationship, and urges the U.S. Government to work closely with the Swiss Government to address the situation.

Switzerland remains a haven for online 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. The Swiss Government should take the following immediate actions to show its willingness to combat these serious infringing activities within its borders:

### **PRIORITY ACTIONS REQUESTED IN 2016**

- Endorse the standing opinion of the Federal Data Protection and Information Commissioner clarifying what evidence collection practices are permissible for effective civil and criminal online copyright enforcement under the Data Protection law, to permit copyright enforcement actions to resume as soon as possible;
- Upon completion of the public comment period for the December 2015 draft Copyright Act amendments, accelerate the passage of a bill to incorporate the compromise recommendations of the AGUR12 dated December 6, 2013, and to make other improvements to modernize the Swiss Copyright Act so that it is fit for purpose;
- Improve the draft Copyright Act amendments to provide efficient anti-piracy tools against all types of piracy regardless of technical details;

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<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/2016SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Switzerland is subject to Article 41(1) of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which requires that its members "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." See also WIPO Copyright Treaty (WCT) Art. 14(2), and WIPO Performances and Phonograms Treaty (WPPT), Art. 23(2).



- 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;
- End the discrimination against neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act; and
- Extend the term of protection consistent with emerging global developments and EU law, including protection for producers and performers of 70 years from publication or performance.

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

At the time of the 2010 Federal Supreme Court decision enjoining Logistep's data collecting practices in the context of preliminary civil anti-piracy cases, Logistep predicted that Switzerland would soon become a safe haven for large-scale copyright infringement.<sup>3</sup> Over the past six years, that prediction has largely come true. Switzerland suffers not only from increasing domestic piracy rates for music, film, video games, and entertainment software, but also from a growing base for the operations of certain Internet service providers (ISPs) 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 483 of the world's most popular websites according to Alexa, an ad-based file storage service that fuels piracy 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.com*, the linking site *Putlocker.is*, the linking and streaming site *Watchseries.it*, 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). USTR identified both *Uploaded.net* and *Putlocker.is* in December 2015 as Notorious Markets that engage in or facilitate substantial copyright piracy.<sup>4</sup> 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 avail themselves of 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. 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.

Book and journal publishers also face a difficult environment in Switzerland, where textbook photocopying and the publication of illegal pdf-scans on websites proliferate. Private copying is allowed from illegal sources, and is permitted not only by private individuals, but also by government and commercial entities. E-books of all kinds circulate widely online. Meanwhile, higher education textbooks are frequently pirated, and while the Copyright Act allows for the copying of a part of a book or a single article of a journal, even where these extracts and articles are electronically available for purchase or rent, there is no mechanism on Swiss campuses to monitor whether professors take the liberty to copy books in substantial part or even in their entirety. Proposed text- and data-mining exceptions in the draft copyright amendments currently under review risk creating new excuses for users to engage in wholesale copying of entire collections, without safeguards for the stability of publisher platforms.

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<sup>3</sup>See Logistep press release (Sep. 8, 2010), available at <http://www.openbroadcast.de/artikel/59607/Schweizer-Bundesgericht-verhindert-Durchsetzung-der-Urheberrechte-in-der-Schweiz-.html>.

<sup>4</sup>See 2015 Out-of-Cycle Review of Notorious Markets, December 2015, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.

## **COPYRIGHT LAW AND ENFORCEMENT IN SWITZERLAND**

Copyright industries in Switzerland have kept up efforts to resume criminal and civil actions against P2P online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the *Logistep* case. Some prosecutors still pursue investigations against cyberlockers and structurally infringing sites, but seem unsure how to enforce existing laws and lack resources to freeze assets, or to secure evidence residing on servers (which may contain significant quantities of infringing materials). Prosecutors — although now beginning to voice their own frustration with the situation — have interpreted the precedent broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. Right 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.

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 — a significant accomplishment given the variety of viewpoints that were represented in the working group.<sup>5</sup>

In June 2014, the Federal Council instructed the Department of Justice to respond to the December 2013 recommendations of the AGUR12 by developing a project of law on a very protracted schedule.<sup>6</sup> The project of law is open to public consultation until the end of March 2016, at which point the government will evaluate stakeholder input and prepare the draft Copyright Act amendments together with a report for the parliamentary law making process. Any resulting proposed amendments would not become law before the end of 2018 (if at all). In the meantime, the Department of Justice has done nothing to set the record straight for its own prosecutors that the *Logistep* decision was a narrow case that, under the Swiss data protection law, should not have foreclosed further private sector gathering of evidence in online copyright cases. Also, 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 Draft Amendments**

The Federal Council presented its proposed revisions to the Copyright Act on December 12, 2015, incorporating many of the AGUR12 recommendations regarding online piracy.<sup>7</sup> The project of law includes some important elements that IIPA has urged the Swiss Government to adopt in the context of *Logistep* and its aftermath, namely, measures that address websites providing access to both hosted and non-hosted infringing content and repeat infringers. The draft amendments need substantial improvement, but offer a basis for continuing the work of modernizing Swiss copyright law. We offer some preliminary, but not exhaustive, comments below. We hope that the Swiss Government will approach this important subject carefully and creatively, incorporating best practices that have been employed in some other jurisdictions.

**Data processing of infringing online activity.** As a general matter, proposed Article 66j is a welcome reaffirmation of the private sector's ability to conduct online piracy investigations. The provision lays out new conditions under which a right holder may collect data about online violations of his or her copyright, and is an apparent effort to restore this ability after the *Logistep* decision caused authorities to question the admissibility of such data in court. However, the proposed amendment is overly restrictive, imposing requirements that any data

<sup>5</sup>For the full report of AGUR12 recommendations, see <https://www.ige.ch/en/copyright/agur12.html>.

<sup>6</sup>See the press release of the Swiss Government at <http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=53259>.

<sup>7</sup>"Federal Council wants to modernize copyright: consultation process under way," Dec. 11, 2015, available at <https://www.ige.ch/en/copyright/modernisierung-des-urheberrechts-2015.html>.

collection be limited to only cases of serious breaches of copyright or related rights (meaning only regarding either a pre-release file, or large-scale making available of published works), and only to activity occurring over P2P networks. The term “large-scale” is not defined. The provision states that data collection should capture no more data than is necessary to pursue copyright infringement actions, then goes further by limiting the permitted collections to three specific types of data.

While the proposed article on data processing is a positive step forward to affirmatively permit certain types of forensic investigations, as written it still perpetuates the incorrect notion that the ability of right holders to investigate online piracy of their works is a privilege, rather than a necessary element in exercising the right to enforce copyright and related rights. That presumption contradicts the statements that the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision — even as it stood by the Federal Court’s opinion — in which the FDPIC underscored, in the context of online piracy cases, that “we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing”.<sup>8</sup> To elucidate its agreement with the Federal Court’s decision against *Logistep*, the FDPIC criticized not the particulars of the data that *Logistep* collected but instead the manner in which the data was presented to the court. To properly address the privacy concerns raised surrounding the *Logistep* decision, it would be sufficient for the proposed amendment language to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (which, incidentally, would mirror the recommendation of the FDPIC, as well as the recommendation of the AGUR12)<sup>9</sup>. Instead, by specifying precise types of data that may be collected, the proposed Article 66j risks jeopardizing the kind of agile analysis in anti-piracy efforts that is vital in a world of evolving technology.

**Notice, Take Down and Stay Down.** Proposed Articles 66b through 66e of the draft law introduce notice-and-action mechanisms to be undertaken by service providers. Under these provisions, a right holder or a competent authority sends a communication about an infringement to an online service provider, upon which the service provider takes the infringing material down or prevents access to it. The draft law provides that Swiss uploaders or service providers (depending on the mechanism in play) may oppose the measures and, in the case of materials hosted in Switzerland, right holders may then take the matter to court. Articles 66b and 66c are directed toward online service providers such as web hosting providers, chat platforms, and document exchange platforms. These “derivative” online service providers are under an obligation to take preventative measures against repeat infringements of the same works (Art. 66b(4)), unless they join a Swiss self-regulatory organization (Art. 66c(2)). In order to make sure that these mechanisms work effectively and are time- and cost-efficient, these articles need to more deeply regulate the formalities and measures to be followed by online service providers, with specifics as to timelines and cooperative exchange with right holders.

**Website Blocking.** Articles 66d and 66e establish a notice-and-action mechanism to be followed by Swiss telecommunication service providers in cases where infringing material is hosted by an online service provider whose headquarters is outside of Switzerland, or is concealed. Under this mechanism, Swiss telecommunication service providers would respond to orders listed by the Swiss Intellectual Property Institute in the Federal Gazette by blocking access to the infringing material from Swiss users. Also, the wording of the articles actually prevents actions against sites offering unreleased material, which is of course the most harmful type of piracy.

**Notifications and Identification of Users.** Proposed Articles 66g through 66h set up a limited mechanism for right holders or competent authorities to send notifications to users engaged in infringing activity, which may result in the identification of repeat infringing users for purposes of civil liability. The mechanism is limited to cases of serious infringement (specifically, either a pre-release of a single work, or the large-scale making available of

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<sup>8</sup>Statement of the Federal Data Protection and Information Commissioner (FDPIC), “*Internet file-sharing networks – the legal situation after the Logistep ruling*”, June 15, 2012, available at <http://www.edoeb.admin.ch/dokumentation/00153/00154/00170/index.html?lang=en>.

<sup>9</sup>“Proposal of the AGUR12”, Paragraph 9.3.5, dated Dec. 6, 2013, available at [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/e/Schlussbericht\\_der\\_AGUR12\\_Empfehlungen\\_EN.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Schlussbericht_der_AGUR12_Empfehlungen_EN.pdf).

otherwise legally available works) that occur over P2P networks (apparently excluding such platforms as cyberlockers). Right holders must allow for at least a two-month delay between notifications, and may not request the identification of the alleged infringer (according to proposed Article 62a) until they have sent two notifications. In other words, it is at least a four-month process to seek from a telecommunication service provider the identity of a user whose Internet connection was used to violate a right holder's copyright. This procedure is too costly and time consuming, and therefore utterly ineffective. It gives any heavy infringer a theoretical safe haven period of at least four months before even a threat of consequences. Furthermore, the draft should clarify that the right holders shall be able to transfer all costs for the procedure to the infringer.

