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Mr. Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: IIPA Comments in Response to Executive Order Regarding Trade Agreements Violations and Abuses, 82 Fed. Reg. 29622 (June 29, 2017)

I. INTRODUCTION

The International Intellectual Property Alliance (IIPA) provides these comments in response to the above-captioned Federal Register Notice (FRN) requesting comments on the Administration's review and report to the President on trade agreement violations and abuses. The Office of the U.S. Trade Representative (USTR) and the Department of Commerce (Commerce) issued the FRN pursuant to Executive Order 13796, which calls for reviews of all bilateral, plurilateral, and multilateral trade agreements and investment agreements to which the United States is a party and all trade relations with countries governed by the rules of the World Trade Organization (WTO) with which the U.S. does not have free trade agreements but with which the U.S. runs significant trade deficits in goods.¹ Among other things, the FRN requested information regarding "whether there have been violations or abuses of the agreement, treaty or program that have harmed American workers [or] harmed intellectual property rights held by U.S. companies and U.S. persons;" "[w]hether any unfair treatment by trade and investment partners has harmed American workers [or] harmed intellectual property rights held by U.S. companies and U.S. persons;" and the "benefits or opportunities created as part of these agreements, treaties, programs, and trade relations with respect to . . . promotion of U.S. intellectual property rights holders."

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), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpa.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of 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.

¹According to the FRN, the countries that fall into this category include China, the European Union, India, Indonesia, Japan, Malaysia, Switzerland, Taiwan, Thailand, and Vietnam.



In December 2016, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2016 Report*, prepared by Stephen E. Siwek of Economists Inc. According to the report, the “core” copyright industries in the U.S. generated over \$1.2 trillion of economic output in 2015, accounting for 6.88% of the entire economy. The core copyright industries also employed over 5.5 million workers in 2015, accounting for 3.87% of the entire U.S. workforce, and 4.57% of total private employment in the U.S. These are good jobs: copyright industry workers earn on average 38% higher wages than other U.S. employees. The core copyright industries also outpaced the U.S. economy, growing at an aggregate annual rate of 4.81% between 2012 and 2015, while the U.S. economy as a whole grew by 2.11%. 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, as detailed in the report. Finally, the report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. In 2015, these sectors contributed \$177 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.² Studies such as this amply demonstrate the contribution of creators, and the copyright-based industries that support them, to the American 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 discriminatory market barriers.

To reach foreign markets through legitimate and state-of-the-art channels, members of the publishing, film/TV, music, and video game sectors rely on consistent, modern standards of copyright protection, effective copyright enforcement, sound legal structures for licensing, and the elimination of market access barriers. The overarching objective is to promote markets where the creative industries can bring more products and services in an increasing variety of ways from a greater diversity of players before an ever-growing global audience.

IIPA welcomes the Administration’s review of trade violations and abuses, and unfair treatment by trading partners, and hopes that it will lead to meaningful action. Effectively reducing the inventory of significant gaps and shortfalls in fulfillment of copyright, enforcement, and market access commitments would benefit the creative sector in the U.S., and advance the overall national economic interest. In this submission, IIPA describes the benefits or opportunities for the copyright industries provided by U.S. trade agreements, identifies violations and abuses of trade obligations by key trading partners that have harmed the U.S. copyright industries and the workers they employ, and highlights U.S. trading partners’ unfair treatment, particularly the failure to adequately protect and enforce intellectual property rights (IPR), which has harmed the U.S. copyright industries and their workers. It is critical that our trading partners take expeditious and robust actions to address the concerns identified in this submission regarding piracy and other market access barriers.

²See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at http://www.iipawebsite.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 the Copyright Industries: Overview*, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see <http://www.wipo.int/copyright/en/performance/>. 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: China (2015), Australia (2015), Hong Kong (2015), Japan (2015), Malaysia (2014), India (2013), Taiwan (2013), Shanghai (2012), New Zealand (2012), Indonesia (2012), Thailand (2012), and South Korea (2012). See Motion Picture Association Asia-Pacific, *Research and Statistics*, available 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, and PWC’s *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available 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.



II. BENEFITS OR OPPORTUNITIES CREATED BY TRADE AGREEMENTS

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, with certain exceptions, implement the long-standing and consistent position of Congresses and Administrations, of both parties, dating back more than 30 years, that stronger copyright laws and enforcement worldwide serve the vital economic interests of the U.S.

As the global norms for copyright legal protections and enforcement standards have evolved and strengthened over time, our trade agreements have also evolved as a vehicle for their promotion. 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 WTO TRIPS Agreement, to which 164 countries have now acceded, Free Trade Agreements (FTAs) or Trade Promotion Agreements (TPAs) with 20 countries have entered into force, most recently with South Korea, Colombia and Panama in 2012. In addition to these, the U.S. government has entered into a wide range of bilateral agreements, including binding trade agreements, in which our trading partners have committed to take steps to modernize and strengthen their copyright laws and/or enforcement regimes.³ Some of the agreements were negotiated bilaterally in the context of accession of our trading partners to international entities such as the WTO, or in the settlement of WTO disputes, while others constitute “action plans” or similar pledges resulting from negotiations to resolve bilateral issues. While the enforcement mechanisms for this diverse collection of bilateral agreements vary in robustness, each of these agreements represent solemn commitments by our trading partners, entered into after serious negotiations, whose fulfillment is intended to serve the global interests of the U.S.

Implementation of these agreements has certainly contributed over the years to more good U.S. jobs and a greater contribution from the copyright sector to U.S. economic growth and global competitiveness. But the full benefits of these agreements will only be realized if the obligations taken on by our trading 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. Likewise, such vigilance and enforcement is essential to ensure that FTA implementation is done in a manner that does not harm U.S. rights holders. Unfortunately, too often in recent years this has not been the case. While there have been some notable enforcement successes, too many of our trading partners have simply ignored these important obligations, or have implemented them insufficiently or to the detriment of the U.S. creative industries. For years, and even in some cases for more than a decade, flagrant non-compliance has effectively been tolerated and normalized, and enforcement mechanisms available to the U.S. government, whether formal or informal, have not been invoked or even seriously threatened. Moreover, some U.S. trading partners have used FTA implementation to diminish strong IPR protection and enforcement, either through only partial implementation (e.g. implementing certain copyright exceptions or limitations, but not adequate and effective affirmative copyright protections), or non-compliant implementation (e.g. implementing copyright exceptions or limitations that are so broad they actually undermine the FTA’s copyright obligations).

III. TRADE VIOLATIONS OR ABUSES THAT HARM IPR AND U.S. WORKERS

Pursuant to the “Special 301” process, the U.S. identifies markets that fail to provide adequate and effective protection of intellectual property rights and/or deny fair and equitable market access to U.S. intellectual property

³See, for example, the intellectual property rights agreements compiled by the Commerce Department’s Trade Compliance Center, http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/index.asp. Some other such bilaterals do not appear in this compilation, such as the 2006 IPR Agreement between the U.S. and Russia, available at https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf.



rights holders. The IIPA has filed in every Special 301 proceeding since 1989, and in February 2017, filed its 29th report in that docket.⁴ IIPA's 2017 Special 301 submission describes deficiencies in intellectual property protection and enforcement, as well as other market access barriers, in 26 U.S. trading partners. As part of the Submission, IIPA prepared reports on 16 of these countries that it recommended for designation in the Special 301 report. These country reports, as summarized below, identified some of the principal unfulfilled commitments to the U.S. that are most concretely hampering the ability of U.S. copyright industries to compete fairly in the marketplaces of our trading partners. The commitments discussed below include provisions in the WTO TRIPS Agreement, FTAs, and World Intellectual Property Organization (WIPO)-administered treaties on intellectual property protection, including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the "Internet Treaties"). Implementation of the WCT and WPPT by U.S. trading partners has been an important objective of U.S. trade policy since the U.S. ratified the treaties in 1999.⁵ These treaties include important obligations that provide the foundation for digital trade in copyrighted works, and inadequate compliance causes significant hardship to the copyright industries.

The persistence of non-compliance by signatories to FTAs with the U.S. is particularly problematic. As the years roll by, producers of products and services from these countries continue to enjoy the unfettered access to our huge national markets for goods and services for which they bargained in the FTA process, while U.S. creative industries remain stymied in our partners' markets by the failure of these countries to take the steps for which U.S. negotiators bargained. While these asymmetries are more specifically cataloged in the country surveys (as described below), notably those for **Chile**, **Colombia**, and **Peru**, they are also felt in the markets of other FTA partners. For example, in **Costa Rica**, the government has done very little to respond to extremely high levels of online piracy, and has fallen far short of meeting its obligations under the Dominican Republic–Central America FTA (DR-CAFTA) regarding ISP liability, including providing meaningful legal incentives for inter-industry cooperation to deal with online infringements. Instead, Costa Rica's law protects ISPs and others even if they allow infringing activity of which they have been notified to continue on their systems for as long as 60 days. Along with repetitive instances in which the country's Top Level Domain registry has provided a safe haven to notorious online enterprises dedicated to copyright infringement, Costa Rica's failure to deal effectively with its obligations regarding online infringement, more than five years after these came into force under DR-CAFTA, is a serious concern.⁶ The problems are similar in **Panama**, where an extended deadline of October 2015 for implementation of the online liability provisions of the U.S.–Panama Trade Promotion Agreement came and went without meaningful action.

In alphabetical order by country, below are summaries of unfulfilled commitments to the U.S. by the countries IIPA recommended for designation in its Special 301 submission:

Brazil

While Brazil is not a party with the U.S. to any bilateral or regional agreements that include obligations with respect to copyright law or enforcement, it is a member of the Berne Convention and of the WTO. The main areas of possible incompatibility with WTO TRIPS Agreement standards lie in the enforcement sphere, and specifically

⁴The full IIPA Submission can be accessed at http://www.iipawebsite.com/2017_SPEC301_TOC.htm, and is included as an attachment to these comments.

⁵The House and Senate Committee Reports on the bills that ultimately became the Bipartisan Trade Promotion Authority Act of 2002 illustrate that implementation of the WCT and WPPT commitments has been a longstanding trade priority. See H. Rept. 107-249 at 26 ("Another important objective is to ensure that standards of protection and enforcement keep pace with rapid technological developments. For example, the Executive Branch should encourage countries to ratify and implement the [WCT and WPPT], which reflect enhanced global minimum standards of protection and enforcement for the networked digital environment."); and S. Rept. 107-139 at 18 ("At the same time, the Committee expects negotiators to pursue 'TRIPS plus' commitments in bilateral and regional trade agreements, as they routinely have done in negotiations undertaken in recent years. An example of such a commitment is an obligation to give effect to provisions contained in other conventions on intellectual property, such as the [WCT and WPPT]. These WIPO conventions reflect enhanced global minimum standards of protection and enforcement for the networked digital environment, and negotiators should continue to seek their ratification and implementation by other trade partners.")

⁶Costa Rica was the last DR-CAFTA country to ratify the agreement, which came into force for it on January 1, 2009. A 30-month transition period for implementing the online liability provisions of the agreement expired in July 2011.



whether in practice Brazil provides civil and criminal enforcement that meets the minimum standards of TRIPS Articles 41 and 61. Brazil is not a member of either the WCT or the WPPT, though it certainly should be encouraged both to join these treaties and to bring its law into full compliance with them.

Canada

Canada's international agreements involving the U.S. that are most relevant to copyright obligations include the WTO TRIPS Agreement and the North American Free Trade Agreement (NAFTA). Some aspects of Canada's current copyright regime may raise significant issues regarding compliance with these agreements (for example, whether the breadth of some of Canada's copyright exceptions, as applied, comply with the well-established "three-step test").⁷ In particular, Canada's ambiguous "education" exception included in the enumeration of fair dealing purposes adopted in the Copyright Modernization Act, which has in large measure decimated the educational publishing market, and Canada's broad and globally unprecedented user-generated content exceptions similarly raise concerns. But the broader problem is that the copyright law and enforcement norms in the TRIPS Agreement and NAFTA, both negotiated more than a quarter-century ago, are extremely outdated, and lack modern copyright protection and enforcement standards for the digital marketplace. Likewise, Canada's discrimination against the American sound recording industry and U.S. producers' rights raise troubling questions regarding fundamental national treatment principles, including under the TRIPS Agreement. Any re-opening of NAFTA in 2017 should give high priority to modernizing its provisions for the digital age, with the goal of further opening the Canadian and Mexican markets for the U.S. copyright industries. For example, NAFTA modernization should address Canada's "notice and notice" system, which falls short of international best practices and has proved ineffective in deterring online infringements.⁸

Chile

Chile's FTA with the U.S. entered into force January 1, 2004. Its failure to meet its FTA obligations for the past 13 years takes on a new level of significance, given the U.S. withdrawal from the Trans-Pacific Partnership (TPP). The concerns IIPA has voiced in past years regarding the deficiencies in Chile's implementation of its copyright obligations under the FTA are as urgent as ever, and ripe for action in the context of heightened attention to trade agreement enforcement.⁹

Seven 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:¹⁰

No protection for technological protection measures (TPMs): (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties (the WCT and the WPPT)). 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 the current law, the sale of circumvention devices continues unabated online and in specialty markets. In particular, the sale of video game copier devices on online marketplaces is increasingly prevalent, and music rights holders are left without support to tackle the problem of stream ripping sites that provide unauthorized access to copyright protected content through circumvention of TPMs. There has been some movement toward amending the Telecommunications Law to address the sale of devices which decode encrypted satellite signals, but

⁷See TRIPS Article 13.

⁸Other issues to be addressed in such modernization could include: securing the full exclusive rights needed for digital dissemination of creative materials; comprehensive protections for access controls and other technological protection measures (TPMs) employed by rights holders; updated copyright term provisions; enhanced enforcement obligations including criminal prohibitions against camcording and availability of statutory damages at deterrent levels; and others. For additional information, see IIPA Comments regarding Negotiating Objectives Regarding Modernization of North American Free Trade Agreement with Canada and Mexico, 82 Fed. Reg. 23699 (May 23, 2017).

⁹The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

¹⁰These 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.iipawebsite.com/rbc/2013/2013SPEC301CHILE.PDF>.



no other protection for TPMs exists. Chile should immediately comply with its FTA obligation to provide adequate legal protection for all forms of TPMs.

Significant obstacles to content removal; no notice and takedown mechanism: (See FTA Article 17.11.23.) Chile does not even have the rudimentary notice and takedown procedure comparable to the U.S. or other jurisdictions globally. Under the current law ISPs are only required to remove content if there is a court order.¹¹ In addition, the “notice-plus-notice” architecture under Chile’s Copyright Law is entirely inadequate. It merely encourages ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. The only option for rights holders is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users, and wrongly shifts the focus of enforcement away from unlicensed platforms that also play a role in illegal distribution. The recording industry has worked together with ISPs to establish a meaningful notice sending scheme, with thousands of notices sent to P2P users who are engaged in the exchange of unauthorized music files. However, despite the considerable resources devoted to initiating this process, the notices have had no deterrent value whatsoever. More than 12,000 notices were sent, but there were no meaningful legal consequences or sanctions against users or ISPs. Unfortunately, since the adoption of the 2010 amendments attempting to establish 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: 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).

Many of these shortcomings also constitute non-compliance with Chile’s obligations under the WIPO Internet Treaties, to which it acceded in 2002, as well as (in the case of overbroad exceptions) under the WTO TRIPS Agreement.

China

China is still not in compliance with the WTO’s ruling in the landmark market access case (DS 363) brought by the U.S. in 2007 and concluded in 2009.¹² In particular, China must do more to liberalize its market to U.S. films

¹¹The Internet Service Provider (ISP) liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. This provision falls far short of FTA compliance. Meanwhile, the mechanism for a voluntary 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, but lacks incentives for compliance, and thus, standing alone, is simply an inadequate response to widespread Internet piracy.

¹²*China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.



and television programming, and take further steps to liberalize its online music market. China has not implemented the portions of the Film Agreement that would ensure greater market reforms and opportunities for U.S. films, reduce government intrusion on marketing and distribution, and enhance competition amongst private Chinese distributors and with the state owned enterprise China Film Group for theatrical exhibition of U.S. films to cinemas in China, the second largest market worldwide.

Moreover, China's recent online publishing rules are also inconsistent with the WTO's ruling and raise concerns regarding China's obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.¹³ Similarly, the Statement and Rules on Importing TV Formats, the Notice and Measures on Administration of Online Foreign Films and TV Dramas, and the other longstanding discriminatory restrictions on audiovisual content may also be inconsistent with China's GATS commitments. The Statement and Rules on Importing TV Formats also raises questions regarding TRIPS Article 3 on national treatment, as it appears to favor Chinese rights holders over foreign rights holders.

Furthermore, China should re-examine its ban on foreign investment in the publishing sector, and consider allowing foreign investment in the scientific, technical and medical (STM) publishing sector. China should also eliminate investment restrictions on the U.S. sound recording industry, including ending the prohibition on foreign investment in the publication and production of audio-visual products, including sound recordings and music videos.

Regarding copyright protection and enforcement, China's deficiencies regarding criminal enforcement procedures (e.g. failure to use a "reasonable suspicion" standard for criminal transfers, thresholds that are too high or unclear, inadequate presumption of ownership, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. Also, the fact that commercial scale infringements are without a criminal remedy because of the requirement to show that the infringement is carried out "for the purpose of making profits" is inconsistent with the requirements of both TRIPS Article 41 and Article 61 on criminal procedures. And China's civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in bilateral engagements, including the Joint Commission on Commerce and Trade (JCCT) and U.S.-China Strategic and Economic Dialogue (S&ED), addressing a number of the issues discussed above, including full implementation of the U.S.-China Film Agreement, enhanced enforcement against Illicit Streaming Devices (ISDs), improved enforcement against online piracy, and enhanced protection of and improved enforcement against online piracy of academic journals, including strengthening library copyright protection.

Colombia

Many of Colombia's IPR obligations under the U.S.-Colombia Trade Promotion Agreement (TPA) (signed in 2012) have been overdue for implementation since at least May 2015. The agreement contains a comprehensive chapter on IPR that would raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. A proposed bill to bring Colombia at least partially in compliance with the TPA was floated twice, most recently in August 2016, but has stalled with no prospect of revival. As things stand, key copyright protection and enforcement obligations under the TPA, such as obligations requiring Internet Service Providers (ISPs) to assist in removal of infringing material online and ensuring that infringing services cannot avoid liability, still have not been implemented. Now that all of the transitional deadlines for Colombia's TPA obligations

¹³In the recently published *2016 Report to Congress on China's WTO Compliance*, USTR acknowledges that the draft *Network Publishing Service Management Regulations*, the predecessor to the new rules, raise concern "relative to China's GATS commitment." See p. 157, report available at <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>.



have passed, it is past time for implementation of those obligations, which Colombia took on in return for the unfettered access to the U.S. market that it has enjoyed ever since the TPA came into force in 2012. While Colombia's commitments go ignored, levels of piracy there continue to grow, increasingly 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; and 2016 has seen a large increase in the number of illegal camcords traced to Colombian cinemas. It is time for Colombia to honor its commitments under the TPA and to make combatting online piracy a priority.

India

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. India is neither a signatory to, nor has it acceded to, either of the WIPO Internet Treaties.

The interpretation of Section 31D of the Copyright Act—treating all digital music services, even if interactive, under a statutory license—is a violation of the WTO TRIPS because it equates the exclusive reproduction right in Article 14(e)(1) of the Copyright Act as also falling within a statutory license.

In addition, India's enforcement procedures are inadequate and do not permit effective action against any act of infringement, which is inconsistent with TRIPS Article 41. India should strengthen statutory provisions regarding online infringements to permit effective enforcement against businesses actively engaged in (or inducing) unlicensed content distribution, as well as expeditious takedowns without automatic put-back (for true intermediaries), in order to address both hosted and non-hosted infringing activities and services, within and outside India. As noted, the Copyright Act currently 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 problematic (and interpreted broadly which is itself a concern). 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 shifts the responsibility to rights holders to comply with burdensome rules and requirements that may not be possible to meet in practice. Those rules allowing 36 hours, are incidentally, too long of a period to wait for some forms of piracy such as pre-release piracy.

Indonesia

While passage of the Copyright Law of 2014 made good progress toward fulfilling Indonesia's obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. Indonesia's broad exceptions and compulsory license provision, limited rights management information (RMI) violations provision, recordal requirement, and unworkable provisional measures provision appear to be out of compliance with Indonesia's international obligations.

In July 2012, USTR initiated an investigation into the country practices in Indonesia regarding IPR and market access, and whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the U.S. 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."¹⁴ 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.

¹⁴19 U.S.C. §§ 2462(c)(4) and (5).



Mexico

Mexico is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. Mexico was a signatory and, in 2002, acceded to both of the WIPO Internet Treaties, although it did not publish its ratification of those treaties with the Agreed Statements.

Fifteen years after acceding to the WIPO Internet Treaties, Mexico has not fully implemented the treaties and its legal regime is missing several key elements required by the treaties and many other related provisions (such as, notice and takedown procedures). Some of the key missing elements are: (i) definitions and provisions on TPMs prohibiting acts of circumvention and the trafficking in tools, devices, components, or services that can be used to circumvent, along with civil and criminal remedies for violations (although some technological protections exist under current administrative sanctions (Article 231(V)); (ii) definitions of RMI and protections, and civil and administrative sanctions for the removal or alteration of RMI; and (iv) clarification regarding the making available right for works (Article 27), and enumerating the making available right for producers of phonograms (Article 131).

One long-standing WTO TRIPS obligation that Mexico has not implemented is to adopt *ex parte* remedies, additional damages and especially injunctive relief, for civil IPR infringement cases.

Mexico is also, of course, a signatory to the North American Free Trade Agreement (NAFTA) and the obligations of the IPR Chapter (Chapter 17) in that trade agreement. The copyright law and enforcement obligations in the NAFTA were negotiated more than a quarter-century ago, and are thus outmoded. Any re-opening of NAFTA in 2017 should give high priority to modernizing its provisions for the digital age, with the goal of further opening the Canadian and Mexican markets for the U.S. copyright industries.¹⁵

Peru

The U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009.¹⁶ As part of the TPA, Peru also signed IPR-related Side Letters, including one on ISP liability and another on retransmission issues. While Peru acted expeditiously to implement many IPR provisions of the TPA,¹⁷ it still has not implemented legislation addressing other important issues, including secondary liability principles or statutory damages. Since entry into force of the TPA, total trade between Peru and the U.S. has expanded from US\$9.1 billion to US\$16.1 billion.¹⁸ Peru has benefitted greatly from the TPA, and should complete its obligation to implement all provisions of the Agreement.

No ISP Liability Provisions: TPA Article 16.11.29 provides for incentives for service providers to comply with notice and takedown procedures for materials that are claimed to be infringing. This provision has not yet been implemented, which poses a significant problem to rights holders seeking to remove unauthorized copies of their works from websites, because ISPs do not risk any liability for copyright infringements otherwise. With no clear liability principles in place, website operators usually do not cooperate with rights holders. Industry sectors report that as a result, they do not bother engaging in notice-sending. While it is unusual to find massive piracy websites listed in Peru because of high costs and connectivity limitations, ISPs such as *Claro* and *Telefonica* have generally been

¹⁵Issues to be addressed in such modernization could include: securing the full exclusive rights needed for digital dissemination of creative materials; comprehensive protections for access controls and other TPMs employed by rights holders; updated copyright term provisions; enhanced enforcement obligations including criminal prohibitions against camcording and availability of statutory damages at deterrent levels; and others. For additional information, see IIPA Comments regarding Negotiating Objectives Regarding Modernization of North American Free Trade Agreement with Canada and Mexico, 82 Fed. Reg. 23699 (May 23, 2017).

¹⁶The final text of the U.S.-Peru Trade Promotion Agreement (TPA) Intellectual Property Rights (IPR) Chapter is posted on USTR's website at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

¹⁷Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to TPMs and judicial remedies.

¹⁸See <https://www.state.gov/e/eb/rls/othr/ics/2015/241704.htm>.



open and cooperative with industry, although no concrete collaboration effort has been tried so far. *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI) should encourage engagement in larger cooperation discussions between rights holders and ISPs, as well as other key Internet intermediaries, in addition to supporting clear provisions on liability principles.¹⁹

No Statutory Damages: Also outstanding is Peru's obligation to provide for pre-established damages (statutory damages) in civil judicial proceedings (TPA Article 16.11.8). This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement.

Russian Federation

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."

Russia joined the WTO in 2012. 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 IPR Action Plan 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 Russian government has not fully implemented these obligations.

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 and U.S.-Russia IPR Agreement obligations 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, so that they are fairly represented and there are no conflicts of interest in the governance structures. 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). Several proposals by the Russian government are now pending; one by the Ministry of Culture would, unfortunately, keep the status quo. A proposal by the Ministry of Communication and Mass Communications would make several improvements to the current system.

Regulations and state accreditations have institutionalized a system that is not transparent and lacks good governance or accountability for authors, record labels and performers—who have no other option except the state collective management organizations. Correcting this problem is a treaty obligation. 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

¹⁹If exemptions from liability are being considered, it should be made clear that such provisions should only apply to ISPs that perform technical, passive, and neutral activities.



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.

In its December 2016 report to Congress on Russia’s WTO compliance, USTR noted Russia’s failure to address the collective management issues. As the report said, instead of improving the system, Russia engaged in 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” even though Russia agreed in the Working Party Report to “phase out non-contractual license management” schemes within five years of the Civil Code reforms coming into place (in 2008). Finally, the U.S. government report said: “Russia’s legislature is considering further amendments to its IPR legal regime, and it appears that the Russian Ministry of Culture is currently making another attempt to reorganize the collecting society regime system in Russia, although draft legislation has not been circulated” and that the U.S. government would “monitor these efforts and whether reforms improve the transparency and effectiveness of these organizations.”

Finally, Russia is considering a measure that, if implemented, would be a clear violation of its WTO obligations, particularly GATS Article XVII on national treatment. The Ministry of Culture has floated a plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia; issuing a film distribution certificate would be conditioned upon payment of this fee. The Ministry’s goal is to promote domestic movies. No draft bill has yet been prepared.

Switzerland

Switzerland is a member of the Berne Convention, TRIPS, WCT, and the WPPT. It is thereby obligated under these international agreements to provide “effective” remedies to prevent and deter infringement. Under Article 41(1) of TRIPS (and similarly the WCT Art. 14(2) and WPPT Art. 23(2)) it is required to “ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” It is not currently doing so, especially in light of the *Logistep* case, which severely curtailed enforcement procedures against online infringers.

Taiwan

Deficiencies in Taiwan’s enforcement framework—including de-prioritization of copyright piracy cases by the Criminal Investigation Brigade (CIBr); inadequate civil procedures that do not result in deterrence; and a judicial system that does not take piracy cases seriously resulting in non-deterrent criminal sentences—are inconsistent with Taiwan’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, if adopted without significant revisions, Taiwan’s fourth draft amendments to the Copyright Law, which were submitted to the Executive Yuan in September 2016 for review, would run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

Thailand

Thailand’s enforcement framework has many deficiencies—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—that run afoul of Thailand’s obligations under the TRIPS enforcement provisions, particularly Articles 41, 42, 45, and 61.

Ukraine

Ukraine is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement.



In 2001, Ukraine acceded to the WIPO Internet Treaties, 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 TPMs, by requiring proof of “intentional” circumvention, which is a major impediment to protection.

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. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been properly addressed by the Government of Ukraine.

United Arab Emirates

UAE is a WTO member. UAE’s copyright law includes a number of shortcomings—including a lack of TRIPS-compatible enforcement procedures, such as *ex parte* civil searches, and inadequate remedies for copyright infringement—that may constitute violations of UAE’s obligations under the WTO TRIPS Agreement. UAE has also acceded to the WIPO Internet Treaties, and some of the shortfalls in its copyright law, including inadequate protections against circumvention of TPMs, also raise issues of compliance with its obligations under those treaties.

Vietnam

Vietnam is a member of the WTO, and therefore subject to the obligations of the TRIPS Agreement, and is also a party to a bilateral trade agreement (BTA) with the U.S., which entered into force in 2001 and includes obligations regarding copyright protection and enforcement. Vietnam’s copyright protection and enforcement frameworks are inconsistent with its international obligations in many respects. These include the following:

- all infringement on a commercial scale is not subject to criminal liability consistent with TRIPS Article 61 and BTA Article 14;
- a number of copyright exceptions are overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;
- remedies for civil, administrative, and border enforcement permit “non-commercial” distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- inadequate enforcement framework including no criminal infringement cases proceeding to the courts, complicated and non-transparent civil procedures, and inadequate training for enforcement officials which is inconsistent with Vietnam’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- term of copyright protection falls short of the requirements of BTA Article 4.4;
- presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2; and
- inadequate remedies against signal theft, in violation of BTA Article 5.



IV. UNFAIR TREATMENT BY TRADING PARTNERS THAT HAS HARMED IPR AND U.S. WORKERS

As noted above, in addition to highlighting the lack of compliance with copyright-related obligations to the U.S., IIPA's 2017 Special 301 Submission (attached) catalogues unfair treatment by 26 U.S. trading partners regarding inadequate protection and enforcement of intellectual property rights, as well as other barriers to market access for the copyright industries.

Besides the troubling gaps and shortfalls in compliance with obligations taken on by U.S. trading partners noted above, the submission highlights another cross-cutting challenge facing the U.S. in today's trade and copyright environment. In many countries around the world copyright reform efforts have become a vehicle for proposals that threaten well-established global norms, including, but by no means limited to the requirement to confine exceptions and limitations to copyright protection to those that satisfy the well-established "three-step test." The U.S. government must urge U.S. trading partners to adhere to current and evolving global norms, including in areas such as term of copyright protection and protections for technological controls that copyright owners use to control access to their works. The submission also lists 11 key challenges that we urge USG to prioritize in its bilateral engagement with our trading partners, starting of course with Internet and mobile network piracy, an overarching challenge for all businesses that depend on copyright.

The 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 has been one of the most encouraging trends in global markets for copyright material. Conversely, the entrenchment of infringing services, including those that profit from enabling others to infringe copyright, is the leading barrier impeding the full access of U.S. creators and producers into markets worldwide. This infringement threatens the viability of licensed platforms, and makes it much more difficult for creators and producers to earn a living from their craft.

In an increasingly digital, online and mobile marketplace, the full costs of copyright piracy are difficult to quantify. A recent study "estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion," while the corresponding estimate for the music industry was \$29 billion.²⁰ The study also spells out methodological reasons why "it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount." This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy. Another recent study by Carnegie Mellon, which is focused on movie piracy, determined that if piracy were eliminated in the theatrical window, then box-office revenues would increase by 15% or \$1.3 billion per year.²¹

IP theft perpetuates the U.S. trade deficit by undermining the U.S. trade in services surplus. According to the Bureau of Economic Analysis (BEA), licensing of IP is a significant contributor to that surplus.²² For example, in 2014, IP licensing accounted for the largest digital trade surplus (\$88.2 billion) of the services categories included in the BEA's analysis, and the second largest category of exports (\$130.3 billion) behind travel services. From 1999-2014, U.S. services exports of IP licensing grew from \$47.7 billion to \$130.4 billion, which was among the largest increases of digital services export categories over the course of this period; and from 2006-2014, IP licensing experienced annual growth of 6.7%. IP licensing, including of copyright, is therefore critical to U.S. economic growth, job creation and trade competitiveness. By undermining the U.S. copyright industries, piracy, as well as other market distortions that prevent the commercial licensing of copyright, significantly impair one of the key drivers of U.S. trade surplus. Moreover, expansion of exceptions or limitations to U.S. intellectual property rights, which effectively allows

²⁰Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-39, available at <http://www.inta.org/Communications/Pages/Impact-Studies.aspx>.

²¹Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

²²See New BEA Estimates of International Trade in Digitally Enabled Services, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.



foreign companies to use U.S. content without compensation to U.S. rights holders, also undermines the President's priority to tackle the trade deficit.

As described in IIPA's Special 301 Submission, in addition to piracy, the U.S. copyright industries suffer from a variety of 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. 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 the IIPA Special 301 Submission.

IV. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates revenues, jobs, and exports. Likewise, our trading partners also benefit from promoting and respecting IPR and opening markets to products and services that depend on copyright. Open markets foster 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. We urge the Administration to effectively address the trade violations and abuses and unfair treatment discussed in this submission to bring real commercial gains to the U.S. creative industries through strengthened copyright and enforcement regimes worldwide.

Respectfully submitted,

/Kevin M. Rosenbaum/

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ATTACHMENT



February 9, 2017

Submitted via regulations.gov Docket No. USTR-2016-0026

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

Re: IIPA Written Submission Regarding 2017 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Notice of Public Hearing, 81 Fed. Reg. 95722 (Dec. 28, 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.¹

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 high standards for protection; efficient copyright enforcement; sound legal structures that enable healthy licensing markets; and elimination of market access barriers and unfair competition. 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 and 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.”² 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. In particular, we highlight key opportunities to enforce specific obligations to the United States that many of these countries have taken on over the past years, in trade agreements and otherwise, but which remain unfulfilled. If the challenges to the creative

¹IIPA will file under separate cover a Notice of Intent to Testify at the March 8, 2017 public hearing on Special 301.

²19 U.S.C. section 2242(a)(1).



industries identified in this submission can be met and addressed, that will create more good jobs, 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. We also commend USTR for maintaining Special 301's focus on improving copyright protection and enforcement. This is clearly what Congress intended.

IIPA's 2017 Submission includes this letter and two appendices. In Appendix A, IIPA provides reports on 16 countries that it recommends for designation in the Special 301 report this year. Appendix B provides an historical chart of Special 301 designations since 1989.³ IIPA's recommendations can be summarized in the following chart:

IIPA 2017 Special 301 Recommendations	
Priority Watch List	Watch List
Chile	Brazil
China	Canada
India	Colombia
Mexico	Indonesia
Russian Federation	Peru
Taiwan	Switzerland
Ukraine	Thailand
Vietnam	United Arab Emirates
8	8

For some other countries that were identified in the USTR's 2016 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.⁴ IIPA does not recommend any change in the Special 301 status for these countries. The countries covered in this Annex are Argentina; Barbados; Costa Rica; Ecuador; Egypt; Guatemala; Jamaica; Kuwait; Turkey; and Venezuela.⁵

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), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpa.org), and Recording Industry Association of America (www.riaa.com). Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of 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.

³A number of 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.

⁴Country surveys and Annex entries were prepared by counsel to the IIPA, including Eric Schwartz, Kevin Rosenbaum, Naomi Backman-Straus, and the undersigned, 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 and Annex contain information which should not be construed as providing legal advice.

⁵Argentina, Kuwait and Venezuela are currently on the Priority Watch List; all others are currently on the Watch List.



In December 2016, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2016 Report*, prepared by Stephen E. Siwek of Economists Inc. According to the report, the “core” copyright industries in the U.S. generated over \$1.2 trillion of economic output in 2015, accounting for 6.88% of the entire economy. The core copyright industries also employed over 5.5 million workers in 2015, accounting for 3.87% of the entire U.S. workforce, and 4.57% of total private employment in the U.S. These are good jobs: copyright industry workers earn on average 38% higher wages than other U.S. employees. The core copyright industries also outpaced the U.S. economy, growing at an aggregate annual rate of 4.81% between 2012 and 2015, while the U.S. economy as a whole grew by 2.11%. 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 2015, these sectors contributed \$177 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.⁶ Studies such as this amply demonstrate the contribution of creators, and the copyright-based industries that support them, to the American 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 discriminatory market barriers.⁷

Content industries and their licensed partners continue to explore new ways to deliver content to consumers, launching new legitimate businesses, services, and 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.⁸ These innovative new services help drive the legitimate digital economy. Unfortunately, these services are also confronted with unfair competition from those who engage in piracy as a high-profit, low risk enterprise, unencumbered by the considerable costs associated with either producing copyrighted works, obtaining rights to use them, or protecting them against theft. Market access or discriminatory barriers imposed by governments further harm creators and discourage investment in legitimate services.⁹ In this way, piracy and market access barriers not only damage existing authorized distribution channels, but also impede the evolution of new legitimate channels, and thus stifle innovation.

B. CURRENT DEVELOPMENTS AND TRENDS

1. Positive Developments

IIPA notes positive developments in the following markets in the past year:

⁶See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at http://www.iipawebsite.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 the Copyright Industries: Overview*, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see <http://www.wipo.int/copyright/en/performance/>. 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: China (2015), Australia (2015), Hong Kong (2015), Japan (2015), Malaysia (2014), India (2013), Taiwan (2013), Shanghai (2012), New Zealand (2012), Indonesia (2012), Thailand (2012), South Korea (2012). See Motion Picture Association Asia-Pacific, *Research and Statistics*, available 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, and PWC’s *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available 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.

⁷In an increasingly digital, online and mobile marketplace, the full costs of copyright piracy are difficult to quantify. A study just released “estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion,” while the corresponding estimate for the music industry was \$29 billion. The study also spells out methodological reasons why “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount.” Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-39, available at <http://www.inta.org/Communications/Pages/Impact-Studies.aspx>. This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy. IIPA looks forward to reviewing it in more detail.

⁸For 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).

⁹See, e.g., USTR, 2016 National Trade Estimate Report on Foreign Trade Barriers (March 2016), available at <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf>, for the leading U.S. Government report on many market access and other trade barriers around the world.



- **Brazil:** Building on last year's successful takedown of *megafilmeshd.net*, coordinated federal law enforcement entities moved against three more major pirate sites trafficking in film and TV materials. The sites—*Filmesonlinegratis.net*, *megafilmeshd20.org* and *armagedomfilmes.biz*—were monetized by advertising, and collectively had received about three-fourths of a billion visits per year, 85% of them from Brazilian Internet users. However, serious problems persist in Brazil, and the music industry in particular notes the absence of positive developments for its sector.
- **China:** IIPA is encouraged by some actions China took in 2016 to combat online piracy, including the continued crackdown by the National Copyright Administration of China (NCAC) on unlicensed music platforms (Operation Swordnet); increased attention by NCAC (though more action is needed) on piracy apps, many of which are linked to Illicit Streaming Devices (ISDs); and first steps to combat the problem of unauthorized camcording in Chinese cinemas. Nonetheless, piracy, in all its forms, remains a persistent problem. Copyright holders also have hopes for the pending Third Copyright Amendment process to provide much-needed updates to certain aspects of protection, as proposed by the NCAC.
- **Honduras:** In March 2016, USTR undertook an Intellectual Property Work Plan with the Government of Honduras. The work plan addresses key IP issues including the retransmission of unauthorized satellite signals, often referred to as signal piracy, and promotes regulatory compliance by cable operators. Adoption of the IP Work Plan spurred the creation of a special investigative unit, which now has an active caseload on signal piracy. Moreover, at least one major rogue cable operator has begun signing licensing agreements with U.S. rights holders. The Honduran Government's willingness to tackle the persistent problem of signal piracy is a bright spot in the region, and IIPA hopes this work plan can serve as a model for future cooperation throughout Latin America. However, serious concerns remain in the treatment of music rights holders.
- **India:** In May 2016, the Ministry of Commerce and Industry released its long-awaited "National Intellectual Property Rights Policy," which sets seven key objectives for improving IPR protection. For the copyright industries, the plan could be a positive step forward to improve the legal regime in India, strengthen enforcement (especially in the online environment), and modernize the government's administration, management and services related to IPR. But concrete and positive implementation of the policy will be the key metric, and some initial indications in this regard from the Ministry of Commerce and Industry raise concerns.
- **Indonesia:** The Government of Indonesia made an important step in 2016 toward improving market access, allowing 100% foreign direct investment in film and recording studios, and film production, distribution, and exhibition, through changes to its negative investment list. Indonesia also held to its commitment to combat online piracy, disabling access to 85 infringing websites. The government also took positive action in cooperation with music rights holders and WIPO to facilitate the exercise of newly enacted rights for performing artists and record producers.
- **Israel:** After giving serious consideration to proposed legislation that would have explicitly authorized third parties to retransmit copyrighted content via the Internet without the rights holders' consent, the government ultimately decided not to proceed with the proposal, which would have been an unprecedented violation of Israel's international obligations.
- **Italy:** The government continued to employ and streamline the antipiracy framework under the Italian Communications Regulatory Authority (AGCOM) to take positive and prompt actions against online infringers (including against some of the foreign infringing sites most popular in Italy). Under the fast-track procedure, which addresses large-scale piracy, AGCOM disabled access to 33 sites dedicated to infringement, in some cases within 12 days after evidence of massive infringing content was submitted. In parallel, law enforcement authorities have pursued some commendable actions disabling access to



infringing sites, which confirms Italy's commitment to combating piracy on multiple levels. We also welcome recent decisions from the IP specialized courts clarifying the scope of Internet Service Provider (ISP) safe harbor protection, and imposing enhanced duties of care on certain online services to prevent infringements (such as obligations that better ensure that infringing content remains inaccessible). Furthermore, nationwide court reforms helped to reduce dramatically civil litigation backlogs in some courts, including for infringement cases. However, high levels of piracy in the country persist, including the availability of sites offering for sale devices to circumvent technological protection measures (TPMs) protecting video games. In addition, the efficacy of the AGCOM framework has room for improvement (and the AGCOM regulation itself is currently under judicial review). Overall, however, Italy continues to provide a powerful example of effective coordination of administrative and judicial copyright enforcement in the digital era.