**Limitation of Liability.** The proposed amendments limit the liability of service providers that comply with these mechanisms against claims of copyright violation that occur over their services or networks, or other contract claims or tort liabilities. (Art. 66k.) However, the proposed amendments fail to explicitly establish any pre-existing possibility of secondary liability, making the supposed incentive of Article 66k likely to be ineffective.

## **ADDITIONAL CONCERNS UNDER 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. None of these concerns have been remedied with the current proposed amendments to the Copyright Act. In summary:<sup>10</sup>

First, the private copy exception in Article 19 of the Copyright Act is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. As the Swiss Federal Council cautioned when it announced that copyright amendments were to be drafted, the Swiss Government has confirmed in statements that downloading from an illegal source is to be permitted, and the current draft amendments do nothing to foreclose this possibility under Article 19. In fact, the measures proposed in the draft amendments apply only to serious cases of infringement, leaving the door open for individuals to download from illegal sources without consequence or penalty of any kind.

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, circumvention devices and 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 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 cap on right holders is wholly inadequate in the present reality of online content licensing. The discrimination against 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 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

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<sup>10</sup>These were explained in greater detail in IIPA's 2013 Special 301 submission on Switzerland. See <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.



Swiss legislature to set these caps based on a political assessment.<sup>11</sup> With this judgment, the Swiss Federal Supreme Court clearly shows the path for reform: This unusual and unjustified discrimination against the neighboring rights should be ended, and replaced with a fair and equitable remuneration for both performing artists and producers. The Swiss Government refused to address this concern in the draft legislation on the grounds that AGUR12 did not find an agreement on this particular point. However, the same was true, for example, with respect to the lending right remuneration which the government nevertheless included in the draft.

The present rule will have an even greater negative effect if Switzerland adopts a so-called “extended collective license” for streaming and Internet television, as is currently proposed in the background media kit that accompanies the draft Copyright Act amendments.<sup>12</sup> The proposed licensing scheme described therein is voluntary in name only. While forms of extended collective licenses exist in some other territories, it is essential that it not be used in connection with central economic rights implicated in services such as streaming. Extended collective licenses undermine individual licensing, the norm for online services. And an opt-out provision does not render an extended collective license a form of voluntary collective licensing. There is substantial risk that extended collective licenses applied in the online space would depress the value for creative works, setting a tariff “norm” that can undermine licensing terms for right holders who choose to exercise their exclusive rights and opt out. In addition, requiring opt-out in order to exercise exclusive rights could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. In short, extended collective licenses are wholly inappropriate with respect to services that are already licensed directly around the world, even with opt-out rights. Together with the existing remuneration caps, the two schemes fall short of the country’s international obligations, including with respect to exceptions and limitations to copyright under the three-step-test of TRIPS Article 13.

Fifth, IIPA is disappointed to find that the current proposed amendments to the copyright law do not include any provision for term extension. The term of protection for sound recordings under the current Copyright Act is only 50 years, and should be extended to at least 70 years. Such extension would not only provide greater incentives for the production of sound recordings, but also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth as well as tax revenues and enabling producers to continue offering recordings to local consumers in updated and restored formats as those formats are developed. A longer term would support the development of the industry and the creation of new jobs. Currently, 63 countries protect sound recordings for 70 years or longer, including the EU Member States, 28 out of the 32 OECD member countries, and 9 out of the top 10 music markets (by total revenue in 2014). Further, in the recently concluded Trans-Pacific Partnership Agreement (TPP), the minimum term of protection for sound recordings is set at 70 years.

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

Seventh, although Article 12 Section 1*bis* of the 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 those motion pictures are still playing in Swiss cinemas.

**Amendments to the Swiss Film Act.** In June 2015, the Swiss Parliament passed amendments to the country’s Federal Act on Film Production and Film Culture (Film Act) that took effect on January 1, 2016. These amendments extend restrictions on theatrical distribution to all other forms of exploitation with the exception of linear broadcasts. The amended law generally provides that an entity may only distribute audiovisual content in Switzerland

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<sup>11</sup>FSC no. 2C/783, p. 16, cons. 6.6.

<sup>12</sup>See media kit prepared by the Swiss Intellectual Property Institute, available at [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/e/modernisierung\\_urheberrecht\\_2015\\_e/Medienrohstoff\\_URG\\_EN.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/modernisierung_urheberrecht_2015_e/Medienrohstoff_URG_EN.pdf).

if it holds rights to all language versions actually exploited in the country in the particular method of distribution. Several relevant issues are not addressed in the amendments and the potential implications of the amended law remain unclear, resulting in much confusion in the marketplace as to compliance. The Federal Ministry of Culture should provide clarification on these amendments so as not to unsettle or disturb licensing activity.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 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:** Taiwan once stood as a model for strong intellectual property protection throughout Asia, implementing progressive policies, including the establishment of a modern copyright regime, that spurred a flourishing marketplace for legitimate creative offerings from locals and foreign right holders alike. Unfortunately, Taiwan's progress on intellectual property rights protection stalled and, over the past several years, Taiwan has been moving away from policies it once instituted to foster and reward creativity. Internet piracy remains the most urgent problem in Taiwan, as it continued to worsen in 2015, stunting the growth of the creative industry. Taiwan remains without an effective mechanism to address foreign piracy websites that target consumers in Taiwan. Media/set-top box (STB) piracy is rapidly increasing, e-book piracy is growing, and more longstanding forms of piracy, including rampant unauthorized photocopying of textbooks on or around university campuses, continue to fester. IIPA is hopeful that President Tsai's recent election will usher in a new era of protection for the rights of authors and creators, which will spur Taiwan's economy and result in boundless contributions to Taiwan's culture.

Taiwan's lack of will to seriously tackle its piracy problems and to provide adequate protections for copyright holders is reflected in the most recent draft amendments to its copyright law. The draft amendments fail to provide tools necessary to effectively address Internet piracy, including the problems posed by foreign piracy websites and the lack of cooperation by Internet Service Providers (ISPs). Furthermore, rather than demonstrate the seriousness of Taiwan's stated desire to join the Trans-Pacific Partnership agreement (TPP), the draft amendments include numerous inconsistencies with the TPP text and even raise questions regarding Taiwan's respect for its existing international obligations. In a positive development, the National Communications Commission (NCC) indicated a willingness to include a new measure in the draft Electronic Communications Act, similar to those adopted in other parts of the world, authorizing disabling of access to foreign websites whose primary purpose is to infringe, although the measure is not included in the latest draft.

On enforcement, although industry cooperates well with the new Criminal Investigation Brigade (CIBr), the Communication Security and Surveillance Act amended in 2014 further restricts police authority to undertake online investigations. As a result, the CIBr has apparently withheld a number of right holder referrals. Judges continue to 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. In many recent criminal cases, prosecutors have agreed to suspended sentences.

Demonstrating the stakes, a 2014 study undertaken by Oxford Economics shows local film and television industries directly contribute US\$5.5 billion to Taiwan's GDP, support 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 2016**

#### **Enforcement:**

- Ensure that the CIBr is provided with sufficient manpower, funding, and resources.

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<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/2016SPEC301HISTORICALCHART.pdf>.





- Reinstate award budget and an adequate bonus system 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.
- Continue the campus inspections program, allowing robust rights holder participation in the evaluation of universities and their compliance with the copyright law and their IPR policies.
- 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:**

- Encourage the NCC to adopt a new measure providing the authority to disable access to websites intended to facilitate infringement and, once enacted, monitor test cases brought to ensure the law operates effectively and fairly to all parties.
- 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 allow a fair-market based royalty rate and eliminate delays in fixing the rate;
  - make unauthorized camcording of motion pictures in theaters a criminal offense;
  - make unauthorized camcording of live musical performances a criminal offense;
  - do not relax or reduce criminal liability standards (including maintaining public crime status 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) at least 70 years from publication.
- Implement the provisions in the Copyright Act dealing with ISP liability to provide appropriate incentives for expeditious removal of infringing materials online, including forwarding notices to infringers and implementing repeat infringer policies.

## **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>2</sup>

**Piracy Continues to Worsen, Especially Online:** Piracy continued to increase in Taiwan in 2015, particularly piracy over the Internet and on mobile devices. Foreign websites, such as *eyny.com*, (the 12<sup>th</sup> most accessed site in Taiwan according to Alexa) and *tw116.com* (ranked 352<sup>nd</sup> in Taiwan),<sup>3</sup> that provide illegal content remain a significant problem, harming right holders’ ability to commercially operate in Taiwan. Particularly popular are streaming, forum,<sup>4</sup> blog, deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites, which are used to infringe copyright in movies, music, video games, and books and journals. Apps, including for set-top boxes (STBs) and mobile devices, have become a significant platform for disseminating illegal content. The music industry estimates the Internet piracy rate at roughly 86% in 2015 (increased from roughly 85% in 2014).

<sup>2</sup>See, e.g., IIPA, *Taiwan*, 2015 Special 301 Report, February 7, 2015, available at <http://www.iipa.com/rbc/2015/2015SPEC301TAIWAN.pdf>.

<sup>3</sup>*Tw116.com* is a notorious site built on, and commercializing, the infringement of others. The site primarily uses *Xigua Player* links.

<sup>4</sup>Forums are a serious problem, including *eyny.com* and *ck101.com* (the 38<sup>th</sup> most accessed site in Taiwan), as just two examples. The flow of infringing music and audiovisual content through these forums is enormous.

The publishing industry has long reported on continued problems with unauthorized photocopying and use of infringing materials at universities. While a “Campus Intellectual Property Protection Action” plan has been incorporated into the Ministry of Education’s (MOE) Campus Inspection program since 2006, the inspections merely consisted of self-assessment by universities. In early 2015, MOE met with representatives of the publishing industry in Taiwan to discuss the 2014 assessment results. At this meeting, publishing industry representatives again reiterated their request to participate in the campus inspections. MOE conducted campus inspections of 16 national universities/institutions in first half of 2015; another batch of 26 private universities/institutions were scheduled to be inspected in second half of 2015. In early July 2015, MOE invited publishing industry representatives to participate in the inspections conducted in November and December. The inspections found that while some universities already had policies in place for intellectual property rights (IPR) protection, student and faculty compliance with these policies was less than robust. Allowing rights holder participation is a significant improvement, and will allow greater cooperation among MOE, university administrators and rights holders in strengthening IPR protection on campus.

**Media Box/STB Piracy:** The sale of media boxes or STBs facilitating piracy has increased considerably in Taiwan. Mostly originating in China and available openly throughout Taiwan, including at so-called “3D” shops that sell computers, software, and peripherals, and via online retailers, STBs facilitate unauthorized streaming of motion pictures and television content through apps that allow users to easily find and use such content without permission or payment to rights holders. These boxes often contain, and can connect to, a hard disk to store downloaded content, and often have an SD card slot, which helps novices connect with foreign piracy sites. Motion picture industry staff have detected more than 30 different brands of such devices now available in the marketplaces in Taiwan.

STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The boxes are either pre-installed with apps that facilitate infringement, or users are easily able to obtain apps required to access unauthorized motion pictures and television content. These apps allow the user to connect to a supporting over-the-top (OTT) online infrastructure, including foreign pirate sites (usually hosted in mainland China), that provides users with instant access to infringing audiovisual content. TIPO has indicated in the past that STB piracy can be addressed through current provisions of the law.<sup>5</sup> One case was brought, but decided unfavorably in 2013. Taiwan must do more to eliminate this illegal activity.

**Lack of Government Will and Inadequate Legal Framework Impede Enforcement:** Regarding enforcement, although the takedown rate remains extremely high for hosted content in Taiwan, Internet users there increasingly obtain unauthorized content from websites located overseas, particularly those in mainland China. While a remedy exists for domestically hosted websites (either civil or criminal), such is not the case for foreign-based infringing websites. Regarding non-hosted forms of infringement, music right holders have been frustrated by the unworkable and unenforceable graduated response process.<sup>6</sup> Taiwan’s relative isolation from the international community, along with lack of proper implementation of the existing Copyright Act and the 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. Efforts by right holders to put in place a Memorandum of Understanding (MOU) with ISPs proved to be fruitless. As IIPA has previously reported, further regulations or legislation will be crucial to provide an appropriate response to Internet piracy in Taiwan, including effectively encouraging ISP cooperation with right holders to educate and, under certain circumstances, take action against repeat infringers. Taiwan has become an outlier in Asia, because many other countries in the region are taking active steps to address the growing online and mobile piracy problem. On a positive note, it appears that it is possible that existing remedies under the Copyright Act could be used more effectively to address

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<sup>5</sup>Actions could be brought under Articles 87(7) or 91 of the Copyright Act, as aiding or abetting cases under the criminal law, or through other measures. It would also appear that allowing the boxes to use apps that provide access infringing content is a violation of anti-circumvention provisions in Taiwan’s Copyright Act.

<sup>6</sup>As noted in last year’s submission, the music industry 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; 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.

the problem of foreign websites that primarily infringe, but the courts must issue a judicial interpretation to allow for disabling access to such sites. Also, NCC has expressed a willingness to include such a measure in its draft Electronic Communications Act, but the most recent draft does not appear to include this remedy.

The implementation of the amendments to the Communication Security and Surveillance Act in 2014 negatively impacted investigations into online infringement, because these amendments restrict the information police can obtain from ISPs without a court order.<sup>7</sup> The local motion picture investigators report that the number of successful raids throughout the first eleven months of 2015 maintained a downward year-on-year trend at 35 in 2015, declining from 37 in 2014 and 94 in 2013.

**IPRP Reorganization Into CIBr and Removal of Award Structure Have Resulted in Downgrading of Priority of Copyright Cases:** The IPR Police (IPRP), prior to its disbanding on January 1, 2014, was one of the more effective units in Taiwan in the fight against copyright piracy. As reported, its reorganization into the CIBr has resulted in decreased human resources, funding, and prioritization of copyright infringement cases. In the transition, a number of good IPRP investigators were “dismissed” because they were not trained as “criminal police,” resulting in a reduction in the number of officers and squadrons (from five squadrons down to three; before the 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. 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/ 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 by the Ministry of Economic Affairs (MOEA), responding to pressure from the Legislative Yuan (LY). IIPA recommends the reinstatement of reasonable awards. As we have raised before, 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 Specialized 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.

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<sup>7</sup>The amended law requires officers to obtain court orders before soliciting further information from ISPs such as IP address account information.

<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.

## **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, the proposed amendments to Taiwan's Copyright Act that included several unfavorable elements for right holders, and TIPO's inappropriate expansion of Taiwan's compulsory license scheme.

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements Emanating from Outside Taiwan:** It remains the case that many of the online services built on infringing activities of others, and/or fostering or encouraging infringement, are located outside of Taiwan. Nonetheless, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. More than three dozen jurisdictions around the world in addition to Taiwan are working toward approaches to halt illegal 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 that are built on, facilitate, and/or encourage infringement. It is unfortunate that no remedy has been proposed as part of the copyright review process. Governments in the region, including recently in Indonesia and Singapore, have adopted and/or refined approaches that provide a remedy for ISPs to disable access to sites that are primarily infringing. As noted above, NCC has indicated interest in enacting a new measure to disable access to infringing websites but, thus far, the proposal appears to be inadequate.

**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*quinquies* 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 of infringement to alleged infringing users, or to have and implement a termination policy for repeat infringers.

**Proposed Copyright Amendments Are Inconsistent With International Norms:** TIPO released the third draft of amendments to the Copyright Act in October 2015. IIPA had provided extensive comments on the second draft of amendments, but, disappointingly, very few of IIPA's comments were reflected in the third draft. In response to the third draft, IIPA reiterated most of these comments and added some others.

Although the third draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. First, the draft misses the opportunity to strengthen Taiwan's enforcement framework to address non-hosted infringements. Second, the draft fails to address Taiwan's urgent need to address foreign rogue websites targeting Taiwan users. A new mechanism is needed to deal with rogue websites that are specifically built to induce and encourage infringement and target users in Taiwan.

The draft also fails to address many of Taiwan's other pressing needs, including: 1) deeming Internet piracy a "public crime" (as was so successfully done regarding optical disc piracy); 2) making it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters; 4) making it a criminal offense to engage in unauthorized camcording of live musical performances; 4) correcting problematic provisions regarding copyright collective management;<sup>9</sup> and 5) 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

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<sup>9</sup>Corrections should include allowing the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establishing judicial dispute resolution mechanisms in lieu of the requirement to have CMOs tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings, and allow for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

any case, no less than 70 years). In addition to retaining an inadequate term of protection, the draft includes many other provisions that are inconsistent with evolving international norms and may even raise questions regarding Taiwan's compliance with its existing international obligations. For example: the draft introduces new, overly broad exceptions to protection, some of which would call into question Taiwan's compliance with its TRIPS obligations;<sup>10</sup> relaxes criminal liability standards (e.g., removing the "public crime" designation for Optical Disc piracy; requiring participation in collective management organizations as a prerequisite for criminal enforcement; and exempting a broad range of uses of copyright works from criminal liability);<sup>11</sup> and requires right holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement. Additionally, authors of sound recordings should be afforded exclusive rights for public performance and retransmissions, as many other countries around the world have done, and the provision on circumvention of technological protection measures should be clarified to ensure the standards are in line with those of the United States.<sup>12</sup>

As IIPA noted in its comments, the third draft unfortunately includes significant inconsistencies with the obligations set forth in the TPP text, including the inadequate term of protection and the lack of *ex officio* authority discussed above. Leaving these inconsistencies uncorrected is at best a substantial missed opportunity. At worst, it sends a signal that Taiwan may not be serious in its stated desire to join its neighbors in the TPP environment.

**TIPO Inappropriately Expanded Compulsory Licensing to Karaoke:** TIPO recently approved a compulsory license application for musical works recorded and reproduced on SD memory cards for use on karaoke music equipment. This does not appear to be within the scope of the compulsory license provisions of the Copyright Act and will have a negative impact on the market for licensing musical works.

## **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 training seminars organized by TIPO for judges, police, prosecutors, customs officers, and other law enforcement units, and organizing similar seminars themselves. 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). Industry also supports 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 2016, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

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<sup>10</sup>To ensure compliance, the three-step test (i.e. TRIPS Article 13) should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

<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 pirate Optical Discs through online marketplaces. The draft mandates that right holders participate in a collective management organization to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. Decriminalization of parallel imports should not be overbroad because the government needs appropriate means to address the fact that many piratical imports are labeled as legitimate goods, which undermines Taiwan's legitimate marketplace. And the exemptions from criminal liability set forth in Article 46 are too broad, covering, for example, exploitation of digitized karaoke machines or jukeboxes which contain reproductions of musical works for public performance.