- **Thailand:** After amending its copyright law in 2015, the Royal Thai Government continued in 2016 to press forward with copyright reforms intended to help Thailand meet the challenges of the digital age. It passed amendments to the Computer Crime Act (CCA) that include a remedy to disable access to infringing content, and introduced an intellectual property roadmap that, among other things, calls for intensifying efforts to combat piracy. IIPA welcomes these developments, which indicate that Thailand is beginning to recognize the seriousness of its growing online piracy problem and the importance of a thriving creative industry; however, significant physical piracy issues remain, particularly with respect to book piracy.

While applauding these positive moves, IIPA emphasizes that, for several of the countries listed above, serious issues remain to be addressed. In most cases, these are spelled out in the respective country surveys in [Appendix A](#) of this Submission.

2. Cross-Cutting Trends in Today's Trade and Copyright Environment

The following section provides a copyright industries perspective on two critical challenges facing the U.S. as it grapples with a level of volatility in global markets unprecedented in recent decades.

A. *Unfulfilled Obligations to the United States*

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 implement the long-standing and consistent position of Congresses and Administrations, of both parties, dating back more than 30 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, our trade agreements have also evolved as a vehicle for their promotion. 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 WTO TRIPS Agreement, to which 164 countries have now acceded, Free Trade Agreements (FTAs) or Trade Promotion Agreements (TPAs) with 20 countries have entered into force, most recently with South Korea, Colombia and Panama in 2012. In addition to these, the U.S. government has entered into a wide range of bilateral agreements, including binding trade agreements, in which our trading partners have committed to us to take steps to modernize and strengthen their copyright laws and/or enforcement regimes.¹⁰ Some of the agreements were

¹⁰See, for example, the intellectual property rights agreements compiled by the Commerce Department's Trade Compliance Center, http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/index.asp. Some other such bilaterals do not appear in this compilation, such as the 2006 IPR Agreement between the U.S. and Russia, available at https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf.



negotiated bilaterally in the context of accession of our trading partners to international entities such as the WTO, or in the settlement of WTO disputes, while others constitute “action plans” or similar pledges resulting from negotiations to resolve bilateral issues. While the enforcement mechanisms for this diverse collection of bilateral agreements vary in robustness, each of these agreements represent solemn commitments by our trading partners, entered into after serious negotiations, whose fulfillment is intended to serve the global interests of the United States.

Implementation of these agreements has certainly contributed over the years 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 trading 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. Unfortunately, too often in recent years this has not been the case. While there have been some notable enforcement successes, too many of our trading partners have simply ignored these important obligations, or have implemented them insufficiently. For years, and even in some cases for more than a decade, flagrant non-compliance has effectively been tolerated and normalized, and enforcement mechanisms available to the U.S. government, whether formal or informal, have not been invoked or even seriously threatened.

U.S. trade agencies should make it a top priority in 2017 to reverse this unfortunate trend. The inventory of significant gaps and shortfalls in fulfillment of copyright, enforcement, and market access commitments by our trading partners needs to be cataloged, prioritized, and effectively reduced. Implementation of such a trade policy priority will not only benefit the creative sector in the United States, and advance the overall national economic interest, but in most cases will also prove a boon to creators within the economies of our trading partners, who too often bear the brunt of weak copyright protection, half-hearted enforcement efforts, market-distorting taxes, unjustified investment restrictions, onerous censorship regimes, and other market access barriers. To assist the U.S. government in this effort, IIPA has identified in each of its country surveys in [Appendix A](#) some of the principal unfulfilled commitments to the United States that are most concretely hampering the ability of U.S. copyright industries to compete fairly in the marketplaces of our trading partners.

The persistence of non-compliance by signatories to [free trade agreements](#) with the United States is particularly problematic. As the years roll by, producers of products and services from these countries continue to enjoy the unfettered access to our huge national markets for goods and services for which they bargained in the FTA process, while U.S. creative industries remain stymied in our partners’ markets by the failure of these countries to take the steps for which U.S. negotiators bargained. While these asymmetries are more specifically cataloged in the country surveys in [Appendix A](#), notably those for **Chile**, **Colombia**, and **Peru**, they are also felt in the markets of other FTA partners. For example, in **Costa Rica**, the government has done very little to respond to extremely high levels of online piracy, and has fallen far short of meeting its obligations under the Dominican Republic–Central America FTA (DR-CAFTA) regarding ISP liability, including providing meaningful legal incentives for inter-industry cooperation to deal with online infringements. Instead, Costa Rica’s law protects ISPs and others even if they allow infringing activity of which they have been notified to remain on their systems for as long as 60 days. Along with repetitive instances in which the country’s Top Level Domain registry has provided a safe haven to notorious online enterprises dedicated to copyright infringement, Costa Rica’s failure to deal effectively with its obligations regarding online infringement, more than five years after these came into force under DR-CAFTA, is a serious concern.¹¹ The problems are similar in **Panama**, where an extended deadline of October 2015 for implementation of the online liability provisions of the U.S.–Panama Trade Promotion Agreement came and went without meaningful action.

At the other end of the spectrum lie relatively informal commitments which nonetheless have the potential to enhance U.S. copyright industries’ access to important markets, and which therefore deserve attention from the trade agencies. A current example involves **Trinidad & Tobago**, which USTR removed from the Special 301 [Watch List](#)

¹¹Costa Rica was the last DR-CAFTA country to ratify the agreement, which came into force for it on January 1, 2009. A 30-month transition period for implementing the online liability provisions of the agreement expired in July 2011.



last April, citing that the Telecommunications Authority of Trinidad & Tobago (TATT) had taken steps to enforce its concessions agreement that mandates broadcasters to obtain all required authorizations from IP owners prior to broadcasting programs, music, information, and other works. TATT set a December 31, 2015 deadline for operators to come into compliance, which succeeded in spurring some operators to remove several unauthorized channels. TATT agreed to conduct an audit and pledged to take further enforcement action. IIPA appreciates the TATT's efforts and statements mandating that all subscription television providers must remove all channels for which they do not have the rights. U.S. rights holders look forward to working with TATT to achieve further and more complete enforcement of these rules in 2017.¹²

While it is critical that the U.S. Government ensure in 2017 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, it is also the case that the provisions of some of these agreements have become somewhat outmoded. In particular, the provisions of the North American Free Trade Agreement (NAFTA) were negotiated more than a quarter century ago, before the dawn of the digital age that has so dramatically changed the landscape of the marketplace for goods and services protected by copyright. Any re-opening of NAFTA in 2017 should give high priority to modernizing these provisions for the digital age, with the goal of further opening the Canadian and Mexican markets for the U.S. copyright industries.¹³

B. Copyright Principles and Norms under Threat

While the U.S. government should continue to press for reform and modernization of national copyright laws that have failed to keep pace with market and technological trends, recent years have revealed an insidious and disturbing downside to copyright reform initiatives in some countries. In some cases, these reform efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments that have met the test of time. Notably, some copyright reformers call for broadly drawn exceptions to copyright protection that threaten to violate the cardinal global rule that such exceptions and limitations be confined to those that meet the familiar “three-step test.”¹⁴ A recent iteration of this trend began in 2011 with the 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” that successfully torpedoed a copyright digital reform effort already almost a decade in process. Of course, the acrimonious collapse in April 2016 of Hong Kong's reform project means that the serious online piracy problems afflicting that market remain unaddressed. Legitimate digital music services struggle to take off in an environment characterized by widespread mobile apps for distribution of unauthorized music files; forum and cyberlocker sites (generally hosted outside Hong Kong) that provide online links to such files; and illicit peer-to-peer (P2P) services. The audiovisual industry faces similar challenges, as well as a marketplace replete with ISDs that undermine the

¹²Additionally, broadcast piracy—both the unauthorized retransmission by platforms and the use of unauthorized decoding equipment—is widespread in Trinidad & Tobago, affecting both free-to-air and premium services. Trinidad & Tobago's law permits the receipt, decoding, retransmission and sale of broadcast signals without rights holders authorization provided that the platforms pay rights holders equitable remuneration. No such remuneration is currently being paid. This statutory compulsory license legitimizes piracy and violates Trinidad's law, as well as its limited international obligations.

¹³Issues to be addressed in such modernization could include: securing the full exclusive rights needed for digital dissemination of creative materials; comprehensive protections for access controls and other technological protection measures (TPMs) employed by rights holders; updated copyright term provisions; enhanced enforcement obligations including criminal prohibitions against camcording and availability of statutory damages at deterrent levels; and others.

¹⁴As articulated in Article 13 of the WTO 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 Convention Art. 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Art. 10 (same, as to all Berne exclusive rights and all exclusive rights granted under WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Art. 16(2) (same, as to all rights provided for under WPPT).



market for legitimate “over-the-top” (OTT) streaming services as well as for pay television.¹⁵ These devices, which are in effect set top boxes used for piracy, are manufactured in mainland China, and openly sold either pre-loaded with apps that enable piracy, or with instructions or after-sale service to install the apps. Apart from isolated cases involving purely local operations,¹⁶ Hong Kong authorities, while motivated and experienced in dealing with piracy, simply lack the necessary legal tools to attack the problem of illegal streaming activities in Hong Kong. Efforts underway to launch a Hong Kong Infringing Website List, to inform online advertisers of sites containing infringing content so that they can avoid them (based on a model in place in the U.K.) are encouraging steps, but no substitute for a modernized copyright law regime. The U.S. Government should continue to urge Hong Kong to address these issues as rapidly as practicable.

Versions of some of the Canadian proposals also popped up in 2015 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. An ill-considered importation of a new “fair use” rubric, under which an indefinite number of otherwise infringing activities, carried out for a broad range of purposes, are declared to be non-infringing, would have been appended to a proliferation of extremely broad new exceptions and limitations to copyright protection, whose effects would imperil the legitimate markets for educational texts, locally-distributed works, and online works in general.¹⁷ Taken as a whole, these provisions are inconsistent with South Africa’s international obligations, since they far exceed the degree of exceptions and limitations permitted under the WTO TRIPS Agreement. While fortunately the 2015 draft copyright revision bill was withdrawn for further review, the extent to which it will guide future copyright reform efforts in one of Africa’s most important markets remains unclear. Moreover, a portion of the original bill, now dubbed the Performers’ Protection Amendments Bill, was published separately in December 2016, and could proceed to Parliament for consideration as early as March. It contains a number of troubling provisions that threaten the digital music marketplace, including a *de facto* compulsory license for the sound recording producers’ making available right. Because a robust legitimate marketplace for copyright works cannot develop in such an unpredictable environment, IIPA urges the U.S. Government to be vigilant regarding such proposals, whether made in the context of comprehensive copyright reform or otherwise, and to insist that our trading partners respect global standards, including but not limited to 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 Organisation for Economic Co-operation and Development (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 the Trans Pacific Partnership (TPP) negotiations agreed to bring their laws up to this standard for all copyright materials, and we continue to urge these countries, including **Canada, Vietnam and Malaysia**, to take this step on its own merits. In addition, 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.

¹⁵The last of the original pay-TV licensees still operating in Hong Kong, TVB, announced in January 2017 that it was terminating its pay-TV service, due in large part to the government’s failure to address online piracy effectively. See www.rapidtvnews.com/2017011145721/tvb-surrenders-licence-as-it-quits-hong-kong-pay-tv-market.html#axzz4VVBojm94.

¹⁶See, e.g., <http://www.scmp.com/news/hong-kong/law-crime/article/1794346/hong-kong-customs-officers-arrest-two-over-alleged-local>.

¹⁷The South Africa draft bill raised a number of other concerns as well. It would have established licensing and regulatory mechanisms that are likely to undermine the digital marketplace by regulating the relationship between creative parties rather than providing a robust framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships. The bill also placed unnecessary restrictions on the freedom of rights holders to contract on the open market, a key factor for the healthy growth of the entire creative sector. New provisions regarding the right of making available for record producers raised significant concerns because they are likely to be read far too narrowly, and confusingly would have subjected individually-negotiated free market licenses to arbitration by a government Tribunal. It also proposed very high quotas for local content, despite its restrictive proposals that will likely have the effect of reducing investment in local content. Finally, the bill fell short of consensus international standards regarding TPMs as set forth in the WCT and the WPPT (which South Africa signed in 1997 but has yet to ratify or implement), and as found in modern copyright statutes of many other countries.



A growing global consensus has also emerged on the need to provide legal protection to technological controls that copyright owners used to control access to their works. These access controls are key enabling technologies for the range of online digital services that have brought more creative works to more consumers in more ways than ever before. It is unfortunate, therefore, that in purporting to implement the TPP provisions on protection of access controls, **New Zealand** wandered far off the mark, adopting legislation that provided a “blanket exception” allowing the hacking of access controls unless accompanied by copyright infringement. This would make the prohibition against hacking the controls essentially useless. New Zealand’s legislation also made civil or criminal enforcement against trafficking in hacking tools almost impossible, by imposing onerous requirements for enforcers to prove that the traffickers knew (a) which specific works were protected by access controls, (b) that the copyright owners of those works did not allow hacking, and (c) that copyright infringement would result from hacking. While this particular legislation may never come into force due to the demise of TPP, the risk is that the New Zealand legislation may spawn imitators, thus undermining the emerging consensus across the developed world (and among many other countries that have implemented the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) that effective TPM legislation must establish a practical and enforceable anti-circumvention prohibition independent of copyright infringement. IIPA urges the U.S. government to remain vigilant on this issue, especially in reviewing legislation purporting to implement the WIPO Treaties and in other national copyright reform contexts.

Finally, with respect to global norms, 2016 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 reiterates 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.

3. 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

Online commerce in products and services protected by copyright is a major component of global digital trade; and 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.¹⁸ In many countries, the rapid adoption of Internet-ready mobile devices is accompanied by comparably rapid adoption of piracy. A 2016 study by IPSOS for the International Federation of Phonographic Industry (IFPI) found that almost one-in-five (19%) Internet users downloaded infringing music using a mobile device, a considerable increase from 2015. Nearly one-half of all users (47%) in **Brazil** and **Mexico** used mobile devices for music piracy.¹⁹ Massive online infringement 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 2016, **Russia**, **Brazil**,

¹⁸According 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 at <http://www.netnames.com/digital-piracy-sizing-piracy-universe>. Data published in 2015 estimates that traffic devoted to peer-to-peer (P2P) service, the vast majority of which is infringing, amounts to more than 6000 petabytes per month, representing 22% of all consumer video traffic on the Internet, and 18% of all consumer Internet traffic overall. See *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.

¹⁹IPSOS Connect/IFPI, *Music Consumer Insight Report 2016*, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf> (“IPSOS/IFPI”).



Ukraine, India, and Kazakhstan 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 **Mexico** were identified as the top four countries with respect to such infringement of games for console platforms.

USTR was correct when it observed in its 2016 Special 301 Report that “piracy over the Internet has become the most challenging copyright enforcement issue in many trading partner markets.”²⁰ But in a broader perspective, the entrenchment of infringing services is the leading barrier impeding the full access of U.S. creators and rights holders into markets worldwide. Online and mobile network piracy threatens the viability of licensed platforms, and erodes the capacity of authors, artists, musicians, filmmakers, publishers, videogame developers, performers and songwriters to earn a living. 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, continues to make a significant contribution in combating systematic online copyright theft.²¹ 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. Most recently, after law enforcement agencies from several of our trading partners collaborated with the U.S. to take down the “Kick Ass Torrents” site (*kat.cr*), one of the most popular and lucrative pirate sites in the world, and arrest its operator, two other major sites (*torrentz.eu* and *ex.ua*) closed voluntarily.²²

In the most recent “Notorious Markets” review filing in October 2016, IIPA members identified 90 notorious online markets, dedicated to infringement of every category of copyright work, and/or to trafficking in unlawful devices or services to circumvent TPMs used by copyright owners. The filings identify, where reasonably possible, the countries affiliated with these sites, whether by nationality or residence of their operators, location of hosting or domain name registration, or provision of other services necessary to the operation of the sites. 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.²³

- **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 rights holders to curb the use of their proprietary networks and services for infringing purposes. Such a regime provides a full panoply of exclusive rights (implementing the WCT and WPPT); recognizes online piracy as a form of cybercrime; and fosters cooperation among all industry stakeholders (including 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, they are often invoked by clearly pirate services. Clearer primary and secondary liability rules are necessary to discourage such abuse and to remove the safe harbor as an unjustifiable excuse for inaction. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement would also prevent services from basing commercial platforms on copyright theft.

²⁰USTR 2016 Special 301 Report, at p. 19 (April 2016), available at <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.

²¹The most recent report is USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>. (“USTR NM 2016”).

²²See USTR NM 2016 at 3. Unfortunately, *ex.ua* subsequently relaunched under a different domain name.

²³Research 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).



- **Inter-industry cooperation:** Like any Internet-based venture, the operations of a website dedicated to enabling or promoting online copyright theft would not be possible without the use of a wide spectrum of supporting services. Combating systematic online infringement of copyright requires the active cooperation of all participants in the e-commerce ecosystem, including online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services); payment processors; hosting providers (including reverse proxy providers and related optimization services); domain name registrars and registries; and search engines. As entities with a direct stake in a secure and stable Internet, and in the healthy growth of e-commerce (including e-commerce in products and services protected by copyright), cooperation against threats to that security, stability and health is part of a sound business strategy for all Internet intermediaries. Governments in many countries should be doing much more than they are currently to foster and encourage such cooperation, and the development of best practices to advance the common goal of a safer, cleaner online marketplace.

A review of the Notorious Markets Out-of-Cycle Review report released by USTR in December, as well as of the industry inputs to that report, provides evidence that some countries are doing a better job of promoting the necessary cooperation than others. The names of some countries recur with troubling frequency as examples of those where the operators of notorious market sites can obtain the supporting services they need. While most of the names that crop up most often are countries such as **Russia** and **Ukraine**, where other serious online piracy problems are documented in the country surveys in [Appendix A](#), several other countries are also mentioned disturbingly often. **Cyprus** and **Poland** provide two linked examples. The parent company for the hosting service for *4Shared.com*, the cyberlocker that is the subject of more URL removal requests to search engines from rights holders than any other in the world, and that was identified by USTR in this year's notorious markets report, is located in Cyprus.²⁴ The operators of *Rapidgator.net*, who net an estimated \$2 million annually from hosting and sharing infringing content, have their corporate registration in Cyprus.²⁵ The most popular cyberlocker in Poland, also a leading contender in the dubious competition for "most URLs of infringing content reported to search engines," *chomikuj.pl*, is owned and operated by a company registered in Cyprus, but is reportedly operated by a Polish national. Likewise, a Polish national also reportedly owns *Zippyshare.com*, a cyberlocker best known for pre-release music piracy. Several major sites providing links to infringing videogame files have connections to Poland, including *pobieramy24.pl* and *darkwarez.pl*, both registered in Poland's country code top level domain registry.²⁶ These connections are especially concerning in light of the fact that Poland is among the top ten countries from which peers accessed infringing video game content in P2P swarms during 2016.²⁷

- **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 disabling access to these foreign pirate sites from within their borders. Government agencies and courts from South Korea and Singapore to many Western European countries²⁸ 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

²⁴USTR NM 2016 at 7. The *4shared.com* IP address is registered in the name of 'New IT Solutions, Ltd.' but it is serviced and administered by Webzilla. Specifically, WZ Communications currently serves as the hosting ISP for *4shared.com* and is one of several companies (including Webzilla, Inc. / Webzilla, B.V. / Root S.A., etc.) that host problematic websites and services and fall under parent company XBT Holding. This convoluted listing of shell companies under XBT is often referred to collectively as "Webzilla".

²⁵USTR NM 2016 at 12.

²⁶Both these Polish-linked sites were also named by USTR in its 2016 notorious markets report. See USTR NM 2016 at 11.

²⁷However, the Polish Border Guard and the National Public Prosecutor's Office should be commended for providing assistance to U.S. authorities in the July 2016 arrest in Poland of the alleged owner of Kickass Torrents, a Ukrainian national who is now facing extradition to the U.S. As noted elsewhere in this Submission, *kat.cr* was the world's most popular torrent site for facilitating piracy.

²⁸These countries include the UK, France, Denmark, Portugal, Spain, Italy and Ireland.



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. Illicit Streaming Devices (ISDs)

ISDs are media boxes, set-top boxes or other devices that allow users to stream or download unauthorized content from the Internet. These devices (and corresponding software programs) take many forms, but have common features, and are fast becoming a significant means through which pirated motion picture and television content is accessed in consumers' homes in markets around the world. China is a hub for the manufacture of these devices, which are not only distributed domestically but also exported to overseas markets. What was once a problem centered mainly in Asian markets has now proliferated worldwide.

ISDs enable many forms of infringement of copyright or other illegal activities, and are often advertised and marketed as such. They facilitate easy and unauthorized access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming (including encrypted content), video games, published materials and TV dramas. The devices are either pre-installed with apps that facilitate infringement (either prior to shipment or by vendors prior to sale or as an after-sale service), or else users themselves are easily able to obtain and install the apps required to access the infringing content. These apps allow the user to connect to a supporting OTT online infrastructure that provides users with instant access to infringing audiovisual content. Many of these piracy apps cross over multiple platforms, including set-top boxes, mobile phones and computers.

ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. Under the right fact patterns, the retailer/distributor can be held liable; if the app developer can be identified and located, this may provide another enforcement path. Governments should also take action against key distribution points for devices that are being used illegally. But unless effectively countered with vigorous action against one or more of these ecosystem participants, the impact of ISDs 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, 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. **China** stands out as needing close scrutiny, as the locus for manufacturing of a host of circumvention devices. In addition to many other countries surveyed in [Appendix A](#), IIPA also notes **Israel** as the only OECD country that has failed to adopt any protection whatsoever in this field.



D. Stream-Ripping Services

The emergence of “stream-ripping” services, which circumvent the TPMs used to prevent download of streaming music, illustrates the destructive potential of these services, and stands as a global problem undermining the legitimate online music market. Stream ripping sites, services and apps enable users to make a permanent, free download of music that was licensed only for streaming use on a video website such as YouTube, and listen to it whenever and wherever they wish, without paying for a premium subscription. They thus inflict damage both on legitimate streaming services and legitimate channels for authorized downloads. Globally, these services are now used by three in ten Internet users and by almost half (49%) of 16-24 year olds, an increase of 20% since 2015.²⁹ In September 2016, organizations representing record companies in the United States and United Kingdom took legal action against *YouTube-mp3.org*, the largest site dedicated to offering illegally “stream ripped” music. There are many more similar sites operating globally, and USTR was correct to identify stream-ripping as an “issue focus” for its 2016 notorious markets report.³⁰

E. 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. In 2016, the Motion Picture Association of America identified 587 total illegal recordings of its member company titles from cinemas around the world, including both video and audio captures—a 59% jump from 2015. These figures do not include numerous independent or foreign films that were illegally camcorded.

A multifaceted approach is needed to tackle this problem, including enacting and enforcing anti-camcording legislation to outlaw the use or attempted use of an audiovisual recording device in a theater to make or transmit a copy of all or part of a motion picture; educating the public about how unauthorized camcording hurts both businesses and the consumer; and working with the private sector to identify and prevent unauthorized camcording in cinemas. This strategy has been implemented in many foreign markets (including Canada, Japan, and Korea) with good results. The country surveys in this submission highlight many other markets where an effective strategy against camcording has not yet been implemented, and where new criminal laws are clearly needed. However, enactment of criminal legislation is not by itself enough. Enforcement of these laws remains critical.

F. 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 consistent action by law enforcement authorities against entities engaged in unauthorized reproduction of textbooks and other professional books. In recent years, these are being produced not just for sale in the foreign market, but also for export to the U.S. and other developed markets. Government agencies, universities and educational institutions (especially those which are state-funded or operated) should do more to promote and adopt appropriate use and copyright policies, in particular the use of legitimate textbooks and journal publications, and to discourage the use of unauthorized copies of all literary, educational and professional works. The U.S. Government should ensure that such acts of infringement are fully covered in all bilateral, regional, and multilateral engagements. In addition to discussion of these issues in various country surveys in [Appendix A](#), publishers note significant problems in **Malaysia** and **India**, where the continuing growth of the publishing market has

²⁹IPSOS Connect/IFPI.

³⁰USTR NM 2016 at 5.



been undercut not only by widespread unauthorized photocopying of educational materials, but also by large scale unauthorized reproduction of academic textbooks for export, including to the U.S. via online vendors.

G. Pay-TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet, costs rights holders dearly. Related problems include operators who take cable and satellite signals by unauthorized means (hacked set top boxes; decoding or decrypting signals; 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**, as well as in **Egypt, UAE, Indonesia, and India**. 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 rights holders of the content or of the signal. Such laws can help foster licensing of broadcasters and cablecasters, and weed out unlicensed television distributors.

H. 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.

I. 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 scores of “notorious” physical markets for the distribution of pirate hard goods, most of them in **Mexico** or **Brazil**.

J. Collective Management Organization (CMO) 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 all commercial uses of their content and effectively exercise all of the rights granted by copyright has become more important than ever. While direct licensing by individual rights 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. As income from these rights has become an increasingly important source of revenue for music rights holders, their need for efficient, transparent, and accountable collective management services has intensified worldwide. Rights holders must be in a position to set up and govern their CMOs themselves, with government interference limited to ensuring efficient, fair and non-discriminatory operations.



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

- Collective management should, as a general matter, always be voluntary;
- CMOs should only be set up (and should only be governed) either by rights holders or by associations directly representing them;
- CMOs may not discriminate between rights holders on the grounds of nationality or similar criteria;
- 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.

While [Appendix A](#) details serious concerns about some or all of these issues in a number of countries, including **Ukraine, Russia, Canada, Taiwan** and **Brazil**, 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.

K. 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 courts³¹;
- update laws and enforcement tools to meet current infringement challenges, including pirate operations based online and/or outside the jurisdiction, 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.

4. Market Access Barriers

The U.S. copyright industries suffer from a variety of 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 (such as through inclusion of royalties in the calculation of duties), taxes, or fees on core copyright businesses and their products and services;

³¹See WTO TRIPS Arts. 41, 61.



- the maintenance of quotas on audiovisual programming, including screen time and broadcast quotas, or complete bans on broadcast of foreign programming or advertising;
- ownership and investment restrictions on copyright-related businesses;
- discriminatory, onerous, and/or dilatory content review/censorship systems;
- periods during which foreign governments prevent U.S. producers from opening their films, or impose onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture); and
- local replication requirements for films.

While market access barriers like those above are discussed in a number of the country surveys in Appendix A, 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.

C. 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 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/

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International Intellectual Property Alliance

APPENDIX A

COUNTRY SURVEYS

PRIORITY WATCH LIST

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2017.¹

Executive Summary: For thirteen years, Chile has flouted major obligations it took on in the U.S.-Chile Free Trade Agreement (FTA), and has not achieved the goal of a copyright law and enforcement regime in line with 21st century norms. Not surprisingly, Chile continues to be a locus of online piracy and trafficking in circumvention devices, including free-to-air boxes, which decode encrypted satellite signals of copyrighted programs and broadcasts. Thirteen years after the FTA came into force, several major gaps in Chile's Copyright Law remain unaddressed, including a lack of protections against circumvention devices; obstacles to the removal of infringing content online; inadequate liability standards to give Internet Service Providers (ISPs) incentives to cooperate with right holders in combating online piracy; the lack of deterrent remedies against infringement; and overly broad exceptions to copyright. Even after Chile adopted amendments to its Copyright Law in 2010 to address some of its FTA obligations, it left these issues to languish, glaringly unresolved. Additionally, it lacks any law directed at illicit camcording in theaters, which continues to be a significant problem for the film industries. Even where Chilean law is adequate to bring action against certain copyright crimes, police and court personnel are not adequately equipped to bring cases, and judges continue to impose non-deterrent remedies. As Chile works to build its local creative industries and its international reputation as a reliable trading partner, it can no longer ignore the basic needs of a robust digital economy, including with respect to its obligations under the FTA.

PRIORITY ACTIONS REQUESTED IN 2017

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil) to satisfy FTA and WIPO Internet Treaties obligations, beginning with revisions to and adoption of the bill regarding sales of free-to-air boxes.
- Further amend the copyright law, including to fully satisfy FTA obligations, to provide meaningful incentives for service provider cooperation with right holders against online infringement (including a notice and takedown system that does not require court orders); deterrent-level civil and criminal sanctions for copyright infringement; the establishment of statutory damages; and an effective civil *ex parte* search remedy.
- 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

Chile has the highest level of Internet use per capita in Latin America;² but it also has a serious Internet piracy problem. Piracy in Chile is characterized by significant levels of stream ripping, 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 foreign based stream ripping sites and illegal streaming services, P2P networks such as BitTorrent, and links to cyberlockers containing infringing content posted on forum sites such as *portalnet.cl* and available on mp3 search sites such as

¹For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See <http://www.internettivestats.com/internet-users-by-country/>, estimating that 77.8% of Chileans were Internet users in July 2016, a higher proportion than any other independent territory in Latin America.



mimp3 and *fullmusicianonline*. The main torrent tracker in Chile is *subtorrents.com*, which receives approximately 2 million visitors per month from Chile. *Todojuegos.cl* is increasingly popular, reaching over 350,000 monthly visits. Chilean users consume significant amounts of pirated content posted on primarily infringing Spanish-language websites, regardless of the location of the hosts and operators of the websites. For example, the 108 top pirate Spanish-language audiovisual content websites received 213 million visits from Chile between December 2015 and June 2016, and an estimated 450 million visits from January-December 2016. Such consumption of pirated content harms the legitimate market in Chile.

Chile remains active in the sale of circumvention devices such as video game copier devices made available through online auction sites. The commercial area of Providencia in Santiago, "Paseo Las Palmas," is well known for the sale of video games and related products. Stores offer handheld consoles for sale at different prices, depending on whether the consoles have been modified or not. The site *NeoGames.cl*, which is hosted and operated in Chile, continues to be a leading purveyor of circumvention devices against which there are no means of enforcement. *NeoGames.cl* deceptively bills itself as an "authorized reseller" in Chile for handheld video game consoles and offers bundle packs, which are consoles pre-loaded with games. Traffic to *NeoGames.cl* increased by 20% over the last six months, totaling over 25,000 monthly visits. Withdrawal of legitimate payment services for this site has been difficult as credit card companies have faced challenges verifying payment methods. In 2016, Chile placed 21st 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 *mercadolibre.cl*, Chile is one of the top three countries in South America offering game copying devices in 2016.

The recording industry continues to be heavily affected by Internet piracy, in particular by stream-ripping websites, which circumvent TPMs and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models both of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. Also prevalent are links to pirate files posted on blogs and social websites and the use of cyberlockers to host infringing content. Today, Chile shows the highest level of Internet piracy across the Latin American region, with about 33% of the total digital market. The recording industry, independent of the government, recently conducted an Internet anti-piracy campaign with promising but modest results. In 2016, 130 mobile apps dedicated to music piracy were removed from Google Play mobile and the Apple App Store. 6.1 million pages offering illegal music were delisted from Google, and 5,800 links to local music were removed, based on takedown notices sent by International Federation of the Phonographic Industry (IFPI) Chile to cooperative ISPs. Notably, these were all foreign ISPs, because local ISPs do not remove content as there is no notice and takedown system in Chile. While the recording industry thus has had some success working together with ISPs, the official "notice-plus-notice" system is inadequate to deter bad actors from hosting infringing content, as outlined below.

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 2016, four full camcords and one audio were traced back to Chilean theaters. These copies were found online and distributed by a number of release groups.

The pay-TV 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. Free-to-air decoders contain a card with modified software able to capture encrypted satellite signals for television viewing, including programs and broadcasts protected by copyright. Because the devices are commonly sold separately from the modified software, it is impossible to enforce against sale of the devices alone. As a result, Chilean police have not taken action against the sale of this equipment.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Chile's FTA with the United States entered into force January 1, 2004. Its failure to meet its FTA obligations for the past 13 years takes on a new level of significance, given the demise of the Trans-Pacific Partnership (TPP). The concerns IIPA has voiced in past years regarding the deficiencies in Chile's implementation of its copyright obligations under the FTA are as urgent as ever, and ripe for action in the context of heightened attention to trade agreement enforcement.³

Seven 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:⁴

No protection for TPMs: (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Right 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. In particular, the sale of video game copier devices on online marketplaces is increasingly prevalent, and music right holders are left without support to tackle the problem of stream ripping sites that provide unauthorized access to copyright protected content through circumvention of TPMs. There has been some movement toward amending the Telecommunications Law to address the sale of devices which decode encrypted satellite signals, but no other protection for TPMs exists. Chile should immediately comply with its FTA obligation to provide adequate legal protection for all forms of TPMs.

Significant obstacles to content removal; no notice and takedown mechanism: (See FTA Article 17.11.23.) Chile does not currently have a notice and takedown procedure comparable to the United States or other jurisdictions globally. Under the current law ISPs are only required to remove content if there is a court order.⁵ In addition, the "notice-plus-notice" architecture under Chile's Copyright Law is entirely inadequate. It merely encourages ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. The only option for right holders is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users, and wrongly shifts the focus of enforcement away from unlicensed platforms that also play a role in illegal distribution. The recording industry has worked together with ISPs to establish a meaningful notice sending scheme, with thousands of notices sent to P2P users who are engaged in the exchange of unauthorized music files. However, despite the considerable resources devoted to initiating this process, the notices have had no deterrent value whatsoever. More than 12,000 notices were sent, but there were no meaningful legal consequences or sanctions against users or ISPs. Unfortunately, since the adoption of the 2010 amendments attempting to establish 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.

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

⁴These 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.iipawebsite.com/rbc/2013/2013SPEC301CHILE.PDF>.

⁵The Internet Service Provider (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.

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: 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).

Many of these shortcomings also constitute non-compliance with Chile's obligations under the WIPO Internet Treaties, to which it acceded in 2002, as well as (in the case of overbroad exceptions) under the WTO TRIPS Agreement.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Illicit Streaming Devices: In September 2015 a bill was introduced in the Chilean Senate that would criminalize the sale or importation of a device or software that decodes encrypted satellite signals.⁶ This is a welcome step toward combatting the proliferation of these devices, which undermine the legitimate pay-TV market in Chile. However, the proposed bill provides inadequate penalties for sale of such devices or software; by comparison, existing fines for signal theft are five times higher. The fines are stated in "monthly tax units," but range from a minimum fine of 10 monthly tax units (approximately 461,370 Chilean Pesos or US\$714) to a maximum of 1,000 monthly tax units (approximately 46,137,000 Chilean Pesos or US\$71,350). Moreover, individuals who install, configure, or modify devices are subject to a fine of five monthly tax units. The economic benefit obtained in relation to the offense, the economic means of the offender, and the previous behavior of the offender are to be considered in setting the fines. In April 2016, several legislators made proposals for changes to the bill, including raising the minimum fine to 100 monthly tax units. The bill should be revised to provide for deterrent level fines, and then brought into force promptly.

Camcording Legislation: 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, VCD Chile, which had been in operation since 2008. VCD Chile was responsible for the physical and online release of at least 80 identified infringing copies of feature films made by illegal camcording in a theater; operated FTP servers in Chile, the United States, and Europe; and managed at least ten different distribution websites. While the Chilean Police dismantled the organization, Chile's criminal laws provide for such low penalties that the operator of the group is likely to see no jail time whatsoever.

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

⁶The bill is to modify the general telecommunications law. See Boletín No 10294/15. Proyecto de Ley que Modifica la Ley General de Telecomunicaciones para establecer sanciones a la decodificación ilegal de los servicios limitados de televisión, available at <http://www.senado.cl/appsenado/templates/tramitacion/index.php#> (search for 10294/15).

the National Police (*Carabineros*) and Civil Police. Police and Customs officials involve right holders in legal procedures, but the copyright industries report a reduction in *ex officio* actions against physical format pirated products, which may be as a result of the shift towards online piracy. Authorities should redirect enforcement energies and pursue 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.

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 substitute inadequate punishments such as community service and probation for criminal penalties.

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2017 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: China's rapidly developing marketplace holds enormous potential for the creative industries. An increasing number of licensed digital services provide Chinese consumers with access to a vast array of legitimate music, movies, TV programming, and other works. Outside the online environment, China now exceeds the United States with over 40,000 movie screens, many of which offer enhanced formats such as IMAX and 3D. Some of the market potential has begun to be realized, thanks in part to improved enforcement efforts, particularly against unlicensed music, which have contributed to accelerated gains for certain sectors. At the same time, China's legacy of piracy continues to distort the market, including by severely depressing licensing revenues, and its continued pursuit of policies that deny fair and equitable market access to U.S. content producers and distributors threatens to undermine the progress that has been achieved.

IIPA is encouraged by some actions China took in 2016 to combat piracy, including the continued crackdown by the National Copyright Administration of China (NCAC) on unlicensed motion picture, television, and music platforms, and some positive steps to combat the problem of unauthorized camcording in Chinese cinemas. Notwithstanding NCAC's announced focus on combatting piracy apps in 2016, NCAC should improve efforts in 2017 against the piracy app ecosystem. That ecosystem, which supports Illicit Streaming Device (ISD) piracy, has emerged as a key means of facilitating access to pirated audiovisual materials in China and requires a sustained response. Chinese authorities' ongoing failure to adequately address blatant online piracy of journals of scientific, technical, and medical (STM) journal articles and academic texts has led to new copycat services, operating undeterred, that facilitate unauthorized access to STM materials and threaten the professional publishing market. The amendments to the Copyright Law are a high priority, which should be made "first tier" legislation and should ensure China effectively addresses its piracy challenges and is in compliance with international norms. The new Criminal Law amendment includes a potentially helpful secondary liability provision, and its implementation should be followed closely.

China should reverse course and abandon proposals that discriminate against U.S. creative industries and should eliminate market access barriers, which exacerbate China's piracy problem. For example, China should abandon a March 2016 proposal that would require registration of Internet domain names through a licensed domestic service provider, and a May 2016 proposal that would require state-owned media companies to have a stake in online platforms for films and TV content. China should also reconsider the revised Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke measures—including the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and longstanding restrictions on broadcast and pay television—that discriminate against foreign content.

IIPA seeks further reforms to improve access to China's growing theatrical film market for U.S. film producers. China must fully implement the 2012 U.S.-China Film Agreement. Implementation thus far has been incomplete and, combined with new barriers to authorized online distribution of imported films and TV programming, it creates 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 this year's consultations on the Agreement, commensurate with commitments made by China in bilateral engagements.

¹For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of China's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



PRIORITY ACTIONS REQUESTED IN 2017

Enforcement:

- Take further effective action against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *ttmeiju.com*, *dy2018.com*, *cn163.net*, *yyp3.com*, and *freevampires.net*; plugin player *xigua* and its related piracy ecosystem; and apps such as *baofeng*, *MoreTV*, *BeeVideo*, *TVFan*, and *Tian Lai K Ge* (an infringing Karaoke app).
- Bring more targeted and deterrent actions, with transparency, against ISD piracy (including against dedicated piracy apps), unauthorized camcording, and hard goods piracy (including against production and supply of high quality counterfeit optical disks).
- Improve effectiveness of administrative enforcement, including by imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content; increasing transparency (e.g. notifying rights holders of the results of administrative actions); and facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that the criminal thresholds are met.

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., ensuring a remedy against apps facilitating infringement; adopting a proper right of communication to the public and broadcasting for sound recordings; clarifying safe harbor requirements; providing a term of protection in line with the international trend; and ensuring that exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope).
- Implement the new property rights protection guidelines regarding intellectual property rights (IPR).

Market Access:

- Reconsider the Online Publishing Rules prohibiting foreign involvement in online publishing activities and revoke all other measures—including the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and new content approval regulations for mobile games—that discriminate against foreign content, including by imposing registration requirements, onerous and opaque censorship procedures, restrictions on broadcast and pay TV, and strict quotas on foreign films and television programming.
- Abandon proposals that discriminate against U.S. producers and distributors of creative content, including the March 2016 Ministry of Industry and Information Technology (MIIT) proposal on Internet domain names; the May 2016 State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) proposal directing that state-owned media companies have a stake in online platforms for films and TV content; and the April 2016 proposed administrative measures on e-commerce that discriminate against foreign suppliers.
- 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 Strategic and Economic Dialogue (S&ED) to promote licensing of independent (private) national distributors in competition with and without intervention by State-owned China Film Group (CFG) and Huaxia. 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.

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.²

Persistent Online Piracy in China: Online piracy in China is persistent and takes a variety of forms, including websites (illegal download sites, peer-to-peer (P2P) piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, social media websites, and online marketplace/auction sites selling pirated goods and high quality counterfeits); apps facilitating piracy, available on myriad devices; and ISDs such as media box or set-top boxes by which users access infringing content, usually through a television. The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile, handheld, and TVs) has been expanding at an alarming rate. App websites provide a portal allowing users to download an app to their device, giving them access to pirated content, including motion pictures and television programming. Examples of such sites include *BeeVideo.tv* and *MoreTV*, which were 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 2016. Another app provided through a website portal, *Baofeng*, has been downloaded over 400 million times worldwide and has reached far beyond China, facilitating massive piracy of, among other things, latest-run motion pictures. In 2016, the music industry reported 236 infringing apps to mobile app marketplaces in China. One app in particular that is extremely popular in China as well as Hong Kong is *Tian Lai K Ge*, a set of infringing Karaoke apps; unfortunately, the Apple App Store has been slow to take down the apps, and Chinese enforcement authorities have been reluctant to take appropriate action.³ China must do more to combat the growing threat of the app piracy ecosystem.

Traditional website piracy remains a major issue in China, causing significant damage to rights holders. For example, another site identified by IIPA members in its "notorious markets" filings was *freevampires.net*, a "read-online site" that makes available unauthorized copies of books to be read online, which was registered in China in 2015. Other notorious piracy sites that disrupt the audiovisual marketplace include *zimuzu.tv*,⁴ *dytt8.net*, *ttmeiju.com*, *dy2018.com*, *cn163.net*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt199.com*, *80s.tw*, *meijutt.com*, *ygdy8.net*, *dysfz.net*, and *lbdy.com*. Streaming sites continue to increase. One music streaming service, *yymp3.com*, was hosted in China but now uses a U.S.-based reverse proxy service to obscure its location and has stopped responding to takedown request notices. The music industry reports that based on their monitoring, 55% of the 467,405 infringing music links they discovered in 2016 were to music streaming websites, 28% were to video streaming websites, and just 5% were to cyberlockers.

Moreover, in a recent and virulent 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), which provides applications allowing users to access infringing content over a proprietary P2P network or a content delivery network (CDN).⁵ An example is the *xigua* plugin player. 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 derivatives sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the

²See, e.g., IIPA 2016, <http://www.iipawebsite.com/rbc/2016/2016SPEC301CHINA.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.

³Apple has only taken down two of four *Tian Lai K Ge* apps after a protracted complaint process. The music industry has filed an administrative complaint with NCAC. Appropriate action should include at least forfeiture of illegal proceeds, seizure of tools and facilities as well as a fine, in addition to removal of the reported infringing content.

⁴According to Alexa, *zimuzu.tv*, a linking site, is one of the 250 most popular websites in China, and Similarweb recorded 24 million visits to the site in December 2016.

⁵comScore recorded more than three million page views to *Xigua.com* in December 2016.

proprietary video player embedded into these websites 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.

Illicit Streaming Device (ISD) Piracy: ISDs⁶ are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps (as discussed above), to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in China as well as elsewhere in Asia and increasingly around the world. China is a hub for the manufacture of these devices. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. These activities include facilitating easy access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming (including encrypted content), video games, published materials, and TV dramas. The devices are either pre-installed with apps that facilitate infringement (either prior to shipment or by vendors prior to sale or as an after sale service), or users themselves are easily able to obtain and install the apps required to access the infringing content.

ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. If the retailer/distributor takes steps to facilitate infringement, including by pre-loading apps or offering the apps as an after-service, or otherwise breaks the law (e.g., through the circumvention of technological protection measures (TPMs) protecting the content), this may provide a legal basis to hold the retailer/distributor liable. Furthermore, an additional avenue for liability would be against the app developer. As noted above, the apps allow users to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual content. However it is done, the Chinese Government must increase enforcement efforts, including cracking down on piracy apps and on device retailers and/or distributors 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 key distribution points for devices that are being used illegally.

Worsening Online Journal Piracy: The problem of online journal piracy continues to worsen. China's continued failure to take effective action against the KJ Med entity, including the Beijing Municipal Procuratorate's recent denial of an appeal of the decision not to prosecute, underscores the lack of effective criminal remedies against even the most egregious infringers in China.⁷ It also highlights both significant limitations in evidence gathering by criminal law enforcement authorities and their unreasonably narrow interpretation and application of the law. The unfortunate lack of deterrence in the marketplace thus continues to encourage copycat services to operate. In July 2015, the publishing industry filed an administrative complaint with the Guangdong Provincial Copyright Bureau against a new but similar service, Metstr. Although the case remains under investigation by Chinese enforcement authorities, progress is slow. Operating undeterred, these illegal services generate increasing revenues, and their operators receive greater returns on their investment, incentivizing them to provide more sophisticated, user-friendly forms of their services, such as through mobile apps. In addition, a growing number of online platforms have emerged that facilitate access to unauthorized copies of journal articles, including *syyi.com*, Baidu Paperhelp, and UReader. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. For example, Baidu Paperhelp appears to facilitate the exchange of copyright protected academic papers among its users, and awards credits for providing unauthorized copies of the copyrighted works. Unfortunately, given the difficulties enforcing against online entities, these platforms continue to operate with impunity. Chinese authorities

⁶In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

⁷The 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, the Haidan Procuratorate declined to pursue a criminal case against its operators. In December 2016, the Beijing Municipal Procuratorate denied an appeal of the Haidan Procuratorate's decision not to criminally prosecute the KJ Med operators.

have thus far failed to take appropriate action on an April 2016 administrative complaint the publishing industry filed against UReader with the Beijing Cultural Enforcement Department.

Furthermore, pirated print publications and compromised log-in credentials continue to be widely available on e-commerce sites. Unfortunately, in part due to China's inadequate online enforcement framework, sending notifications of infringement remains unduly complicated. E-commerce sites rarely act upon notifications from rights holders, unless they are a "trusted party." Becoming a "trusted party" is extremely burdensome, requiring a rights holder to submit business registration licenses, copyright registration documents, and authorization letters.

Circumvention Devices: 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 TPMs in a video game console in order to download and play illegal video games. 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. These 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.

Unauthorized Camcording Remains a Concern: 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, and high quality camcords are increasingly sourced to China.⁸ 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 criminal convictions for camcord piracy in Hefei in November 2014 and in Hubei in September 2016 are positive signs. Moreover, 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. The new Film Promotion Law, set to take effect on March 1, 2017, allows cinema personnel to take action against camcording, although unfortunately the law fails to provide for any form of sanctions, limiting its effectiveness. 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, 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 commitments made in the Joint Commission on Commerce and Trade (JCCT) 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 an 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, including High Quality Counterfeit (HQC) box sets of motion picture and television content and music content, often through e-

⁸As of November 2016, 15 forensic matches of MPAA studio titles available online have been traced to camcording in Chinese theaters.

commerce platforms. China must implement an effective program to stop and prevent future production and supply of HQC optical disks, sold through popular Chinese and international online marketplaces, including Alibaba, Amazon, Dhgate, eBay and Taobao.

ENFORCEMENT UPDATES IN CHINA

IIPA remains encouraged that China continued to take certain positive steps in 2016 to combat piracy, contributing to commercial gains in some creative sectors. More local Chinese rights holders are initiating lawsuits and seeking enforcement actions against major pirate operators, which has improved the climate for enforcement. But China's historic lack of enforcement remains a substantial impediment, which is why, notwithstanding recent actions, online piracy, and its negative impact on monetization options for licensed platforms, remains the dominant issue in China. As of the end of 2016, China had the largest Internet user base in the world, estimated at 731 million users, including 695 million mobile web users. This creates the potential for enormous market opportunities for rights holders; but a historic toleration for piracy and resulting overlapping consumption of legal and illegal content have kept revenues from creative content far below their commercial potential. Although the market for legitimate content has improved, more progress must be achieved for this potential to be realized, because the ease of access to pirated content hinders the monetization of legitimate services.⁹

Efforts to Combat Unlicensed Music Bearing Fruit: There were notable signs of progress in enforcement against online piracy in China over the past year, particularly regarding efforts to combat unlicensed music. As noted in our 2016 submission, the 2015 version of China's "Sword Net" anti-piracy campaign focused on cracking down on unlicensed music.¹⁰ As a result, significant amounts of unlicensed works were taken down from music platforms and there was an encouraging wave of licensing activity, with numerous platforms becoming licensed by many rights holders.¹¹ NCAC is reportedly reviewing the results of this campaign to determine its next steps, but has not proactively taken enforcement actions against noncompliant platforms. In 2016, the music industry filed 258 administrative cases with NCAC, with a 76% resolution rate, including: closure of 25 infringing websites and apps; punishment against 9 music websites; changes in business models for 31 websites (ceasing to offer music); deletion of infringing tracks on 89 websites; and warnings issued by local law enforcement against 47 websites.¹²

China's progress in cracking down on unlicensed music services has helped contribute to substantially increased revenues for the music industry. In 2015 the total music market was US\$169.7 million, up 63.8% from the previous year, and revenues from digital sales were US\$151.9 million, up 68.8%.¹³ That said, the legitimate music market in China is still nowhere near its potential, primarily due to the continued availability of unlicensed music on a large number of sites, services, and mobile apps. Despite boasting the largest number of Internet users in the world, China's music market is ranked just 14th globally, behind much smaller markets such as South Korea and Sweden. Revenues remain a small fraction of what they should be even when compared to revenues seen in comparably developed markets. Furthermore, 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.

⁹It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach.

¹⁰See IIPA 2016 at 19.

¹¹Various Chinese online music platforms including Kuwo, Kugou, QQ Music, Xiami, TTPod and NetEase 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.

¹²Difficulties 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.

¹³Total music revenues in 2014 were US\$105.2 million, and revenues attributed to digital sales were US\$91.4 million.

Additional Signs of Progress, But Challenges Remain: Through industry actions and NCAC support, some online piracy services causing grave harm to the audiovisual industry in China were shuttered in 2016.¹⁴ Five criminal cases were brought by police in Jiangsu Province, and there are 13 ongoing administrative cases (10 referred to NCAC as part of Sword Net, 2 brought by local enforcement agencies in Jiangsu Province, and 1 brought by the Hefei Cultural Task Force). Notwithstanding these actions, as noted above, dozens of notorious piracy websites remain, disrupting the legitimate market for creative content.

While the actions of NCAC and other enforcement authorities have made some progress against infringing websites, the Chinese government has only recently begun to prioritize the growing problem of infringing apps. The 2016 Sword Net campaign included a focus on combatting piracy apps and resulted in some notable enforcement actions. For example, in response to a music industry complaint, in 2016 the Chongqing General Brigade of Cultural Market Administrative Law Enforcement ordered the operator of the infringing mobile music app *Song One* to pay a fine of RMB 30,000 (US\$4,360) and confiscated its illegal income of RMB 3,000 (US\$436). Separately, enforcement authorities in Shanghai fined the operators of infringing mobile apps *QingTing FM* and *ECHO* RMB 20,000 (US\$2,907) and RMB 200,000 (US\$29,060) respectively.¹⁵ Furthermore, effective January 16, 2017, all app stores must register with the State Internet Information Office's local branches, which holds the potential to enhance the Chinese government's ability to take action against piracy apps. In 2016, the music industry reported 236 infringing mobile apps to mobile app marketplaces, mostly Android Markets, and the takedown rate upon notice to Apple was 96%, while the takedown rate for infringing Android apps was 85%.¹⁶ More needs to be done, including an effective enforcement campaign against "rogue" app developers found to facilitate copyright infringement.

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. In July 2016, the music industry monitored 16 major cyberlockers (i.e., online storage providers) and, of the 16, 9 have been closed and 4 have shut down their file sharing functionality. 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.¹⁷ 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 approximately 96%, although infringing content reappears quickly as there is no requirement for ISPs to ensure this content stays down permanently. Also, unfortunately, it is often difficult for rights holders to identify infringers and their locations because ISPs only provide this information in response to government requests. Additional cooperation is needed. In a positive development, Baidu has recently agreed to provide a simplified and expeditious takedown tool for motion picture and television content, and to demote infringing video listings of new release titles on the top ten pages of Baidu search results.

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 with infringing music, and for Baidu to halt advertisements on such marked websites. The first stage of the action was launched in April 2014. Hundreds of links have been reported since. According to the music industry, 4036 links have been reported to Baidu from the launch of Qingyuan Action through December 2016, and Baidu has taken down its advertisements on the reported infringing websites.¹⁸

¹⁴These sites include *mp4ba.com*, *xiamp4.com*, *dytt.com*, and *4567.tv*, *bttiantang.com*, *k178x.com*, and *andjvcd.com*.

¹⁵According to Similarweb, QingTingFM recorded more than 1.5 million visits per month from China during 2016.

¹⁶The music industry reported 48 infringing apps to Apple, and 148 infringing Android apps to Baidu and 34 to Tencent.

¹⁷In 2016, 59,056 links were sent to Baidu, and all were removed. Sina Disk (a cyberlocker service provided by Sina) has shut down its sharing and uploading functions. In 2016, NCAC also released a list of 284 movies and TV episodes that needed to be specifically monitored.

¹⁸Unfortunately, infringement on most of these websites still remains.

In addition, pursuant to Sword Net, NCAC has begun to monitor the top three advertising networks in China, Baidu, Alimama (of Alibaba Group), and 360, to help eliminate illegal advertising revenue to rogue sites. In November 2016, China's top four advertising networks, Baidu, 360, Alimama, and Tencent, jointly called for industry self-enforcement against piracy sites. Among other things, the advertisers committed to terminate advertisements on websites identified by the NCAC and the State Administration for Industry and Commerce (SAIC) on a "blacklist" of piracy sites, or that have been subject to repeated complaints from copyright holders.

Continued Need for Enhanced Chinese Government Resources to Tackle Piracy: The disproportionately small amount of resources devoted to fighting piracy in China, when compared with those deployed to stop other criminal activities, creates a recipe for failure and fertile ground for piracy. 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. In addition, China's criminal, administrative, and civil enforcement systems do not reliably nor in a timely manner impose deterrent level penalties on infringers. Accordingly, IIPA urges the Chinese government to undertake the following measures:

- Ensure deterrent-level penalties against operators of piracy websites, especially those that repeatedly infringe or make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions.
- Provide a full range of injunctive relief for civil enforcement, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply.
- Streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of money damages.
- Enhance expertise among police throughout the country to effectively bring criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.

As noted above regarding the growing problems of ISD piracy and networks of "do-it-yourself" piracy websites, the piracy challenges in China are constantly evolving and becoming more complicated. Chinese enforcement capabilities are lagging behind; authorities must adapt to keep pace with illegal piracy activity. Accordingly, the Chinese Government should be encouraged to expand resources and capability at NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (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.¹⁹ These reform processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

Copyright Law Amendments Should Be Made "First Tier" Legislation: While amendments to the Copyright Law remain with the State Counsel Legislative Affairs Office (SCLAO), many local stakeholders, including

¹⁹See, e.g., IIPA 2016 and IIPA 2015 at <http://www.iipawebsite.com/rbc/2015/2015SPEC301CHINA.pdf>. 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 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 were accepted by the Beijing IP court, with 3859 cases closed; 1488 cases were accepted by the Shanghai IP court with 887 closed; and 4612 cases were accepted by the Guangzhou IP court, with 2613 cases closed.

Chinese companies, are pressing for the draft to be moved from second tier to first tier legislation to ensure swifter consideration by the National People's Congress (NPC).

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.²⁰ 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.

The draft, however, contains a number of deficiencies that IIPA hopes will be addressed. First, it is critical that the legislation clarify China's Copyright Law to ensure adequate and effective enforcement against apps that facilitate unauthorized access to copyrighted works. The draft should clarify that the right of "communication over information networks" clearly permits action against an app that makes available content to users without authorization, regardless of where the content is stored. Certain Chinese IP judges have embraced the "server principle," interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app. Clarifying the law to reject the "server principle" is necessary because these illicit apps typically facilitate unauthorized access to content stored on remote servers. Furthermore, it should be clarified that liability should attach where an app circumvents TPMs used by legitimate rights holders to prevent unauthorized access to their content (again, regardless of where that content is stored). Article 48(6) of China's Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content (i.e., access controls), without the need to prove a copyright infringement occurred. Apps that allow a user to access unauthorized content undermine business models that are essential to a healthy online ecosystem. Therefore, to the extent current law on the right of "communication over information networks" and access controls does not clearly permit action against apps that facilitate unauthorized access to copyrighted works, the amendments should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

In addition, some of the current proposals may require revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices.²¹ 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 no knowledge of the infringement or, upon notice or otherwise obtaining knowledge, promptly took reasonable steps to limit or stop the infringement, including expeditious takedown of infringing content; 3) ISPs cannot modify the content or interfere with the TPMs used by copyright owners to protect their works; and 4) ISPs must have policies to take effective action against repeat infringements.²² In addition, IIPA is disappointed that the present draft leaves in place China's outdated term of copyright protection. China should bring its term of protection in line with the majority of The Organization for Economic Cooperation and Development

²⁰The latest draft has deleted the reference to "blocking" which was in previous drafts, but retains the request that Internet Service Providers (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.":).

²¹The 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 rights holders.

²²These 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.

(OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Not only would this ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This in turn would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats.²³ 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. In addition, the Copyright Law must include a legal basis for injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown. Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

Criminal Code Reform: On August 29, 2015, China adopted the Ninth Amendment to its Criminal Law (“Ninth Amendment”), which took effect on November 1, 2015. Among other things, the Ninth Amendment includes a potentially helpful secondary liability provision, adding the offense of “assisting criminal activities over information networks.” According to this new law, “knowing others are using information networks to perpetrate crimes, providing technical support such as Internet access, server hosting, web storage, or communication transmission services, or providing assistance in advertising or processing payments, where circumstances are serious,” is subject to criminal liability. This is an important development in Chinese criminal jurisprudence and this provision’s implementation should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement.

Unfortunately, the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying Judicial Interpretations) and other related provisions were not included in China’s Criminal Law reform process. This was a major missed opportunity, and we urge the Chinese Government to adopt further reforms that address the following shortcomings in China’s criminal enforcement framework:

- Thresholds are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).²⁴
- Some critical commercial scale infringements are 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 rights holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy.
- Criminal violations related to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are not separately defined, for example, regarding circumvention of TPMs, or trafficking in circumvention technologies, software, devices, components, and services.
- Presumption of copyright ownership is inadequate and creates unnecessary substantial burdens on rights holders, impeding effective enforcement.²⁵
- Criminal accomplice liability with respect to imports and exports is limited (with lower penalties available).
- There are uncertainties regarding increased penalties against repeat offenders.
- There is a jurisdictional bar limiting foreign rights holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

²³More than 80 countries protect some or all creative materials per the terms stated. Twenty-eight out of the 32 member countries of The Organization for Economic Co-operation 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.

²⁴The 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. Thresholds that inhibit effective enforcement against online journal piracy must be updated to reflect reality. There may also be a need to address thresholds so that non-hosted online services such as peer-to-peer (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.

²⁵Even after establishing proof of ownership, it is practically impossible to shift the burden to an alleged infringer to demonstrate that use of a copyrighted work is within the scope of a license.

Property Rights Protection Guidelines: In November 2016, the Central Committee of the Communist Party of China and the State Council jointly released “opinions” on “improving the property rights protection system and lawfully protecting property rights,” which includes a number of guidelines regarding IPR. These include the following: (1) raise penalties for IPR infringement, and explore establishing a system for punitive damages; (2) mark the credit record of entities found to infringe IPR, and improve the transparency of administrative sanctions in IPR infringement cases; (3) combine judicial procedures (civil, criminal and administrative) regarding IPR infringement into one tribunal to improve coordination and cooperation between enforcement authorities, and improve procedures for transferring cases from administrative enforcement agencies to criminal enforcement authorities; and (4) enhance international cooperation in criminal enforcement and intensify criminal investigations of foreign-related IPR infringement. IIPA views these guidelines as an extremely positive step, and we are hopeful that the China will implement them swiftly.

Draft E-Commerce Law: In December 2016, the NPC released a draft E-Commerce law for public comment. The draft law is wide in scope, intending to broadly regulate e-commerce activities, and includes a section that covers intellectual property rights. It outlines notice and takedown procedures that appear to include a streamlined notification requirement that would be less onerous for rights holders than the requirement in the Network Rules. The requirement for platforms to take down infringing content when they are “aware” of IP infringements should be broadened to require takedown when a platform “knows or should know” that the content is infringing. Furthermore, platforms should be obligated to cooperate with rights holders and take reasonable measures to prevent infringement. Finally, the provision that rights holders are liable for losses suffered by platforms as a result of erroneous notices should be amended to ensure that rights holders are only liable for losses caused by notices in which a rights holder knowingly, materially misrepresented that the content is infringing. Some rights holders already experience good cooperation with some e-commerce platforms through voluntary arrangements by which infringing content is expeditiously removed from the platforms. Thus, any implementation of this e-commerce bill should not upset those existing arrangements.

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.²⁶

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 ISPs 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 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

The positive actions China has recently taken to improve enforcement against piracy may well be for naught due to the Government of China’s continued pursuit of policies that impede the U.S. creative industries’ access to the Chinese marketplace. This direct relationship between the fight against piracy in China and the need for liberalized

²⁶Presently, 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.

market access to supply legitimate product, both foreign and domestic, to Chinese consumers 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, and, after the case concluded in 2009, China eased several market access restrictions.²⁷ Yet many core activities of copyright industries remain restricted or prohibited.²⁸ While IIPA has been hopeful China would continue to make progress and address longstanding market access barriers, the Government of China has recently introduced a slew of measures that appear to be in violation of its international obligations.

Growing Online Market Access Concerns: In February 2016, SAPPRFT released revised Online Publishing Rules, which took effect in March 2016, that appear to expand the scope of longstanding restrictions on the involvement of foreign entities from online publishing activities.²⁹ The rules follow China's amendment of the Foreign Investment Catalogue, released by the Ministry of Commerce (MOFCOM) in March 2015, which added "network publication service" to the "Prohibited" list. The rules appear to expand the definition of "online publishing" to include maps, games and online databases, and a "catch-all" provision to cover new types of digital works to be determined by SAPPRFT. The full impact of these measures on activities newly covered under the revised regulations are not yet clear; unfortunately, early indications signal that these measures are likely to have a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.³⁰

China has also recently introduced a raft of alarming draft measures that, if implemented, would clearly discriminate against U.S. producers and distributors of creative content. For example, in March 2016, MIIT issued draft regulations that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider. In May 2016, SAPPRFT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.³¹ While this proposal was temporarily suspended due to significant opposition from online platforms, there is concern that it may reemerge. In April 2016, China published a set of administrative measures on e-commerce that discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile games that make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

²⁷China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of "music videos" is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China would be helpful as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

²⁸For example, the Negative Investment List in the Shanghai FTZ expressly prohibits investment in "online audio and video programs," as well as so-called "Internet cultural business," while the rules also indicate, "Foreign investors are forbidden to be engaged or involved in operation of online video games directly or indirectly." Publishing likewise remains a prohibited investment category, with publishers prohibited from undertaking core publishing activities such as editorial and production work, and unable to determine which works, and how many, to bring to market. Other rules of the Ministry of Culture (MOC) also appear to create conflict with respect to foreign-invested entity involvement in Internet distribution of music. 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 State Administration of Press, Publication, Radio, Film and Television (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.

²⁹The February 2016 Online Publishing Rules revises and consolidates longstanding regulations, the Provisional Internet Publishing Management Regulations of 2002, that restricted foreign involvement in online publishing activities. A December 2012 draft of the revised regulations was made available for public comment.

³⁰For example, media reports around the time of the measures entering into force noted that the Online Publishing Rules were used to shut down Apple's online book and movie services. See, e.g., <https://www.nytimes.com/2016/04/22/technology/apple-no-longer-immune-to-chinas-scrutiny-of-us-tech-firms.html>.

³¹The proposal was for leading online video platforms to sell up to a 10% "special management stake" and cede at least one board seat to selected state-owned media companies.

This flurry of discriminatory measures follows other measures China has introduced in the last couple years to restrict the online distribution of foreign audiovisual content. SAPPRFT recently finalized Measures for the Administration of the Distribution of Audiovisual Programs over the Internet and Other Information Networks that 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 Notice caps the online distribution of foreign films and TV dramas at 30%, and requires online distributors to register content, obtain permits, and submit content for censorship review. The regulations allow only one opportunity to submit content for registration and censorship per year, which, because of the nature of television production, does not allow for submission of a full season of a television series. Consequently, the rules significantly delay and curtail the legitimate access of Chinese consumers to U.S. television content. The Notice also has had a damaging effect on Chinese websites and the licensing of audiovisual content, and has made “day-and-date” releases³² impossible. Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the Notice, and have cited conflicting reports on the corresponding requirements. There is serious concern that these systemic delays and limitations on Chinese consumers’ ability to access legitimate content will lead to increased piracy.

In addition, 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 Ministry of Culture (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.³³

Additional Audiovisual Market Access Concerns: China maintains a number of longstanding discriminatory restrictions on audiovisual content that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth. For example, China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television. Local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels. Furthermore, foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform, and may only be shown in three-star hotels and above and in foreign institutions. The annual fee for each channel remains excessively high at \$100,000. In addition, foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time. Foreign programming is banned during prime time and may not constitute more than 30% of pay television channels. Foreign TV series and movies are limited to 50 episodes. Foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation.

China continues to introduce additional impediments to its market for U.S. film and television content. In June 2016, SAPPRFT issued a Statement and Rules on Importing TV Formats that is clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content. Among other things, the rules establish a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a “major guiding role” in production if the Chinese party does not “fully obtain intellectual property rights” in the program. Only two of these “foreign” programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year. This distortion of China’s market for

³²“Day and date” release refers to releasing a film in theaters and making it available on a Video on Demand service the same day.

³³The 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.

television and radio content will negatively impact U.S. producers and appears to contravene China's WTO obligations.

China's further lapse toward protectionism is a mistake. It is critical to send a strong message that these policies are unacceptable, particularly at a time when China's creative marketplace holds the potential for explosive growth, and should be reversed. China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

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%. However, China has not implemented key provisions of the Agreement that would bring broad reforms and introduce competition, for example, to the distribution marketplace, benefitting more producers and increasing the number of films imported into China. Despite the rapid growth of screens in China and the strengthening of local productions, the market is still deliberately distorted to limit the access for imported films. In the case of "flat fee films," which are imported outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the amount of these films that can be imported, that limit the ability of private Chinese distributors to import and distribute films outside the box office revenue sharing quota. Furthermore, China committed in the Agreement to promote and license privately-owned Chinese distributors to engage in national theatrical distribution, independent of the State Owned Enterprise CFG and Huaxia. Although China Film Corporation (CFC) recently held an initial public offering, the majority of shares are still owned by the Chinese government and the state owned enterprise tasked with the distribution. In addition, commitments made by China at the conclusion of the June 2015 S&ED to promote private distributors for imported flat fee films remain unmet despite these commitments already being made in the Film Agreement—including specifically paragraphs 4-8. As a result, many U.S. producers (principally independents) have very limited export opportunities to China, and flat fee releases have seen a decline in revenues.³⁴

IIPA recommends that the PRC take action on the following issues: 1) immediately and fully implement all the terms of the 2012 US China Film Agreement and liberalize the distribution market; 2) increase U.S. producers' share of revenues for the box office revenue share films from the current 25%; 3) further relax the quota for revenue sharing films so filmmakers and audiovisual companies may have access to the rapidly growing marketplace for films in China; 4) eliminate restrictions on the number of imported "flat fee" films so that more producers have unimpeded access to the Chinese market; 5) allow 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 6) ensure U.S. producers have access to ticketing system information to ensure proper reporting of revenues.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As noted above, China is still not in full compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. in 2007 and concluded in 2009.³⁵ In particular, China must do more to open its

³⁴The 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>.

³⁵*China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.

market to U.S. films, and take further steps to liberalize its online music market. Moreover, the new online publishing rules are also inconsistent with the WTO's ruling and raise concerns regarding China's obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.³⁶ Similarly, the Statement and Rules on Importing TV Formats, the Notice and Measures on Administration of Online Foreign Films and TV Dramas, and the other longstanding discriminatory restrictions on audiovisual content may also be inconsistent with China's GATS commitments. The Statement and Rules on Importing TV Formats also raises questions regarding TRIPS Article 3 on national treatment, as it appears to favor Chinese rights holders over foreign rights holders.

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. failure to use a "reasonable suspicion" standard for criminal transfers, thresholds that are too high or unclear, inadequate presumption of ownership, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. Also, the fact that commercial scale infringements are without a criminal remedy because of the requirement to show that the infringement is carried out "for the purpose of making profits" is inconsistent with the requirements of both TRIPS Article 41 and Article 61 on criminal procedures. And China's civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in bilateral engagements, including the JCCT and S&ED, addressing a number of the issues discussed above, including full implementation of the U.S.-China Film Agreement, enhanced enforcement against ISDs, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

³⁶In the recently published *2016 Report to Congress on China's WTO Compliance*, USTR acknowledges that the draft *Network Publishing Service Management Regulations*, the predecessor to the new rules, raise concern "relative to China's GATS commitment." See p. 157, report available at <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>.

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2017.¹

Executive Summary: India remains a market with significant concerns for the copyright industries, but one with great potential given the large number of people using digital devices and creative content. In order to reach its potential, India must first undertake important legal reforms to improve its antiquated regime for the digital age. For example, India has neither acceded to, nor more importantly, implemented, the 1996 WIPO Digital Treaties—the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). India also lags behind other countries in adopting basic online enforcement tools and measures to encourage cooperation and meaningful engagement between rights holders and users of materials (including Internet Service Providers (ISPs), payment processors, advertisers and domain registrars), such as clear third party liability for inducing infringement, and more effective notice and takedown procedures. And much needs to be done to coordinate and improve India's fractured system of state-level enforcement to address online copyright piracy as well as the hard copy piracy that still plagues some copyright sectors.

India took one important step forward to improve its IPR regime in 2016. The Government of India (Ministry of Commerce and Industry) released its long-awaited “National Intellectual Property Rights Policy” in May 2016. The National IPR Policy outlines the government's long-term plans to improve IPR with seven key objectives, but it needs to be properly implemented with concrete steps. For the copyright industries, the plan, if well implemented, will improve the legal regime in India, strengthen enforcement (especially in the online environment), and modernize the government's administration, management and services related to IPR. The stated goal of the National IPR Policy is to protect India's large and vibrant creative sector; this will also benefit foreign (i.e., U.S.) creators and producers. A potentially significant development in the National IPR Policy is the decision to relocate copyright jurisdiction in the Ministry of Industry and Commerce's Department of Industrial Policy and Promotion (DIPP). This change offers the possibility of greatly improving both the visibility of, and resources available for, better copyright protection and enforcement if the DIPP delivers on its promised IPR reforms.

India's current judicial system is not up to the task of providing effective or efficient relief against piracy over the country's rapidly expanding online space. While some of the copyright industries continue to report good cooperation against the hosting of unauthorized content online, more work is needed, including the legal reforms (detailed below) as well as IP-specialized law enforcement within the police forces, the Central Bureau of Investigation (CBI), and, in the courts (including IP-dedicated prosecutors). Changes to the Copyright Act, the Information Technology Act, and the Cinematograph Bill (to address unauthorized camcording of motion pictures in theaters) are needed to allow enforcement actions to be swiftly initiated and resolved with deterrent penalties. As the U.S. Government noted when retaining India on the PWL in April 2016 it “encourages the Government of India to adopt effective measures to counter online piracy” noting the many existing deficiencies.

Other hurdles, not addressed in the National IPR Policy, are regulatory and market access barriers that inhibit the market growth for domestic and foreign copyright stakeholders. These barriers include: implementation of the national Goods and Services Tax (GST) with potentially high entertainment taxes (the GST was enacted in August 2016, and must be implemented by June 2017); a disjointed state tax structure; and several concerns in the television sector. India is currently the second largest mobile Internet market in the world after China, and has a huge segment of the population using creative content thus offering significant new market opportunities for domestic and

¹For more details on India's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of India's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



foreign copyright creators and producers. Instead, the lack of effective enforcement, pirate services online, illegal textbook copying businesses, problematic regulations, illegal camcording networks, illicit streaming devices (e.g., set-top boxes) and infringing cable operators, are undermining the Indian marketplace. In December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “[i]f 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.”²

PRIORITY ACTIONS REQUESTED IN 2017

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2017:

Enforcement

- Establish a National Copyright Enforcement Task Force, including police and the CBI, directed at online and mobile copyright infringements. Further, within the CBI Cyber Crime Detectives unit establish a centralized IP crime unit to ensure proper investigation of IP crimes, including Internet piracy.
- Establish state-level cybercrime law enforcement officers and establish uniform enforcement procedures.

Legislation

- Accede and fully implement the WIPO Internet treaties—in the Copyright Law, and the Criminal and Criminal Procedure Codes, including the adoption of: (i) definitions and provisions on technological protection measures (TPMs) as well as civil and criminal penalties. The sanctions should apply to “acts” as well as trafficking in devices, components and services; (ii) definitions and sanctions for rights management information (RMI); (iii) adopt procedures for fair, efficient and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India.
- Other key legislative reforms include: (i) amend the Information Technology Act to make copyright infringement a predicate offense; (ii) enact the Cinematograph Bill to make it unlawful to possess an audiovisual recording device to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility; (iii) adopt enhanced penalties for “pre-release” piracy and appropriate statutory damages for copyright piracy generally; (iv) amend state organized crime laws (Control of Goonda) to include book, music and video piracy; and (v) reverse the position taken in the September 2016 memorandum which opines that Section 31D applies to all online transmissions, placing all digital music services under a statutory license, in contravention to treaty obligations (WPPT and WTO TRIPS) and international norms.

Market Access

- Eliminate market access barriers, including: (i) the “must provide” rules in the pay-TV sector; (ii) compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries; and (iii) high tariffs on video game software and hardware.
- Implement new Goods and Services Tax (GST) rules by lowering levels of entertainment taxes and other related taxes (including for the distribution of motion picture and television content); the law requires implementation by September 2017.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Digital Marketplace: Under the Modi Administration’s “Digital India” initiative, there has been a rapid expansion of broadband and mobile Internet access across both urban and rural India. Over 462 million individuals in

²USITC, *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>.

India now have access to the Internet, a jump of over 30% in just the last year.³ As of January 2017, the Telecom Regulatory Authority of India (TRAI) reported 218.4 million broadband subscribers, a number that continues to grow exponentially, offering a great opportunity for the creative industries from both domestic and foreign sources.⁴

Unfortunately, the legal online marketplace (with many legitimate platforms, including Netflix and iTunes) faces stiff and unfair competition from illegal offerings that continue due to a weak IPR legal and enforcement regime. In a one month period, the motion picture industry estimates that 59 million visitors accessed the top five piracy websites (mostly torrent sites) in India for motion picture and television content, accounting for 300 million page views. The most successful anti-piracy event of 2016 was not an action taken by the Government of India; it was the arrest in Poland of one of the key operators of the notorious website *kickasstorrents* (*kat.cr*) and the resulting cessation of activities of that site in all countries including India. That website was one of the most popular in India. Even after court actions to disable access to several popular sites, hundreds of pirate sites remain. Torrent sites still dominate the marketplace in India, including: *torrentz2.eu*, *extratorrent.cc*, *extra.to*, *yts.ag*, *rarbg.to*, *torrentproject.se* and *thepiratebay.org*. There are also many popular video streaming sites, such as *movierulz.to* and *onlinemoviewatches.com*, as well as many cyberlinking sites (sites that index links to infringing cyberlocker files for download); lastly, there are mobile apps such as Movie Box that link to websites offering infringing content. The recorded music industry reports (IPSO Connect Report 2016) that revenues fell 29% between 2012 and 2015, after several years of growth. Thus, widespread piracy on traditional computers and mobile devices is clearly harming the legal market. Stream-ripping (websites offering Internet users the ability to make free permanent downloads of music from streaming video services) is a major problem. It is estimated that in 2016, 78% of Internet users in India had used stream-ripping in the previous six months (one such site is *savefrom.net*, the 58th most popular website in India according to the web-monitoring service Alexa). In addition, pre-release piracy is a recurring problem for the music and film industries.

Other forms of piracy include mobile phone downloading on memory cards and mobile apps for downloading and streaming and file-sharing through Bluetooth—for tablets, smart phones, and other devices. Also there are wireless application protocol (WAP) optimized sites. 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. The video game industry reports that India placed fourth in the world in 2016 (up from fifth in 2015) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks, and India remains second in the world when it comes to mobile infringement of games.

Civil copyright infringement cases in India can drag on for years (some have lasted twelve years). In lieu of infringement cases, some right holders have been able to get limited relief through John Doe court orders taking down or disabling access to infringing sites. Many of the sites denied access were streaming or retransmitting live sports telecasts. Access has been denied to hundreds of motion picture and television-related sites over the years. Some copyright industries report good cooperation from ISPs in disabling access. Still there remain hundreds of sites in India which operate with impunity, feeding off the content owned by others to garner profits (and, there are also many mirror sites which are created after court orders, so that infringing material remains available).

Given the scope of the challenge, the Government of India should prioritize online and mobile piracy cases among the enforcement authorities at all levels, and ensure proper tools are in place to address both hosted and non-hosted infringements as well as both domestic and foreign sites. The newly amended Information Technology Act does not sufficiently clarify that copyright infringement is a predicate offense under section 69A. The IIPA recommends that the relevant statute be further amended to add copyright infringement as a predicate offense. This will expressly allow actions to disable access to infringing websites located outside India.