<sup>12</sup>Draft Article 87 identifies the three conditions for a prohibited circumvention technology, device, components, etc., similar to requirements found in U.S. law. Unfortunately, it is not clear whether just one of the three conditions must be satisfied, as is the case in U.S. law, or whether all three conditions must be satisfied, which would substantially weaken the standard of protection.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2016 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 2016.<sup>1</sup>

**Executive Summary:** Yet another year has passed with no movement toward a regulatory structure that would allow music right holders to collect any compensation for the commercial use of their music in the UAE. As a major hub for tourism, and host to legitimate online and mobile music services and sold-out concerts for many major music acts, the UAE is in a position not only to follow through with payments that are critical for U.S. right holders but also to invest in local cultural production and the development of a robust local industry that can develop local talent. 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. Protracted content review, resulting in significant backlog in the availability of books in the market, is exacerbated by the lack of adequate personnel (book title monitors) at the National Media Counsel to conduct the reviews expeditiously. 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 region.<sup>3</sup>

#### **PRIORITY ACTIONS REQUESTED IN 2016<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.
- Create an expeditious content review procedure for clearing book titles for sale into the market, including by providing adequate resources and personnel to the National Media Council and by creating a central database of cleared titles to avoid repetition among the title monitors assigned to various book stores/retailers.
- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit products.

#### **COPYRIGHT ENFORCEMENT ISSUES IN UAE**

**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 nothing is being collected today,

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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/2016SPEC301HISTORICALCHART.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 IIPA reports on UAE have contained more detailed discussions of piracy and enforcement issues (see, e.g., IIPA, *United Arab Emirates*, 2014 Special 301 Report, February 7, 2014, available at <http://www.iipa.com/rbc/2014/2014SPEC301UAE.PDF>), and identified the following priority actions, which 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 WTO 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.



substantially 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 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 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).

More than a decade later, right holders still find themselves without the ability to license on a collective basis. There are however signs that the deadlock could be solved and UAE and international right holders could at long last start to benefit from the rights that were granted in 2002. Twofour54 — an Abu Dhabi Media Zone entity supported by a broad based right holder coalition — submitted in 2015 an application for an operating license for a music rights collective licensing organization to the MOE. The MOE should move swiftly to approve the application, which is made by a reputable local body and supported by the music industry across the board.

**Expedite Content Review of Book Titles.** The book publishing industry faces a protracted content review process in the UAE, particularly in Dubai. There appears to be no standard review process in the country. Instead, title monitors make determinations as to whether particular titles should or should not be sold in the UAE after what is often a lengthy process, whereby a monitor is assigned to a retail establishment, and is required to inspect each title and write a summary of it before making a determination—and this review does not apply to other retailers that may have ordered the very same title. Thus, it may be the case that while one retailer has been cleared to sell a title, the very same title may yet be unavailable at other retail shops (if review of the same title by another monitor at a different shop is still pending). The lack of a central database listing all titles reviewed and cleared for sale in the country contributes to the significant delay in bringing new titles to market. For instance, the reviews of many titles that were submitted in early 2015 still remain pending. While there is reportedly an effort to create a database of books authorized for sale in the market, it is unclear whether this has progressed at all. In addition to creating such a database (which would also alleviate duplicative reviews by different monitors), additional monitors should be trained and deployed to address the existing backlog.

**Other Issues:** Due to the lack of a proactive approach of the MOE with respect to copyright concerns, Internet piracy has proliferated.<sup>5</sup> Customs enforcement in UAE has been ineffective, exacerbated by the requirement to file separate customs notices with each regional authority and the lack of coordination between these authorities. As a consequence, the UAE's out-of-city malls and free trade zone areas — such as the Dragon Mart (scheduled to significantly increase in capacity with the completion of Dragon Mart 2) and the China Mall — are rife with infringing product. Both of these are renowned forums for Chinese manufacturers and traders to showcase infringing products for trade throughout the Middle East and North Africa. While the Dubai Department of Economic Development enables right holders to seize infringing product through its open complaints mechanism, political will is required to

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<sup>5</sup>According to the Telecommunications Regulatory Authority (TRA), as of October 2015, Internet broadband penetration in the UAE has increased to more than 1.16 million subscriptions, and more than 13% of the population. The UAE also boasts more than 17 million active mobile users (with well over 200 subscriptions per 100 inhabitants), meaning roughly 88% of the population now uses the Internet. These numbers mean enormous opportunities for growth in legitimate copyright distribution services. 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 *Torrentz.eu* (the 43rd most accessed site in the UAE) and *putlocker.is* (64th). 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 video games, 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.

tackle the magnitude of trade in counterfeit and pirated goods within these zones and enhance controls at the country's borders to prevent such goods from reaching them.

## **COPYRIGHT AND RELATED LAW UPDATES**

**Amendments to the UAE Copyright Law:** The MOE has in recent years contemplated amendments to the UAE Copyright Law to make certain needed changes, following a study by the Abu Dhabi Technology Development Committee. The plans were reported to 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 TPM that effectively controls access to copyright-protected materials<sup>6</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>7</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention Appendix;<sup>8</sup> 3) ensuring WTO TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; 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>6</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>7</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 by statute as they are here.

<sup>8</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, available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.



# **OUT-OF-CYCLE REVIEW**

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Spain is not currently listed on USTR's Special 301 list but is subject to an out-of-cycle review (OCR), announced in 2013, "which is focused, in particular, on concrete steps taken by Spain to combat copyright piracy over the Internet." IIPA recommends that USTR conduct a formal review to determine the strengths and weaknesses of Spain's performance under each of the established OCR benchmarks, and to take appropriate action upon the completion of that review.<sup>1</sup>

**Executive Summary:** If Spain's success in the fight against piracy were to be measured solely by the comprehensive legislative reform that it has undertaken, there is no doubt that the reforms of 2014 and 2015 would put Spain on the online enforcement map. However, Spain's success as measured by any concrete change in the significant levels of piracy in the country is still barely perceptible. A 2015 study shows that, of all of the digital content that Spain's 35 million Internet users consumed in the previous year, 88% of it was infringing.<sup>2</sup> The demand for creative content is so significant that, absent such massive levels of piracy, Spain's economy would generate over 29,000 new jobs, and the Spanish Government would realize an additional 627 million euros (\$US687 million) in annual sales and income taxes. The situation is a stark reminder that for rule of law to take hold, particularly in the online space, administrative and judicial enforcement bodies must be equipped with the resources and training to implement the law effectively with the aim of obtaining concrete results.

Unfortunately, Spain's Intellectual Property Commission (IPC), which has the ability to make the greatest immediate impact in reducing Spain's online piracy, is also the one enforcement tool that the government of Spain has done the least to improve. With an average resolution time of 480 days per case, the IPC is no deterrent to the massive online piracy operations that maintain a firm grip on the Spanish market. IIPA is hopeful that in the coming year, Spain's judiciary will effectively apply new provisions in its Intellectual Property and Civil Procedure Laws, Criminal Code and newly issued Attorney General's Circular against Spain's worst offenders. However, to truly open the market to legitimate creative products, a better equipped IPC is imperative: one that can process a volume of complaints commensurate with the 4.4 billion digital works accessed illegally in Spain on a yearly basis.

### PRIORITY ACTIONS REQUESTED IN 2016

- 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 dedicated to tax fraud and smuggling linked to IP infringement.
- Provide government support for agreements between rights holders and major online advertising services toward removal of ads from websites offering illegal material.

<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/2016SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Tommaso Koch and Fernando Navarro, "88% of cultural content consumed online in Spain illegal, says industry," *El Pais* (March 10, 2015), available at [http://elpais.com/elpais/2015/03/10/inenglish/1425997747\\_249854.html](http://elpais.com/elpais/2015/03/10/inenglish/1425997747_249854.html).



## **COPYRIGHT PIRACY IN SPAIN**

Online piracy in Spain continues to be quite significant for the markets for music, film, television programs, 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>3</sup> shows that in 2014, there were more than 886 million illicit audiovisual files acquired, causing 571 million euros (US\$625 million) in lost profits. The volume of physical and online pirate music products in 2014 amounted to 1.835 billion files, causing an estimated 410 million euros (US\$449 million) in lost profits. Pirated leisure books in Spain (not including educational and professional texts) totaled 335 million files in 2014, causing 100 million euros (US\$109 million) in lost profits. Altogether, the GfK study found a total loss in Spain of potential earnings due to piracy of 1.7 billion euros (US\$1.86 billion).<sup>4</sup>

According to the GfK study, 61% of Spanish Internet users proclaim that they would not pay for something they could get for free, while 51% argue that they should not have to pay for content because they already pay for an Internet connection. More than one out of three Internet users in Spain say that they would not maintain a broadband Internet service if they were not able to download content. 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 2014, because of piracy the potential for more than 29,000 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 627 million euros (\$US 687 million).

**Online Piracy Generally:** Digital piracy represents the greatest threat to a legitimate marketplace in Spain. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers," BitTorrent networks, peer-to-peer (P2P) networks (such as *Edonkey*), and increasingly via illegal streaming and ripping services. The incidence of digital piracy is generally evenly split between P2P and non-P2P formats. Of Internet users using P2P services to access illegal music, 95% do so via BitTorrent networks. BitTorrent is also highly favored for access to audiovisual and video game content. Among non-P2P formats, illegal stream-ripping is gaining the most rapidly in popularity for music piracy—with growth of 52% over the past year; while cyberlockers, illegal streaming, and hosted websites continue to be active but at decreasing levels. 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 direct users to files located in other jurisdictions. Websites such as *DivxTotal.com* (ranked the 104<sup>th</sup> most popular website in Spain), *elmonky.com*, and *fluxy.net*, for example, are operated abroad (Russia, in

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<sup>3</sup>See <http://lacoalicion.es/observatorio-de-la-pirateria/observatorio-de-la-pirateria-2014/>.

<sup>4</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 (US\$18.07 billion). Together with physical piracy, the value of illicit material totaled 16.279 billion euros (US\$18.23 billion). 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 450 million euro (US\$504 million) lost profits figure cited in the text above (11.7% of 3.8 billion 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%.

the case of *DivxTotal*), but are hosted out of Spain, and are 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. Nearly 72% of users search for copyrighted content in browsers, with an overwhelming majority choosing Google to access to illegal content. More than 25% of users say they find illegal content through direct download sites, 17.4% use illegal streaming sites, and smaller percentages use social networks or mobile/tablet apps.

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 a significant number 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 touristic cities such as Seville, Madrid, and Barcelona, where local police have been instructed to ease up on pirate vendors, who frequently are illegal immigrants. 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, has reported declines in the legitimate home video market for years, and in 2014 reports another 5% in losses compared to 2013.

**Camcord Piracy:** Camcording in theaters has been significantly reduced in Spain thanks to cooperation between distributors and exhibitors in preventing camcording through police action. Unfortunately, audio camcording remains a problem and prosecution of these offenders is an uphill battle. As a general matter, 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. In the past, Spanish-sourced copies have routinely appeared in other markets, particularly in Latin America. 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. The introduction of new provisions in the Criminal Code governing the protection of TPMs in July 2015, together with guidance issued by the Attorney General in December 2015, has helped to strengthen and clarify the existing legal framework in this area. This, in turn, has resulted in a number of e-commerce websites and retail outlets appearing to cease sales of circumvention devices. However, the sales of such devices continue elsewhere, either through consumers purchasing them directly from China or through local online websites. In 2015, Spain had the fourth highest number of peers discovered in P2P swarms in which illegal copies of console games were distributed.

## **COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN**

Spain’s law enforcement bodies for years have lacked the resources and – until 2015 – the legal certainty to address forms of piracy such as P2P piracy and circumvention devices. At the end of 2015, the Attorney General issued new instructions for enforcement in the digital age, replacing the problematic 2006 Circular that all but

exonerated P2P piracy. Spain's courts now have a stronger legal mandate to tackle piracy cases, with amendments to the Intellectual Property and Civil Procedure Laws that came into force in January 2015, and Criminal Code amendments that came into force in July 2015 (described in greater detail below). However, it is still premature to declare a new era of deterrent enforcement in the courts given the slow nature of Spain's civil and criminal proceedings. For the immediate future, an agile administrative remedy is all the more important. The following are top-priority enforcement action items that IIPA recommends for Spain to make effective change in 2016.

**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 within 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.

The Spanish Copyright Commission, approved by law in 2011 to be set up within the IPC, (and referred to herein as the IPC) has yet to remedy its extremely slow response times to right holders' complaints of infringement. 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. Assurances that the IPC has made to industry representatives that it would shorten procedures to about two or three months have not been realized; and, in any case, 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.

**Since its inception, the IPC has been plagued by delays and uncertainty.** 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 480 days to resolve a case initiated from a right holder complaint. The local recording industry (*Asociación de Gestión de Derechos Intelectuales* (AGEDI)) reports that as of December 2015, since the IPC began operations, it has filed 54 cases mostly referencing linking sites, and only 5 have resulted in an IPC order requiring the removal of infringing material (Goear I, Goear II, Goear BV, Thepiratebay and Bajatodo). Only one of AGEDI's cases in four years has resulted in the closure of a website, the Pirate Bay, but those orders were ultimately ineffective. In May 2015, the IPC handed down its final resolution in AGEDI's case against *www.baja-todo.net*, which it filed in June 2012. The IPC ordered the infringing content removed, but when the website operator refused to comply, the IPC reasoned that it could take no further action because, at the time of the initial complaint, the website would not have qualified for enforcement measures.

Additionally, the timeframes established in the procedure for safeguarding IP rights on the Internet have been broadly ignored. For example, according to Article 122 bis 2 of Act 29/1998 of July, regulating Administrative Litigation Jurisdiction, "within the non-extendable period of 2 days after receipt of notification of the Commission's final resolution, the Court shall summon the Administration's Public Prosecutor, . . . to a hearing that will decide whether to authorize the execution measures or not." Experience shows that these terms are not met. For instance, in the procedure against *www.goear.com* (Goear BV), right holders received the summon on the December 17, 2015 and the hearing was finally set for April 18, 2016. The Court explained the reason for the delay was that many of the intermediaries to be summoned are located abroad.

Positive results from the IPC have included the decision against Goeur BV, held to be directly responsible for piracy and subject to injunction by Internet access providers in Spain and the elimination of Goeur search results from search engine providers. The execution of such measures should be granted by the Court in the hearing to be held in early 2016. But the overwhelming characteristics of the IPC are of delay and inefficiency. 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 recent 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, helpfully requires the appointed members of the Committee to have IP expertise, it also reaffirms the bureaucratic and slow nature of the IPC's deliberating process.

**New Pre-requisites to Apply for IPC action:** In another change that could further delay anti-piracy actions, Article 158ter(3) of the IP Law now requires right holders to provide, along with an application for the IPC to take action in a particular case, proof of the right holder's prior attempt to request by email that the ISP in question remove the allegedly-infringing material. Also, the IPC has recently narrowed the scope of its action with a requirement that the target websites be engaged in "economic activity," an element not required by law under the IPC's procedures. The IPC is no longer admitting cases against websites that fail to meet this requirement, which clearly weakens the reach of the IPC and should be reversed

**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 Law 34/2002 of July 11th, on Information Society Services and E-Commerce (the "LSSI," which is the Spanish Law that implements the E-commerce Directive), for example with the law's requirement to provide contact information for website operators. Right holders report that SETSI still fails in 2015 to issue sanctions against any of the cases regarding linking sites reported to it by the IPC. In fact, in many cases SETSI has failed even to acknowledge receipt of the cases reported to it. In November 2015, AGEDI filed a complaint before the SETSI against [www.marcharte.es](http://www.marcharte.es) because this site infringes the LSSI. Although the Article 10 of the LSSI correctly implements Article 5 of the E-commerce Directive, the vast majority of the Spanish infringing sites do not comply with it.

**IPC action over cases involving foreign jurisdictions.** In November, 2012, right holders 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 28, 2014 requested an Authorization from the Administrative Judicial Court to take further action. Unfortunately, as mentioned above, on November 25, 2015 the Judicial Authorization was denied. The case has set highly disappointing 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 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 Phonograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT)) (emphasis added).

***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.***

Armed with important improvements in the relevant laws in 2015, there are new opportunities for the development of effective criminal enforcement against copyright theft at a national level. The special office for cybercrime has improved its cooperation with copyright holders but could be improved. Right holders have proposed a special General Attorney's office for Intellectual property, which might improve judicial response, but has not been accepted by the Spanish Government. Still, important steps remain to be taken in 2016 to ensure that police forces and prosecutors have the resources and legal foundation needed to take comprehensive action. The percentage of copyright cases resulting in convictions has dropped from 80% in 2012 to only 50% in 2015. Enforcement against physical piracy remains insufficient to tackle the rampant street piracy across the country. The July 2015 entry into force of the new Criminal Code has not yet resulted in an increase in police actions, either for online or physical piracy.

**Internet Piracy Enforcement:** After a decade without correction to the 2006 Attorney General instructions that effectively decriminalized organized online file sharing of pirated content,<sup>5</sup> Spain's Attorney General issued a new Circular in late 2015 addressing many concerns that IIPA has raised in previous submissions, recognizing that:

- Links to infringing content amount to an act of communication to the public, and thus a violation of copyright, in line with the *Svensson* decision of the European Court of Justice.<sup>6</sup>
- The "aim of profit" element in criminal copyright infringement may be satisfied by an indirect economic benefit.
- The legislative intent of the Criminal Code amendments is to respond to the rapidly developing technology through which infringement might occur; and as a result, the Criminal Code Article 270 does not contain an exhaustive list of infringing conduct. (It does not, however, cover the activities of end users that only irregularly access illegal files.)
- The "effective knowledge" requirement for liability on the part of an ISP under the Spanish E-commerce Law may be satisfied by communications from rights holders or a court or competent administrative body, a determination that is consistent with recent Supreme Court decisions.
- Search engines may be subject to liability where they have been put on notice of illegal content appearing in their search results.
- Uploading unauthorized works for file-sharing, or links to works, may be subject to criminal liability, particularly for site administrators that manage such activity, or users that are part of an organized framework of unlawful activity with the possibility of economic benefit.
- Repeat infringers should be subject to enforcement action, even with respect to differing works of the same right holder.
- The penalties reserved for lesser infringements may not be applied to online infringement, due to the multiplying effect of the Internet.

Many of the above clarifications target issues that had been cited in the past by Spain's police, prosecutors, and judges in dropping Internet cases. Right holders in Spain are hopeful that this new, clearer mandate will permit prosecutions to more fully resume in cases that had been hindered by the 2006 Circular.

In 2015, the Coalition's proposal for a special Attorney General's Office on Intellectual Property was rejected by the Spanish Government. Currently, criminal copyright procedures are lengthy and fail to reasonably judge piracy cases. In some instances, the timespan is so long that many offenders avoid punishment by leaving the country or

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<sup>5</sup>For background on the 2006 Attorney General Circular, see IIPA's 2014 Special 301 submission, available at <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>.

<sup>6</sup>Judgment of 13 February 2013 (C-466/12).

relying on a statute of limitations. On the enforcement side, police conducted only 3 raids on linking sites in 2015. In addition, a release group was dismantled and defendants in 3 Internet piracy cases were deemed not-guilty.

Nonetheless, the Special Office for Cybercrime has improved its cooperation with copyright holders, who report that the public prosecutors demonstrated increased support in 2015. 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 IPR awareness in the judiciary in the digital realm. In 2015, AGEDI filed two criminal complaints against the linking websites *Bajui* and *Descargasmix*. AGEDI sought to file them before the High Court with jurisdiction across Spain, but the prosecutor refused to take the case to the High Court and finally it was rejected. As a result, these important cases will be heard in lesser local Courts, which lack specialization.

A vital aspect to effective court enforcement will be the speed with which the cases are processed, as illustrated by a December 2013 decision of the 15th Section of the Barcelona Court of Appeals – a Section specializing on IP. Based on the Spanish implementation of Article 8(3) of the EU Copyright Directive, the Court ordered an Internet service provider (ISP) to close the Internet account of a subscriber who used the ISP's services to engaged in unauthorized file sharing. The decision could not be executed because, under Spain's data retention law, the ISP was not obliged to retain the relevant data for more than a year, and the time had expired.