³Internet Users by Country available at <http://www.internetlivesstats.com>.

⁴Telecom Regulatory Authority of India (TRAI), January 2017 Report.

It is also important that India strengthen the current legal framework by instituting safeguards for TPMs and RMI, third party liability clarity for inducing infringement, and improved notice and takedown procedures. The proposed Copyright Act provisions on notice and takedown are not adequate to address online piracy. They only provide a 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. It also overlooks the rights holders' needs to safeguard the exclusive rights to authorize the distribution of on-demand content. The Government of India should convene regular meetings between rights holders and the major ISPs to foster more voluntary cooperation (with neutral intermediaries). Any discussion of third party liability should include the National Internet eXchange of India (NIXI), a non-profit organization designated to neutrally facilitate the exchange of domestic traffic between peering ISP members (intermediaries); it is also responsible for managing (since 2005) the .in ccTLD registry.

One recent case on third party liability may make it more difficult for rights holders to get cooperation from ISPs (at least in Delhi). On December 23, 2016 an appeals court bench (Delhi High Court) overturned an earlier decision (a single-judge bench ruling of the same court) involving the liability of the social networking site MySpace. In the initial ruling, the judge had ordered MySpace to stop hosting copyrighted works by Super Cassettes India Ltd. (SCIL), a company that produces and distributes music and video CDs (and tapes and cassettes). SCIL had sought a permanent injunction. Instead, the appeals court ruled that MySpace has no liability for posts of SCIL's content by MySpace users absent "actual knowledge" and a failure upon actual knowledge to remove the infringing posts. It relied for its ruling on the "safe harbors" of Section 79 of the Information Technology Act (and Section 51(a)(ii) of the Copyright Act—which requires knowledge). The lower court ruling had read these provisions to require a "general awareness" (of infringement) test, not actual knowledge. According to the order: "The remedy here is not to target intermediaries but to ensure that infringing material is removed in an orderly and reasonable manner" reassuring those who fear that requiring intermediaries to police their sites would have a "chilling effect" on speech. SCIL was ordered to provide MySpace with a "specific" list of copyrighted material. MySpace must remove the content within 36 hours in accordance with existing notice and takedown guidelines.

In addition to adequate enforcement tools, accountability among advertising companies who provide revenue for piracy sites that are not subscriber-fee based (although, in some instances, brands appear on these sites unknowingly) and payment processors in India should also be explored.

Criminal enforcement is also an important tool for online piracy operations, including against individuals or organizations that make illicit camcords and upload them, and would be especially effective if used against organized crime syndicates.

Unauthorized Camcording: A significant percentage 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 the Motion Picture Distributors' Association (MPDA) India noted in a 2015 report, "[t]his affects the performance of the film, the distribution cycle and jobs." After a few years of decline in the detections of major U.S. motion pictures camcordered off theater screens in India, 2016 saw almost a doubling of the number of illicit camcords sourced from Indian theaters—32 in 2016 compared with 17 in 2015. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. In total, between 2011 and 2016, India was the source of 117 camcordered copies of films and/or audio materials. The incidents of illicit camcording have now shifted to theaters in different locations, although Ghaziabad continues to be major source, in large part due to the prevailing notorious crime syndicates operating there.

These are largely sophisticated criminal operations that require effective criminal enforcement. As an example, global organized "release groups" and "camcord brokers" begin their operations in India by procuring an illegal camcord of a motion picture from a downstream agent; that material is then supplied to a rogue website or another syndicate outside of India. Criminal enforcement can shut down these operations, if done properly.

In July 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. It resulted in the arrest of a major camcord broker (Priyank Pardesh) operating as "Team Telly" in Pune, in the state of Maharashtra. The accused is alleged to have camcorded and distributed illegal copies of both Hollywood and local Indian content through associates in India and through international criminal camcording syndicates. The case is currently ongoing, but could take years to reach a final resolution. In spite of this arrest, India remains a major source of unauthorized camcorded material because of the absence of clear anti-camcording legislation and a lack of enforcement resources by local authorities.

The legislative "fix" would require an amendment to the Cinematograph Act (1952) to include a clear prohibition against unauthorized camcording. The law should make it unlawful to possess an audiovisual recording device (such as a video camera, audio recording device, or other device) to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility. In addition, it is important for theater owners to augment the ongoing public information campaign by using slides before screenings, messages on theater tickets and the like. Such efforts have been undertaken and have raised awareness, but more needs to be done. The move by the national cinema owners (with the Central Board of Film Certification (CBFC)) away from DVDs to digital cinema packs (DCPs) for exhibition is also a positive step and should help to reduce release piracy.

State Coordination and a National Cybercrime (including IPR Crime) Strategy: The Government of India has now revealed its National IPR Policy. It next needs to fully and properly implement it (many details, including any deadlines for implementation, were not included in the Policy paper). Implementation should include: (i) a focus on inter-state operations of organized crime units engaged in piracy; (ii) the establishment of a National Copyright Enforcement Task Force; and (iii) enforcement task forces at the state level to work together in a coordinated, systematic and efficient manner. At present, India's fractured judicial system is not up to the task of maintaining an effective or efficient rule of law against piracy, especially in the country's rapidly expanding online marketplace.

State-level Indian authorities continue to run thousands of raids per year, and industry investigators report improvements in cooperation with authorities in 2016. There are various state enforcement cells in the state police headquarters, and states have appointed specialized lead officers to handle IPR related offenses. This has proven to be very effective and efficient, especially 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 recommends that books, music, and video games should be clearly covered under these laws. Without such clear 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.

Online copyright infringements in India are often large-scale commercial operations tied to organized cybercrime activity. As a result, the proper enforcement approach is criminal enforcement. IPR enforcement has, however, been a low priority of law enforcement officials in India. This is a result of both a lack of attention to cybercriminal activity, and of familiarity, interest, and awareness in IP cases among certain Indian enforcement authorities. In 2014, the Mumbai police announced they would add a cybercrime law enforcement officer to all police stations in Mumbai precincts.

One positive enforcement development in 2016 was the establishment of the Telangana Intellectual Property Crime Unit (TIPCU). On June 24, 2016, the Telangana Government in association with the Telangana Film Chamber of Commerce, the Federation of Indian Chambers of Commerce and Industry (FICCI) and key industry stakeholders, launched this IPR crime unit. It is meant to bridge communications between industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, to fight piracy. The TIPCU will propose online content protection initiatives, with an initial focus on online film piracy. It will create a watch list of

pirate websites similar to the London police's (PIPCU) IWL (Infringing Website List) initiative, and an industry database to share intelligence on syndicates.

This and the 2014 Mumbai unit are welcome moves that should be replicated in other localities, not only to focus on criminal activities, but also to seek actions to disable access to infringing sites as well as working with ISPs to develop voluntary anti-piracy campaigns, including warning systems for infringing Internet users. In addition, a long overdue centralized unit should be established under CBI (or under the DIPP) to cover IPR infringements, with dedicated prosecutors. Under this proposal, a National Copyright Enforcement Task Force, that included police and the CBI, would focus on online and mobile copyright piracy. Further, the DIPP could empower the Cell for IP Promotion and Management (CIPAM) to serve as the Task Force coordinator to engage in regular consultations with stakeholders, develop mechanisms to counter online piracy, and share enforcement information. Last, the DIPP CIPAM should encourage states to create similar dedicated IP police units as well.

Training should be another priority. The cybercrime officers and the centralized units should receive training on IPR enforcement, including a focus on online transactions, cybercrime, and evidentiary requirements in relation to electronic evidence.

Standard Operating Procedures for States: Criminal enforcement in India is a state matter. Unfortunately, there is no enforcement coordination or standard operating procedure at the national level for IPR criminal cases. As a result, IPR rights holders face varying capabilities of enforcement officials and divergent outcomes on cases throughout the country.

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. Also, the police do not take *ex officio* actions, and, as noted, there are usually no dedicated police or prosecutors for copyright infringements. Often, the police refuse to act because of a lack of resources including available personnel. Second, the time from the registration of a "First Information Report" for an initial criminal complaint made by a rights holder to the execution of a raid is often too slow for effective enforcements (sometimes taking three to four days, or more), particularly against covert networks when speed of response, confidentiality, adaptability and the gathering of evidence are key factors. Where arrests are made, it can take police up to a year to prepare a charge sheet and the related post-arrest investigations are often cursory. Speed is even more important for law enforcement in smaller cities and towns, where piracy and pirate networks now flourish. Third, there are many reports of high risk targets receiving tips about forthcoming raids. Publishers report that district police departments have different requirements for pre-raid documentation to lodge complaints, as well as for gathering evidence during raids, safeguards during raids, and post-raid recordation. These differing procedures invariably lead to different results, often a 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 for the resumption of business. If and when charge sheets are finally presented in court, cases are routinely dismissed.

Court Reforms: In general, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as "courts of first instance") have developed good civil law jurisprudence for copyright infringement; most of the favorable rulings, relief measures and court orders emanate from these courts.⁵ One exception is the Delhi High Court course pack case, which effectively broadened the scope of third party safe harbors (at least pertaining to the facts of that case); the case is on appeal. In addition, civil claims are dismissed frequently enough to deter rights holders from initiating cases even in these courts. The experience in other regions, where district courts are the courts of first instance for piracy issues, is even spottier. As noted, cases can take up to twelve years 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 (and a lack

⁵Innovative approaches have included Anton Piller orders, John Doe orders, Norwich Pharmacal orders, and Mareva injunctions, all of which have assisted IP owners in securing infringing goods, as well as assisting with police raids, sealing evidence, securing bank account details of defendants, and requiring the disclosure of passwords for IT resources.

of familiarity with the related evidentiary requirements); and, difficulty with enforcing civil court orders. Civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the rights holder for the harm, 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. 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.

In 2014, an amendment was introduced in Parliament to enhance 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\$293,772). The bill was introduced on the recommendation of the Delhi High Court (one of the few courts with IP judicial specialists). Rights holders are very concerned that, if enacted, this change will severely hamper anti-piracy efforts in India. IIPA recommends that the Parliament not adopt this amendment.

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 compromised, leading to acquittals. In plea bargains or even convictions, fines remain low and non-deterrent, with most falling under INR1500 (approximately US\$22).

The experiences of the copyright industries with criminal cases differs by region, but overall, further training of 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. In addition, there should be dedicated IP expert prosecutors. Last, IIPA recommends that the Government of India appoint special IP judges or panels in courts throughout the country and that these judges, like prosecutors, be properly trained (the copyright industries are willing to assist with training).

Unauthorized Book Copying: Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India. To combat rampant piracy, publishers long ago established practices to create 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 other 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 few years, there has been an increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into the U.S. market. This phenomenon threatens not just the U.S. market, but also the longstanding system of providing less expensive reprints exclusively for the Indian market. The Government of India should take more robust action to protect continued access by its students to textbooks by empowering Customs officials 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.

A 2016 court ruling is another serious set-back for the publishing industry. In a case that commenced in 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 was intended 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 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.

On September 16, 2016, the Delhi High Court found that the reproduction and distribution by the photocopying services for students, fell within an exception of the Copyright Act of 1957. The court further held that the photocopy shop was allowed to make these copies (of excerpts), with no limit on the number of copies, because each student would have been similarly allowed to make copies for themselves. The publishers alleged that the university was inducing and encouraging the making of these course packs, which the court dismissed. The court could have, but did not take a middle ground to enjoin the copy shop and the Delhi University from commercial acts of unauthorized photocopying (reproduction) and distribution of course packs without appropriate licenses from publishers. Doing so would have required licenses via the local reprographic rights collective licensing body recognized by the Indian Government with appropriate payments for course packs, while still preserving appropriate fair dealing. The publisher plaintiffs appealed the high court division bench determination that the course packs do not infringe because the inclusion of the works in the course packs is justifiable (i.e., for instructional use by teachers in classrooms) provided the course packs are not published or sold for profit. The case has been referred back to the single judge for trial on the facts. The ruling exceeds the well-established three-step test to which India must adhere under the TRIPS Agreement and Berne Convention.

Fraud of print subscription orders for peer-reviewed scientific, technical, and medical journals continues to cause significant harm to publishers. Ordinarily, subscription agents are retained by institutional customers (such as universities, government agencies, corporations, and hospitals) to place journal orders with publishers on behalf of the institutions. In India, instead of ordering subscriptions at the applicable institutional customer rate, the agents fraudulently order subscriptions at 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 ("subscription fraud") deprives publishers of significant revenues, and threatens the continued sustainability of scholarly communication of important scientific, technical, and medical research. IIPA urges the Government of India to work with the publishing industry in India to expel agent members engaged in this fraud, and to increase transparency on the orders placed by government agencies through subscription agents.

Retail Piracy: In addition to the various types of piracy already noted, piracy of retail hard goods in India takes many forms. These include optical discs either burned or factory produced in India, or made elsewhere and imported into India; the loading of illicit content onto mobile devices, flash or pen drives as an after-service; unauthorized rental of motion pictures; and the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles. These activities undermine innovative market-based solutions provided by right holders. For example, there is the MXM Mobile Music Exchange which provides legitimate music services for mobile phones in India. Retail piracy harms foreign and domestic creators, such as the films produced locally: Bollywood, Hindi, Tollywood, and South Indian movie titles, and titles in other regional languages.

In December 2016, the U.S. Government named three markets in India to its "Notorious Markets" list: Gandhi Nagar and Kashmere Gate in Delhi, and Burma Bazaar in Chennai. It noted Burma Bazaar, in particular, for its "pirated media discs" including CDs and DVDs. The U.S. Government said "[t]he United States encourages India to take sustained and coordinated enforcement actions at these and other previously-listed markets, as well as numerous other nominated [by industry] markets." In 2016, 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).

Often the material in these retail markets 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 Government of India should amend its laws to 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.

Signal Theft and Illicit Streaming Device Piracy: The audiovisual industry continues to experience rampant 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 Motion Picture Association of America (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 Delhi High Court against entire networks (including franchisees, distributors and cable operators forming part of a 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 costly and time consuming. In addition, often, unauthorized camcords are retransmitted by rogue cable or pay-TV systems.

Separately, the motion picture industry urges the Government of India to work with the private sector to effectively enforce against the use of illicit streaming devices (ISDs). ISDs are media boxes, set-top boxes or other devices that allow users, through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. These devices, which are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials, have emerged as a significant means of accessing pirated motion picture and television content in homes in India (and elsewhere in the world). The devices are promoted or advertised as facilitating easy access to remote online sources of unauthorized entertainment content, using the ISDs with these apps. The devices are either pre-loaded with the apps (prior to shipment, by vendors prior to sale, or as an after-sale service), or users can easily obtain the apps themselves to access infringing content. Enforcement against these devices is either through the use of anti-circumvention sanctions (technological protection measures) in the Copyright Act, via third party liability, or any other effective means. The enforcement focus should be aimed at key distribution points, piracy app producers, or those vendors who preload the devices with apps to facilitate infringement.

Circumvention Services: 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 with proper TPM provisions consistent with the WIPO Digital Treaties. 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.

COMPLIANCE WITH EXISTING TREATY OBLIGATIONS

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. India is neither a signatory to, nor has it acceded to, either of the WIPO Internet Treaties (the WCT and the WPPT).

To accede to the WIPO Internet Treaties, India needs to enact key elements required by the treaties and many other related provisions such as, effective online enforcement procedures. Some of the key missing elements are: (i) definitions and provisions on TPMs prohibiting acts of circumvention and the trafficking in tools, devices, components, or services that can be used to circumvent, along with civil and criminal remedies for violations; (ii) definitions of RMIs and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iii) definitions of key WPPT-compatible rights (making available and communication to the public).

The current law contains a criminal (but not civil) prohibition, in Section 65A (Copyright Act), of the act of circumvention of a TPM “with the intention of infringing” an exclusive right. The provision falls short of full WCT and WPPT compliance, and the exception for an “act” of circumvention is too broad (these and other deficiencies are fully described in prior IIPA filings). As noted, the interpretation of Section 31D of the Copyright Act—treating all digital music services, even if interactive, under a statutory license—is a violation of the WTO TRIPS and WPPT obligations (the TRIPS violation is in equating the exclusive reproduction right in Article 14(e)(1) of the Copyright Act as also falling within a statutory license).

In addition, India should strengthen statutory provisions regarding online infringements to permit effective enforcement against businesses actively engaged in (or inducing) unlicensed content distribution, as well as expeditious takedowns without automatic put-back (for true intermediaries), in order to address both hosted and non-hosted infringing activities and services, within and outside India. As noted, the Copyright Act currently 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 problematic (and interpreted broadly which is itself a concern). 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 shifts the responsibility to rights holders to comply with burdensome rules and requirements that may not be possible to meet in practice. Those rules allowing 36 hours, are incidentally, too long of a period to wait for some forms of piracy such as pre-release piracy.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Act of 1957 was last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013). The Act and Rules have been subject to constitutional challenges (for example, in a recent case by the Indian Broadcasting Foundation and individual broadcasters).

Copyright Law: In addition to the already-noted required reforms for WCT and WPPT compliance, and camcording enforcement (including remedies), other changes needed are: (1) to amend ownership and assignment provisions that are harming and altering commercial arrangements in India (as noted in prior IIPA filings); (2) to eliminate 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 (also noted in prior IIPA filings); (3) to 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) could apply to the Copyright Board for a statutory license, affecting the negotiating power of right owners. This represents a serious regulatory and policy restriction on stakeholders, including for non-Indian repertoire (the law was enacted, effective in 2013). The Indian Government stated in 2012 that a new Copyright Board would be created and the rate of royalties determined (based on the economic value of the use), but to date, this has not occurred. It is expected to be undertaken in 2017. Rights holders should be able to fairly participate in any rate setting. Regarding the Section 31D compulsory license, the Government of India should withdraw its September 2016 memorandum which opines that Section 31D applies to all online transmissions. This position is incompatible with the obligations of the WPPT, and fails to account for the legal and commercial differences between broadcast and online digital music services.

In addition, the Copyright Act should ensure that any exceptions and limitations comply with the Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a)).

ISPs: As noted, ISPs are cooperating with takedown notices for hosted content, but have not been as cooperative regarding non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. The current legislative framework, as noted, is not ideal even for hosted content. Until it is improved, any safe harbors should only apply to merely technical or passive ISPs. Coverage of copyright infringement as a predicate offense under the IT Act (2000 Rules) would largely help resolve this problem because it would require ISPs to take measures to prevent communications infringing copyright or intellectual property rights from being

carried on their networks (the Government takes the position that the IT Act currently does not cover copyright matters). With this change, it would not matter where the infringing material emanated from, as long as its destination is India, an ISP would be required to prevent the material being communicated or available (carriage) on its network.

Cable Piracy Legislation: Section 18 of the Cable Television Networks (Regulation) Act (1995) places an unnecessary burden on criminal enforcement. It provides a court cannot recognize any offense under the Act except upon a written complaint by an authorized officer. This requires the personal presence of the complainant at all relevant hearings throughout the subsequent prosecution which is a bar to most criminal piracy cases (because authorized officers are reluctant to become complainants).

Tax Benefits for Anti-Piracy Associations: 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 support anti-piracy and capacity building efforts. 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 rights 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 rights holders. Addressing market access barriers is also critical to reducing piracy, since their removal permits the advancement of legitimate business models bringing greater content to the marketplace with a diversity of prices and terms. Market access barriers (most previously noted) 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.⁶
- 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,⁷ including unconstitutional taxes based on the language of a film, other taxes such as value-added tax (VAT) and service taxes levied by the Government of India. These taxes can sometimes amount to 30-60%. All taxes, except local taxes, were subsuming into the unified GST, enacted in August 2016. Local taxes (not subsumed by the GST) should not be allowed to rise above current levels.
- Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
- Burdensome regulations for cinema construction. Current law requires 70 different regulatory clearances (and the India marketplace already suffers from a very low screen density—only 8.7 screens per million people).
- 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. IIPA encourages India to join the expanded Information Technology Agreement which will reduce tariffs on goods that enhance digital trade in India.

⁶The Telecom Regulatory Authority (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. Federal Communications Commission did when the U.S. deregulated cable TV rates.

⁷Entertainment 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, 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.

The GST legislation must be implemented no later than September 2017. Once implemented it should reduce the regulatory burden imposed upon the copyright industries in India with a uniform rate.

TRAINING AND PUBLIC AWARENESS

IIPA member associations continued to participate in training, public awareness, and policy initiatives with various constituencies in India in 2016. For example, the Motion Pictures Distributors' Association (MPDA), with the Telugu Film Chamber of Commerce (TFCC, formerly APFCC) continued the training of theater staff, with over 2,884 staff, in 43 cities, trained. The focus of this training was on preventing camcording. In addition, the MPDA continued its outreach programs with the FICCI and the U.S. Patent and Trademark Office foreign visitor training programs.

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2017.¹

Executive Summary: There are two significant impediments stifling the development of a vibrant legal marketplace in Mexico for consumers of music, films, video games and books online. First, the Mexican IPR legal regime is antiquated for the digital age. For example, Mexico has not yet fully implemented the 1996 digital copyright and neighboring rights treaties, much less the full panoply of legal provisions and procedures commonplace in most countries. Second, Mexican enforcement authorities continue to focus on hard goods, not digital piracy. The copyright industries report continued good cooperation with some of the Mexican federal authorities in efforts against hard copy piracy. And, some agencies have developed infrastructures for addressing Internet piracy, but resources in key spots remain woefully short for effective enforcement. Budget cuts in 2016 nationwide in various agencies (including several IPR enforcement agencies), will only worsen these problems.

Mexican consumers, as in other countries, have quickly embraced the digital age in recent years, with exponential growth in the last decade. But legal reforms lag. In 2015, the Government of Mexico took a positive step forward by creating an IP crime unit to focus on improving digital enforcement. This new sub-unit was formed with five public prosecutors within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) in the Attorney General's Office (PGR). Unfortunately, the unit is understaffed, with only two of the five prosecutors currently in place. The PGR has pledged to fully staff the UEIDDAPI sub-unit, but other key IPR enforcement units in the PGR and the police are also understaffed.

Meaningful reform of the Copyright Law (and related laws), especially on digital enforcement issues, has been long-stalled. The Government of Mexico delayed reforms for several years awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). With the demise of the TPP, Mexico needs to move forward in order to comply with its existing treaty obligations (WTO TRIPS, the WIPO Internet Treaties, etc.) as well as to catch up to international norms to allow the digital marketplace to flourish in Mexico.

The Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and Internet Service Providers (ISPs) to combat online copyright infringement. 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 to expand opportunities for a robust and legitimate online marketplace. Over eight years ago, 37 civil organizations representing copyright industries and 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. The CLAC, working with various government entities and federal authorities, focused on legislative reforms, including addressing private copy issues, provisional measures for collecting societies, and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CLAC initiative provides a starting point for needed improvements, including *inter alia*: (1) an effective notice and takedown (and "staydown") system; (2) clear third party liability rules, including for parties inducing or promoting infringement of copyright and related rights; and (3) injunctive relief and a duty on ISPs to provide information to law enforcement agencies (provided, in part, in Article 189 of the 2014 Telecommunications Law). Unfortunately, some in the ISP community oppose cooperative efforts.

¹For more details on Mexico's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Mexico's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPECIAL301HISTORICALCHART.PDF>.



Mexico is now the number one foreign source for unauthorized camcords. In 2016 (through November), 79 American feature films were sourced from illicit camcords in Mexico—this is significantly more than the 40 films sourced from Mexico in 2015.

In 2016, as in prior years, there were some notable enforcement actions undertaken against hard goods piracy resulting in the seizure of large quantities of illegal goods. While hard copy piracy is an ongoing problem for some industries, digital piracy is significantly worsening for all the copyright industries. In addition, state and municipal government anti-piracy efforts continue to be weak overall, with few local entities working on combating piracy. One enforcement step that has been long-recommended is 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. Even with large-scale enforcement actions in 2016, hard copy piracy persists, including CD-R and DVD-R burned discs (and USB drives) of music and audiovisual and video games (as well as circumvention devices), all widely available in numerous street markets; and, the unauthorized photocopying of books at universities remains a significant problem.

PRIORITY ACTIONS REQUESTED IN 2017

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2017:

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 (and, properly resource UEIDDAPI and its new sub-unit).
- 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, allow IMPI regional officers to conduct local raids, 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.
- 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.

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against online piracy (as well as hard copy piracy); to focus on prosecuting individuals arrested in such actions; to build efficiencies by creating a reference library of legitimate copies; and to seek deterrent sentences, including jail time. Also, PGR should be encouraged 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. Last, there needs to be increased prosecutorial training in IPR cases.

Legal Reforms

- Fully implement the WIPO Internet treaties—in the Copyright Law, and the Industrial Property, Criminal and Criminal Procedure Codes (as detailed in this report) including by:
 - (i) adopting definitions and provisions on technological protection measures (TPMs) as well as civil and criminal penalties, with criminal sanctions for the importation and distribution of devices used

for the unauthorized circumvention TPMs. This should include sanctions for “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; more often these devices are made abroad and imported into Mexico;

- (ii) adopting definitions and sanctions for rights management information (RMI);
 - (iii) removing the proof-of-profit standards (and onerous authorization standards) for infringements of the making available right, and as a prerequisite to criminal liability for large-scale copyright infringements;
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports.
- Enact legislation to impose criminal penalties—with a prison term (three to ten years) and fines—for the unauthorized camcording of films in theaters, and eliminate any required proof of commercial intent.

COPYRIGHT PIRACY IN MEXICO

Internet piracy: In the past 15 years, Internet use in Mexico has risen from 2.7% in 2000 to 45.1% in 2015; mobile phone use has grown to 85.3 per hundred Mexicans. But, as noted, Internet piracy has grown rapidly because the legal regime and enforcement have lagged far behind the rate of Internet and mobile access by Mexican consumers. That is unfortunate because the copyright industries could add to the Mexican economy if supported with a solid IPR legal regime. A 2015 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. The music industry reports (IPSO Connect Report 2016) that 64% of Internet users in Mexico use audio streaming, and 77% are doing so on their smartphones. In addition, 60% of recorded music industry revenue in Mexico is from digital music services; unfortunately, the per capita contribution is US\$1 per year (compared with US\$15.50 per capita in the U.S.). Instead of allowing legal services to grow, illegal services are flourishing in Mexico and also spreading harm into other marketplaces in Latin America. The most prevalent digital platforms are stream-ripping services as well as MP3 search engine sites that provide links to enable the downloading of film, music and video game content hosted on cyberlocker platforms, and, BitTorrent index sites. While many of these infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), they are routinely accessed by individuals in Mexico. Even though many sites and services are not hosted in Mexico, the Mexican authorities can still 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 administered in Mexico.

The most widespread source of music piracy is stream-ripping (e.g., YouTube-MP3.org) as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links. These platforms are also very popular distribution channels for pre-release piracy. The Motion Picture Association (MPA) reports almost 90 websites harming the Mexican market, including *Pelis24.com*, which is a popular streaming linking site (and, one of Mexico’s largest websites) that currently offers more than 150,000 links to more than 10,000 illegally reproduced titles including films and television series. The site has been active since 2013. 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 revenue for financing the development of new creative works worldwide. In 2016, Mexico ranked 14th overall in the world (up from 18th in 2015) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fourth (an increase from 2015) in unauthorized file sharing using consoles, 14th using mobile devices, and 19th using PCs. In 2016, there were ten major sources of illegal entertainment software available for downloads. But, in a significant positive development, the federal police disabled the operation of a mirror website of *kickass torrents* (*kickass.mx*) in Mexico.

Hard goods piracy: Hard goods piracy persists both in manufacturing and distribution networks on the street and at markets (even as digital piracy has far eclipsed hard copy piracy). In December 2016, as it has since 2012, the U.S. Government named two Mexican physical markets to its “Notorious Markets” list: (1) San Juan de Dios in Guadalajara; and (2) Tepito in Mexico City. As the 2016 report noted, in these two markets “significant levels of piracy and counterfeiting continue” as well as in “dozens of other markets across Mexico.” The U.S. Government encouraged Mexico “to continue coordinated law enforcement efforts, including against high-level targets in the distribution chain” to reduce piracy in these markets and to “empower customs officials to interdict infringing imports on their own authority.” The motion picture industry, in its Notorious Markets filing singled out not only the two named street markets, but also Lomas Verdes, Juarez or Central Camionera, Toreo Subway Station (State of Mexico) and Salto del Agua and Toreo Markets (Federal District) as the main suppliers of pirated optical discs in the Federal District of Mexico. In addition, there are labs and warehouses throughout Mexico. The nearly 90 well-known markets operating across Mexico, are, in many instances, owned by municipalities even though organized crime is clearly involved in their operations, including running discrete distribution chains.

Hard goods piracy, mainly street piracy, remains very damaging for the entertainment software industry. Flea markets, bazaars, plazas and other established marketplaces, including Plaza Meave, and others named above, are proliferating and very popular, 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 mass online infringement 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. Top sellers on Mercado Libre offer dozens of different mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. 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.

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, the labs and warehouses located in many markets should remain a focus of enforcement activity.

Camcord piracy: As noted, Mexico is now the world leader in sourcing illegally recorded films from Mexican theaters, nearly doubling the number from 2015. There have been a few convictions in recent years 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. To do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. Mexico’s anti-camcording law must be strengthened to allow for enforcement without proof of a profit motive, to prevent further harm to the Mexican box office, as well as to the other distribution channels for films in Mexico. One positive step in 2016 was an agreement between rights holders and PGR to screen warning notices before exhibiting films in all theaters in Mexico to deter camcording.

Other issues: Satellite and signal piracy remain a concern in Mexico as well as the use of illicit streaming devices (media boxes, set-top boxes and other devices that allow users through the use of private apps, to stream, download or otherwise access unauthorized content from the Internet). These devices are gaining popularity in Mexico and becoming a leading vehicle for online piracy of audiovisual material. The current Criminal Code (the Federal Penal Code, Article 426) covers only encrypted-program-carrying satellite signal theft. There is no law prohibiting the theft of encrypted program-carrying cable signals. Nor are there current civil remedies for parties harmed by the decryption of encrypted program-carrying satellite signal or its content, or for cable systems. Mexico thus needs to amend its Criminal Code (and the Copyright Law or Civil Code) to cover cable systems, and to eliminate the “for profit” requirement for acts of decryption of satellite and cable systems, and to provide criminal and civil remedies in the Criminal Code and the Civil Code, for such activities. In addition, the Government of Mexico needs to take enforcement actions against vendors and illegal channels.

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 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 Secretary of Public Security (*Secretaria de Seguridad Publica*) have also assisted rights holders by providing information on illegal software websites. In 2016, the Scientific Police ordered NIC Mexico, the agency responsible for the .mx top level domain registry, to suspend the domain *kickass.mx*, a popular mirror site for *kickasstorrents* (*kat.cr*), and a criminal case was commenced.

An inter-agency committee (COIDAPI) has periodically prepared strategic national enforcement plans; COIDAPI is currently preparing a new version (to be released in 2017) with plans to address digital piracy.

Criminal Enforcement

Mexico is transitioning to a more adversarial justice system, so judges are undergoing training with foreign judges, including U.S. federal district court judges with expertise in IPR criminal cases. The new criminal system means that criminal copyright cases will not be prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. While cooperation between rights holders and the PGR is very good, IPR prosecution is hampered by insufficient resources, inadequate training of new agents (despite many programs), long delays (years) for cases to resolve, 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. There has been increased cooperation between rights holders and IMPI and PGR in recent years (and a few industries report better cooperation with INDAUTOR as well).

A complicating element in combatting video game piracy in Mexico is the cumbersome requirement (by PGR) that each copy of an infringing game must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*). Under the existing system, when the comparison involves multiple copies of the same infringing game, rights holders must submit an equal number of legitimate game copies to the experts for comparison. More frustrating, the *peritos* have been reluctant to cooperate with investigations and prosecutions. IIPA members encourage Mexican IPR authorities to create a reference library of legitimate originals to be used by the experts (or, use online authorized website copies), and to seek cooperation with these experts. Additionally, the law should recognize a clear presumption of ownership in civil (and criminal and administrative) matters. 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 2016, it was reported that over 900,000 items were seized in 269 raids.

As noted, even though UEIDDAPI's sub-unit formation was a major step forward, it is hampered by inadequate resources. It should be properly resourced to conduct raids and seizures at major (physical piracy) markets and to create or expand "pirate free" areas around legal vendors at markets (those noted above) to go after supply chains in order to dismantle the manufacturing of pirate material sold to market owners. This unit, along with the other enforcement authorities, should address digital piracy as a priority, including increased IPR judicial training, with an emphasis on technology, so that prosecutors seek, and judges impose, deterrent criminal penalties.

Structural reforms and jurisdictional issues: IIPA continues to recommend several "structural" reforms or agency actions to improve criminal enforcement. An overarching priority 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, 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. Four years ago, a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. PGR has discussed re-energizing 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. But PGR remains under resourced as well.

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 regularly 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. Before the adoption of the new criminal system, the PGR had the authority to take *ex officio* actions and criminal cases against copyright infringement, but it prioritized raids at laboratories and warehouses. The specialized IP sub-unit within UEIDDAPI (in PGR) needs resources to properly undertake criminal investigations of digital piracy. PGR can still take *ex officio* actions (e.g., raids), but criminal cases now formally need a complaint to be filed by a rights holder to commence the case.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, in digital piracy. The PGR has a special deputy attorney general department, the *Subprocuraduría* Specialized in Investigation of Federal Crimes (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is also 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 could also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Judges could 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 very complicated, time consuming, and costly for rights holders. There have been some recent improvements. For example, the Copyright Law (since 2013) allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. The Copyright Law does not provide statutory damages, but rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. Mexican law 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: In 2014, for the first time, IMPI used its administrative authority to take down an infringing website (*ba-k.com*), and issued an order blocking access to the site. The website administrator was punished with a penalty fee, and the website removed the infringing material. The case is still pending because two ISPs have failed to comply with the IMPI orders. In 2015, IMPI used its authority against the website *mymusic.com* after a case was brought by the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM). These cases, while positive developments, have been the exception. There were no administrative proceedings in 2016 to take down or block access to infringing websites, in large part, due to pending appeals filed by the ISPs on these cases. These issues may ultimately go to the Supreme Court for resolution.

Regarding hard copy piracy, 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 the first half of 2016, it was reported that there were over 231 IMPI administrative actions including 245 copyright infringements and 89

provisional measures related to copyright infringements. In 2016, IMPI added IPR enforcement officers in regional offices in Guadalajara and Leon, which was a positive step. 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. Most report that INDAUTOR has not cooperated with the copyright industries on legal reforms or enforcement matters. 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 late 2015, the Mexican Congress created a new Ministry of Culture to oversee cultural policy and funding and placed INDAUTOR within that Ministry (with the same authority it had under the Ministry of Education).

Online Enforcement

One of the biggest obstacles to effective online enforcement is the absence of law that directly establishes liability principles for ISPs (who, in the absence of clear law, seek to avoid assuming responsibility). Instead, 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 takedown notifications from the copyright industries. Some IIPA members report cooperation for 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 it is certainly not an effective or sufficient remedy. And with the web access denial cases pending judicial review, there were as noted, no such actions in 2016. Mexico needs to enact legislation to create incentives and a duty for ISPs to cooperate with right holders to combat infringement taking place over their networks or platforms (following the CLAC initiative).

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 of service contracts if subscribers infringe intellectual property rights. Thus, ISP contractual practices compound the difficulties of obtaining access to information necessary for seeking civil remedies.

Regarding criminal enforcement, file sharing committed through online networks is generally 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. For file sharing, the two major ISPs (Telmex Infinitem which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. A few smaller ISPs do respond to IMPI orders. It is estimated that over 100 million takedown requests were filed by rights holders in recent years, including many in 2016 to delist infringing music from Google search results (sent to Google by Mexican music organizations). 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. Additionally, IMPI claims to only have authority to address local

websites (when their administrators or owners are located in Mexico), limiting any effectiveness against foreign infringing sites.

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. There were some steps taken in 2016 to improve collaboration between Customs, IMPI and PGR. A significant improvement would be for the Customs Code to be amended to grant Customs officers *ex officio* powers to independently conduct seizures of infringing goods and components.

Over ten years ago, 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 rights holders 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 pirated 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. For such shipments via courier services, complaints of suspected infringing product must be filed with the local PGR office where the shipment is located. It would be more efficient to centralize this (e.g., by allowing notification at the PGR IPR office in Mexico City). 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; amending the law to provide for formal notification processes to rights holders; and developing a strategy to identify infringers who import their goods using falsified information. In addition, infringers and importers hide their true identities, so more scrutiny is needed.

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 (and is willing to undertake additional training). These results include detention notifications and seizures of pirated video game product from diverse ports, in particular, Guadalajara and Monterrey. The industry notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. Despite these smaller sized shipments, the video game industry appreciates the cooperation and successes that they have received from border authorities in Mexico in seizing infringing products. For many years, there were improvements in the level of support from Customs in dealing with shipments of circumvention devices. In 2015, there was, however, a sharp decline. But in a positive sign, 2016 was much improved. 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. In 2016, 1,615 items were seized. The motion picture industry reported 15,643 Customs actions in 2016.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Mexico is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. Mexico was a signatory and, in 2002, acceded to both of the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), although it did not publish its ratification of those treaties with the Agreed Statements.

Fifteen years after acceding to the WIPO Internet Treaties, Mexico has not fully implemented the treaties and its legal regime is missing several key elements required by the treaties and many other related provisions (such as, notice and takedown procedures). Some of the key missing elements are: (i) definitions and provisions on TPMs prohibiting acts of circumvention and the trafficking in tools, devices, components, or services that can be used to circumvent, along with civil and criminal remedies for violations (although some technological protections exist under current administrative sanctions (Art. 231(V)); (ii) definitions of rights management information (RMIs) and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iv) clarification regarding the making available right for works (Art. 27), and enumerating the making available right for producers of phonograms (Art. 131).

One long-standing WTO TRIPS obligation that Mexico has not implemented is to adopt *ex parte* remedies, additional damages and especially injunctive relief, for civil IPR infringement cases.

Mexico is also, of course, a signatory to the North American Free Trade Agreement (NAFTA) and the obligations of the IPR Chapter (Chapter 17) in that trade agreement. The copyright law and enforcement obligations in the NAFTA were negotiated more than a quarter-century ago, and are thus outmoded. Re-opening NAFTA could provide an opportunity to update these obligations for the age of digital networked access to copyright materials as well as including other global copyright norms.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law was last amended in 2003 (with implementing regulations in 2005). Draft laws to implement the WIPO Internet Treaties have circulated for years, but have never been enacted. Some of the drafts that most recently circulated (in 2013) would have fallen far short of proper implementation on issues relating to technological protection measures, for example. The legal reform deficiencies and failure to implement treaty obligations are long-standing. It is hoped that 2017 will finally be the year of improvement for a long-standing list of deficiencies.

The list of legal reforms (some already noted above) include: (i) adding definitions and protection for TPMs, RMIs and appropriate civil and criminal sanctions; (ii) clarify the making available right for works in Article 27 of the Copyright Law, and clearly enumerating the right for producers of phonograms in Article 131 (it is currently part of the distribution right in Article 131(III)); (iii) criminalizing camcording (eliminating the required proof of commercial intent); (iv) raising civil penalties to deterrent levels—the current system does not include statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (v) amending the Criminal Code to delete the “for profit” provisions and replace them with acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders; (vi) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (vii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (viii) amending the Administrative Code, Tax Code and Criminal Code to (a) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (b) increase administrative sanctions; (ix) establish an effective and efficient system for notice and takedowns; (x) add sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) create presumptions of copyright ownership.

The Government of Mexico also needs to take administrative and regulatory steps to 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.

In 2013, a new broadcasting and theatrical exhibition regulation went into force adding burdensome regulations for motion picture and television program producers. Separately, 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.

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2017 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 2017.¹

Executive Summary: Recent legal reforms have improved enforcement in Russia against online piracy. The reforms (adopted in 2013 and 2014) established procedures and streamlined processes for websites and hosts of infringing content to comply with takedown notices from rights holders. Some Russian courts (in particular, the Moscow City Court) have also disabled access to infringing sites for users within Russia. In spite of these positive steps, several sectors of the copyright industries and the U.S. Government report that IPR enforcement in Russia has declined overall in recent years. Additionally, the new procedures and processes have been directed at online piracy only within Russia. The Russian Government has not adequately addressed the problem of sites operating inside Russia that target users abroad, resulting in a substantial international copyright piracy problem. That is why the U.S. Government placed several Russian online sites on its Notorious Markets List in December 2016. One such site, the torrent website *rutracker.org* has over 13 million active accounts. Even though it was subject to a Moscow court-ordered permanent injunction last year, it is still operating on several mirror websites. Further revisions to the current anti-piracy law are needed to ensure it is effective over time, including its application to clone, proxy and mirror sites, and there is needed clarification regarding the liability of Internet Service Providers (ISPs).

To be more effective, IPR enforcement in Russia should focus on *ex officio* criminal actions targeted at large-scale commercial enterprises as well as taking administrative action and strengthening administrative penalties. This 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. It would also help support smaller independent rights holders who do not have the resources and therefore must rely on the government for effective enforcement.

In sum, there are three long-standing IPR priority issues for the copyright industries: first and most importantly, is to see an overall improvement in enforcement against online piracy, a problem pervasive for all of the copyright industries. Second, Russia needs to address the collective administration problems that have thwarted music rights holders' attempts to exercise effective control over how collecting societies 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. Third, is the ongoing problem of camcording motion pictures, an illegal activity which, after a few years in decline, was up sharply in 2015 and then saw a three-fold increase in 2016. Reforms in the legal framework are necessary to correct this severe deficiency, along with adequate resources and a commitment to effective enforcement.

It has been five years since Russia completed its accession to the World Trade Organization and agreed to a detailed IPR Action Plan with the U.S. Government (U.S.-Russia IPR Action Plan). Neither the WTO obligations outlined in the U.S.-Russia IPR 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. In December 2016, the U.S. Trade Representative submitted a report to Congress on Russia's compliance with its WTO TRIPS obligations.² The report concluded: “[a]s a general matter, the current IPR enforcement

¹For more details on Russia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Russia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See 2016 Report on the Implementation and Enforcement of Russia's WTO Commitments available at <http://ustr.gov/sites/default/files/2016-WTO-Report-Russia.pdf>.



environment in Russia remains weak...online piracy (including unlicensed streaming services, pay-per-download websites, videogame hacking sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and others) has been, and remains a significant problem in Russia." Further, the U.S. Government stated that although Russia committed in the Working Party Report to address and "prevent certain types of devices or services from circumventing technical protection measures protecting content...notorious pirate websites continue to proliferate."

PRIORITY ACTIONS REQUESTED IN 2017

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2017:

- Undertake effective and deterrent actions against Internet piracy—including streaming services, 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. The current law (court ordered injunctions and disabling access to infringing sites) should be amended to cover clone, proxy and mirror sites, and also apply not only to websites, but to mobile apps.
- Increase the overall effectiveness of criminal IPR cases focusing on digital piracy. This includes bringing deterrent criminal actions against organized criminal syndicates as well as against those involved in piracy retail chains that sell pirated entertainment software, music and movies.
- Implement regulations on the operation of collecting societies that confirm that rights holders have the legal and practical ability to determine how to exercise their rights (including whether to choose to entrust licensing to any collective, and if so, to choose that entity, and to delineate the rights for such collections).
- Amend (additionally) 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 activities of intermediaries eligible to benefit from the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits; and
 - c) provide legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks (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 (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: (i) for unauthorized camcording of motion pictures (and the Government needs to commence enforcement actions); (ii) against principals in legal entities, including for IPR crimes; and (iii) for the importation and commercial trafficking in circumvention devices.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels 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.

COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA

Internet Piracy: Effective copyright enforcement continues to lag behind the rapid growth of Internet and wireless access in Russia. In 2009, it was estimated that 29% of individuals in Russia were using the Internet. In 2015, that figure grew to 72.1%, and there has been a huge growth in the number of Russians that have mobile broadband subscriptions—according to the International Telecommunications Union (ITU) (December 2016 Report). The lag in the legal and licensing regime is stifling the development of legitimate markets for copyrighted content.

Despite the legal reforms of the past few years, Russia remains home to many services supporting 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 books and journal articles. Many of these sites cater to English-speaking (and other non-Russian) users, harming markets outside of Russia. The new legal reforms (and court ordered injunctions) have been directed at sites within the Russian market. As a result, some BitTorrent and other pirate sites (especially those hosting unauthorized motion pictures or television programs) have moved their sites to foreign hosting locations.

But there are many sites still hosted in Russia, including those that are listed on the U.S. Government's Notorious Markets List (December 2016), that continue to do significant harm to markets outside of Russia.

The book publishing, motion picture and recorded music industries all cited the cyberlocker *rapidgator.net* which appears to be based in Russia, and *rutracker.org*, formerly *torrents.ru*. The U.S. Government retained *rapidgator* and *rutracker* on the Notorious Markets List in its December 2016 report; they have been on the list since 2012. According to the 2016 U.S. Government report, “[o]perators of the site allegedly net an estimated \$2 million annually” noting also that *rutracker* is “hosted in and operated from Russia.” This is just one of a number of major BitTorrent indexing sites which contain links to a wide variety of infringing copyrighted material, especially motion pictures and television programs.

There are many other problematic sites. For example, the Russian-hosted *demonoid* has over 17,000 infringing video game files available for download; and *myegy.to*, an Arabic-language linking and streaming site that is hosted in Russia, makes over 15,000 links available to unauthorized video games.³ Most ISPs and website owners do not 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 are complying with takedown notices (and the new laws have helped), while others never comply. Additionally, Russia is a haven for the production of cloning software and the hacking of entertainment software programs.

For the fourth 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 three times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2016, users with Russian IP addresses accounted for more than 31% of the global volume of detected infringements occurring on public P2P networks.

Infringing sites hosted in Russia continue to offer infringing content abroad and remain an impediment to the functioning of a legitimate online marketplace for music. In addition, 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 30 *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to 30 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*. According to a recent global music report (IFPI Global Music Report

³For the most recent report, see USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

2016: Data and Analysis Section – Russia), Russians spend on average 40 cents per person per year on music, in comparison to Americans who spend \$15.50 per person.

The Moscow City Court has issued a number of injunctions, including permanent injunctions, against various Russian websites. For example, the following websites have been permanently blocked: *rutracker.org*, *rutor.org*, *ex.ua* (a Ukrainian site, popular in Russia), *ru-ru.org*, and *new-rutor.org*. However, workarounds exist and thousands of Internet users have access to mirror sites and VPNs. For instance, *rutracker.org* may be accessed through a VPN or through browser add-ons, and *new-rutor.org* redirects to a mirror site called *xrutor.org*.

One positive note in 2016: *vKontakte* (*vk.com*), the most popular online social network in Russia, agreed to music licenses with several major record companies. In spite of these licensing agreements, the U.S. Government retained *vKontakte* on the Notorious Markets List in December 2016 because, as the government noted (and many of the other copyright industries concur), *vKontakte* is still a “hub of infringing activity”, including pre-release content (and because, in 2016, it was the 13th most visited website in the world according to *Alexa.com*). The U.S. Government explained that *vKontakte* will “continue[] to be listed pending the institutionalization of appropriate measures to promote respect on its platform for IPR for all right holders, not just those with whom it has contracts...” and that those measures need to be “comparable to those measures used by other social media sites.” *vKontakte*, now owned by *Mail.ru*, has a functionality specifically designed to enable its members to upload 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*) operates a music service (now with licenses similar to *vKontakte*’s service), but includes thousands of unauthorized motion pictures and television programs. These two sites alone host more than half of the unauthorized motion picture and television material in Russia. So, while some progress has been made at this site on music issues, the same cannot be said for other works such as films and books and other reading materials. *vKontakte* continues to be the preferred platform for the unauthorized distribution of pirated educational course books, and CD and DVD content by certain educational establishments to its students, as well as between and among users of the site.

Book and journal publishers are very 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 51 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 several such sites exist, including *bookzz.org* and *booksc.org*. A *libgen.org*-related, but more specialized site, is *sci-hub.io* (formerly *sci-hub.org*). *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 gain unauthorized access to the database and subsequently obtain a copy of an STM article, the article is delivered to the requesting user, and then cross-posted, or also made available, on *libgen.org* and its related mirror sites.

Sci-hub.org, the Library Genesis Project (*Libgen*), and its operators were sued in the Southern District of New York in 2015 by an Association of American Publishers (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 publisher a preliminary injunction against *Sci-hub.org*, 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 top-level domain (TLD) registries for the defendants’ websites to place the subject domains on registryHold/serverHold. The

site then resurfaced under the *sci-hub.io* domain. These illegal activities compromise the security of libraries and institutions around the world, employing techniques similar to those employed in other instances of cyber intrusions to defeat security measures used to protect not just access to content, but the personal data of students and academic personnel. These activities also endanger the sustainability of science and scholarly communication (promoting the quality and integrity of the scholarly record), which are important to commercial and non-profit publishers, but clearly not a goal of the pirates.

In general, publishers report online enforcement is hampered by low compliance rates in response to rights holder requests to takedown links to infringing content, with many sites ignoring requests altogether. P2P piracy providing free unauthorized access to e-books continues to be an issue as well.

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. As a result of the piracy, 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 in synch with local release patterns that includes compatibility with local holidays as well as investment in local marketing and advertising.

Camcord Piracy: 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 2016 to 73 camcords. By comparison, in 2015, there were 26 camcords sourced from Russia. Most of the Russian camcords come from Moscow, Tatarstan, St. Petersburg, Ekaterinburg and some of the Siberian cities. 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 damaging revenues worldwide. The Government of Russia should amend Article 146 of the Criminal Code to effectively address illicit camcording in theaters (a 2013 amendment was never adopted). The Government should also properly resource and undertake effective enforcement against illegal camcording of motion pictures.

Enforcement Against Internet Piracy: 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 several years ago.

Some of the fundamental enforcement shortcomings include: a lack of political will, scarce resources, and no institutional incentives for enforcement agencies 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 is no interest, and no Department K staff, to undertake IPR enforcement (it is left to the Economic Crime Police). Department K's authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be properly staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers in how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, 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. There has been insufficient political will, and little incentive with the government agencies, to undertake the needed actions. The relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia. Changes to criminal procedure which placed copyright infringement cases into the category of serious crimes have enabled—at least in theory—Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against owners of commercial Internet operations. One practical problem in recent years: 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 significantly improved in the recent years. The 2013 legal reforms included two key civil law changes and procedures directed at online 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)) authorizing judicial injunctions (only) after notice and takedown to block access to infringing materials or websites. In addition to expanding the scope of subject matter covered by the 2013 laws, the 2014 amendments (Federal Law No. 364, in force May 2015) also expanded existing procedures for court ordered site-blocking against repeat infringers.

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 2015, the court ordered the permanent shut down of 13 Russian websites (including *rutor.org* the BitTorrent tracker and ten other websites) with infringing content, in response to a complaint filed by a Russian music label. In December 2016, the Moscow City Court ordered the permanent shutdown of 27 websites. Official data is not yet available, but it is estimated that the courts have issued 679 preliminary injunctions (350 against infringing websites), taken 456 IPR cases, and disabled access to 103 websites, since the laws went into force.

In 2016, the Russian-Anti Piracy Organization (RAPO) initiated nine criminal cases against the operators of pirate sites. There have been, to date, three criminal prosecutions against the owners of pirate sites. Mostly, however, private parties have to rely on civil, not criminal actions. Using the new anti-piracy laws, petitions by American film producers and record producers have resulted in court orders to disable access to infringing websites of films and music. For example, in August 2015, the Moscow City Court blocked access to sixteen websites for illegally distributing one American film. 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. But this decision was overturned on appeal in 2016, finding *vKontakte* not liable. This has caused concern that the Civil Code reform pertaining to “information brokers” and other intermediaries is not being properly applied or needs further

clarification. In another lawsuit in October 2015, brought by a Russian record label, *vKontakte* was ordered to pay damages of 750,000 rubles (then, approximately US\$9,616) for ten infringing songs. In a similar suit by another Russian record label, *vKontakte* was ordered to pay 600,000 rubles (then, approximately US\$7,687) for unauthorized uploading of musical recordings. Civil actions, while a positive step, are generally not deterrents. Thus, without more criminal or administrative enforcement of the principals involved in running these lucrative illegal sites, the civil laws alone will not improve the landscape for legal markets to develop in Russia.

In 2013, a Memorandum of Understanding was signed by RAPO, the Mail Group and other Internet platforms, and the Government of Russia (RosKomNadzor). As a result, the motion picture industry reports that, in 2016, most ISPs in Russia voluntarily cooperated and responded to 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. Overall, although some ISPs cooperate and take down infringing materials once identified, many ISPs are not willing to cooperate, even with clear evidence of infringement, and there has been little cooperation with advertising agencies and payment processors who financially support infringing sites. In addition, the response times by some websites is very slow—measured in weeks, not days—to takedown notices. Despite these shortcomings, the motion picture industry reports that the number of users in Russia accessing legal content has increased significantly in recent years. Additionally, some of the copyright industries reported that civil enforcement on balance improved in 2016. There were approximately 2,500 copyright and related rights civil court claims filed in the first half of 2016 (with 1,809 resolved by the court of first instance).

Criminal Enforcement in General: Criminal enforcement in Russia remains a priority for some of the copyright industries 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 2016 was aimed at physical piracy, but that form of piracy has declined significantly as the marketplace moved online. A few industries, such as the independent segment of the film and television industry (IFTA), reports that physical piracy is still a problem, in their case, for independent producers and distributors. High quality pirated DVDs and artwork are routinely sold in street markets or uploaded and offered for free online, destroying the legitimate market for these works.

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 permit a rights holder to 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). But the criminal courts are reluctant to order this and treat these as civil law matters instead. The copyright industries recommend that the Supreme Court should clarify guidelines on destruction of goods, and the courts should also clarify 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. In 2013, a specialized IP court in Skolkovo (the innovation center) was launched with 30 trained judges. This was a positive step in IP enforcement, but was limited to patent cases. These courts should be created in other cities and regions across Russia and the jurisdiction broadened to handle copyright, as well as patent cases. Another important step would be the establishment of an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement.

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, so many cases are suspended without any penalty.

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.

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 (as it has done in the courts actions against some websites). 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 there are the 2013 improvements), 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 clear 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\$25 to US\$33), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$166 to US\$332), and on legal entities themselves (30,000 to 40,000 rubles, US\$499 to US\$665), 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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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.”

Russia joined the WTO in 2012. 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 IPR Action Plan 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 these obligations.

Regulations and state accreditations have institutionalized a system that is not transparent and lacks good governance or accountability for authors, record labels and performers—who have no other option except the state collective management organizations. Correcting this problem is a treaty obligation. 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.

It was noted in the December 2016 U.S. Government report to Congress on Russia’s WTO compliance as Russia’s failure to address the collective management issues. As the report said, instead of improving the system, Russia engaged in 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” even though Russia agreed in the Working Party Report to “phase out non-contractual license management” schemes within five years of the Civil Code reforms coming into place (in 2008). Finally, the U.S. Government report said: “Russia’s legislature is considering further amendments to its IPR legal regime, and it appears that the Russian Ministry of Culture is currently making another attempt to reorganize the collecting society regime system in Russia, although draft legislation has not been circulated” and that the United States Government would “monitor these efforts and whether reforms improve the transparency and effectiveness of these organizations.”

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 (and U.S.-Russia IPR Agreement) obligations 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, so that they are fairly represented and there are no conflicts of interest in the governance structures. 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). Several Government of Russia proposals are now pending; one by the Ministry of Culture would, unfortunately, keep the status quo. A proposal by the Ministry of Communication and Mass Communications would make several improvements to the current system.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Although Russia made progress on legal reforms during the lead up to WTO accession, and the more recent Civil Code, Part IV revisions (2013 through 2015), there remain gaps in the legal regime, with either incomplete or inadequate reforms, especially with regard to effective Internet enforcement and implementation of the digital treaties. As noted, the anti-piracy laws need to be expanded to include clone, proxy and mirror sites. A proposal by the Ministry of Communication and Mass Communications would do this. It would also require search engines to remove links to infringing content on sites that have been subjected to an order under the law.

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 (and the applicability of safe harbors for such services). Even after the recent 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 and applicable to all works, 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.⁴

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. Commercial trafficking in circumvention devices (including by importation) should be criminalized as well.

In addition to those already mentioned, IIPA recommends 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, IIPA recommends that Article 1252(5) of the Civil Code, which currently includes remedies for the

⁴For a detailed list of IIPA's prior comments specifically on the Civil Code (and some of the related laws), see <http://www.iipawebsite.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138.

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.

MARKET ACCESS ISSUES

In January 2015, a law went into force that bans advertisements on pay cable and satellite channels. While the 2015 law does not appear to effect state-owned television channels, it will likely eventually 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.

In late 2016, a draft law was introduced in the Duma to regulate (license) online film websites and limit foreign ownership of such sites (ownership interests by non-Russians would be limited to 20%). The law is opposed by Russian and foreign film distributors and website owners of legitimate content, fearing the new law, if adopted, would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites. It also would impose very burdensome regulations on the operators of legal sites. The draft bill passed its first reading in the Duma in January 2017. Additionally, the Ministry of Culture has floated a plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia; issuing a film distribution certificate would be conditioned upon payment of this fee. The Ministry’s goal is to promote domestic movies, and it appears to have local industry support. No draft bill has yet been prepared.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

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.

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Taiwan be placed on the Special 301 Priority Watch List.¹

Executive Summary: The market for creative works in Taiwan continued to deteriorate in 2016 due to the incessant growth of digital piracy, which has created an environment inimical to legitimate content producers. This is particularly unfortunate because Taiwan was once at the forefront in the region of establishing policies that fostered and rewarded creativity. Over the last several years, however, Taiwan has not made any progress towards meeting the challenges of the digital age and protecting creative investment, whether foreign or homegrown. Although the new Administration has taken some nominally positive steps, the Government of Taiwan has not been willing to adopt measures adequate to address Taiwan's urgent Internet piracy problem.

Make no mistake, the scale of Taiwan's online piracy problem calls for urgent action. The motion picture industry estimates that during one three-month period, there were five times more page views to top piracy websites as there were visits to the top legitimate platforms in Taiwan, outpacing most of Asia. More and more, Taiwan is becoming an outlier in the region regarding both its high levels of online piracy and its lack of will to address the problem. Taiwan remains without an effective mechanism to address foreign piracy websites that target consumers in Taiwan. Illicit Streaming Device (ISD) piracy is rapidly increasing. Websites and apps that facilitate stream ripping are proliferating. And e-book piracy is booming, including a derivative form of e-book piracy involving distribution of on-demand printouts at educational institutions, which is overtaking the longstanding problem of unauthorized photocopying of textbooks.

Taiwan has thus far failed to take advantage of opportunities to address this increasingly dire situation. The fourth draft amendments to the Copyright Law ("Fourth Draft") fail to provide tools adequate to effectively address Internet piracy, including the problems posed by non-hosted infringement and piracy websites hosted outside of Taiwan. The Fourth Draft also moves Taiwan further away from international norms and raises questions regarding Taiwan's commitment to its existing international obligations. A second set of Copyright Law amendments ("TPP Draft") intended to further Taiwan's aspiration to join the Trans-Pacific Partnership (TPP) appears to include provisions that would improve some of the deficiencies in the Fourth Draft, but falls short in other key areas. IIPA hopes that, eventually, Taiwan incorporates the positive aspects of the TPP Draft into the Fourth Draft. Taiwan should also add a remedy, similar to those employed in other parts of the world, to combat foreign-hosted websites that facilitate infringement; bring its term of protection in line with evolving global norms; and correct unfair practices regarding collective management.

Unfortunately, Taiwan's enforcement regime has not met the challenge of its Internet piracy problem. Although industry cooperates well with enforcement authorities, recent legal changes have inhibited investigations into online piracy cases. Furthermore, the judiciary in Taiwan typically views copyright piracy as a minor offense, resulting in suspended sentences in recent criminal cases. The lack of adequate and effective protection and enforcement is at odds with the industry's contribution to the economy, as demonstrated by a 2014 Oxford Economics study showing local film and television sectors directly contribute US\$5.5 billion to Taiwan's GDP, support 113,800 jobs and generate approximately US\$543 million in tax revenues. Moreover, Taiwan is a hub of music production for the Chinese speaking world and a major exporter of "C-pop." We urge the Taiwanese Government to reinvalidate its commitment to protect and nurture this important contributor to Taiwan's economy.

¹For more details on Taiwan's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Taiwan's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



PRIORITY ACTIONS REQUESTED IN 2017

Enforcement:

- Ensure that the Criminal Investigation Bureau (CIB) focuses on piracy cases and that the Criminal Investigation Brigade (CIBr) is provided with sufficient training to investigate online piracy cases.
- Increase trainings for judges and prosecutors on specific issues related to online copyright infringement.
- Take action against book piracy at educational institutions, including against providers of on-demand printouts of pirated e-books, and against digital piracy on online education platforms.
- Bring and conclude a greater number of ISD 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.
- Issue an administrative statement confirming Article 87(7) of the Copyright Law can be used to bring cases against websites and apps that facilitate stream ripping and bring cases under that provision.

Legislative:

- As part of amendments to the Copyright Law or the revision of the draft Digital Communications Act, adopt a new measure, similar to those adopted in other parts of the world, providing the authority to disable access to websites based outside of Taiwan intended to facilitate infringement and, once enacted, monitor test cases brought to ensure the law operates effectively and fairly for all parties.
- Ensure that the contemplated Copyright Law amendments also:
 - make Internet piracy a “public crime”;
 - extend term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years);
 - make unauthorized camcording of motion pictures in theaters a criminal offense;
 - make unauthorized camcording of live musical performances a criminal offense;
 - correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a fair-market based royalty rate and eliminate delays in fixing the rate;
 - do not relax or reduce criminal liability standards; and
 - do not unreasonably extend exceptions beyond what is permissible under Taiwan’s TRIPS obligations.

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 all issues.²

Piracy Continues to Fester, Especially Online: Piracy remained a significant problem in Taiwan in 2016, particularly piracy over the Internet and on mobile devices, which continue to mushroom. Foreign websites, such as *eyny.com*, (the 19th most accessed site in Taiwan according to Alexa), *youmaker.com* (ranked 118th in Taiwan), and *123kubo.com* (ranked 38th in Taiwan), that provide illegal content remain a significant problem, putting enormous pressure on the ability of legitimate rights holders to survive commercially in Taiwan. Particularly popular are streaming, forum,³ 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. There is still no effective means to combat P2P sites, and sites such as *jvod* and *xfplay*, hosted in China, are popular with local users. Stream ripping, where users of legitimate online music platforms use tools, such as an app or a website, to “rip” the streamed content, is a

²See, e.g., *IIPA, Taiwan, 2016 Special 301 Report*, (February 5, 2016), available at <http://www.iipawebsite.com/rbc/2016/2016SPEC301TAIWAN.PDF>.

³Forums are a serious problem, including *eyny.com* and *ck101.com* (the 14th most accessed site in Taiwan), as just two examples. The flow of infringing music and audiovisual content through these forums is enormous.

growing problem.⁴ Social media platforms have become a popular way to share pirated content. Apps for ISDs and mobile devices have become a significant platform for disseminating illegal content.

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 late 2015, MOE included publishing industry representatives in the campus inspections, which found that while some of the universities inspected had policies in place regarding copyright protection, student and faculty compliance was low. MOE should continue to allow industry participation in the campus inspections, which will foster greater cooperation among MOE, university administrators, and rights holders.

The problem of unauthorized photocopying of textbooks at universities is diminishing, in large part due to an even more pernicious form of piracy consisting of the proliferation of on-demand printouts of pirated digital textbooks. The MOE and university administrators may have also inadvertently contributed to another form of infringement through a “Teaching Excellence Program,” which encourages teachers to make all teaching materials available on a university digital platform freely accessible to students. The publishing industry has reason to believe that in addition to original content generated by the instructors themselves, a significant amount of materials—such as textbook content, PowerPoint slides, exercises, or test banks and the like—on these platforms consist of unauthorized copyrighted content. Unfortunately, without access to these platforms, the full extent of the infringement is unknown. Unauthorized copies of textbooks in digital form proliferate online, through hosted and non-hosted (P2P) platforms,⁵ and there are a number of services that sell unauthorized copies of digital textbooks on optical media.⁶ This growth in piracy has contributed to decreases in textbook sales and revenues derived from those sales.⁷ Although a few enforcement actions were taken in 2016 against “cram schools,” much more is needed to meet the growing challenge of book piracy in educational settings.⁸

Illicit Streaming Device (ISD) Piracy: The sale of ISDs⁹ (i.e., media boxes or set-top boxes), which facilitate piracy, has increased considerably in Taiwan. Mostly originating in China and available openly throughout Taiwan, including at so-called “3C” shops that sell computers, software, and peripherals, and via online retailers, ISDs 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 devices 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.

⁴The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e. the app developer or website operator), but it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used. IIPA urges Taiwan Intellectual Property Office (TIPO) to issue an administrative statement specifying that Article 87(7) provides a clear legal basis for liability against apps or websites that facilitate stream ripping.

⁵For example, *PDFDrive* provides downloads of millions of PDFs, including more than 18 million ebooks; *iss.net* is a web server that hosts pirated content; *taodocs.com* is a file sharing site providing pirated content to read for free and selling downloads; and *taobao* sells pirated textbooks.

⁶For example, *XYZ DBT* sells pirated books, exam materials, as well as videos, music, software, and games.

⁷Initial estimates of the 2016 fall semester show that textbook sales were down 15% from the same period in 2015, and revenues from the full year 2016 are estimated to be down 16% from the previous year.

⁸Cram schools are specialized schools that help students meet a specific goal such as passing an English language proficiency test. The publishing industry reports that a criminal case was brought against a cram school in April 2016 and an investigation into another cram school was initiated in the fall. A criminal case against a cram school brought in 2015 was settled in November 2016 for only US\$2,500 even though the market value of the infringing materials was US\$4,000.

⁹In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement, or users are able to easily obtain apps required to access unauthorized motion pictures and television content. These apps allow users 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 ISD piracy can be addressed through current provisions of the law.¹⁰ One case was brought, but decided unfavorably in 2013. Taiwan must do more to eliminate this illegal activity.

Lack of Will and Inadequate Legal Framework Impede Enforcement: On enforcement, although the takedown rate remains extremely high for content hosted in Taiwan, Internet users there increasingly obtain unauthorized content from websites located overseas, particularly those in mainland China. Although injunctive relief is apparently available for domestically-hosted infringement, no remedy is available to address the problem of foreign-based infringing websites, which cause significant damage to the Taiwanese marketplace. Cooperation with Internet Service Providers (ISPs) is ad hoc, but it is generally good for domestic infringement. Unfortunately, a lack of clarity regarding existing remedies undermines cooperation with ISPs regarding infringement from foreign-hosted websites. 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. Although it may be possible that existing remedies under the Copyright Act could be used more effectively to address the problem of foreign websites that primarily infringe, courts have failed to issue the necessary judicial interpretation to allow for disabling access to such sites.

Online piracy investigations suffer because the CIB, the specialized unit for online crime investigation, does not focus on intellectual property crimes and the CIBr, the specialized unit on intellectual property crimes, does not have the training or expertise to investigate online piracy. The implementation of the amendments to the Communication Security and Surveillance Act in 2014 has negatively impacted investigations into online infringement because these amendments restrict the information police can obtain from an ISP without a court order.¹¹ Investigators for the local motion picture industry report that the number of successful raids throughout the first eight months of 2016 was 22, continuing a year-on-year decline since 2013 when there were 94 raids. The music industry reports that CIBr actions against music piracy have been significantly reduced in part because takedown notice recipients have become more responsive. In a positive development, a formal civilian organization, the Association of CIBr Friends, was established in 2016 as a mechanism for stakeholders to support CIBr in its anti-piracy enforcement efforts. IIPA is hopeful that this will enhance coordination between industry and CIBr and lead to improved enforcement against online infringements.

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 combatting copyright piracy. But 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.¹² 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 re-staff to at least 185 officers; keep IPR protection within the division as the most important mission; and 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 initiated, as well as reasonable targets for successful convictions. It is important that

¹⁰Actions 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 devices to use apps that provide access infringing content is a violation of anti-circumvention provisions in Taiwan's Copyright Act.

¹¹The amended law requires officers to obtain court orders before soliciting further information from Internet Service Providers (ISPs) such as IP address account information. It is estimated that only about 30% of applications for such orders are approved by the courts.

¹²Before the reorganization, the IPR Police (IPRP) once had seven squadrons located in seven major cities.

such goals be subdivided by subject matter, such as: Internet piracy, book piracy,¹³ unauthorized camcording, ISD 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 (US\$145,005) 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. 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 rights holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal prosecutions do not result in deterrence. In the criminal context, prosecutors overwhelmingly settle for "suspension of indictment" in digital piracy cases and judges tend to commute prison sentences to a fine or suspend punishment altogether. Regular training schedules should be established for judges and prosecutors on specific issues related to IP infringements, focusing on the technical particularities of Internet and new technology-based copyright infringement cases; aspects of the civil and criminal system that are not operating smoothly for right holders; and primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the online and digital environment.

COPYRIGHT LAW AND RELATED ISSUES

The dominant concern in Taiwan is the continued lack of an administrative or judicial remedy against foreign piracy services targeting Taiwan users. IIPA strongly urges Taiwan to incorporate such a remedy into its copyright reform process or as part of the revisions to the draft Digital Communications Act.¹⁴ IIPA is also concerned about the proposed amendments to Taiwan's Copyright Act, which fail to address important needs and include several unfavorable elements for rights holders.

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. Although ISPs in Taiwan have indicated a willingness to address the problem of foreign websites hosting infringing content, the current inadequate legal framework inhibits them from doing so. More than three dozen jurisdictions around the world have developed approaches to halt illegal services from being accessed from across 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 was included 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.¹⁵

Draft Digital Communications Act: In October 2015, the National Communications Commission (NCC) published a draft of the Electronic Communications Act (now called the Digital Communications Act), which is part of

¹³As noted above, on-demand printouts of pirated digital books (particularly higher education and English language teaching materials (ELT)) and journals has become the primary problem faced by the U.S. publishing industry in Taiwan. 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.

¹⁴This Act was known as the Electronic Communications Act until it was recently renamed.

¹⁵IIPA encourages Taiwan to also look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which permits injunctive relief against intermediaries to remove access to infringing content.

a legislative effort to consolidate regulation of telecommunication, Internet, television, and radio platforms. Encouragingly, the draft law includes authorization for ISPs to remove or disable access to infringing content upon knowledge that the content is infringing; but, unfortunately, it does not include authorization to disable access to foreign hosted infringing sites. After approval by the Executive Yuan, the draft was sent to the Legislative Yuan, which returned the draft to NCC for reconsideration. As the NCC revises this legislation, IIPA urges it to consider adding an effective remedy against the problem of infringing websites hosted outside of Taiwan.

Proposed Copyright Amendments Are Inconsistent With International Norms: TIPO released the Fourth Draft in April 2016. IIPA has provided extensive comments on all four drafts of the amendments, but, disappointingly, very few of IIPA's suggestions were incorporated into the Fourth Draft, which was submitted to the Executive Yuan in September 2016 for review.

Although the Fourth Draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. First, the draft represents a missed 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 directed at Taiwanese 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 Fourth 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) extending term of protection in line with the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years); 3) making it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters;¹⁶ 4) making it a criminal offense to engage in unauthorized camcording of live musical performances;¹⁷ and 5) correcting problematic TIPO practices regarding collective management.¹⁸ 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 a catalogue of new, overly broad exceptions to protection, which includes language that would call into question Taiwan's compliance with its TRIPS obligations;¹⁹ relaxes criminal liability standards (e.g., 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);²⁰ and requires rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement. Additionally, producers and performers should be afforded exclusive rights for public performance and retransmissions of sound recordings, as many other countries around the world have done, and the provision on circumvention of technological protection measures (TPMs) should be clarified to ensure the standards are in line with those of the United States.²¹

¹⁶It has been reported that actions against camcording as "unauthorized duplication" have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording.

¹⁷The music industry reports that infringement through camcording live concerts is increasing.

¹⁸Corrections 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 Collective Management Organizations (CMOs) tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings, and allow for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

¹⁹To 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.

²⁰The draft mandates that rights holders participate in a CMO to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. 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.

²¹Draft 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.

To further its stated ambition to join the TPP, Taiwan has been considering the TPP Draft, a second set of amendments to the Copyright Law. Although the draft has not been released for public comment, we understand it includes criminal penalties for circumvention of TPMs, makes Internet piracy a public crime where the infringement value exceeds NT\$1M (about US\$32,169), and adds prohibitions against signal theft. Earlier versions of this legislation included a provision that would extend the term of protection to meet TPP's requirement of no less than 70 years, but that provision was dropped and will reportedly be reconsidered should Taiwan join TPP. The TPP Draft currently sits for review with the Legislative Yuan, but it is unlikely to move forward, given present prospects for TPP's entry into force. The TPP Draft could be a positive development, although IIPA strongly encourages removal of the NT\$1M threshold requirement for considering Internet piracy a public crime because calculating the value of infringement is fraught with uncertainty, and the high bar does little to deter online infringement and may actually encourage it. IIPA also encourages Taiwan to restore the provision bringing its copyright term into alignment with the evolving global norm to ensure greater incentives for the production of creative works and investment in local industry, spurring economic growth and tax revenues, and enabling producers to continue offering content to local consumers in the latest formats.

Taiwan is on the verge of squandering this opportunity to update its copyright laws. Rather than conducting a complicated copyright overhaul that fails to address many of Taiwan's most pressing needs and moves Taiwan further away from international norms and even its current international obligations, Taiwan instead should use this opportunity to improve its copyright regime to meet the challenges of the digital age. At a minimum, Taiwan should incorporate the positive aspects of the TPP Draft (while removing the threshold for making Internet piracy a public crime and including term extension) into the Fourth Draft to avoid the need for multiple revisions to its Copyright Act and to demonstrate that Taiwan is serious in its desire to join the neighboring countries in the region that, in the TPP, agreed to implement copyright protection and enforcement standards consistent with evolving global norms.

TRAINING AND OUTREACH

Rights 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. A symposium on collective management best practices was jointly held by the music industry and TIPO. 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 2017, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The deficiencies in the Taiwan's enforcement framework outlined above—including de-prioritization of copyright piracy cases at CIBr; inadequate civil procedures that do not result in deterrence; and a judicial system that does not take piracy cases seriously resulting in non-deterrent criminal sentences—are inconsistent with Taiwan's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt the Fourth Draft without significant revisions, Taiwan's copyright laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2017.¹

Executive Summary: In May 2013, Ukraine was designated by the U.S. Government as a Priority Foreign Country (PFC), which initiated an investigation under section 301 of the Trade Act of 1974. Countries are designated a PFC if “acts, policies and practices” are deemed “unreasonable and burden or restrict U.S. commerce” including “the denial of adequate and effective protection of intellectual property rights.” The PFC designation was based specifically on three critical problems in Ukraine’s IPR regime, including the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights” and “the unfair, nontransparent administration of the system for collecting societies.” On March 13, 2014, the U.S. Government completed its PFC investigation, noting 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.”

Ukraine has been on the Priority Watch List since 2015 because the same problems that were the grounds for the PFC designation four years ago persist today. These problems are causing severe economic harm to U.S. copyright rights holders in Ukraine as well as to Ukrainian and other rights holders. One positive note in 2016 was the transnational enforcement operation, which included Ukrainian authorities, that led to the arrest in Poland of the Ukrainian operator of *kickasstorrents* (*kat.cr*). The site, one of the largest torrent sites in the world, has been described by U.S. criminal enforcement agents as a “lucrative flea market” for “infringing movies, television shows, video games, music and computer software.”

Last April, USTR’s Special 301 Report acknowledged the lack of progress by Ukraine in “addressing the three problems identified in the 2013 Special 301 Report.” The Report recognized as a positive step, the formation of a Cyber Police Department within the National Police Department, which was created to focus on telecommunication and Internet crimes, including IPR violations. But problems persist with “long-standing concerns about endemic corruption and mismanagement, including in IPR protection and enforcement.” The U.S. Government acknowledged that “little has changed” with the unauthorized collecting societies, and although one rogue collecting society was “de-credited” in [2015] and “reportedly [the government] suspended two more societies pending investigation[,]...approximately 15 other collecting societies continue to operate, collecting royalties without paying right holders.” There was no progress (as the U.S. Government confirmed) on legislative reforms in 2015 regarding collective management. In 2016, not only was there no forward progress on this issue, but proposals were floated that, if enacted, would significantly worsen the situation by the creation of a single state-run “super” collective management organization.

Similarly, the U.S. Government expressed its frustration with the “stalled” attempts at legislative reforms to improve the government’s response to online infringement, even though “Ukraine continues to host some of the largest pirate sites in the world serving IP infringing content to a global audience.” The copyright industries agree with the U.S. Government that improving these problems would “advance [the Government of Ukraine’s] own agenda for economic improvement, particularly in promoting foreign direct investment.” If undertaken properly, fixing these problems will improve the marketplace for the digital distribution of music, films, television programs, video games

¹For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



and books online, benefiting Ukrainian consumers and the local economy. Instead, the Ministry of Economic Development and Trade (MEDT) is pushing IPR “reform” legislation that, if adopted, would not improve online enforcement, or collective administration, consistent with international norms.

PRIORITY ACTIONS REQUESTED IN 2017

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2017:

Criminal enforcement:

- Focus criminal enforcement on: (1) owners and operators (and syndicates) of the numerous free streaming and pay-per-download sites, as well as peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials, as well as on the principals of rogue collecting societies and camcording operations—using existing laws; and (2) owners and operators of open air and street market piracy, especially at large outdoor markets, at or around underground stations, near local shops and supermarkets, and hard copy distribution centers.
- Coordinate key agencies, including the Ministry of Internal Affairs and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized “cyber police” units; and establish specialized IPR prosecutors within the General Prosecutors Office.

Legal reforms:

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Enact the anti-piracy provisions in Bill #3081-d, and make all the necessary amendments to provide effective procedures to address online piracy.
- Enact the Law “On Collective Management” (based on text drafted by international experts in 2015) to require organizations to operate with proper transparency, accountability and rules of governance.
- Amend the Copyright Law and Criminal Code to make camcording in movie theaters illegal—excluding camcording from any “private use” exception and criminalizing this activity.

COPYRIGHT ENFORCEMENT IN UKRAINE

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.

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 some of the world’s largest BitTorrent sites 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 2016, Ukraine ranked third in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks using PCs, retaining its position from 2015. Ukraine is also ranked sixth in the world for mobile infringement of video games.