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. The Criminal Code amendments adopted in 2015 appear to resolve this conflict, clarifying the availability of criminal penalties for trafficking in devices that are “primarily” designed to facilitate the unauthorized removal or circumvention of TPMs.

In March and April of 2015, two Spanish criminal courts confirmed that the importation and sale of game copying devices (R4 cards) used to play pirated games on video game consoles, is illegal. One company had attempted to import R4 game-copying devices into Spain but was intercepted at an airport, where those devices were then seized. A court found the other company to have violated the law by selling those same R4 circumvention devices to users. IIPA hopes to see continued enforcement actions against devices that facilitate copyright infringement, particularly since the entry into force in July 2015 of Spain's Criminal Code amendments.

**Physical Piracy Enforcement:** Police agencies have taken *ex officio* actions in criminal copyright actions mainly in cases of physical piracy, and these right holders report positive relationships with the State enforcement agencies, local police and customs authorities. Unfortunately, the number of actions decreased in 2015, both on the part of the national and autonomous enforcement agencies (*Cuerpo Nacional de Policía, Guardia Civil, Mossos d'Esquadra and Ertzaintza*), and the local police.

During 2015, police seized more than 42,000 pirate Optical Discs and arrested 214 street vendors. Police forces conducted 3 raids against linking sites and dismantled a release group. Only one lab was raided, compared with 15 raids against labs and distribution centers in 2014. More than 2,000 street vendors were raided within the first ten months of 2015. Of 21 judicial decisions in 2015 against labs and distribution centers, only 9 resulted in convictions.

As in the previous year, the number of police actions in 2015 has declined. The 2015 Criminal Code amendments provide higher penalties, addressing a concern under the 2010 Criminal Code that crimes below 400 euros (US\$445) were minor offenses, but have yet to bear fruit. 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. IIPA's members are unaware of any 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:** 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 IPR laws with regard to injunctions. As an example, right holders filed a case against *Exvagos* in April 2015 and the preliminary hearing (prior to the main hearing) will not be held until February 2016. The decision of the mercantile Court is expected by the end of 2016.

**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 IPR 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 IPR Law empower the IPC to require payment and advertising services to collaborate with it, and to 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.

**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 Contenidos*, 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 of the agreement is to adopt a good practices code in the field of advertising that supports the legal offer of digital content and protects IPR 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.

## **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 legislative changes needed to develop an effective anti-piracy program, which IIPA included in the Priority Action Items of its 2013, 2014, and 2015 Special 301 submissions on Spain.<sup>7</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 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, which went into effect in January 2015, 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.

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<sup>7</sup> See <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF>, <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>, and <http://www.iipa.com/rbc/2015/2015SPEC301SPAIN.pdf>.

The Spanish Congress then adopted Criminal Code amendments, which entered into force in July, 2015, clarifying the scope of judicial actions regarding linking activity, liability for inducing infringement, and other important areas. Specifically, these amendments target illegal websites, including linking sites if they are operated for direct or indirect profit, and provide for injunctions to restrict access to sites that are found to be illegal. Together with the recently issued Attorney General's Circular, of December 2015 (detailed above), many of the legal gaps that IIPA has raised in previous submissions have been significantly improved, including: clarifying that infringing linking sites can be criminally prosecuted; allowing prosecutions to resume in cases of P2P piracy; and empowering rights holder-submitted notices of infringement to put ISPs on notice for purposes of establishing liability. However, the following concerns still remain regarding Spain's copyright law regime.

**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. Right holders are still evaluating 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. Film industry representatives (from the organization FAP), however, note that some ISPs are beginning to cooperate. In 2014, FAP sent 68 letters to cyberlockers asking for the removal of more than 5,000 illicit links, which were mostly withdrawn.

**Correct Spain's implementation of the right of information as provided in Article 8 of the Enforcement Directive in the Civil Procedure Law to eliminate the requirement that clients are not "mere end users in good faith and without an aim to obtain economic or commercial benefits."**

Adopted amendments to Article 256.1(11) of the Civil Procedure Law 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. The provision thus failed to provide the needed clarity required under Article 8 of the EU Enforcement Directive. This language, unfortunately, solidifies the existing status quo in Spain, under which infringing online users are guaranteed impunity for copyright infringement. The amendments 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.

**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, due to reduced payment from the government.<sup>8</sup> Questions as to whether this amendment conforms with the European Information Society Directive 2001/29/EC are currently in front of the Court of Justice of the European Union, and a decision is expected mid 2016 (EGEDA and Others; Case C-470/14).

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<sup>8</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>.

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 Directive 2001/29/EC. 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 collective management organizations that will distribute the revenue collected). It is unclear whether these new provisions will effectively encourage universities to obtain repertoire licenses for educational uses, or whether the exception for uncompensated uses will lead to continued resistance by universities to obtain these licenses. 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>9</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>9</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).

# **ANNEX**

# **ANNEX – SHORT COUNTRY SUMMARIES**

## **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)**

### **2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT**

The following countries were identified in the U.S. Trade Representative's 2015 Special 301 Report. In prior years, the IIPA filed separate country reports for some of the countries listed in this Annex. This year, because IIPA members did not have sufficient new information on these countries to justify preparation of a full country report, we instead provide these short country summaries. IIPA does not recommend any change in the Special 301 status for these countries. The countries in this Annex are either currently on the U.S. Government's Watch List or, in a few instances, Priority Watch List (Argentina, Ecuador and Venezuela).

#### **Argentina**

The Government of Argentina has not made copyright protection and enforcement a priority, and in fact, has publicly lauded as “innovators” individuals who have stolen the content of creators, in violation of the language and spirit of the many international treaties that Argentina adheres to (Berne Convention, the WIPO digital treaties etc.). This has allowed Argentina to become a completely inhospitable environment for creators and producers of copyrighted works. Hard copy piracy is still rampant in major public markets, and accounts for a majority of the piracy nationwide. Digital piracy rates exceed 95%, making it nearly impossible for legal services to develop, much less flourish, to the detriment of Argentinian consumers for music, film, video games and printed materials. This is unfortunate because there are multiple legal online services trying to get a toe-hold in the marketplace. For example, there are many legal digital music services offering their services including: Spotify, Apple Music, Google Play Music, Personal Música, Clara Musica, Deezer and Xbox Music.

Some of the weakness in Argentina's copyright enforcement regime is attributable to a lack of resources, but much rests on failings in procedures and laws, and the will power of the government to address these problems. There are simple measures that can be taken, for example, against hard copy piracy: market organizers should restrict licenses to vendors selling legitimate products. There are many procedural hurdles in the criminal and civil courts that need to be addressed to help cases move through the system. To address digital piracy, the government should: (i) encourage the development of processes that enhance cooperation between rights holders and online intermediaries; (ii) establish voluntary best practices or codes of conduct to deal with copyright piracy over Internet services; and (i) ensure that the law establishes sufficient liability for known infringements and permits courts access to incriminating data regarding online piracy. Overall, the government should, at the highest levels, commit to develop and implement a coordinated antipiracy campaign that addresses hard goods and online infringements as a matter of national priority. The federal, provincial, and city governments should also take appropriate measures to prioritize well-known markets selling pirate and counterfeit merchandise.

#### **Barbados**

There is ongoing widespread broadcast piracy of both free-to-air and premium services in Barbados. This includes the use of unauthorized decoding of equipment and the unauthorized retransmission of signals. This is a violation of Barbados' Copyright Law and it violates international norms.

#### **Bulgaria**

The marketplace for the copyright industries, in particular, the music industry, continues to deteriorate. This is due in large part because the Copyright and Neighboring Rights Act is seriously outdated. There is currently no clear legal framework regarding digital rights, including the making available right. In fact, none of the exclusive rights are clearly delineated in the law, so instead the framework for protection, and collection of any monies based on the rights, is confusing and disjointed. This is a major hindrance to enforcement as well, and it is hoped that major



revisions to the Act can be undertaken. Additionally, a new law regulating collective rights management is under consideration.

Enforcement in Bulgaria remains a major concern, and has weakened due to a lack of effort by the Government of Bulgaria. In 2015, a reorganization within the government meant that the Ministry of Interior lost jurisdiction over the General Directorate for Combating Organized Crime (GDCOC). Until this change, this unit was a lone example of an office successfully undertaking enforcement against a major problem in Bulgaria, namely, organized criminal syndicates engaged in widespread piracy. Instead, the law now requires the private sector to prove a link to organized crime as a threshold matter in order to initiate an investigation, which means, in effect, that no such cases will be initiated. The Ministry of Culture has, in the past, demonstrated a willingness to address IPR infringements, a task greatly appreciated by the copyright industries. However, with this change in jurisdiction, their administrative capacity is also quite limited. That, coupled with the absence of deterrent criminal sanctions, means that enforcement will only further weaken without substantial changes in the legal and enforcement regimes in Bulgaria.

### **Costa Rica**

The Costa Rican music market continues to be harmed by a significant piracy problem and there were no notable actions taken by the Government of Costa Rica in 2015 to address this problem. One of the larger torrent websites, *kickasstorrents*, has successfully sought refuge for its domain name on Costa Rica's ccTLD registry, and (unlike in Somalia) the Government of Costa Rica has refused to suspend the domain name, even though the website is on the U.S. Government's Notorious Markets List. On the legislative side, the Government (President Solís' administration) has failed to withdraw the reservations filed in 2009 by the former administration of Oscar Arias to key provisions in the WIPO Performances and Phonograms Treaty (Article 15) and to the Rome Convention (article 12). The reservations exempt broadcasters from having to pay foreign (U.S.) artists, musicians and labels. Although those reservations were never implemented into the Costa Rican Copyright Law, broadcasters use the reservations to avoid payments to producers and performers.