One positive step in late 2016 was the shutting down of the pirate site *ex.ua*, and the takedown by enforcement officials of *fs.to*, one of largest pirate sites in Ukraine with over 20 million users per month. For years,

ex.ua was one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content; it has also been on the U.S. Government's list of Notorious Markets since 2012. 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. It is hoped that the 2016 takedown against this site will be permanent, and that a criminal case will now proceed (although there are troubling reports that *ex.ua* has resurfaced as a cyberlocker at *fex.ua*). Another site that has been on the Notorious Markets list since 2013 is *extratorrent.cc* (*extratorrent.com*); it was included on the December 2016 U.S. Government Notorious Markets list (although it is now no longer hosted in Ukraine). The U.S. Government identified *extratorrent* as a "source of malware" and noted that it was disrupting markets in India, Pakistan and China. Among the many pirate websites in Ukraine are streaming sites, torrent sites (which comprise about half of the total illegal sites), cyberlockers, and linking sites. Examples include linking and streaming sites such as *kinogo.co*, *kkiste.to*, *kinofilms.tv*; *stream-tv2.ag*, *video.online.ua* (among many others); 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*. One particular site to highlight is *dnj.to* (formerly *jams.to*), a linking site that caters to the international market; it is hosted by the ISP Infium UAB which also hosts many cyberlockers and proxy sites, and which has not cooperated at all with rights holders on takedown notices.

In 2016, the recording industry reported three criminal cases (covering 14 domain names) to the Cyber Police; one was against an ISP directly. All three cases were opened by the police and the investigations continue. In 2015, there were three criminal case verdicts against the owners of pirated websites (with terms of imprisonment ranging from two to five years). There were no such cases in 2016.

There were 55 criminal digital piracy investigations opened in 2016, compared to 31 in 2015. In 2016, there were 78 pirate sites targeted by anti-piracy organizations which were closed by the police or site owners (compared to 61 in 2015), 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 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 hundreds of sites offering pirated content). The copyright industries have, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to take down illegal websites and slow illegal P2P traffic (but, in the absence of legislation, these voluntary efforts have generally not succeeded); although, some ISPs will delete links upon request. In 2016 (as 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 to take effective action against unauthorized sites. The UAPA and the Motion

Picture Association of America (MPAA) report a little better than a 20% response rate to notice and takedown requests (there are no laws mandating compliance). In 2016, UAPA issued 2,285 takedown notices to ISPs and cease and desist letters to site operators in Ukraine (compared to 3,602 in 2015 and 1,119 in 2014). Some of the ISPs currently respond to notice and takedown requests, but many do not, in large part because the Telecommunications Law explicitly stipulates that they have no responsibility for the content on their websites (even with knowledge it is infringing). Legislation, as detailed in the "Legal Reforms" section, is needed to institute proper notice and takedown provisions, including so-called "stay down" provisions for repeat infringers, and the retention of information for law enforcement, as well as to provide clear third party liability regarding ISPs.

Currently, the Criminal Procedure Code does not grant police *ex officio* authority, 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 Cyber Police Department was established within the National Police Department for the purpose of combating Internet crimes. In 2016, 30 investigators were reportedly being recruited to join this unit. The formation of this unit, and its full staffing, if undertaken, is positive news. Unfortunately, it is reported that the unit is not yet fully resourced; this may be due, in part, to a late 2015 re-organization of all police units still being implemented.

Collecting Societies: The current collective administrative system in Ukraine, with 18 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. As noted, the U.S. Government acknowledged in its April 2016 Special 301 report that there has been no progress on this issue since the PFC designation in 2013, and there has been no progress since April.

Collecting societies in the music sector, specifically in connection with broadcasting, public performances and certain 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 contain music and audiovisual material, claimed to be "licensed" from the rogue collecting societies.

The main criterion for accreditation should be to accredit the organization based on a majority of national and international repertoire represented, and the organization should be owned and managed by rights holders. 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 reconstituted, and societies would be granted operational licenses provided they meet statutory criteria. Further, no more than 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. This would prevent accreditation to a society that had a nominally high

volume of repertoire (when in fact, most of the repertoire is never actually performed), and avoid favorable treatment to undemocratic, non-representative and non-transparent collecting societies, which, with their internal governmental influences, 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 half 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 created in violation of the Copyright Law. These societies claim to have the power to license on behalf of all rights holders based on an interpretation of current law, despite having no international mandate. This has led to parallel licensing, unfair competition and legal and commercial uncertainty. A 2016 “moratorium” on regulations has halted the registration of any new societies, but does not solve the problem.

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.

Criminal Enforcement: Now that the Cyber Police Department within the National Police Department of Ukraine has been formed it needs staffing, staff training and resources. The lack of effective criminal prosecutions and deterrent sentencing is a lingering problem in Ukraine for both digital and hard copy piracy. In 2005, the Criminal Code (Article 176) was amended to lower the threshold for criminal prosecution. The current threshold is 16,000 UAH (or US\$588). 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 every rights holder does not exceed the threshold, a criminal case does not proceed (the losses cannot be combined).

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; (4) the lack of presumptions that rights holders are the infringed (harmed) party to commence a criminal proceeding; and (5) 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). A proposal to establish a specialized IP court (perhaps in 2017) is also under consideration – it should be properly staffed with qualified IP-trained jurists.

Provisions 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. Other (related) lingering enforcement problems: (1) 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; (2) the confiscation and destruction of infringing goods, as well as materials and equipment used for their manufacturing is not clearly a part of the Criminal Code sanctions; (3) the requirement that parties in all cases – beginning January 1, 2017 – be represented by local counsel (no more *pro se* or power of attorney representations).

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 the first half of 2016, the Economic Police seized about 5,000 optical discs in the Lviv region, but there were no reports of any seizures at any of the Notorious Markets.

The copyright industries continue to report persistent problems with the administration of the hologram sticker system (adopted in 2000). The holograms sticker system should be repealed.

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. Between 2011 and early 2017, over 126 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2016, there were at least seven videos and nine audio or video only films sourced from Ukraine as compared to 13 illicit video recordings in 2015. As noted, legal reforms are needed to amend the Copyright Law and the Criminal Code to effectively enforce against illicit camcording (Bill #3081-d included an amendment to the Criminal Code Article 176 to criminalize camcording, but was vetoed after passage, and is currently back in the Verkhovna Rada for reconsideration). Theatrical piracy is also a problem in Ukraine, especially a small theaters which screen pirate prints without a license which is a violation of the Administrative Code (Article 164-6). In 2016, there were 29 incidents of theaters engaging in these acts; 22 theaters were ordered to close operations, and criminal cases are pending.

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.

Administrative and Customs Enforcements: The Government of Ukraine should focus administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions. In addition, *ex officio* authority should be used to improve border controls, especially along the Russian border, focused on railroad traffic.

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).

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Ukraine is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement.

In 2001, Ukraine acceded to the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), which entered into force in 2002. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete

and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of “intentional” circumvention, which is a major impediment to protection.

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. For example, addressing the problems of ISP liability, notice and takedown, administrative remedies, and fixing or eliminating the hologram sticker program, are all covered in the 2010 Action Plan, and have not been properly addressed by the Government of Ukraine.

LEGAL REFORMS

The recommended legal reforms needed in Ukraine, in addition to full WIPO Digital Treaty implementation, as well as some of the other reforms already noted in this filing, include:

Copyright Law: Bill #3081-d (now under reconsideration) has a variety of provisions on ISP liability, camcording sanctions and notice and takedown. There is an alternative bill (Bill #4629) as well. To be effective, notice and takedown should not (as earlier drafts 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).

In sum, Bill #3081-d, introduced in 2016, would have instituted notice and takedown provisions without the need for a state authority or court (but, by a licensed lawyer), and included a “repeat infringer clause” which would have served to prevent infringing content from reappearing. This bill included amendments to the Copyright Law, the Law on Telecommunications and the Code on Administrative Offences, to promote a fair and effective response to online piracy, including: (1) legal incentives for web operators and ISPs to cooperate with rights holders to remove infringing online content; and (2) a duty to provide information to law enforcement agencies and rights holders. The bill also includes amendments to the e-Commerce Law enacted in September 2015 to correct the overbroad exemptions from liability for ISPs and hosting service providers, which go beyond international norms. The bill was adopted by the Verkhovna Rada (the Parliament) in late 2016, but vetoed by the President who sent it back to the Verkhovna Rada for further amendment. Important amendments are needed to make the procedures simpler and workable, to clarify definitions, and address burdensome notice requirements, as well as to clarify and align the scope of this legislation and the e-Commerce Law.

Providing clear third party (ISP) liability is critical to effective enforcement and cooperation with rights holders. There is currently no liability for legal entities engaged in IPR crimes. Unfortunately, the IAU has worked against ISP liability reforms, including basic notice and takedown provisions, in the many bills proposed recent years.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) excluding camcording from the scope of the private copy exception (in addition to the Criminal Code amendment); (3) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (4) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (5) 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); and (6) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

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. The draft bill has broad support from international organizations (e.g., IFPI, ICMP, CISAC), but has been rejected by the MEDT. Instead, in late 2016, proposals (Bill #4461) were endorsed by the Government of Ukraine (MEDT) that are contrary to the advice of the EU and U.S. experts, and would make these organizations less transparent and less likely to fairly compensate rights holders. The Bill #4461 proposes the creation of a single “super” collective management organization, combining all music rights holder interests (songwriters, lyricists, publishers, producers and performers), which would not work effectively or be market driven, and is contrary to international practice (and contrary to the EU-Ukraine Association Agreement and the EU Directive on Collective Rights Management).

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: Bill #3081-d includes amendments to Article 176 to ensure the availability of criminal remedies against online piracy of all works and sound recordings (current law only applies clearly to hard copy piracy); it would also sanction camcording. Also needed are: (1) remedies against repeat infringers (within twelve months) that would automatically lead to criminal, not solely, administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement (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).

Administrative Remedies: Administrative remedies 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 ISSUES

The Government of Ukraine continues to maintain onerous market access barriers. Two of these barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium. In December 2015, the Government of Ukraine adopted a law on VAT that discriminates against foreign films. It applies to the distribution, theatrical exhibition and other public performances of 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. The Law on Cinematography should be amended to repeal this requirement of local production of film prints.

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 revised 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 (which is still in force).

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.

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2017.¹

Executive Summary: Vietnam's market for legitimate creative goods and services remains a fraction of its potential, hampered by Vietnam's mounting piracy problems and its onerous market access barriers. While Vietnam's Government has indicated a willingness to cooperate with right holders and a recognition of the "sophisticated" and serious nature of its piracy problem, much more needs to be done. As the chair of the Asia-Pacific Economic Cooperation (APEC) for 2017, the time has come for Vietnam to make good on its international commitments, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace. Vietnam must take more affirmative enforcement actions against piracy, such as issuing deterrent administrative penalties against infringers and spearheading criminal prosecutions, beginning with major online piracy operations based in Vietnam. Vietnam's piracy problems would also be reduced if the country removed its highly restrictive market access barriers, which, by limiting Vietnamese consumers' access to legitimate content, pushes them towards illegal alternatives. A positive development, which IIPA hopes the Government of Vietnam and Vietnamese industry will support, is the establishment of a pilot program to ensure online advertisers and brand owners do not inadvertently place their ads or products onto piracy websites. In addition, a new film classification system, which entered into force in January 2017, should have a positive impact on the development of the theatrical market. Vietnam should build on recent regulatory reform efforts, move to eliminate discriminatory barriers, and take steps to bring its copyright protection and enforcement frameworks into alignment with the Bilateral Trade Agreement (BTA) with the United States and with evolving global norms, including those it agreed to implement in the Trans-Pacific Partnership (TPP).

PRIORITY ACTIONS REQUESTED IN 2017

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, including against operators of such sites.
- Have the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, Ministry of Information and Communication (MIC) and Ministry of Public Security (MPS) IPR/High-Tech Police and related police units conduct more operations focused on online infringement, issuing deterrent administrative penalties, and bringing criminal prosecutions where appropriate.
- Encourage universities to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks and other course materials.

Legislation:

- Make necessary changes to laws and implementing Decrees and Circulars, including the IP Code and the Criminal Code, to ensure Vietnam is in full compliance with its BTA, TRIPS, and other international obligations, including, in particular, clarifying and confirming that "commercial scale" IP violations under the Criminal Code

¹For more details on Vietnam's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Vietnam's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



(1) apply to online distributions; and (2) that the thresholds can be interpreted to include infringement that is significant even absent a profit motive.

- Afford adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Extend the term of copyright protection to be in line with the international trend 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.
- Eliminate the legal and procedural impediments that interfere with the ability to take effective action against Illicit Streaming Devices (ISDs) and the apps that enable ISD piracy.

Market Access

- Eliminate foreign investment restrictions, quotas, 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.²

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.”³ Yet, thus far, Vietnam’s actions to combat piracy, including actions taken pursuant to a 2012 MIC and MCST Joint Circular 07⁴, have been inadequate to address its piracy challenges, including those identified below.

Internet and Mobile Opportunities, Challenges in Vietnam: More than half of the Vietnamese population is online, with most of that access stemming from mobile broadband subscriptions.⁵ Vietnam’s large population of young people and rapidly growing online and mobile user base offer enormous new opportunities for legitimate services for creative content. And, indeed, a growing number of licensed Internet content providers are trying to take 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 as vehicles for the distribution of content, including local Vietnamese content. Two new video on demand (VOD) services were launched in Vietnam in 2016: Film+ (“film plus”) and Dannet. Netflix is also available.

As these opportunities increase, however, Vietnam faces the mounting challenge of combating online and mobile network piracy, including through streaming and download sites, peer-to-peer (P2P) networks, linking sites, video streaming sites, search engines, cyberlockers, and social media networks. Streaming of unlicensed music through websites and mobile apps is rising. One major global piracy site, *putlocker.is*, is operating out of Vietnam.⁶ Other piracy sites include *chacha.vn*, which makes available a significant amount of infringing music, including both

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

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

⁴*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 07”).

⁵According to Internet Live Stats, in 2016 52% of Vietnam’s population was using the Internet. See Internet Live Stats at <http://www.internetlivesstats.com/internet-users-by-country/>. The International Telecommunication Union (ITU) indicates that 39% of Vietnamese people had mobile broadband subscription in 2015. See ITU’s *Measuring the Information Society Report 2016*, at p. 247, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>.

⁶*Putlocker.is* allows users to stream pirated versions of motion pictures and television programs from cyberlockers using an embedded player on the site as well as links. The movie industry noted *putlocker.is* in its submission to the U.S. Trade Representative (USTR) in advance of its 2016 out-of-cycle review of “notorious markets.” USTR recognized *putlocker.is* on its 2016 list, one of a number of notorious sites hosted in Switzerland, noting that its operator is located in Vietnam.

Vietnamese and popular foreign music.⁷ *Chiasenhac.com* (Alexa ranking 144) is another popular music site that allows users to stream unlicensed Vietnamese and international music.⁸ *Zing.vn* provides access to unlicensed music for download and streaming.⁹ Other sites providing unlicensed music and music video content for download and streaming include *nhac.pro.vn* (also *nhacpro.net*) (960th), *nhac.vn* (324th), and *tainhacmp3.vn* (855th). Sites such as *nghenhac.in* (and related sites), *phimmoi.net* (38th), *hdonline.vn* (80th), *phim14.net* (128th), *phim3s.net* (107th), *xemphim.com* (and related sites), *socbay.com* (and related mobile app), *HDViet.com* (136th),¹⁰ *phim22.com*, *tamlay.vn* (718th), *animetvn.com*, *xemphimso.com*, *phimnhanh.com*, *viettorrent.vn* (423rd), and cyberlockers like *fshare.vn* (97th), and *4share.vn* (351st) remain of concern to the motion picture and television industry. Most of these sites generate revenue through advertisements or through paid subscriptions for premium service. Even licensed sites inadvertently contribute to global piracy because most music sites do not have efficient geo-blocking systems and, therefore, the content becomes available elsewhere.¹¹ The harm caused from online piracy is significant and makes it nearly impossible for legitimate online platforms to compete with pirated sites. And, for the motion picture industry, it implicates the life cycle of filmed entertainment, as 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.¹² In June 2016, MIC and MCST took an important step by promulgating a Joint Circular to provide guidance for changing and revoking domain names that infringe intellectual property laws.¹³ Yet it remains to be seen whether this Joint Circular will be effective in disrupting online infringers. In addition, the MIC, in response to an administrative complaint, recently imposed a fine on an infringing website and ordered it to take down infringing content. More such actions are needed, especially against the top infringing sites.

Unfortunately, however, industry notes the process of addressing infringements is cumbersome and is done on a case-by-case basis. It is not helpful that Vietnam's domain registrar, Vietnam Internet Network Information Center (VNNIC), is not required to provide contact and registration information of website owners in the WHOIS lookup database, making tracing the owners of infringing websites extremely difficult and hampering enforcement. Many offending rogue sites remain in operation and are growing in popularity. 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 07 (JC), including bringing criminal prosecutions.¹⁴ The Inspector of MIC should use the authority granted

⁷*Chacha.vn*, a free to use direct download site, has a large amount and wide variety of infringing music available on the site. 1554 takedown notices were sent to the site in 2016, which included 8624 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.

⁸*Chiasenhac.com* (also *chiasenhac.vn*), which has an Alexa ranking of 144 and receives 5 million monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC. As a result of an administrative complaint filed in 2016 with the Ministry of Information and Communications against *chiasenhac.com*, the site was fined and ordered to remove all infringing contents.

⁹Although *Zing.vn*, the top music platform in Vietnam, 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. That said, in 2016, *Zing.vn* has implemented a geo-blocking system, which at least is helping to prevent access to infringing content from outside Vietnam.

¹⁰This site has the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications."

¹¹SimilarWeb estimates that visitors from the United States and Japan are the second and third top foreign visitors to Vietnam's music sites.

¹²For example, in 2014, reportedly, two infringing mobile applications were shut down and administrative penalties were imposed on the developers/operators. In April 2013, the Ministry of Culture, Sports, and Tourism (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*.

¹³See Joint Circular 14/2016/TTLT-BTTTT-BKHCN.

¹⁴Joint Circular 07 (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

under the JC to enforce against these types of violations more effectively, particularly against those websites that are under MIC licenses. IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, including the MCST Inspectorate, MPS IPR/High-Tech Police and related police units (including the Hanoi local High Tech Crime Police (PC50), the High Tech Crime Police (National) (C50), and the Security Police (P83)); and increased prosecutions by the Supreme People's Procuracy.

The level of cooperation with Internet Service Providers (ISPs) improved in 2016 due to the introduction of new legitimate services, which are provided on some key ISPs. The music industry, for example, reports an improved takedown rate from of 92% in 2016. Unfortunately cooperation is limited because ISPs claim that under the JC they are unable to take action against piracy websites without government intervention. Thus, while high piracy levels continue to distort the marketplace, ISPs will only take down infringing content when instructed by government authorities. The JC should be amended to correct this problem and encourage greater cooperation.

A positive development is that the local audiovisual industry, with U.S. rights holders, has established a pilot program to work with online advertisers and brand owners to ensure they do not inadvertently place ads or sell products on piracy websites in Vietnam. IIPA would welcome support of this initiative from the Government of Vietnam as well as from Vietnamese industry to begin to choke the revenue stream of piracy sites. 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 music industry intends to discuss the possibility of a Memorandum of Understanding with ISPs in the coming year to increase cooperation. The situation for motion picture companies is also difficult. In general, most ISPs are cooperating by not placing pirated films on their VOD services, but more needs to be done to ensure full compliance on all the services they provide. For example, under the terms and conditions with websites they host, there is no provision for the termination of services due to copyright infringement.

With rapid increases in the number of mobile phone subscribers in Vietnam, there has also been an increase in mobile network piracy over the past couple of years. Right holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto devices at the point of sale; and 2) "apps" designed to access infringing sites from 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.

Illicit Streaming Devices (ISDs) and Apps: ISDs¹⁵ are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world. China is a hub for the manufacture of these devices. The devices, gaining popularity in Vietnam, may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities is enabling users through apps, to access remote online sources of unauthorized motion pictures or television programming. The apps may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an "after sale" service, or by the users themselves, often utilizing easy to follow instructions provided by the vendor. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The Vietnamese Government, including MCST and MIC, must

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."

¹⁵In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement. Moreover, Vietnam should take action against key distribution points for devices that are being used illegally.

Ex Officio Enforcement Needed Against Hard Goods: 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, including of audiovisual “box sets,” as well as home-made pirated optical discs) remains a real threat. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions. To the extent the Criminal Procedure Code does not currently make it possible to take *ex officio* actions, it should be amended.¹⁶ 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.

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. In 2015, in the course of its cease-and-desist campaign against multiple copy shops and bookstores in Ho Chi Minh City and Hanoi, the Association of American Publishers (AAP) uncovered a domestic book printer that appeared to be engaged in unauthorized reproduction and distribution of the copyrighted works of AAP member publishers. The book printer produced large quantities of unauthorized ELT materials and text books, and openly sold them in book stores that it operated. Unlicensed print overruns also continue to harm foreign 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 civil and criminal courts are not a realistic 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.

¹⁶Article 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.

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. A camcording of a major motion picture was recently found on Youtube with Vietnamese subtitles. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. 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 CGV cinema. The perpetrator also admitted that he had recorded and uploaded additional films.¹⁷ 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.

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).¹⁸ 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.

Vietnam committed to raising its standards in the TPP and, although TPP is unlikely to enter into force, Vietnam should press forward with reforms to spur development of Vietnam’s creative industries. As the chair of APEC for 2017, Vietnam has an opportunity to show the world a positive example on intellectual property rights protection and enforcement. At minimum, Vietnam should close the gaps between its current legal framework and its unmet international obligations, including those it committed to in the BTA with the United States.¹⁹ Unfortunately, some recent changes noted below may have moved Vietnam further from those standards. We are hopeful that Vietnam will raise its standards for copyright protection and enforcement to at least meet its BTA obligations as quickly as possible.

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. 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 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.”²⁰

¹⁷Six 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.”

¹⁸Decree 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).

¹⁹Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA), Chapter II on Intellectual Property Rights.

²⁰Article 30(1)(b) should be clarified to ensure it provides a making available right, as well as a distribution right, and that it covers any form of transmissions of sound recordings, including interactive and non-interactive digital transmissions. 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 WIPO Performances and Phonograms Treaty (WPPT).

- 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, which were found by a WTO panel to violate China’s WTO obligations.²¹
- 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, including TRIPS Article 13 and Article 4.9 of the BTA.²²
- 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.
- Article 203 fails to provide an adequate presumption of copyright ownership, potentially running afoul of Vietnam’s commitments in the BTA (Article 3.2), as well as TRIPS.

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,²³ it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.²⁴ 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.²⁵ Vietnam should amend the Criminal Code to ensure all infringement on a commercial scale and signal theft can be subject to criminal liability. The Vietnam Government should immediately issue implementing regulations for the Criminal Code to confirm that it applies to online distributions and other violations of the IP code, and that “commercial scale” infringements are not limited to those undertaken with a profit motive. Otherwise, the U.S. should commence consultations in accordance with Chapter VII, Article 5 of the BTA to resolve these violations.

Administrative Enforcement Decree Must Be Implemented in Practice: As reported previously, the Administrative Violations Decree (No. 131) reduced the maximum administrative fine for an individual to VND250 million (US\$11,057), and set the maximum fine for an organization at VND500 million (US\$22,115). The following fines are also set forth: 1) VND400 to 500 million (\$US17,692 to \$22,115) against an organization that imports an unauthorized copy; 2) VND70 to 100 million (US\$3,096 to \$4,401) against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million (US\$663 to \$1,546) 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

²¹Article 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.

²²Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes”; Article 25(1)(f) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns”; and Article 25(1)(j) allowing importation of copies of others’ works for personal use remain problematic. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audiovisual 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. Articles 7(2), 7(3), and 8, referenced above, are overbroad exceptions that run afoul of the three-step test.

²³For 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.

²⁴The 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.iipawebsite.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

²⁵See BTA Article 14.

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.²⁶ 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.²⁷ 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.

Decree No. 72 Ignores Piracy: Decree No. 72 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information unfortunately fails to include copyright infringement on the list of prohibited acts that trigger sanctions and remedies. Vietnam should amend this decree to ensure that piracy is included among the Decree No. 72's prohibited acts and, thus, eligible for remedial action, including the remedy of disabling access to infringing websites.

Certain Enforcement Provisions Inconsistent with the BTA: A number of Vietnam's enforcement provisions are inconsistent with obligations in the BTA. For example, the availability of pre-established damages is limited and the amount is inadequate. BTA Articles 12.2.D and 12.3, require the availability of pre-established damages "adequate to compensate for the injury the right holder has suffered..." As noted above, Vietnam's remedies for civil and administrative enforcement allow for distribution or use for non-commercial purposes of infringing goods and the materials and means for producing them, falling short of Vietnam's obligations in BTA Article 12.4 and TRIPS Article 46. Similarly, Vietnam's remedies for infringement at the border also allows for distribution or use for non-commercial purpose of infringing goods, which does not meet its obligations in the BTA (Article 15.12) and TRIPS (Article 59).

ISP Liability Should be Amended to Meet Modern Challenges: Joint Circular 07 (JC) merely requires intermediaries to take down infringing content and terminate services under certain circumstances, but this authority has been used only where online services and websites are directly infringing, and no contributory liability provision exists in the JC or elsewhere in Vietnam's legal framework. The JC does not include any requirement for intermediaries to take down infringing content in response to a notice received directly from a right holder and the requirements of JC Article 5 appear to apply only where the government has intervened. What is needed are clear legal incentives, including secondary liability, that ensure online platforms do not engage in infringing activities, especially regarding the making available right, and, secondly, that ensure neutral intermediary service providers will cooperate with right holders to deter unauthorized storage and transmission of copyrighted materials. For example, the "right" for ISPs to take measures to prevent infringement under Article 4 should be required as an obligation, rather than a right. And the requirements in Article 5 for ISPs to remove and erase digital content that violates copyright and suspend services should be clarified to ensure ISPs are held liable at least for infringements that ISPs control, initiate, or direct, and for infringements that ISPs fail to expeditiously remove or disable access to upon obtaining knowledge, such as notification from a right holder.

²⁶Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

²⁷For 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.

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.²⁸ 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 pirated product, instigating a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam’s cultural sector, Vietnam should look to internationally accepted standards and practices, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

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 the Decision appear to be hortatory in nature, the Vietnamese Government should, in the recently proposed amendment to the Cinematography Law, remove the quota. 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 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.²⁹ 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. In 2016, MIC indicated it is considering treating pay-TV services as a form of utility, which could affect the current free market pricing and competition. 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—and the process lacks transparency. In a positive development, MCST introduced a

²⁸See 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, available at http://www.nhandan.com.vn/english/culture/171208/culture_v.htm.

²⁹Decree 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.

film classification and rating system in January 2017. IIPA is hopeful that the classification and rating system will spur development of the theatrical market.

Barriers Specific to the Video Game Industry

Decree No. 72 Restricts Video Game Right Holders: Decree No. 72 on the management of Internet services and online information creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. However, 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. We also urge Vietnam to work towards commitments agreed to in TPP to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

Barriers Specific to the Music Sector

Onerous Market Access Restrictions on the Music Sector: Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, also 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,³⁰ and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As outlined above, Vietnam's copyright protection and enforcement frameworks are inconsistent with its international obligations in many respects. These include the following:

- all infringement on a commercial scale is not subject to criminal liability consistent with TRIPS Article 61 and BTA Article 14;
- a number of copyright exceptions are overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;

³⁰The 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 MCST 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.

- remedies for civil, administrative, and border enforcement permit “non-commercial” distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- inadequate enforcement framework including no criminal infringement cases proceeding to the courts, complicated and non-transparent civil procedures, and inadequate training for enforcement officials which is inconsistent with Vietnam’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- term of copyright protection falls short of the requirements of BTA Article 4.4;
- presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2; and
- inadequate remedies against signal theft, in violation of BTA Article 5.

WATCH LIST

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2017.¹

Executive Summary: In a year of political tumult and economic stress in Brazil, there were no dramatic changes in the environment for the copyright industries. A legitimate Internet marketplace for copyright materials in Brazil continues to develop, but pervasive piracy operations targeting the Brazilian market still hampers the healthy growth of e-commerce in creative works. Federal criminal enforcement that took down three leading piracy websites was an isolated bright spot; otherwise, the online piracy ecosystem—including the growing phenomenon of “stream ripping” services, a particular threat to legitimate digital music services—remained largely undisturbed by Brazilian law enforcement. The roster of notorious physical marketplaces (including in São Paulo) for products and services enabling widespread video game piracy, as well as for counterfeit optical discs, remained unchanged. The main obstacles to an effective anti-piracy response include inadequate resources, insufficient training, jurisdictional frictions among federal and state authorities, and the lack of an overall national strategy and the political will to implement it. The legislature’s congressional commission on cybercrime, *CPI do Cibercrime* (CPI), cybercrime commission could help spark some of the needed changes; however, the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) remains an underutilized resource. That could change if, in 2017, CNCP adopts and implements a national strategic plan that gives priority to criminal enforcement against well-established pirate operators, and to active government encouragement for voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. Enactment of pending legislation against camcording, and setting guidelines for court orders on blocking access to websites dedicated to pervasive piracy (as developed by CPI), are also needed steps forward. Implementation of the 2014 Marco Civil legislation must also be carefully monitored to ensure that it preserves space for voluntary notice and takedown for copyright infringement, and other inter-industry cooperative efforts. 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. A wide range of market access barriers for the audiovisual sector also remain to be addressed.

PRIORITY ACTIONS REQUESTED IN 2017

Enforcement

- Launch additional 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.
- Adopt, fund and implement a CNCP strategic plan that prioritizes encouraging cross-industry efforts to combat Internet piracy, and that extends CNCP training and coordination activities to the fight against Internet piracy.
- Ensure that all cities in the “City Free of Piracy Initiative,” including São Paulo, are devoting adequate resources and using all available legal tools to combat pirate marketplaces and distribution chains within their jurisdiction.
- As steps toward a deterrent enforcement system, implement a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.

¹For more details on Brazil’s Special 301 history, see previous years’ reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Brazil’s Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



Legislation and Regulation

- Enact pending legislation to authorize court orders requiring Internet service providers (ISPs) to block access to offshore websites dedicated to criminal activity, including criminal copyright infringement.
- Enact pending legislation to provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation do not interfere with voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Advance the efforts of the CPI for legislative reforms and clarification of jurisdictional boundaries to enable inter-agency coordination needed to effectively address online copyright theft.
- Reduce high tariffs and taxes placed on video game products in order 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 audiovisual quotas that discriminate against non-Brazilian content.

COPYRIGHT PIRACY IN BRAZIL

Internet Piracy: Internet access continues to grow in Brazil, with over 59% of Brazilian households online, and nearly 89 mobile broadband subscriptions per 100 inhabitants.² Increasingly, these connections are used to access legitimate, licensed sources of copyright materials. According to music industry research, more than two-thirds of urban Brazilian Internet users consume music via smartphone, one of the highest proportions in major world markets, and 52% patronize audio streaming services, half of these on a paying subscription basis.³ Music industry digital revenues in Brazil increased 45% in 2015, led by streaming revenue, which nearly doubled. Digital is now the single leading contributor to music industry revenues in Brazil, the world’s tenth largest music market.⁴ Some 14 legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.⁵ Similarly, at least a dozen free or low-cost online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime as the most recent entry in the market. Most pay-TV operators also provide TV Everywhere services, allowing subscribers to access authenticated content across multiple platforms. All this makes Brazil the region’s most competitive and largest online video market, reaping an estimated total of US\$527 million in gross revenue in 2016. Online access in Brazil to legitimate video game play is available through Xbox Live and PlayStation Network.

Despite 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. Government and private sector studies described in previous IIPA Special 301 submissions documented the huge volume of Brazilian IP addresses engaged in unauthorized downloads using the BitTorrent Peer-to-Peer (P2P) protocol⁶, and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.⁷ While the increasing ubiquity of legal alternatives may have ameliorated these adverse trends, it has hardly eliminated them. A recent motion picture industry report noted “over 400 piracy websites

²International Telecommunications Union, *Measuring the Information Society Report 2016*, at p. 244, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>.

³Ipsos Connect, *Music Consumer Insight Report 2016*, at pp. 6-8, available at <http://www.ifpi.org/news/IFPI-and-Ipsos-publish-Music-Consumer-Insight-Report-2016>.

⁴IFPI, *Global Music Report* (April 2016), at p. 110, available at <http://www.ifpi.org/recording-industry-in-numbers.php> (“GMR 2016”).

⁵<http://www.pro-music.org/legal-music-services-latin-america.php>

⁶See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <http://iipawebsite.com/rbc/2016/2016SPEC301BRAZIL.PDF> (“IIPA 2016”) at p. 67, documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

⁷See 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/images/stories/PDFs/comunicado/120510_comunicadoipea0147.pdf (unofficial translation on file with IIPA), summarized in IIPA’s 2013 Special 301 submission, at p. 106, available at <http://www.iipawebsite.com/rbc/2013/2013SPEC301BRAZIL.PDF> (“IIPA 2013”).

dedicated to the Brazilian market [that] are currently in operation, 57 of which receive over one million visitors per month. Combined, these pages offer over 13,000 national and foreign titles, including movies that are still in theaters, and have recorded 1.7 billion visits” in the 6-month period ending May 2016.⁸ Monetizing the digital market for music in Brazil remains difficult in the face of piracy, and per capita spending on music remains very low, 64% below the corresponding figure in Argentina, for instance.⁹ Industry research indicates that some 40% of all Brazilian Internet users access infringing content services on a monthly basis. And even as some high-profile piracy sites have been taken down in well-publicized operations in recent years, as discussed below, many popular and well-monetized sites persist, and new infringing sites have proliferated.

Internet piracy problems in Brazil feature three 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, they are clearly targeted to the Brazilian market. Many appear to have local operators, and rely on local intermediaries (such as advertising providers and payment processors) for monetization channels. 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 audiovisual material.¹⁰ Another industry study found that the Brazilian user base of such notorious sites providing links to offshore piracy repositories increased 14% in 2016. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring. The files to which such sites link are generally stored on offshore hosting sites such as *4shared.com*, identified as a notorious market site in USTR’s 2016 Special 301 Out-of-Cycle Review, and itself one of the 50 sites most visited by Brazilian users.¹¹ One local cyberlocker site, *minhateca.com.br*, hosted more than half a million infringing music files that were reported by the recording industry and removed in 2016.

Infringing Portuguese-language linking sites for illegal video games available for download in Brazil 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 and torrent sites) produce monthly revenue ranging from US\$4,000 to US\$30,000 from subscriptions, donations and/or advertising revenue. The top 20 sites generate over 40 million monthly visits. Examples of these types of sites include: *roxroms.net*, *mundoeu.net*, and *romsup.com*. 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 continue to thrive and pose a serious threat for the entertainment software industry as well as other sectors. The Entertainment Software Association (ESA) reports that in 2016, for the sixth 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, Brazil topped the world’s list for volume of unauthorized file sharing using consoles; it ranked second for PCs and fifth for mobile devices. The most popular torrent sites for Brazilian gamers in search of illegal content include *torrentgames.biz*, *gamestorrents.biz*, and *jogosandroidgratis.com*, with growing levels of access to other P2P services such as *gamesviciantes.net* and *baixargamestorrent.biz*. Private paid torrent forum sites focusing on music piracy include *cpturbo.org*, *manicomio-share.com* and *speed-share.com*, while the most popular such sites

⁸Tendências Consultoria Integrada, *The Economic Impact of Brazil’s Audiovisual Industry* (October 2016), at pp. 57-59, available at (http://www.mpaamericalatina.org/wp-content/uploads/2015/12/MPAAL_10_04_2016-english-fv.pdf).

⁹GMR 2016 at p. 57.

¹⁰NetNames 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>.

¹¹USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) (“USTR NM”), at p. 7 and n. 12. available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

for access to infringing movies and TV shows include *comandofilmes.net*, which harvests revenue from advertising and from the sale of premium accounts, and which receives over 10 million visits per month, 94% of them from Brazil, according to the website audience monitoring service Similarweb.¹² Overall, last year's 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."¹³

A third major channel for online piracy is of particular concern to the music industry. "Stream ripping" websites circumvent technological protection measures and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models both of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. According to Similarweb, Brazilian stream ripping site *Baixartube.com.br* received more than two million individual visits from Brazil between October and December 2016. Brazilian internet users also often turn to stream ripping sites that have a localized version but are hosted outside the country. For instance, *YouTube-mp3.org* offers a Portuguese interface, and received more than 24 million individual visits from Brazil in December 2016 alone.

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.¹⁴ Similarly, while robust growth of the legitimate market for online music continues, the fact remains that this marketplace is dominated by illegal sources. For example, the music industry estimates that music tracks valued at \$645 million were downloaded via stream ripping alone in Brazil during 2016, compared to a licensed market worth \$247 million in 2015.

Hard Goods Piracy: Even though Internet piracy is clearly growing faster than physical piracy in Brazil for films, TV programming and video games, online products demand high bandwidth, so strong demand persists for pirate physical copies. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. In the case of video games, hard goods piracy takes several forms. Pre-loaded devices with illegal copies of videogames are readily available, in both online and street markets, including the notorious Galeria Page market in São Paulo, identified by USTR in its latest Out-of-Cycle Review.¹⁵ 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. 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.¹⁶ 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 content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes.

Another 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 for R4 devices and other game copiers. Typically, sellers of the

¹²The same attributes, and similar levels of visitor volume, characterize a leading Brazilian illicit streaming site for infringing films, *filmeseriesonline.net*.

¹³Supra n. 10 at p. 33.

¹⁴The new video on demand tax, and other market access barriers discussed later in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

¹⁵USTR NM at pp. 17-18.

¹⁶For example, a Nintendo Sky3DS is typically offered for sale on Mercado Livre with 20 infringing games pre-loaded for BRL279.99 (US\$90).

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\$45). These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software.

Along with the many Galeria Page vendors who traffic in pirated games, game circumvention devices, and game consoles that have been modified to play pirated games, more than 70 shops in São Paulo's Santa Ifigenia street specialize in these illicit products. 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. Other notorious outlets for infringing video game products (as well as for pirate optical discs bearing movies and TV shows) include *Rua Urugaiana* in downtown Rio de Janeiro¹⁷, the *Feira dos Importados* in Brasília, and the *Feira da Sulanca de Caruaru* in the northeast of the country, which supplies many small markets and street vendors.

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 as being burned onto DVD-Rs, and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 16 video and 15 audio camcords of its member companies' films sourced to Brazilian theaters in 2016. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy of independent films and television programming, negatively impacting local, national and worldwide distribution, and hampering 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. However, the case is still pending trial.

Counterfeit Decoders and Illicit Streaming Devices: Like many other markets, Brazil is experiencing increased trafficking in devices that circumvent access controls and enable unauthorized access to encrypted pay TV services, online games, and other copyright content online. Like circumvention devices for video game consoles, these illicit devices are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview: Online Piracy

Brazil's enforcement effort against online copyright crime remains far short of what is needed to combat this serious problem. 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—largely undisturbed. With one major exception, this discouraging trend continued in 2016.

The notable exception involved Operation Blackbeard II, in which federal police built on the success of the 2015 takedown of the major audiovisual piracy portal *megafilmesHD.net*. In October 2016, federal police executed seven search warrants in four states, made five arrests, and shut down three major pirate sites. *Filmesonlinegratis.net*, discussed in past IIPA submissions, had been in operation since 2009, and attracted 36 million visitors per month.¹⁸ The other two sites, *megafilmeshd20.org* and *armagedomfilmes.biz*, had each offered thousands of film and TV titles for free streaming without authorization, monetized through advertising. Altogether,

¹⁷The Camelodromo Urugaiana covers four city blocks and includes over 1500 kiosks, many of them selling illicit optical discs.