### **Ecuador**

Ecuador has seen a significant spike in unauthorized camcords; there were eleven camcords sourced from Ecuador in 2015. Ecuador is now the fourth largest source of unauthorized camcords in Latin America. Although the Ecuadorian enforcement authorities arrested one camcorder in Quito in 2015, he was released after a few days, without any further prosecution. This lack of deterrence, and of any deterrent sentencing, continues to hamper effective enforcement. During the first ten months of 2015, sales of physical music products in Ecuador declined by 46.5%. This is the result, among other factors, of the disastrous reform to the Penal Code passed in 2014 that deleted sanctions for copyright and trademark piracy. Although the Government of Ecuador promised change, including after strong concerns voiced by the U.S. Government and private sector, new amendments adopted in August 2015 only penalize piracy as a minor offense punishable with fines. The most troublesome development by the Government of Ecuador in 2015 was the introduction of the bill entitled "Code of the Social Economy of Knowledge and Innovation" ("COESCI"). This legislation is intended to implement the Government's position and theories about intellectual property rights, to in essence, weaken, not strengthen protection. For example, COESCI, as introduced, proposed to delete a record producers' performance rights, to reduce the term of protection from 70 to 50 years (against the international norms), and to create new exceptions and limitations including "fair use" provisions for the circumvention of technical protection measures. During the ensuing legislative debate, some of the most troubling provisions were removed (and, the performance right for record producers was reinstated), but other concerning provisions remain including the shortened term of protection and the "fair use" provision. Although the timetable for adoption of the legislation appears to have slowed, COESCI, if adopted, would pose as a significant threat to artists and producers rights.

## **Guatemala**

Between January and October 2015, the sales of compact discs in Guatemala declined by 37%. At present, Guatemalan online music sales are done through nine digital music services. However, the legitimate services are struggling because online piracy is exceedingly high, principally from sites located outside of Guatemala. In 2015, a local CMO of record producers and artists (AGINPRO) made a significant effort to start collections for public performances on the legitimate services and for other performances. This effort was supported by the authorities within the judiciary, and the Intellectual Property Registry at the Ministry of Economy. The biggest challenge for the recording industry in Guatemala for 2016 will be to achieve collections of performance rights from the major cable operators in the country, including CLARO TV (a part of the Mexico's Grupo Carso) and TIGO (Millicon Corporation). Guatemala also needs to revise its legal regime to fully comply with the Dominican Republic – Central America Free Trade Agreement (CAFTA).

## **Jamaica**

IIPA appreciates that the Government of Jamaica has now expressed an interest in legitimizing its broadcast television ecosystem which is plagued by rampant signal theft. Jamaica's current legal framework permits the receipt, decoding, retransmission and sale of broadcast signals without a rights holder's authorization, provided the platforms pay rights holders an equitable remuneration. However, even with this limited legal framework, remunerations have not been paid to rights holders. The Government needs to enforce the current law.

## **Peru**

The Peruvian music market, like most other countries in the region, has seen a sharp decline in physical products and an increase in the digital market. Currently, Copyright Law reform is pending in Congress, that would, among other things strengthen controls on collecting societies (CMOs). The bill was originally introduced with widespread support in 2013, but has been losing traction more recently. The changes were designed to improve the existing regime for CMOs, specifically to address a corruption scandal surrounding one copyright collecting society (APDAYC). Peru has not yet implemented the ISP's limited liability provisions from its Free Trade Agreement with the U.S., and after numerous delays, the Government is now seeking to, instead, ratify and implement its Trans-Pacific Partnership (TPP) obligations. Peru is a major source of unauthorized camcords in the region: between 2012-2015, 68 unauthorized camcords were sourced from Peru, including 24 in 2015. Copies of these films were traded by local brokers and found online. It is hoped that the TPP anti-camcording provision will be effectively implemented and will facilitate enforcement against this form of piracy. In addition, the administrators of many of the most notorious Spanish-language Latin American websites are based in Peru, including [yaske.cc](http://yaske.cc).

## **Trinidad and Tobago**

Broadcast piracy, both the unauthorized retransmission by platforms and the use of unauthorized decoding equipment, is widespread in Trinidad and Tobago; this form of piracy includes both free-to-air and premium services. Trinidad and Tobago's law permits the receipt, decoding, retransmission and sale of broadcast signals without rights holder authorization provided that the platforms pay rights holders equitable remuneration, which they do not. This statutory compulsory license legitimizes piracy and violates Trinidad's law, as well as its limited international obligations. IIPA does recognize that Trinidad and Tobago's Telecommunications Authority issued a release in August mandating that all subscription television providers must remove all channels for which they do not have the rights; it is not clear, however, if this mandate has been effectively enforced.

## **Turkey**

Piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. There are two very specific issues to highlight. The first, is the discriminatory Turkish policies that prevent the full participation in the management and decision-making of collective management organizations (CMOs). Second, there are judicial decisions that have incorrectly interpreted the right of communication to the public, in violation of the Berne Convention, the WIPO Copyright Treaty, and the WIPO

Performances and Phonograms Treaty, as well as national law. These interpretations have meant that so-called “indirect” performances (the playing of a radio, a television or other communications in a bar, hotel, train station, or other public place), have been exempted from collections. IIPA urges the Government of Turkey to: (1) remove the membership discrimination within CMOs, and to enable full and fair distribution to all members in collecting societies; and (2) to correct the misinterpretation of public performances to capture “indirect” performances, as is required by international treaties, the Copyright Law of Turkey, and consistent with international norms. Additionally, IIPA understands that a new legislative proposal on liability “safe harbors” is expected in the near term, and we look forward to reviewing that legislation to ensure that it is properly tailored to adequately incentivize online platforms and services to cooperate with copyright owners to meaningfully address copyright infringement.

Book piracy is also rampant in Turkey. Entities involved in the production of pirated books operate on a large scale. Typically, before school terms start, pirates collect information from students and faculty as to which books will be used during the term. Once the relevant titles are identified, a legitimate copy is obtained, photocopying machines and scanners are rented or bought and installed in warehouses, or on trucks — ready to produce unauthorized copies to be sold through shops or apartments located near universities. Unfortunately, pursuing book pirates is not a law enforcement priority. The entire enforcement process is marred by endemic delays — from obtaining a search warrant to conduct a raid, to the assignment of a subject matter expert (of which there are not enough) to assist a court in determining whether piracy has occurred, to an actual judgment, can take anywhere from five to seven years. The lack of personnel and expertise in prosecuting IP infringements thus contributes to the proliferation of book piracy in the market.

## **Venezuela**

The Venezuelan music market has been barely able to survive for the last decade, due to very difficult market conditions and rampant piracy that has overwhelmed the legal marketplace. The retail sector for music has almost completely disappeared, and only one international record label (Sony Music) remains in the country with a small presence. There are seven digital music platforms operating in a small and fragile digital market. Performance rights collections made by a local producers’ and artists’ collecting society (AVINPRO) continued to grow during 2015. But even this positive note did not have a significant impact for national and international music rights holders because of the overall dismal economic climate and the plummeting value of the currency. In addition, in the past year, eight infringing camcords were identified as sourced from Venezuelan theaters, with copies found online fueling international piracy.



# **APPENDIX B**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2015) & IIPA'S 2016 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2015)  
AND IIPA 2016 SPECIAL 301 RECOMMENDATIONS**