¹⁸See IIPA 2016 at p. 68.

the three sites had received about three-fourths of a billion visits per year, 85% of them from Brazilian Internet users. Coupled with last year's takedown, Operation Blackbeard demonstrates the viability of coordinated federal law enforcement action against criminal enterprises engaged in systematic and pervasive piracy. The resulting prosecutions should be closely watched to see what progress is made in 2017 and whether deterrent punishments are ultimately imposed.

While the Blackbeard actions are encouraging, they remain isolated bright spots in an otherwise bleak digital enforcement landscape; IIPA is aware of no other significant criminal prosecutions against online piracy in Brazil in 2016. Clearly, before it can be said that Brazilian law enforcement has gotten off the sidelines and truly taken the field against criminal enterprises engaged in online copyright theft, much more needs to be done. Training, dedication of resources, and infusion of political will among police, prosecutors and judges determined to crack down on widespread online piracy are all deficient. Indeed, an overall national strategy for combating this form of cybercrime is sorely lacking.

The concurrent jurisdiction of federal and state police and prosecutors over enforcement of the copyright laws online presents an additional hurdle. So far, most of the handful of successful prosecutions in recent years have taken place in federal courts, where it is more likely to encounter police and prosecutors with the training and resources to handle these cases effectively. Federal cases also proceed more quickly than in the states. However, bringing the state law enforcement institutions into the fray against online piracy enterprises in a coordinated manner would be a force multiplier, especially if more state police and prosecutors received state-of-the-art training against cybercrime. But the power of law enforcement and courts of a given state to handle these cases, which concern violation of federal laws and which by their nature involve activities not confined to one jurisdiction, has been called into question. The decision of Brazil's Supreme Court in the long-running *Woloski* case, which could come this year, could provide guidance on these jurisdictional issues. Even though that case arose from importation of DVD-Rs containing infringing material, the issue it presents—whether Brazil's international obligations under the WTO TRIPS Agreement are sufficient to establish a federal jurisdictional nexus for infringement cases—has relevance to any copyright cases with an international component, including those arising from Internet piracy. A favorable outcome in *Woloski* could enable a more efficient federal effort, with assistance on the state level, in tackling online piracy through criminal prosecutions.

Civil enforcement should also be part of the solution, including on the state level. In particular, the power of preliminary injunctive relief has great potential, if orders can be obtained quickly. In several cases, these orders have been used to take down large volumes of infringing content, to require ISPs to block access to a group of pirate music websites, or to seize domain names from pirates. A similar injunction was issued against a now defunct P2P service called KLite Nitro. However, if effective preliminary relief cannot be obtained, then backlogs and delays in the civil justice system greatly reduce the value of civil enforcement in the online environment. For example, 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, two years later, the cases are still in the judicial queue waiting for resolution by a first instance judge.

One potential route for mobilizing the needed political, fiscal and other commitments against online piracy is the CPI do CyberCrime, the legislative branch investigative commission formed in July 2015. After spotlighting the online piracy problem in one of its initial public sessions, the CPI developed a legislative proposal (discussed below) to enhance the legal remedies available to block access to websites dedicated to the commission of serious crimes, including criminal copyright infringement. 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, and essential cooperation between the government and the private sector to disrupt the funding base of rogue websites.

The logical forum for implementing a coordinated national effort against online piracy is the long-standing 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. The year ahead presents yet another opportunity for CNCP to reverse this trend. CNCP underwent a reorganization in late 2016, and now has new members from both the government and the private sector. Its first order of business in 2017 will be to develop a new 3-year strategic plan (the previous plan expired in 2016). It is essential that the new plan give top priority to combatting widespread online enterprises dedicated to copyright infringement. For example, it is past time for the CNCP's "Cities Free From Piracy" initiative to make the transition to the cyber environment, and to ensure that the local law enforcement agencies and courts, which CNCP 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, advertising networks, payment providers, and the like. While CNCP efforts to provide a forum for inter-industry discussion have foundered in the past several years, 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.

The majority of international companies operating in Brazil, and a lesser proportion of local ISPs and online marketplaces, are already somewhat responsive when rights holders bring infringements to their attention. 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 send a strong message that would 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

The copyright industries in general enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. But while 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 the hard goods piracy that remains a significant problem. 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.¹⁹ Even in cities that are at least formally engaged in the CNCP "City Free of Piracy" program, enforcement efforts have yet to make a real impact on the most notorious pirate marketplaces. This is especially true in São Paulo, the nation's largest city, where enforcement retrenchments by the city government over the past four years mean that retail piracy is resurgent not only there, but in other markets around the country that are supplied from São Paulo. To reverse this trend, local laws that impose liability on the owners and administrators of properties used to carry out the illicit trade must be enforced; this could have a significant disruptive impact on the retail piracy ecosystem. Overall, however, too much of Brazil's judicial system lacks adequate understanding of intellectual property matters, though there are some exceptions (for instance, the specialized commercial courts in Rio de Janeiro which have jurisdiction over IP matters).

¹⁹See, e.g., IIPA 2015 report, at p. 76, <http://www.iipawebsite.com/rbc/2015/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

Redoubled efforts are needed to modernize Brazil's police and courts, to propagate best practices²⁰, and to train judges and prosecutors, before the Brazilian judicial system can play an effective role in addressing piracy.

LEGISLATION AND REGULATION IN BRAZIL

In a year of political turmoil in Brazil, it is not surprising that little legislation of significance to the copyright industries was acted upon in 2016.²¹ The upheavals in the federal government following on the presidential impeachment process have contributed to the lack of forward movement. However, several important bills affecting copyright enforcement were presented to the legislature in 2016, and action may be taken on some of these this year.

Enforcement Legislation: One of the most important new initiatives grew out of the work of the CPI. Bill 5.204/16 would expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside Brazil that are dedicated to the commission of serious crimes punishable by at least two years of imprisonment, a category that includes criminal copyright infringement. If enacted, the legislation would set clear guidelines for use of an important enforcement tool, which has been shown to be highly effective against online infringement in many other jurisdictions. The measure is now pending in the lower house of Congress, which should be encouraged to act on it as swiftly as possible.

A different bill in Brazil's Senate (no. 200/16) takes a diametrically opposed approach. It would amend the 2014 Marco Civil da Internet law to expressly prohibit site blocking under any circumstances. While IIPA urges that this bill be rejected, its introduction underscores how vulnerable the enforcement ecosystem in Brazil remains to improper implementation and elaboration of the Marco Civil legislation.²² As described more fully in IIPA's 2015 report, the Marco Civil 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.²³ 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 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 security measures, whether undertaken by court order, law enforcement request, or voluntarily, 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. In this regard, it is encouraging that the pending Bill 5.276/16, as introduced, secures the rights of private organizations, such as rights holders groups, to carry out reasonable online monitoring activities to protect copyrighted content. Close attention to the legislative progress of the bill is needed 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 continue

²⁰For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. 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. For more details, see IIPA 2016 at pp. 71-72.

²¹While Brazil's 1998 Copyright Law remains seriously outdated, there seems to be no current progress toward positive reform. See IIPA 2015 at p. 78 for a brief summary of the outstanding issues.

²²In a case currently pending before Brazil's Supreme Court, a friend of the court brief asks the court to prohibit any kind of site blocking order. While it is unlikely this case will be resolved in 2017, developments in it should be monitored.

²³See IIPA 2015 at p. 77.

to monitor these developments, not only to ensure that, in fact, there is no adverse impact on current or future inter-industry arrangements to combat online piracy, but also to encourage an appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace.

The persistence of the problem of camcording (recording audiovisual works or soundtracks in movie theaters) of newly-released feature films in Brazilian cinemas, a leading source for illegal online dissemination of these works, requires improved legislation that punishes this criminal conduct without requiring proof of the perpetrator's intent to profit. Bill 6512/16 would accomplish this goal. Its enactment should be a high priority of the Brazilian Congress.

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 referenced above. 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 three years ago, but still awaits action by the full Senate. Enactment of the bill would 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.²⁴

“Normative Instruction on Collective Management in the Digital Environment”: Under the former government, Brazil's Ministry of Culture issued a decision empowering ECAD, the umbrella collective management organization (CMO), to license digital music services without authorization from the rights holders. This authority undermines direct licensing and causes major interference with the commercial aspects of rights licensing. This unjustified intervention in the market raises serious questions regarding consistency with international copyright treaties (which recognize the exclusive nature of the right to license on-demand services), with Brazil's constitutional law, and with industry practice. IIPA urges that the “Normative Instruction” be repealed as soon as possible by the new Ministry of Culture.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While Brazil is not a party with the United States to any bilateral or regional agreements that include obligations with respect to copyright law or enforcement, it is a member of the Berne Convention and of the WTO. The main areas of possible incompatibility with WTO TRIPS standards lie in the enforcement sphere, and specifically whether in practice Brazil provides civil and criminal enforcement that meets the minimum standards of TRIPS Articles 41 and 61. Brazil is not a member of either the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty, though it certainly should be encouraged both to join these treaties and to bring its law into full compliance with them.

MARKET ACCESS AND RELATED ISSUES

High Tariffs, Taxes 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 2016. They act as a significant barrier to legitimate market entry, as a spur to the market for infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the 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

²⁴Among 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.

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, and has resulted in at least one major game publisher withdrawing from the Brazilian market. Finally, Bill 366/2013, which became law on December 30, 2016, imposes a tax on all digitally-delivered content services for the first time in Brazil. While this new tax also applies more broadly to delivery of “audio, video, image and text content by means of the Internet,” it provides additional discouragement for development of the legitimate market for online video games in Brazil.

Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector: Law 12.485 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. CONDECINE taxation levels are re-set every five years, and in 2016, the government proposed eliminating any cap on these adjustments. Fortunately, the proposal was amended to limit increases to the national inflation index (IPCA), a change that increases legal security for all players involved. 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. The MPAA and other stakeholders have prepared an alternative proposal for VOD taxation that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers; we urge ANCINE and the Ministry of Culture to give it favorable consideration.

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. Faced with widespread opposition, ANCINE is not currently pressing for access to confidential contracts; but this could change. Overall, the ANCINE regulatory proposal creates debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. Industry continues to oppose this initiative and seeks to reclaim its legitimate rights.

Screen Quotas: The most recent Presidential Decree on Screen Quotas imposes quotas for 2017 similar to prior years: 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 competing legislative proposals have been introduced that would either loosen

or tighten the restrictions. Quotas limit consumer choice, and have the adverse effect of pushing consumers toward illegitimate content sources. They should be relaxed.

Accessibility in Theaters: In 2016, ANCINE sought public comment on a draft ruling to mandate audio description, closed-captioning, and sign language interpretation in Brazilian cinemas. While the U.S. film industry supports measures to broaden access to its productions and to better serve special needs patrons, it objected to some of the unrealistic deadlines initially proposed. ANCINE agreed to extend the sign language deadline and to form a technical committee of key stakeholders, including MPAA companies, to facilitate timely and effective implementation of these accessibility tools. These developments should be monitored.

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Special 301 Watch List in 2017.¹

Executive Summary: Canada's Copyright Act mandates a full parliamentary review, to commence no later than November 2017, five years after enactment of the Copyright Modernization Act. From the perspective of the copyright industries, the report card on Canadian copyright modernization is decidedly mixed. While the country's legal environment has become somewhat less attractive to the operators of massive multinational online piracy operations, online infringement remains widespread in Canada, hampering the growth of the legitimate digital marketplace. Circumvention devices and services (and, increasingly, illicit streaming devices and apps) remain readily available, especially online. The new law clearly provides insufficient incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement; nor has its "notice and notice" system changed consumer behavior with regards to infringement. Meanwhile, the greatly expanded exceptions to copyright protection that were the hallmark of the Copyright Modernization Act have already caused serious damage to Canada's educational publishing market; and their ill-defined boundaries, in combination with unfavorable decisions of Canadian courts and the Copyright Board, further ratchet up the level of market uncertainty for creative industries in Canada. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business. IIPA urges Canada to employ the statutory review to recalibrate the course set by the Copyright Modernization Act in order to better confront the challenges of today's digital networked marketplace, and asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2017.

PRIORITY ACTIONS REQUESTED IN 2017

- In the statutory review of the Copyright Act, make it a priority to address the crisis in the educational publishing market, including by clarifying the fair dealing amendments in the Copyright Modernization Act that have contributed fundamentally to the crisis.
- 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 and application of new or expanded copyright exceptions, including the globally unprecedented user-generated content exception, with regard to market impact and conformity with Canada's international obligations.
- Direct the Royal Canadian Mounted Police (RCMP) and Crown prosecutors to give high priority to intellectual property rights enforcement, particularly online piracy and the trafficking in illicit streaming devices and other circumvention tools; and provide police, prosecutors and courts with the resources and training required to implement this priority and impose deterrent penalties on major violators.
- Complete the process of bringing the duration of protection for copyright into conformance with evolving global norms.
- Reform the Copyright Board's extremely slow and unpredictable tariff-setting process.
- Remove the cap on radio revenue.

¹For more details on Canada's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Canada's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



KEY TOPICS FOR THE COPYRIGHT REVIEW

After years of consideration, Canada enacted its Copyright Modernization Act in 2012, and finally completed the task of bringing all the legislation's provisions into force in January 2015. This year brings the next significant milestone: section 92 of the Copyright Act requires that a parliamentary review of Canadian copyright law begin by November, 2017. A host of issues deserve full consideration in that review, as outlined below.

1. The Digital Environment

A. The Digital Marketplace in Canada Today

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that 89% of Canadians use the Internet.² More than two-thirds of Canadians listen to some sort of online audio daily, while 78% stream online video,³ and 72% play games on cell phones, tablets, or other mobile devices.⁴ Legitimate digital distribution of creative content in Canada continues to grow. Nearly 30 music services now offer Canadians licensed downloads, streaming, or both,⁵ with revenues from digital delivery of music predominating and continuing to grow, though the pace of that growth has slackened.⁶ 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.⁷

However, there is also evidence that the digital marketplace for copyright content in Canada is still underperforming, and that the pressure on legitimate services from illicit online sources is part of the reason.⁸ For instance, the uptake on legitimate subscription music services lags well behind the levels in comparable countries. Only 11% of Canadian consumers paid for audio streaming services in 2015, far fewer than their counterparts in almost any other developed market surveyed.⁹ While studies documenting the unusually great propensity of Canadian consumers to patronize illegal online sources of copyright material may by now be somewhat dated,¹⁰ an examination of the Canadian legal landscape for online infringement indicates why the exciting potential of this market has not been fully realized.

For a number of years, extending well into the current decade, Canada had a well-deserved reputation as a safe haven for some of the most massive and flagrant Internet sites dedicated to the online theft of copyright material. Over the past few years, however, progress has been made toward rectifying this reputation. This trend continued in 2016 with the successful takedown of the "Kick Ass Torrents" (KAT) operation that included the biggest BitTorrent¹¹ site in the world in terms of visitors and popularity, *Kat.cr*, which was hosted in Canada among other jurisdictions.¹² Although the KAT investigation was U.S.-led, and culminated in the arrest of a Ukrainian national in Poland as the mastermind, Canadian authorities cooperated in the effort. Unlike in some previous cases, it does not

²CIRA *Internet Factbook 2016*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-Internet-trends/canada%E2%80%99s-internet>

³*Id.*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-Internet-trends/Internet-use-canada>. Industry research cited by CIRA asserts that "Canadians on average watch 5.1 more hours of [online] video per month than their American counterparts."

⁴Entertainment Software Association of Canada, *Essential Facts 2016*, available at http://theesa.ca/wp-content/uploads/2016/11/2016_booklet_Web.compressed2.pdf.

⁵<http://www.pro-music.org/legal-music-services-north-america.php>.

⁶IFPI, *Global Music Report* (April 2016), at p. 71, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2016") (showing 13% digital revenue growth 2012-2015).

⁷www.wheretowatchincanada.com.

⁸As CIRA notes, "Canadians are willing to tread on some legal grey areas to access the online content they want." *CIRA Internet Factbook 2016*, supra n. 3.

⁹Ipsos Connect, *Music Consumer Insight Report 2016*, at p. 16, available at <http://www.ifpi.org/news/IFPI-and-Ipsos-publish-Music-Consumer-Insight-Report-2016>.

¹⁰See http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html for a 2012 study finding that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country.

¹¹BitTorrent is by far the leading protocol used by unlicensed Peer-to-Peer (P2P) file sharing networks.

¹²For more details on *kat.cr*, see 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>, as well as IIPA 2016 at 80.

appear that the KAT investigation directly involved the Copyright Modernization Act provision (section 27(2.3)) establishing civil liability for providing services primarily for the purpose of enabling acts of copyright infringement. But the enactment of this so-called “enablement” prohibition continues to provide a helpful new tool for copyright industry efforts to shut down Canadian-connected sites dedicated to piracy, and to help purge the Canadian online environment of these outlaw services that undermine legitimate digital markets for copyright materials worldwide. For example, the enablement prohibition was cited in a consent order filed in the British Columbia Supreme Court in July 2016, which ended longstanding litigation by music companies against *isoHunt*, once among the largest unauthorized BitTorrent sites in the world.¹³

Nonetheless, major online piracy operations still find a home in Canada. These include leading BitTorrent sites such as *Sumotorrent.sx* and *Seedpeer.eu*, and hybrid cloud storage services utilizing BitTorrents, such as *cloudload.com*. 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.

Sites associated with Canada play a leading role in facilitating online theft of recorded music, including through “stream-ripping” technologies, which USTR has recognized as a global challenge to the growth of digital markets.¹⁴ Stream-rippers defeat the technological measures employed by legitimate music streaming services to prevent copying and redistribution of the recordings streamed; they thus undermine the legitimate markets both for streaming and for licensed music downloads. Well-trafficked stream-ripping sites whose domain names are registered in Canada inflict considerable damage worldwide both on music performers and on record labels. Three leading sites in this category, *mp3juices.cc*, *youtubemp3.cc*, and *aiomp3.com*, together accounted for almost 900 million visits in the past year. In addition, *zippyshare.com*, one of the world’s leading sources of illicit recorded music files available before authorized release, is a major cyberlocker service whose domain name is registered by a Canadian company to a Canadian proxy registration service.¹⁵ This advertising-supported site, which has been in operation for more than a decade, 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 motion picture industry reports an increase in deceptively marketed illegal streaming sites, along with the prevalence of illicit streaming devices and mobile applications discussed below.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform. The video game industry reports that sites operated and hosted in Canada, such as *R4cardmontreal.com*, *gamersection.ca*, and *r4dscanada.com*, continue to offer circumvention devices and game copiers for sale. Computer software that effects a “soft modification” of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. In a growing and problematic trend, sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S. are moving to Canadian ISPs for hosting, to evade enforcement action under U.S. law. Canadian hosting services such as Hawk Host and Crocweb are particularly popular with such sites. This trend breathes new life into Canada’s problematic “safe haven” reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. For example, *3roms.com*, a direct download site for multiple game platforms, is registered and operated out of Chilliwack, British Columbia. Even those sites that have been terminated from payment processing services can

¹³Under the order, *isoHunt* was found liable for CAD\$55 million in damages and CAD\$10 million in punitive damages, and *isoHunt* and its principal were prohibited from associating in the future with any service that makes music companies’ recordings available without authorization. For more background on *isoHunt*, see IIPA 2014 Report, at p. 103, available at <http://www.iipawebsite.com/rbc/2014/2014SPEC301CANADA.PDF>.

¹⁴Stream ripping provided the special “Issue Focus” for the 2016 USTR Notorious Markets report, which called it “an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services.” USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) (“USTR NM”), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

¹⁵easyDNS is another Canadian domain name registrar that provides similar services to sites dedicated to piracy.

generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content.

B. Canada's legal regime falls short

Beyond enactment of the “enablement” provision, which targets the sites that clearly are dedicated to promoting copyright theft, the challenge of online infringement is a much broader one, to which Canada's Copyright Act simply fails to respond adequately.¹⁶ The statute still lacks important tools that world-class copyright laws now routinely provide for dealing with infringement that takes place in connection with more legitimate online services. And the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law provides inadequate incentives for cooperation by a range of other legitimate players, such as advertisers, payment processors, and domain name registrars, whose services are all too often abused to facilitate online copyright theft. For example, data sourced from International Federation of the Phonographic Industry (IFPI) investigations suggest that Toronto-based WWWPromoter is the fastest growing advertising network enabling the monetization of infringing music sites in Canada and worldwide through revenue-generating advertisements.

There is no evidence that Canada's “notice and notice” system, which came into force in January 2015, is contributing to any significant change in consumer behavior with regard to infringement. IIPA endorses the concept of ISPs sending notices to their users to alert them that their accounts are being used for infringing purposes. However, simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving the notices lacks any meaningful consequences under the Canadian system. 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.¹⁷ Some right 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 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.¹⁸ Better 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.

More fundamentally, “notice and notice” was never even intended to address a different and very serious problem: hosting service providers who fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. So long as known infringing content remains readily accessible online, the battle against online piracy is seriously compromised. 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 “notice-and-takedown” remedy that most other modern copyright laws provide is far from a panacea for online piracy, but it does, at a minimum, provide some incentives for cooperation, incentives that Canada's laws simply lack. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Taken as a whole, these 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. In the upcoming Copyright Act review, Canada should look for ways to make its current

¹⁶The shortcomings of the legislation are detailed in past more extensive analyses of the Copyright Modernization Act by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 (“IIPA 2013”), available at <http://www.iipawebsite.com/rbc/2013/2013SPEC301CANADA.PDF>, at 127-131, and other sources referenced therein.

¹⁷Cf. the data retention obligation contained in section 41.26(1)(b) of the Copyright Act.

¹⁸See section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

regime more effective, and to provide meaningful incentives to stimulate full inter-industry cooperation against online piracy.

C. Copyright Board needs reform

Another factor contributing to continued underperformance in the digital music space arises from the inefficient and unpredictable tariff-setting process before the Copyright Board, where on average it takes three-and-one-half years, and in significant cases five years or more, to complete hearings, and another two years or more to render a decision. These extreme delays make economic forecasting nearly impossible for stakeholders, and have become a barrier to some copyright industries doing business in Canada. Furthermore, the Board's process is unpredictable and lacks any specific rate-setting criteria, other than an overarching requirement that royalty rates be "fair." Unlike comparable tribunals in the U.S. and around the world, the Board is not required to use the willing buyer/willing seller principle as a benchmark for determining the commercial value of the rights in question. These problems should be addressed in the upcoming parliamentary review.¹⁹

The Board's recent decision in the "Tariff 8" proceeding highlights these challenges. The 2014 decision, rendered six years after the tariff was proposed, set rates for webcasting at a small fraction of the rates negotiated in the marketplace or those applicable in neighboring markets. The rates fall far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery. The Board's decision was appealed to the federal courts, with a decision expected in 2017.

2. The Educational Publishing Crisis, and Other Fallout of New/Expanded Copyright Exceptions

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.²⁰ 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, as IIPA has previously reported, that system has been all but destroyed. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.²¹ The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22.9 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.²² A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

¹⁹A Canadian Senate committee has "strongly recommend[ed]" that the Copyright Board be examined in the context of the Section 92 copyright review. See http://www.parl.gc.ca/content/sen/committee/421/BANC/Reports/2016-11-25BANCFINALVERSIONCopyright_e.pdf

²⁰For detailed analysis of the concerns raised by some of these new exceptions, see e.g., IIPA 2013, at pp. 130-31.

²¹Pricewaterhouse 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 (hereafter "PwC").

²²PwC at 6, 7.

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.²³ Although the *Alberta Education v. Access Copyright* case in the Supreme Court’s pentology directly affected only a marginal aspect of the educational copying collective licenses, the subsequent statutory amendment poured gasoline on a smoldering fire.

Lawyers for primary and secondary school systems across Canada, giving both the precedents and the new fair dealing amendment the “large and liberal” reading that the pentology decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from 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. In February 2016, a decision of Canada’s Copyright Board, setting retrospective royalty rates for copying in K-12 schools across the nation, codified the crisis in the market. The Board concluded that the copyright exceptions were so broad that 87% of the copying undertaken by schools each year—some 179 million pages annually, equivalent to 879,000 books—deserved no compensation at all. It cut the per student royalty rate for 2010-15 almost in half, by comparison to the 2005-09 rate.²⁴ This decision was upheld by the Federal Court of Appeal in January 2017. However, all of Canada’s provincial ministries of education (except in Quebec) find even these meager royalty rates intolerable, and have refused to pay anything for copying during 2013-2015, not even the rate certified by the Copyright Board. As the PwC study concluded, “[l]icensing income from the K-12 sector has been all but eliminated.”

The damage in the post-secondary market may be even worse. After university licensing agreements with Access Copyright expired at the end of 2015, 80% of the covered institutions refused to renew. When the Copyright Board convened to set royalty rates for copying by post-secondary institutions for 2011-17, colleges and universities simply refused to participate. Like the K-12 sector, post-secondary institutions appear to have concluded that their exposure to copyright liability is so low that it is uneconomic to pay for any license. Access Copyright royalty collections from this sector are projected to decline from C\$11.1 million (US\$8.5 million) in 2015 to C\$1 million (US\$764,000) in 2017.

The PwC study encapsulated the situation: in Canada, “[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.”²⁵ In other words, the Canadian educational establishment across Canada, at the primary, secondary and post-secondary levels, has concluded that the risk of liability for copyright infringement is now so minimal that it should take that risk by refusing to pay for any copying. Pending copyright litigation against York University may serve as a test case in the post-secondary sphere; a decision is expected in 2017. But no doubt Canadian educational institutions are buttressed in their sense of impunity from copyright liability by another objectionable feature of the Copyright Modernization Act. The Act’s extremely low C\$5000 (US\$3,800) 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

²³Of 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-csclen/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-csclen/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>. Their impacts are discussed in IIPA’s 2015 Special 301 submission on Canada, at pages 85-86.

²⁴Access Copyright, “Copyright Board certifies 2010-2015 K-12 tariff,” at <https://accesscopyright.ca/media/announcements/copyright-board-certifies-2010-2015-k-12-tariff/>

²⁵PwC at 6.

insignificant in any copyright dispute with a school or university, further discouraging enforcement of rights.²⁶ Given the difficulty of detecting and documenting infringement, the high costs of litigation, and the low likelihood of recovering any meaningful and deterrent damages, a nationwide education sector policy of boldly and deliberately copying protected material without permission, license or compensation is hardly surprising.

Nor is the damage confined to licensing revenue for copying. 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,”²⁷ and that sales of digital content, as well as publisher investment in digital resources, will be adversely affected.²⁸ One publisher reported last year that high schools that used to buy 20 to 30 copies “started buying just a single copy of the same book... They then scanned or photocopied portions to distribute to students.” When this publisher’s revenue from high school sales plummeted by 90%, it had no choice but to terminate its high school program as “unsustainable.”²⁹

While Canadian publishers and authors are most profoundly impacted, the fallout has reverberated in the U.S. creative sector as well, 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. 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 what the PwC characterized as “an atmosphere where unlimited copying has become commonplace, while content producers are unable to assert their intellectual property rights in any meaningful way.”³⁰ 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 from copyright responsibility that Canada’s educational establishment increasingly displays. Besides the statutory damages cap discussed above, the broad new exception in section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a technological protection measure (TPM).

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, Canada³¹, of the sweeping “fair dealing guidelines” that provide the legal justification for the cessation of licensing royalty payments. Canadian federal authorities should be encouraged, as a matter of urgency, to clarify the scope of the education fair dealing exception. Their goal must be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials. Because the amendments made by

²⁶See section 38.1(1)(b). 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.

²⁷PwC at 9.

²⁸PwC at 71.

²⁹*This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

³⁰PwC at 94.

³¹Council 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>

the Copyright Modernization Act have played such a central role in creating the instability and sense of impunity from copyright responsibilities that now prevails in Canada, advancing this goal must be a top priority for the parliamentary review of copyright law mandated by Section 92 of the Copyright Act, followed by swift action to amend the statute.

IIPA's frequently-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to those impacting the educational sector. 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.³² Although enactment of the exception is globally unprecedented, it has spawned imitators, such as the proposal 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.

3. Discrimination and Duration

Other issues require attention as part of Canada's statutory review. The Canadian music marketplace suffers from Canada's decision, at the time it brought into force the provisions of the Modernization Act, to deny all protection to producers of U.S. sound recordings for any form of broadcasting in Canada, and any compensation for online simulcasting, webcasting, or other forms 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 all these sound recordings suffered similar denials. Canada's unfair and discriminatory policy does not befit its status as our neighbor and major trading partner. IIPA highlights that U.S. law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights. While we applaud Canada's long-delayed 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, this discriminatory stance should be reconsidered, whether in the context of the Copyright Act review or otherwise.

An additional concern for the music industry is the cap on radio revenue in Canada. The C\$100 (US\$76) statutory royalty on sound recording broadcast royalties is applied to all commercial radio stations with a turnover not exceeding C\$1.25 million (US\$951,000). Radio stations pay the approved percentage tariff only for revenues in excess of that limit. The rule has led to widespread abuses, through establishment of chains of small stations that are in practice however syndicated and under the same ownership, etc. As a result of this issue among others, industry broadcast revenues are significantly lower than in other similar economies. The Canadian system does not guarantee "equitable" remuneration as per the WIPO Performances and Phonograms Treaty (WPPT).

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. While Canada extended the term of protection for sound recordings in 2015, it should also 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. Its willingness to do so in the context of the Trans Pacific Partnership Agreement is commendable; but the demise of that accord has not changed the merits of the argument for Canada to bring its law into line with this de facto global norm.

³²See, e.g., Article 13 of the WTO TRIPS Agreement.

COPYRIGHT ENFORCEMENT

The entry into force in 2015 of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods). But that legislation did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

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, 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, and thus increasingly fail to pursue even well-documented referrals from industry. 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 a decade or more, remain basically unchanged.³³

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. Crown Counsel are now declining training offered by right holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.³⁴ The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism.

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in physical goods piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat increasingly involves trafficking in set-top boxes sold pre-loaded with infringing applications that enable cord-cutting Canadians to obtain unauthorized access to high-quality digital streaming and video on demand (VOD) content. These illicit streaming devices are readily available in kiosks in reputable shopping malls for as little as C\$100 (US\$76). Of course they are also sold on dedicated Canadian-owned and -operated websites, and in well-known third-party online marketplaces; but their presence in legitimate retail spaces, where they are deceptively marketed with high quality promotional materials, sows even greater confusion among consumers. This is by no means solely a physical piracy problem—as noted above, illegal streaming sites are also proliferating, and applications for mobile devices that achieve the same unauthorized access are also widely available. The problem extends to the sale of devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention. But since Canadian law enforcement authorities are almost completely unengaged in criminal

³³For 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://cmtc.parl.gc.ca/cmtc/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://cmtc.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/secup10/secup10-e.pdf>.

³⁴This 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.

enforcement against online piracy of any kind, their inability to deal with the sale of physical goods such as these illicit streaming devices is even more discouraging.³⁵

Thus it is more important than ever for the U.S. Government to press Canada to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include specialized training on the new prohibitions on circumvention of TPMs and its relationship to piracy. Since the availability of pirated products (and of illicit streaming devices or other circumvention tools) will not be reduced without criminal prosecutions against traffickers and the imposition of deterrent sentences, particularly jail time, Crown Counsel must take on and fully prosecute more copyright infringement and TPMs circumvention cases, and should be provided with the training and other support 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.

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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada's international agreements involving the U.S. that are most relevant to copyright obligations include the WTO TRIPS Agreement and the North American Free Trade Agreement (NAFTA).³⁶ As noted above, some aspects of Canada's current copyright regime may raise significant issues regarding compliance with these agreements (for example, whether the breadth of some of Canada's copyright exceptions, as applied, comply with the well-established "three-step test")³⁷. But the broader problem is that the copyright law and enforcement norms in these agreements, both negotiated more than a quarter-century ago, are extremely outdated, and lack modern copyright protection and enforcement standards for the digital marketplace.

³⁵On a more positive note, in civil litigation, at least one Canadian federal court has issued an interlocutory injunction against retailers of "plug-and-play" set-top boxes pre-loaded with applications to allow consumers to access TV programs and movies without cable or other subscriptions. See *Bell Canada v. 1326030 Ontario Inc (iTVBox.net)*, 2016 FC 612.

³⁶IIPA commends Canada's accession to the WIPO Internet Treaties (WCT and WPPT), which were enabled by bringing the Copyright Modernization Act into force.

³⁷See TRIPS Art. 13.

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2017.

Executive Summary:¹ Many of Colombia's intellectual property rights (IPR) obligations under the U.S.-Colombia Trade Promotion Agreement (TPA) (signed in 2012) have been overdue for implementation since at least May 2015. The agreement contains a comprehensive chapter on IPR that would raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. A proposed bill to bring Colombia at least partially in compliance with the TPA was floated twice, most recently in August 2016, but has stalled with no prospect of revival. Colombia needs to focus on implementing key copyright protection and enforcement obligations under the TPA, such as addressing obligations for Internet Service Providers (ISPs) to assist in removal of infringing material online and ensuring that infringing services cannot avoid liability. Now that all of the transitional deadlines for Colombia's TPA obligations have passed, it is time for enforcement of those obligations, which Colombia took on in return for the unfettered access to the U.S. market that it has enjoyed ever since the TPA came into force in 2012. IIPA urges the U.S. Government to prioritize its dialogue with Colombia and encourage this vital trading partner to fulfill its obligations under the TPA and to demonstrate the will to protect creative sectors by combating the high levels of piracy that persist throughout the country. While Colombia's commitments go ignored, levels of piracy there continue to grow, increasingly 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, and 2016 has seen a large increase in the number of illegal camcords traced to Colombian cinemas. It is time for Colombia to honor its commitments under the TPA and to make combatting online piracy a priority.

PRIORITY ACTIONS REQUESTED IN 2017

- Implement Colombia's past due 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 neighboring rights to at least 70 years for all producers of sound recordings, including corporate entities.
- Devote law enforcement and prosecutorial resources to combatting online piracy and ensuring due respect for existing legal protection such as the right of communication to the public.

COPYRIGHT PIRACY IN COLOMBIA

Online piracy in Colombia is an increasing problem that has gone unaddressed by the Colombian Government and threatens to undermine the development of legitimate online distribution of media content. Internet broadband reaches more than 28% of households and 41% of the population, according to the Colombia Ministry of Information Technology and Communications, and more than 13.7 million internet connections are active in Colombia (1.5% growth year-over-year).² E-commerce in Colombia grew 24% from 2014 to 2016, reaching 76% of Internet users in Colombia (56% using credit cards), but the creative content industries are not part of this growth—the entertainment sector represents only 2% of transactions, given the high volume of piracy. In 2016, there were an

¹For more details on Colombia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Colombia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See <http://www.ccce.org.co/>.



estimated 500 million visits from Colombia to the top 108 Spanish-language audiovisual piracy websites. Meanwhile, physical piracy continues to plague 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 digital music market. Stream-ripping of music videos from online platforms such as YouTube is currently the most prevalent form of piracy harming the recording industry in Colombia. Stream-ripping mostly occurs on foreign sites such as *youtube-mp3.org*, but is also available on the local site *bajaryoutbe.com*, which receives more than eight million monthly visits. Also prevalent is the distribution of illegal links to cyberlockers via social networks, forums, and mp3 search engine sites such as *mp3clan* and *mimp3*. Cyberlocker sites continue to harm the industry—among the most popular cyberlocker platforms are *4shared* and *hulkshare*. Finally, BitTorrent is also an important source for pirated music.

Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In addition, eight full motion picture camcords and three audio caps were sourced from Colombian theaters in the first eleven months of 2016, a dramatic increase from the two camcords traced to Colombia in 2015.

In 2016, Colombia ranked among the top 25 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 15 countries in the world when it comes to mobile piracy of games.

The recording industry reports that there are eleven legitimate online music services competing in the Colombian market. While the digital music market is growing, much of its potential is frustrated by the widespread practice of stream-ripping, as well as other sources of pirated music. Although the recording industry has made a significant effort to license and promote more digital services, many of them offering millions of tracks for free to consumers, the Colombian Government has not acted to protect this new legitimate market from unfair competition by pirate operators. One problem is the absence of a national anti-piracy campaign that recognizes the importance of copyright protection in the context of the country's economy and culture, including Colombia's internationally successful music exports.

COPYRIGHT LAW IN COLOMBIA

Colombia's obligations under the U.S.-Colombia TPA, which entered into force May 15, 2012, are now long past due. Several copyright obligations were due upon the date of entry into force, and 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 (May 15, 2015). As of May 15, 2015, Colombia is thus substantially out of compliance with the TPA. While some movement has been made toward implementing Colombia's obligations under the TPA, none of the proposed modifications of the Copyright Law needed for compliance have been implemented.

In August 2016 the Colombian Government published for consultation a draft bill to modify the Copyright Law in order to implement at least some obligations under the TPA. Among other provisions, the draft bill includes:

- Civil remedies to protect against the circumvention 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.)
- 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)). This does not completely resolve the outstanding problem that Colombia's Copyright Law only provides for a 50 year term for sound recordings produced by corporate entities, which is out of pace with regional standards and the term in the U.S. and Europe.
- Protection of Rights Management Information (RMIs) (required under TPA Article 16.7.5).
- A series of new exceptions and limitations (caching, lending of copyrighted materials by public libraries, and free making available of copyrighted materials legally acquired by public libraries).

The bill was supposed to be filed after a short consultation process of 30 days (which was then extended to 45 days). However, the bill has not been filed in Congress and the outlook for passage is unclear.

The government previously prepared a package of provisions addressing the digital environment and bringing Colombia in line with international norms for copyright protection. 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.

Colombia should take prompt action to revisit proposed amendments to its Copyright Law and bring Colombia in line with international norms for copyright protection. To this end and consistent with its TPA obligations, Colombia should bring its law into compliance with the WIPO Internet Treaties, to which it acceded in 2002.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Colombia lacks a national anti-piracy campaign to address online piracy, which is now the predominant form of piracy in the country. In 2016, the top 146 Spanish-language online video piracy websites received an estimated 500 million visits from terminals in Colombia. 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. However, coordination among police officers, prosecutors, and judges to combat online piracy is still lacking, and many authorities believe online piracy is not a problem, or is one that only affects foreign interests. 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. The competent authority in the Executive on Copyright is the *Nacional del Derecho de Autor* (DNDA). However, the DNDA is not legally empowered to conduct enforcement actions. The DNDA operates under the Ministry of the Interior, which makes its role in government less relevant, and many proposals to move the DNDA to the Ministry of Commerce, Industry and Tourism (where it is located in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector.

Even before the rise in online piracy, the prosecution of piracy was a weak point in Colombia's enforcement regime. It is considered a minor offense by Colombian criminal judges and appellate courts. For example, 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*. However, the action was never considered by the judge. Despite the good efforts of the National Police in recent years conducting investigations and raids, there have been no significant efforts to take *ex officio* action against widespread piracy. No criminal convictions on music piracy cases were issued in 2016.

A significant issue for the recording industry arose in April 2016, when the Minister of Transportation made a public statement on national media declaring her opposition to performance rights payments for music played on buses and other public transportation systems, stating that "payments for music on buses won't be allowed" and "the matter will have to be solved in Congress by legislation." In fact, existing Colombian law recognizes a public performance right in Article 173 of Law No. 23 of 1982, and a large part of music companies', performers' and authors' income in Colombia comes from the licensing of recorded music that is played on board buses and coaches—a form of public transportation that is extensively used in the country.

Music producers, performers and authors (composers) created an entity called *Organizacion SAYCO-ACINPRO*³ (OSA) for the purpose of simplifying the public performance licensing process. OSA has licensed more than 100,000 businesses in Colombia for public performance of sound recordings. In recent years, OSA signed

³OSA is a joint venture between the collective management organization of authors (Authors' and Composers' Society (SAYCO)) and the collective management organization of producers and performers (the Record Producers' and Artists' Society (ACINPRO)).

agreements with two important trade organizations within the transportation sector to license the performance right on buses and similar private sector transportation systems, pursuant to which around 300,000 buses currently offer music to passengers on routes around the country. OSA estimates that it expected to collect from these “bus” agreements in 2016 approximately 7 billion Colombian pesos (US\$2.5 million).