| USTR 301 PLACEMENT<br>(as of April/May of each year) |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          |      |      |      |      |      |      |      |      |      |      |      |
|--|---|------|---------|------|------------------|----------|---------|-----------|-----------|----------|-----------|-----------|-----------|------|-----------|------|----------|------|------|------|------|------|------|------|------|------|------|------|
| COUNTRY  | IIPA<br>Recommendation<br>February 2016 | 2015 | 2014    | 2013 | 2012             | 2011     | 2010    | 2009      | 2008      | 2007     | 2006      | 2005      | 2004      | 2003 | 2002      | 2001 | 2000     | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |
| Algeria  |   | PWL  | PWL     | PWL  | PWL              | PWL      | PWL     | PWL       | WL        |          |           |           |           |      |           | WL   | WL       | 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   | WL   |
| Armenia  |   |      |         |      |                  |          |         |           |           |          |           |           |           |      | WL        | WL   | WL       |      |      |      |      |      |      |      |      |      |      |      |
| Australia  |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          | WL   | WL   | WL   | WL   |      | WL   | PWL  | PWL  | PWL  |      |      |
| Austria  |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          |      | OO   | OO   |      |      |      |      |      |      |      |      |
| Azerbaijan   |   |      |         |      |                  |          |         |           |           |          |           | WL        | WL        | WL   | WL        | WL   | WL       |      |      |      |      |      |      |      |      |      |      |      |
| Bahamas  |   |      |         |      |                  |          |         |           |           |          | WL        | WL        | PWL       | PWL  | WL + OCR  | OCR  | OCR      |      |      |      |      |      |      |      |      |      |      |      |
| Bahrain  |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          |      |      | WL   | WL   | WL   | WL   |      |      |      |      |      |
| Barbados   |   | WL   | WL      | WL   |                  |          |         |           |           |          |           |           |           |      |           |      |          |      |      |      |      |      |      |      |      |      |      |      |
| 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        | WL + OCR | PWL       | PWL       | PWL       | PWL  | PWL       | PWL  | WL       | WL   | WL   |      | WL   | WL   | PWL  | OO   | PFC  | PWL  | PWL  | PWL  |
| Brunei   |   |      |         |      | WL               | WL       | WL      | WL        |           |          |           |           |           |      |           |      |          |      |      |      |      |      |      |      |      |      |      |      |
| Bulgaria   |   | WL   | WL      | WL   |                  |          |         |           |           |          | WL        | WL        | WL        |      |           |      |          |      |      | PWL  | WL   | OO   | OO   |      |      |      |      |      |
| Canada   | WL                                      | 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       | PWL      | PWL       | WL + OCR  | WL        | WL   | WL        | WL   | WL       | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |
| China (PRC)  | PWL                                     | PWL  | PWL+306 | PWL  | PWL+306          | PWL      | PWL     | PWL       | PWL       | PWL      | PWL + 306 | PWL       | 306 + OCR | 306  | 306       | 306  | 306      | 306  | 306  | 306  | PFC  | WL   | PFC  | WL   | WL   | PFC  | PWL  | PWL  |
| Colombia   | WL                                      | WL   | WL      | 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   | 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        | WL   | PWL       | PWL  | PWL      | PWL  | PWL  | WL   | OO   |      |      |      |      |      |      |      |
| Ecuador  |   | PWL  | WL      | WL   | WL               | WL       | WL      | WL        | WL        | WL       | WL        | WL        | WL        | WL   |           |      | WL       | WL   | PWL  | PWL  | WL   |      |      | WL   | WL   |      |      |      |
| Egypt  |   | WL   | WL      | WL   | WL               | WL       | WL      | WL        | WL        | 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  | 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        | WL   | PWL      | PWL  | PWL  | PWL  | PWL  | WL   | WL   | WL   | WL   | WL   | WL   | WL   |
| Guatemala  |   | WL   | WL      | WL   | WL               | WL       | WL      | WL        | WL        | WL       | WL        | WL        | WL        | WL   | WL        | WL   | PWL      | PWL  | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |      |      |
| Honduras   |   | OCR  |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          |      |      | WL   | WL   | OO   | OO   | OO   |      |      |      |      |
| Hong Kong  | WL                                      |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          | OCR  | WL   | WL   | OO   |      |      |      |      |      |      |      |
| Hungary  |   |      |         |      |                  |          |         | WL        | WL        | WL       | WL        | WL        | WL        | WL   | PWL       | PWL  | WL       | WL   | OO   | OO   |      |      |      | PWL  | PWL  | WL   |      |      |
| India  | PWL                                     | 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  | WL                                      | PWL  | PWL     | PWL  | PWL+GSP          | PWL      | PWL     | PWL       | WL        | WL       | PWL + OCR | PWL + OCR | PWL       | PWL  | PWL + OCR | PWL  | WL       | PWL  | PWL  | PWL  | PWL  | WL   | WL   | WL   | WL   | WL   | WL   | WL   |
| 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   | WL + OCR | PWL  | PWL  | PWL  | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |
| Jamaica  |   | WL   | WL      | WL   | WL               | WL       | WL      | WL        | WL        | WL       | WL        | WL        | WL        | WL   | WL        | WL   | WL       | WL   | WL   | WL   |      |      |      |      |      |      |      |      |
| Japan  |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           | OCR  |          |      | WL   | WL   | WL   | PWL  | PWL  | PWL  | WL   | WL   | WL   | WL   |
| Jordan   |   |      |         |      |                  |          |         |           |           |          |           |           |           |      |           |      |          | WL   | WL   | WL   | OO   | OO   |      |      |      |      |      |      |

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2015)  
AND IIPA 2016 SPECIAL 301 RECOMMENDATIONS**

| USTR 301 PLACEMENT<br>(as of April/May of each year) |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      |      |      |      |          |      |      |      |      |      |      |      |     |
|--|---|--------|------------|------|------|------|-----------|----------|--------------------------|-----------|-----------|-----------|-----------|----------|-----------|------|------|------|------|------|----------|------|------|------|------|------|------|------|-----|
| COUNTRY  | IIPA<br>Recommendation<br>February 2016 | 2015   | 2014       | 2013 | 2012 | 2011 | 2010      | 2009     | 2008                     | 2007      | 2006      | 2005      | 2004      | 2003     | 2002      | 2001 | 2000 | 1999 | 1998 | 1997 | 1996     | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |     |
| Kazakhstan   |   |        |            |      |      |      |           |          |                          |           |           | WL        | WL        | WL       | WL        | WL   | WL   |      | OO   |      |          |      |      |      |      |      |      |      |     |
| Kuwait   |   | PWL    | WL+OCR     | WL   | WL   | WL   | WL        | WL       | WL                       | WL        | WL        | PWL       | PWL       | WL       | WL        | WL   | WL   | PWL  | PWL  | WL   | WL       | OO   |      |      |      |      |      |      |     |
| Kyrgyz Republic                                      |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           | OCR  |      |      |      |      |          |      |      |      |      |      |      |      |     |
| Latvia   |   |        |            |      |      |      |           |          |                          |           | WL + OCR  | WL        | WL        | WL       | WL        | WL   | WL   | WL   |      |      |          |      |      |      |      |      |      |      |     |
| Lebanon  |   | WL     | WL         | WL   | WL   | WL   | WL        | WL       | WL                       | PWL       | PWL       | PWL       | PWL       | PWL      | PWL       | PWL  | WL   | 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        | WL       | OCR       |      |      | WL   | OO   | OO   | OO       |      |      |      |      |      |      | PWL  |     |
| Moldova  |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      | WL   |      |      |      |          |      |      |      |      |      |      |      |     |
| Netherlands  |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      |      | OO   |      |          |      |      |      |      |      |      |      |     |
| New Zealand  |   |        |            |      |      |      |           |          |                          |           |           |           |           |          | WL        | WL   |      | WL   |      |      |          |      |      |      | WL   | WL   |      |      |     |
| Nicaragua  |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      |      | OO   | OO   |          |      |      |      |      | WL   | WL   |      |     |
| Norway   |   |        |            |      | WL   | WL   | WL        | WL       | WL                       |           |           |           |           |          |           |      |      |      |      |      |          |      |      |      |      |      |      |      |     |
| Oman   |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      | WL   | WL   | WL   | WL   | WL       | WL   | OO   |      |      |      |      |      |     |
| Pakistan   |   | PWL    | PWL        | PWL  | PWL  | PWL  | PWL       | PWL      | PWL                      | WL + OCR  | WL        | PWL       | PWL       | WL       | WL        | WL   | WL   | WL   | WL   | WL   | WL       | WL   | WL   | WL   | WL   | WL   | WL   | WL   |     |
| Palestinian Authority                                |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      | OCR  |      |      |          |      |      |      |      |      |      |      |     |
| Panama   |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      |      | OO   | WL   | OO       |      | OO   |      |      |      |      |      |     |
| Paraguay   |   | WL+OCR | WL+306+OCR | WL   | 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        | WL   | PWL  | PWL  | 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   | WL   | OO   | OO   | OO       | WL   |      |      |      |      |      |      |     |
| Russian Federation                                   | PWL                                     | 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    | OCR        | OCR  |      | WL   | WL        | WL       | WL                       |           |           |           |           |          |           |      | WL   | WL   | OO   |      |          |      | WL   | 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   | WL   | PWL |
| Tajikistan   |   | WL+OCR | WL         | WL   | WL   | WL   | WL        | WL       | WL                       | WL        | WL        | WL        | WL        | WL       | WL        | WL   | WL   | WL   |      |      | OO       | WL   | WL   | PWL  | PFC  | WL   | WL   | PWL  |     |
| Thailand   | PWL                                     | PWL    | PWL        | PWL  | PWL  | PWL  | PWL + OCR | PWL      | PWL + OCR                | PWL       | WL        | WL        | WL        | WL       | WL + OCR  | WL   | WL   | WL   | WL   | WL   | WL       | WL   | PWL  | PFC  | PFC  | PFC  | PWL  | PWL  |     |
| Trinidad & Tobago                                    |   | WL     | WL         | WL   |      |      |           |          |                          |           |           |           |           |          |           |      |      |      |      |      |          |      |      |      |      |      |      |      |     |
| Tunisia  |   |        |            |      |      |      |           |          |                          |           |           |           |           |          |           |      |      |      | OO   |      |          |      |      |      |      |      |      |      |     |
| Turkey   |   | WL     | WL         | WL   | WL   | WL   | WL        | WL       | WL                       | PWL       | PWL       | PWL       | PWL       | WL       | WL        | WL   | PWL  | PWL  | PWL  | PWL  | PWL      | PWL  | PWL  | PWL  | PWL  | WL   | WL   | WL   |     |
| Turkmenistan   |   | WL+OCR | WL         | WL   | WL   | WL   | WL        | WL       | WL                       | WL        | WL        | WL        | WL        | WL       | WL        | WL   | WL   |      |      |      |          |      |      |      |      |      |      |      |     |

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2015)  
AND IIPA 2016 SPECIAL 301 RECOMMENDATIONS**

| USTR 301 PLACEMENT<br>(as of April/May of each year) |   |      |      |      |         |      |      |      |      |      |      |           |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |
|--|---|------|------|------|---------|------|------|------|------|------|------|-----------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| COUNTRY  | IIPA<br>Recommendation<br>February 2016 | 2015 | 2014 | 2013 | 2012    | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 | 2005      | 2004 | 2003 | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |
| UAE  | WL                                      |      |      |      |         |      |      |      |      |      |      |           |      |      |      | WL   | OCR  | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |      |
| Ukraine  | PFC                                     | PWL  | 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   | WL   |      |      |      |      |      |      |      |      |      |      |      |
| Venezuela  |   | PWL  | PWL  | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL       | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |
| Vietnam  | PWL                                     | WL   | WL   | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | OO   | OO   |      |      |      |      |      |      |
| Yemen  |   |      |      |      |         |      |      |      |      |      |      |           |      |      |      |      |      |      | OO   |      |      |      |      |      |      |      |      |      |

301: 301 Investigation  
 PFC: Priority Foreign Country  
 PWL: Priority Watch List  
 WL: Watch List  
 OO: Other Observations (an informal listing formerly used by USTR)  
 SM: Special Mention  
 OCR: Out-of-Cycle Review to be conducted by USTR  
 GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.  
 DS: Dispute Settlement