The statement from Minister Abello was immediately echoed by all transportation companies in the country, payments to OSA were suspended, and now collections of licensing fees for public performances are being questioned by transportation companies, taxi drivers and the general public. The Minister’s public statements and encouragement for bus companies to avoid or suspend payments for performance rights licenses go directly against existing law, inflict material harm on musical performers, producers, and composers, and should be officially reversed. As a result of the damaging statements from Minister of Transportation, OSA filed an action to the Andean Court of Justice seeking a judicial order that the Government of Colombia must comply with copyright legislation and Colombia’s obligations under the Andean Community treaties. The process is at an early stage of consideration. Meanwhile, although the DNDA has issued a Circular confirming the existence of legal obligations under domestic law, the Circular has been largely ignored by other parts of the government and consumers.

MARKET ACCESS

Pending on the books is an Actors Bill, which if passed, would have the effect of increasing production costs for film and television made in Colombia. The bill would impose excessive burdens on producers of audiovisual works in terms of costs and production schedules, limitations on talent engagement, and a set of compensations and encumbrances that curtail the legitimate ability to commercially exploit audiovisual works. In sum, this bill would significantly raise costs for producers, would render local production unviable, and would make Colombia less competitive as a location for audiovisual production.

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia be moved to the Watch List in 2017, in recognition of positive efforts on the part of the Indonesian Government in 2016. 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.¹

Executive Summary: IIPA commends the Government of Indonesia for improving market access in 2016. In May 2016, the Government of Indonesia issued Decree 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, and film distribution and exhibition. However, it is important that this positive movement not be undermined by the planned implementation and enforcement of aspects of the 2009 Film Law that would impose significant barriers to market entry, such as a prohibition on dubbing of imported films for theatrical distribution, exhibition, and broadcast on television; implement a 60% screen quota for Indonesian films; and otherwise restrict the film industry. The Government of Indonesia held to its commitment to combat online piracy by implementing and enforcing the Copyright Law and Regulations Nos. 14 and 26 of 2015, specifically by effectively enforcing against 85 websites that facilitated infringement of films and music; the Government has been asked to further enforce against additional sites causing serious harm to the creative industries. This dedication to anti-piracy efforts is a positive step, though the problem remains serious; in a one month period there were more than 2.5 times the page views to the top piracy sites in Indonesia as there were page views to the top legitimate sites. The past year has seen positive developments with respect to collective management of music performance rights and the launch of licensing activities. However, active monitoring continues to be needed to ensure collective licensing in Indonesia remains in right holders' control and is allowed to develop as an efficient, transparent and accountable activity. In 2017, IIPA asks the U.S. Government continue to engage the Indonesian Government to maintain focus in the coming year on continuing effective actions under the law to address primarily infringing websites; amending the Film Law or its implementing regulations to remove significant barriers to market entry; setting enforcement benchmarks (including judicial reform); and expanding cooperation to address the concerns of all of the copyright sectors.

PRIORITY ACTIONS REQUESTED IN 2017

Enforcement:

- Devote additional resources to ensuring continued enforcement of the Copyright Law under Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites.
- Target the problem of primarily infringing websites, such as by developing an Infringing Website List (IWL) initiative similar to that used in countries like the U.K. to combat advertising by brands and advertising networks, which fuels primarily infringing websites' revenues and their existence, and addressing sites such as cyberlockers that are not covered by the current blocking regime.
- Combat Illicit Streaming Devices (ISDs) (set-top boxes used for piracy) and/or their associated apps, which promote or enable the dissemination, decryption, or receipt of unauthorized motion picture and television content, and which prey upon legitimate pay television and newly-emerging over-the-top (OTT) platforms, among others.
- Commit to judicial reforms in Jakarta and other commercial centers, and establish special IP criminal courts.

¹For more details on Indonesia's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



Legislation:

- Eliminate provisions from the Film Law that serve as barriers to market access such as local screen quotas and the prohibition on dubbing imported films.
- Seek repeal of the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- Clarify or remove Article 18 and Article 30 of the Copyright Law which provide that the rights in music and performances transferred by sale revert back to the author/performer after 25 years.
- Extend the copyright protection term for sound recordings, cinematographic works, and video games to at least 70 years, consistent with emerging global developments.
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws.
- Clarify the government's e-commerce roadmap launched in 2016, including Circular Letter 5 (2016) on user-generated content (UGC), and any related regulations with respect to takedown requirements and sanctions for failure to comply with regulations, to ensure that the full scope of the making available/communication to the public right is preserved and available to right holders, and provide opportunities for stakeholders to comment and consult.

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 Association of Indonesian Film Producers (APROFI) estimates that losses approach Rp 4.3 billion (US\$322,260) per film.² 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.³ Indonesia's Recording Industry Association (ASIRI) reports that there are over 2.8 billion illegal song downloads annually, estimating losses of Rp 14 trillion (US\$1.05 billion) per year.⁴

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 2016. These improvements will benefit all creators, Indonesian and foreign alike. Working with APROFI and ASIRI, the government took effective action by disabling access to 85 primarily infringing sites in 2015 and 2016, following implementation of the Regulations Nos. 14 and 26 of 2015. In October 2016, a further set of infringing sites was submitted to the competent authorities for action. These actions have resulted in a significant reduction of audiovisual and music piracy in Indonesia on the sites involved, with very close to 100% compliance by Internet Service Providers (ISPs). Notably, access to the streaming/downloading site *Stafaband* (*stafaband.info*), identified by Recording Industry Association of America (RIAA) in the fall of 2015 as a notorious market for infringing sound recording files, was disabled as a part of this implementation.⁵ In 2016, access was disabled to three more infringing sites that seem to be related to *Stafaband*,⁶ or that are using *Stafaband*'s name (*downloadlagustafaband.top*; *stafaband.bz*; *stafamp3skullbursalagu4shared.com*).

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.⁷ The legitimate commercial market for online

²See "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>.

³See "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>.

⁴See "Rampant piracy paralyzes Indonesian music industry," Jakarta Post (Nov. 30, 2016), <http://www.thejakartapost.com/news/2016/11/30/rampant-piracy-paralyzes-indonesian-music-industry.html>.

⁵See "Govt blocks illegal music-sharing sites," Jakarta Post (Nov. 24, 2015), <http://www.thejakartapost.com/news/2015/11/24/govt-blocks-illegal-music-sharing-sites.html-0>.

⁶It is believed that users of *Stafaband* moved to these sites after *Stafaband.info* was blocked in 2015.

⁷International Telecommunications Union, *Measuring the Information Society Report (2016)*, available at <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/mis2016.aspx>.

dissemination of copyright works is gaining a foothold: iTunes and several international streaming services operate in Indonesia, including Netflix, iFlix, CatchPlay, Vue, Genflix, and HOOQ. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting the growth of legitimate distribution in creative output of foreign and local right holders. Significant online markets for infringing content exist in Indonesia, as exemplified by *subscene.com*, a subtitle file download site that hosts subtitle files of major motion pictures, but does not host the video files themselves, and is the 39th most accessed site in Indonesia. The music industry reports that in 2016, cease and desist notices involving 75,740 infringing links were sent in Indonesia, with a takedown rate of 93.47%. These infringing sites are mostly free to users, but operating them is a lucrative and low-risk enterprise due to paid advertising from gambling services, malware providers, transactional sex offers, and pornography sites. Given the similarity of their languages, Indonesian-based pirate sites are often popular in Malaysia, and vice-versa.

Illicit Streaming Devices: ISDs⁸ are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in Indonesia. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities are enabling users to access unauthorized motion pictures or television programming, often through apps to remote online sources, and which may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an “after sale” service, or by the users themselves. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The Indonesian Government must increase enforcement efforts, including cracking down on piracy apps and on device manufacturers who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for devices that are being used illegally.

Book Piracy: Indonesia’s market for publications shows great promise for growth, but piracy of published materials makes it one of the worst markets in Asia for publishers. Piracy comes in the form of unauthorized copies of academic textbooks. Industry efforts to disrupt unauthorized photocopying at dozens of copy shops situated near universities in Jakarta and Yogyakarta were successful in educating copy shop operators, many of whom agreed to no longer copy entire textbooks. Unauthorized photocopying activities unfortunately continue, as a number of shops refused to cooperate. University administrators remain central in the fight against unauthorized use of books, textbooks, journals, or other publications. 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.

Signal Theft: 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.⁹ It is critically important, with the 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: Retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia.¹⁰ USTR named Harco Glodok in Jakarta a Notorious Market in its 2016 out-of-cycle report, for its role as “the retail distribution point for a complex piracy and counterfeiting network.”¹¹ While the U.S. Copyright industries have shifted their priorities to improving the health of Indonesia’s online marketplace, unauthorized Optical Discs, CDs and DVDs continue to pervade the physical market for music,

⁸In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

⁹See 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>.

¹⁰Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials.

¹¹See USTR, 2016 *Out-of-Cycle Review of Notorious Markets* (December 2015), available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

movies (including those pirate movies in or claiming to be in Blu-ray format), and video games. 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 must 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. Instead, enforcement officials have consistently shown a lack of interest in enforcing against the widespread illegal activity taking place in Harco Glodok.

ENFORCEMENT UPDATES

While the online enforcement environment in Indonesia has improved in 2016 with continued enforcement of the new copyright law implementing regulations, other enforcement areas remain challenging. There are few enforcement raids, fewer prosecutions, and the legal system continues to be challenging for right holders generally. The government should conclude the current online enforcement rounds and continue additional enforcement rounds in 2017 to allow legitimate online distributors the opportunity to increase their market share. It is important that the government 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): These two ministries worked with right holders to continue implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015, which implement provisions of the 2014 Copyright Law that address infringing websites. Industry groups report complaints electronically and/or in 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. In all, access to 85 infringing sites reported by industry groups through October 2016 had been disabled and numerous additional infringing sites were referred to the government toward the end of 2016. So far enforcement has been promising, with excellent compliance by the seven largest ISPs.

Public-private anti-piracy taskforce, collaboration with the National Police: In September 2015, the National IP Task Force of the Creative Economy Agency (Bekraf), a group of officials from within the agency, and several film and music associations, including APROFI, ASIRI, and the Indonesian Association of Artists, Singers, Composers and Recording Businessmen (PAPPRI), announced plans to collaborate with the National Police's detective division on anti-piracy actions. The international film industry association has actively participated in Bekraf's anti-piracy task force. In 2016, the task force assisted with reports filed with the police, and coordinated with Kominfo and right holders on the site blocking actions.¹² 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.

Infringing Website List (IWL): As most online piracy websites are funded through advertising, IIPA recommends that the Government of Indonesia institute an IWL that would identify key piracy websites for the purpose of informing advertising brokers and networks, and the brands that advertise on them, that the sites are piracy websites, and encouraging them not to place ads on such sites. As an example, the United Kingdom's Police Intellectual Property Crime Unit (PIPCU) established such a program in recent years, and by all accounts it has been extremely successful, exponentially reducing ad revenues for infringing sites. While piracy websites will take money from any source to make a profit, starving them of such easy money can be an extremely effective tool in addressing online piracy. Various jurisdictions have created such programs, whether governmental or voluntary, and IIPA recommends that the Government of Indonesia follow suit. Discussions have begun towards this goal and should be accelerated in 2017.

¹²See "Agency shuts down tens of illegal music and film websites," Jakarta Post (Oct. 11, 2016), <http://www.thejakartapost.com/life/2016/10/11/agency-shuts-down-tens-of-illegal-music-and-film-websites.html>.

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 2017 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.¹³

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.
- Training should ensue on IPR cases, including on calculating damages; issuing provisional orders; implementing injunctions; and 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,"¹⁴ in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines.

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).¹⁵ However, some provisions raise serious concerns, while other provisions require further clarification in implementing regulations. In several cases, critical changes were omitted.

Provisions in the New Law Raising Concerns

IIPA raises the following concerns with respect to the Law as enacted:

¹³At 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.

¹⁴Attorney 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.

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

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

Criminal Case Structure and Penalties Weakened: For criminal cases, the Law raises significant concerns and take steps backward from the previous law, including by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and allowing for non-deterrent fines, including for landlord criminal liability. Finally, Article 95 of the 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 unclear.

Exceptions and Limitations/Compulsory License: Article 44 of the 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.” It is 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, and confirm 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 occur only 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 [or the Berne Convention]*" (bracketed text in WCT only; emphasis added).

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

Registration, Invalidity, and Recordal Requirement: While registration of copyright remains voluntary in the Law, the substantive examination for voluntary registration will apparently address whether a work is "substantially similar" to another work previously registered as a grounds for refusal. There remains considerable concern about abuse of the voluntary copyright registration process in Indonesia, since apparently, many invalid copyrights get registered, including by IP infringers. It is hoped that through this new provision, the authorities will be able to review and invalidate false applications or registrations. IIPA suggests 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. Moreover, greater clarity is needed that recordation is not always feasible for industries and right holders that control a high number of works.

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 is subject to a 30-day review process. This would clearly not provide for "expeditious" remedies as required by TRIPS.

Other Needed Legal Reforms:

Unauthorized Camcording and Live Broadcasting 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 with enforcement, including fostering greater cooperation with cinema owners to fully uphold and enforce the Law, through targeted enforcement actions and, where warranted, prosecution against those engaged in this highly damaging activity.¹⁶ The Motion Picture Association of America (MPAA) reports that two audio camcords were traced to two different local cinemas in Jakarta in 2016. Moreover, mobile penetration has led to new types of piracy; in 2016, several cases were reported of illegal live broadcasting of local films through mobile applications directly from cinemas. These reports demonstrate the need for enforcement to stem online piracy.

Term extension. The term of protection for sound recordings, cinematographic works, and video games should be extended to at least 70 years, in line with international norms. This will not only provide greater incentives

¹⁶Preferably, an express provision would 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.

for production, but also will 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. After the 2014 Copyright Law amendment, certain categories of works are protected for 70 years, including books, music, dramas, artworks such as drawings, and architectural works, but the protection for other categories, including sound recordings, cinematographic works, and video games, remains at 50 years. There is no justification for such different treatment, and protection should be extended accordingly.

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 Indonesia's organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

E-Commerce Roadmap and UGC Prohibitions

E-Commerce Roadmap: In November 2016, Kominfo released its "E-Commerce Roadmap," which lists 30 key initiatives related to the development of e-commerce in Indonesia. The first regulatory document related to the roadmap is the Circular Letter discussed below.

On December 30, 2016, Kominfo issued Circular Letter 5 (2016), which sets out guidelines for e-commerce platforms hosting UGC, and for those who upload UGC content. Included among the specific types of prohibited content is content that infringes intellectual property, and content that contains "goods or services that contain hacking services content and/or provide access without rights." It is unclear exactly what is meant by this, but it could mean content that demonstrates or effects circumvention of TPMs. The Circular Letter provides for a form of notice and takedown, requiring platforms to offer a reporting facility that allows them to receive complaints about prohibited content and requires them to conduct an examination of the report, delete or block the objectionable content, notify the merchant (uploader) that the content has been flagged, and provide a means for the merchant to disclaim that the uploaded content is not prohibited. Mere notice and takedown is not sufficient. The law should require service providers to do more than takedown upon receiving a notice, rather, they should ensure that take down means stay down. Once a specific instance of a particular infringed work is notified to a service provider, that service provider should take steps to ensure that all other copies of, or URL links to, that same work: (a) are also removed, and (b) do not appear in the future. It appears that for content that infringes intellectual property, the blocking or deletion period need not be carried out for 14 days, which is excessively slow.¹⁷ The Circular Letter also requires platforms to monitor user activities on UGC platforms. It does not specify any punishments or sanctions for users or platforms that fail to comply. The Director General of Kominfo has indicated that further comprehensive regulations for all Internet platforms will follow, and these proposals will be open to public consultations. IIPA urges the Government of Indonesia and Kominfo to provide opportunities for stakeholders to comment and consult on further regulations, specifically with respect to clarifying the takedown requirements, establishing punishments and sanctions for failure to comply with regulations, and setting forth safe harbor provisions for platforms, if any.¹⁸

¹⁷If the content were deemed "urgent," then a one day period might apply, but intellectual property is not listed as one of the defined types of "urgent" protected content and thus would have to be deemed "urgent" by other laws and regulations.

¹⁸Such provisions should clarify that any safe harbor covers only truly neutral and passive activities. Service providers that take an active role, for example by optimizing the presentation of content or promoting it, and can intervene in the making available of content, should not be protected. The law should also clarify that safe harbors, if introduced, should provide protection only from monetary damages and criminal penalties, but the service provider can be subject to injunctive relief regardless of whether the safe harbor provisions apply. It is also critical to state expressly in the law that even entirely passive and neutral sites and services that are also structurally infringing cannot benefit from safe harbor protection.

Amended Law for Information & Electronic Transactions

The Ministry of Communication and IT announced an amended Law for Information & Electronic Transaction (UU ITE) Number 11 Year 2008, effective November 28, 2016.¹⁹ While the revisions for the most part do not directly implicate IPR (focusing on defamation, cyber bullying, and the “right to be forgotten”), some of the provisions for enforcement and penalties may serve as models for anti-piracy efforts. Revised provisions give the government the authority to block negative content or to order ISPs to do so. The revisions also synchronize confiscation, arrest and detention procedures with the Criminal Code.

MARKET ACCESS AND RELATED ISSUES

Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List and Continue Removing Barriers to Entry for Other Sectors: In a very positive development, in May 2016, the Government of Indonesia issued Decree 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, and film distribution and exhibition. This positive move should be accompanied by the issuance of clear guidelines on the implementation process of the Decree. However, many media sectors remain on the (NIL), preventing direct foreign investment in other Indonesian media industries.²⁰ The same investment access opened to the film industry 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). While the removal of the film industry sectors from the NIL begins this process, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials.

Eliminate Problematic Provisions from the Film Law: The Government of Indonesia is in the process of drafting implementing regulations for its Film Law No. 33 Year 2009, and plans to introduce the draft regulations to Parliament shortly. The Film Law includes 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 Film Law. The Film Law includes a 60% local content (screen time) quota, and a ban on the dubbing of imported films except those for educational or research purposes.²¹ The draft regulations would include a gradual implementation of the screen time quota, and would not impose sanctions if local cinemas are unable to meet the requirement, which to a small degree lessens the impact of the quota. However, the dubbing restrictions remain unchanged.

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); and 5) Article 40, restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses.²² The Film Law also includes

¹⁹The full text of the law, and an English translation, are available at: <https://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf>.

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

²¹Dubbing of imported films into a local language is a commercial decision that should be based on business considerations.

²²Decree 44 regarding the Negative Investment List should supersede this Article 40, but to avoid confusion, Article 40 should be removed in any amended version of the Film Law.

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.

In writing implementing regulations, the government should recognize international best practices, notably the exclusive right of right holders to determine whether, how, and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector. Moreover, it is reported that the government has a longer-term plan to amend the 2009 Film Law over the next three to five years. IIPA recommends that the Indonesian Government consider the importance of an open and level playing field in the film sector, and remove the troublesome restrictions on foreign participation in any amended version of the Film Law.

Advertising Restrictions: Indonesia's Broadcasting Law (No. 32 Year 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, statements by the Indonesian Broadcasting Commission (KPI) in 2015 calling for its implementation have raised concerns about the possible deleterious effects of such a requirement. The Broadcasting Law has been critiqued for being outdated, and unofficial reports are that it will be revised soon, but no timeline has been provided by the government as to when such revisions will be finalized. IIPA recommends that revisions be completed quickly to remove these restrictions, as they would have harmful effects on Indonesian consumers' access to foreign TV channels.

Customs Valuation: Indonesia recently imposed a new specific tariff that is based on the running time of the film, including film in video format, resulting in a significant increase in the amount of customs duties paid for the importation of foreign films. Indonesia should join the WTO Information Technology Agreement (ITA) Expansion Agreement to address this issue.

Local Replication Requirement: Regulation No. PM 55 issued by the Minister for Culture and Tourism (MCOT) in 2008 required that all theatrical prints and home video titles released in Indonesia be replicated locally effective January 1, 2009. However, the effective date was repeatedly postponed, and this regulation never went into effect. In December 2015, the new government transferred the film sector responsibility from MCOT to a newly formed Ministry of Culture and Education, and claimed unofficially that PM 55 is no longer enforceable as MCOT no longer exists. While this regulation is no longer a priority as it appears to be defunct, and because following the digital conversion in 2013 all studio prints are now replicated locally in the format of DCPs, the harmful regulation should be permanently and officially abrogated.

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 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."²³ 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.

²³19 U.S.C. §§ 2462(c)(4) and (5).

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

While passage of the Copyright Law of 2014 made good progress toward fulfilling Indonesia's obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. As set forth in more detail above in the "Copyright Law and Related Issues" section, the broad exceptions and compulsory license provision, limited RMI violations provision, recordal requirement, and unworkable provisional measures provision appear to be out of compliance with Indonesia's international obligations.

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2017.

Executive Summary: The U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009, and as a result, trade with Peru has almost doubled. However, while Peru made promising steps initially to implement the comprehensive Intellectual Property Rights (IPR) chapter of the TPA, which contains high standards for copyright protection and enforcement, it has yet to complete implementation. Notably lacking are Internet Service Provider (ISP) limited liability provisions and statutory damages for civil copyright infringement. These provisions should be implemented expeditiously. Piracy continues to be a large problem in Peru, both online and on the streets. Peru is also one of the largest sources of unauthorized camcords in the world: between 2012 and 2016, 94 unauthorized camcords were sourced from Peru, including 29 in 2016. Copies of these camcorded films were traded by local brokers and found online. Criminal prohibitions against camcording, without a need to prove a profit intent, should be enacted to facilitate enforcement against this form of piracy. In addition, Peru has become a safe haven for web piracy. In the last two years, several illegal websites launched operations from Peru, offering thousands of music tracks for users in and out of the country for both downloads and streaming. Some of these websites offer interactive functionalities, allow access from mobile devices and compete with legitimate services in the music market. The online piracy website market doubled in the past year and its impact is affecting not only Peru but other countries in the region, where those websites attract hundreds of thousands, and for some countries, millions of visitors.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2017

The copyright industries recommend that the following actions be taken expeditiously in order to improve the adequate and effective protection of copyrighted materials:

- Pass legislation to address secondary liability principles for online copyright infringement, implement provisions creating powers for judges to disable access to infringing sites, establish obligations for ISPs to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement, in part to satisfy FTA obligations.
- Devote significantly more resources to combatting digital piracy.
- Take action, through the agency charged with promoting and defending intellectual property rights, *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), against administrators of piracy websites, who currently find Peru to be a safe haven.
- Pass legislation criminalizing unauthorized camcording of films without the need to prove profit intent.
- Improve the efficiency and effectiveness of the judicial system.

COPYRIGHT PIRACY IN PERU

Internet Piracy

Internet-based piracy is increasingly widespread in Peru. While Peru is not a leading country in broadband penetration, the number of Internet users is steadily increasing. At present, there are approximately 13 million Internet users in Peru,¹ representing about 45% of the population, and 50% in the urban areas.² 57% of Internet

¹See www.Internetworldstats.com.

²This data is from early 2016, based on GfK analysis. See http://www.gfk.com/fileadmin/user_upload/dyna_content/PE/GfK_OP_Octubre.2015_-_Uso_de_Internet_2.pdf and http://www.gfk.com/fileadmin/user_upload/dyna_content/PE/GfK_OP_Diciembre.2015_-_Compras_por_Internet_3.pdf.



users are considered heavy users. The majority of Peru's Internet population is from the upper economic groups, and young, between 18 to 24 years (70%). A growing base of Internet users are adopting e-commerce, and music is one of the top products purchased online, representing 7% of all e-commerce transactions. Mobile broadband penetration is increasing rapidly. In 2015 there were 36.7 active mobile broadband subscriptions per 100 inhabitants, up from 28.5 the previous year.³ Fixed broadband is not nearly as prevalent, with only 6.4 fixed broadband subscriptions per 100 inhabitants (up from 5.7 in 2014).⁴

Streaming of pirated audiovisual content is prevalent in Peru. The 108 top pirate Spanish-language audiovisual content websites received 133 million visits from Peru from December 2015 through June 2016, and an estimated 300 million visits from January through December, 2016. Two websites identified by MPAA as notorious markets in its 2016 out-of-cycle review filing receive a high volume of traffic from Peru. Both sites are streaming linking sites, which make content available through framing or embedding a player in the website, and also provide one or more active links so users can stream the content in a video-on-demand format. Many streaming linking sites also frame or embed video players from third-party websites, reducing the number of clicks needed to get to content for a more seamless user experience. These sites are monetized through advertising served by a large number of national and international ad networks. *Repells.tv* is a popular streaming linking site that offers more than 150,000 links to more than 10,000 illegally reproduced titles including movies and television series. The website has been active since December 2013, and its *Peru Alexa* rank is 70. *Peliss24.com* is another popular streaming linking site, which 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 and has a *Peru Alexa* rank of 112. While the site is currently hosted in Seychelles, *Peliss24.com's* operators live in Peru, which is also home to the operators of the other largest Spanish-language illegal audiovisual content websites in Latin America, including *yaske.ro* (formerly *yaske.cc*). These sites affect the legitimate market in the entire region.

Peru's music market, like most other countries in the region, saw a significant increase in digital sales in the last year (+30%) with almost all growth coming from streaming platforms (+80%). Today, eleven online legitimate services compete for consumers in the Peruvian market. However, a big portion of the market potential is lost because of the unfair competition of pirate websites openly operating and offering millions of illegal music tracks to consumers mainly via mobile devices. The top 40 notorious infringing music websites operating in Peru have more than 30 million monthly visits, according to SimilarWeb. These sites are exclusively dedicated to distributing infringing music content, and usually provide for interactive streaming for mobile users as well as file downloading, directly and unfairly competing against legitimate music platforms. Their revenue is based mostly on advertisements. These websites, among many others, are well known in Peru, including to the authorities.

Hard Goods Piracy

While online infringement has increased, hard goods piracy is still relevant in the Peruvian market.

In the notorious black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda (which is located one block away from the police and Public Ministry's headquarters), pirates operate during daylight hours. There are also some popular shopping galleries and arcades that sell pirate products. The sale of pirate discs through street vendors and small stores and stands located in informal discount retail centers continues to be the main channel of pirate commerce, and the one that most affects the audiovisual industry. Lima, Arequipa, Trujillo, Chiclayo, and Tacna have the most wide-spread hard goods piracy problem. The purchase of pirate and counterfeit hard goods through web sites and online marketplaces is becoming more popular as Peruvians embrace e-commerce. For example, *mercadolibre.com.pe* hosts listings of hacked game consoles that come installed with infringing games, as well as listings of circumvention devices bundled with infringing games. In addition to advertising listings on *Mercado Libre*, many top sellers also run their own proprietary e-commerce sites where they traffic in video game circumvention devices and services. Optical disc piracy is a major problem in Peru where large numbers

³Data from International Telecommunication Union, *Measuring the Information Society Report 2016*, p. 246.

⁴Id.

of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content, which is then sold in street markets and over the Internet. As for street piracy, there are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases, available for US\$1.00 each. It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in reported imports of blank media in recent years does not necessarily mean that the amount of blank CDs and DVDs used by pirates has decreased in recent years (down to 16.2 million units in 2007, more recent data is not available). Peru has implemented a levy on each unit of raw blank media, so blank media is now being smuggled into the country.

Camcording: Camcording as “source piracy” has grown exponentially over the last few years in Latin America, along with camcorder technology, which makes detection difficult and copies nearly perfect. Peru is now one of the leading sources of unauthorized camcords in the world. Twenty-nine unauthorized camcords were traced to Peru in 2016, and 14 professional “cammers” were arrested between 2012 through 2016. Unfortunately, none of these individuals have been convicted. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which in practice makes it virtually impossible to obtain a conviction. The main regions where these illegal camcordings take place are in the cities of Lima, Trujillo and Chimbote.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The TPA entered into force on February 1, 2009.⁵ As part of the TPA, Peru also signed IPR-related Side Letters, including one on ISP liability and another on retransmission issues. While Peru acted expeditiously to implement many IPR provisions of the TPA,⁶ it still has not implemented legislation addressing other important issues, including secondary liability principles or statutory damages. Since entry into force of the TPA, total trade between Peru and the U.S. has expanded from US\$9.1 billion to US\$16.1 billion.⁷ Peru has benefitted greatly from the TPA, and should complete its obligation to implement all provisions of the TPA.

No ISP Liability Provisions: TPA Article 16.11.29 provides for incentives for service providers to comply with notice and takedown procedures for materials that are claimed to be infringing. This provision has not yet been implemented, which poses a significant problem to right holders attempting to get unauthorized copies of their works removed from websites, because ISPs do not risk any liability for copyright infringements otherwise. With no clear liability principles in place, website operators usually do not cooperate with right holders. Industry sectors report that as a result, they do not bother engaging in notice-sending. While it is unusual to find massive-piracy websites listed in Peru because of high costs and connectivity limitations, ISPs such as Claro and Telefonica have generally been open and cooperative with industry, although no concrete collaboration effort has been tried so far. INDECOPI should encourage engagement in larger cooperation discussions between right holders and ISPs, as well as other key Internet intermediaries, in addition to supporting clear provisions on liability principles.⁸

No Statutory Damages: Also outstanding is Peru’s obligation to provide for pre-established damages (statutory damages) in civil judicial proceedings (TPA Article 16.11.8). This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement.

⁵The final text of the U.S.-Peru Trade Promotion Agreement (TPA) Intellectual Property Rights (IPR) Chapter is posted on USTR’s website at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

⁶Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to technological protection measures (TPMs) and judicial remedies.

⁷See <https://www.state.gov/e/eb/rls/othr/ics/2015/241704.htm>.

⁸If exemptions from liability are being considered, it should be made clear that such provisions should only apply to ISPs that perform technical, passive, and neutral activities.

OTHER COPYRIGHT LAW AND RELATED ISSUES

Camcording Legislation: Anti-camcording legislation is necessary to address the rapid increase in camcording. Peru should adopt a legislative framework specifically criminalizing illicit camcording in theaters without requiring proof of profit motive. The lack of anti-camcord laws to criminalize unauthorized movie recording makes it difficult to obtain cooperation from law enforcement and prosecutors.

Revocation of Licenses: Law 28976 on Licenses for Business Preparations should be amended to include, as grounds for closure and revocation of licenses, the sale of products that violate intellectual property. Law 28976 only grants local government the ability to close temporarily or permanently a shop or stand in markets and commercial galleries on the ground of infringing administrative norms. This law should be amended in two ways: (1) it should apply to any type of commercial establishment and not only markets and commercial galleries, and (2) the basis should be infringement of any type of law (including civil and criminal) and not only administrative ones.

COPYRIGHT ENFORCEMENT IN PERU

Enforcement against piracy, whether criminal, civil, or administrative, is hampered by a distinct lack of resources devoted to combatting both hard-goods piracy and online piracy. Industry sectors report generally good cooperation with the criminal enforcement authorities (prosecution offices, police and tax authorities) handling hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective and deterrent sanctions that deter piracy. Peru has a cross-commission established by law, *Comisión de Lucha contra los Delitos Aduaneros y la Piratería*, to "fight against border-control infringements and piracy."⁹ This committee should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental priority and draw focus from judges, prosecutors and the police.

Criminal Anti-Piracy Enforcement in Peru

Police actions and prosecutions: The copyright industries have excellent relationships with the Fiscal Police as well as with the specialized prosecution division in Lima for Intellectual Property and Border Enforcement (*Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*). However, this specialized prosecution division has very limited geographic jurisdiction, which limits its effectiveness. Enforcement actions conducted by the specialized IP prosecution division should continue, and in particular should focus on the large suppliers of burned discs to the market. Otherwise, the police do not take *ex officio* actions against piracy.

The U.S. Secret Service agency deployed to Lima has conducted trainings and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. In the longer term, this effort should counteract piracy and counterfeiting activity in Peru. Additionally, the deployment of a Department of Justice Law Enforcement Coordinator (IPLEC) to Latin America should help coordinate training efforts across the territory.

There is a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*División de Investigación de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations, to support the National Police (7th Region), and to provide troops when large raids are conducted in the black markets. Because the National Police lacks resources to carry out intelligence activities prior to and following raids, it performs neither intelligence nor follow-up activities. The specialized police force lacks

⁹The commission is comprised of the Ministry of Production; the Ministry of Economy and Finance; the Ministry of Trade and Tourism; the Ministry of Internal Affairs; the Ministry of Defense; the Commissioner of Tax Administration; a representative of the General Prosecution Office; the President of *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI); and representatives of the National Association of Industries, the Finance Intelligence Unit of Peru, the National Group of Commerce Chambers, Small and Medium Company Associations, the Association of Border Agents of Peru, the Association of Exporters, the State Governments, the Committee to Fight Against Piracy (*Contracopia*), the Peruvian Books Chamber, the Association of Phonographic Producers, the Association of Cities of Peru, the National Association of Authors and Composers (APDAYC), and the National Council of Cinema (CONACINE).

resources to develop intelligence plans that would support investigating and discovering large warehouses of clandestine laboratories of pirated goods. They have few logistical resources (vehicles, cell phones) needed to coordinate their field work. The Specialized Prosecutors need more budgetary resources to hire personnel who can follow up on cases after the raids in order to process them swiftly. Currently, they do not have sufficient personnel to fully prepare findings of their activities, which results in dismissal of cases at prosecutor or court levels. The National Police and the Prosecutor's Office lack adequate warehouses to safely store seized goods.

Although current Peruvian legislation provides the tools to sanction unlawful behavior on the Internet, further refinements are needed to fully implement the TPA and also to specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.¹⁰ A specialized body in the National Police deals with High Technology crimes, prioritizing Internet-based crimes linked to pedophilia, kidnapping, and phishing; as a result, it investigates very few cases focused on intellectual property.

INDECOPI is empowered to open *ex-officio* actions and investigations against Internet Piracy. INDECOPI, in consultation with relevant stakeholders, should develop an effective campaign to impose sanctions on administrators of notorious pirate websites openly operating in Peru that have registered companies and domiciles in Cusco and other locations associated with them. It is also hoped that INDECOPI will implement urgent measures to disable access to those sites, impose fines on the administrators, and suspend the domain names of those registered at NIC Peru. INDECOPI has the capacity and legal powers to accomplish these actions, however, it is underfunded, especially in light of its self-funding role, discussed below.

Few prosecutions: The four IPR prosecutors in Lima's special prosecution division work with INDECOPI when they are requested to do so. Despite limited resources, INDECOPI can play an important role in disrupting mass online infringement in Peru. Unfortunately, these IPR prosecutors' jurisdiction is restricted, and filing of a complaint before a judge can take four to six months after the raid has occurred; in fact, some cases have seen delays as long as two years from the raid before getting to court.

Problems with the judiciary—non-deterrent results and delays: Few criminal IPR cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges are not sensitive to IP crimes, as they do not perceive the importance of IPR or see IPR crimes as dangerous; as a result, sentences are nondeterrent. Criminal sentences take between 3-5 years to be issued, and cases often languish even longer. For example, there is a criminal case involving circumvention devices that was filed in 2011, and has been continually delayed due to excessive bureaucracy and appeals.

Furthermore, the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code, including: the 2004 amendments, which provided an increase of minimum sentencing to four or more years for copyright infringements; and amendments made in November 2006 to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes.

INDECOPI and Administrative Enforcement

INDECOPI serves as an administrative enforcement agency for the copyright sector. It has been active in public awareness and educational campaigns, and collects royalties for the public performance right. INDECOPI is supposed to be self-funded through its income from patent and trademark registrations and from the fines that its administrative bodies are permitted to impose. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's enforcement efforts.

¹⁰In particular, Section 48 of the Peruvian Copyright Law, Legislative Decree No. 822, should be amended in order to exclude the possibility of considering peer-to-peer (P2P) sharing and the use of information as a private copy.

Increasing deterrent sanctions: It remains important to issue regulations to increase the level of fines that could be issued against businesses that refuse to be investigated or raided by INDECOPI. Through Legislative Decree No. 807, INDECOPI already has the authority to level fines against individuals or businesses that refuse to be investigated. Article 28 of this law stipulates that if an individual or business is served with an injunction or receives a fine from INDECOPI and fails to comply, the maximum allowable penalty for the violation will be imposed. If the non-compliance persists, then INDECOPI may impose a new fine, the amount of which will be doubled at established intervals. INDECOPI can file a criminal complaint with the Office of the Public Prosecutor. To increase and support enforcement against piracy, IIPA suggests that regulations be issued increasing and establishing fines, which would also help fund INDECOPI's actions.

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendations: IIPA recommends that Switzerland remain on the Watch List in 2017 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.¹

Executive Summary: In 2016 and 2017, there were new rounds of meetings of the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12), regarding long-awaited revisions to the Swiss Copyright Act. These contemplated revisions, even if agreed-upon, would enter into force no sooner than the end of 2018 at the very earliest, and if at all. Meanwhile, unprecedented restrictions remain in place with respect to the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. The debate over the legislative changes needed to combat online piracy has been unnecessarily prolonged; the original multi-stakeholder AGUR12 met regularly and published its *unanimous* recommendations on the topic in December 2013. While the government published a draft bill for consultation in December 2015, the AGUR12 has now resumed. The fact that online piracy continues to escape any liability in Switzerland over three years after the first AGUR12 recommendation, 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 the country's obligations under international agreements to provide remedies that prevent and deter infringements. IIPA urges the U.S. Government to send a clear message that the status quo remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship. IIPA further urges the U.S. Government to work closely with the Government of Switzerland to address the piracy enforcement situation, which raises serious questions with respect to Switzerland's commitments under the WTO TRIPS Agreement to provide a remedy for any form of infringement. The Government of Switzerland should address online piracy now, including through legislation implementing the compromise recommendations of the AGUR12, and update its legislation to match copyright protection (including term of protection) offered elsewhere in Europe, in the United States, and in other developed markets.

PRIORITY ACTIONS REQUESTED IN 2017

- Improve, and accelerate the passage of, the draft Copyright Act amendments to provide efficient tools against all types of piracy, regardless of technical details and to otherwise incorporate the compromise recommendations of the AGUR12 dated December 6, 2013.
- Endorse the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) clarifying permissible evidence collection practices under the Data Protection law in criminal online copyright enforcement actions, and highlight that this extends to civil enforcement actions.
- 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.
- 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.

¹For more details on Switzerland's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Switzerland's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



THE NATURE OF PIRACY IN SWITZERLAND

Levels of Internet based piracy in Switzerland remain high due to weak enforcement and weak laws (including current law, which does not sanction the private consumption of works from clearly illegal sources). Switzerland suffers not only from high domestic piracy rates for music, film, video games, and entertainment software, but also from serving as a base of operations for some Internet Service Providers (ISPs) dedicated to piracy on a global scale. At the same time, Switzerland's legitimate online market is growing, with Netflix's entry into the market and the building of Subscription Video on Demand (SVoD) libraries by local telecom operators. Thus, it is increasingly important that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of this legitimate market.

Streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland and carry copyrighted material relevant for this market, especially films early in their exploitation cycle. Peer-to-Peer (P2P) BitTorrent activity for the purposes of sharing infringing material remains popular. Stream ripping sites and applications, which permit users to create a local copy of unauthorized streamed content, are still high in usage. Downloading and streaming of unauthorized content for private use are widely viewed as legal in Switzerland, as long as no uploading occurs. Cyberlocker services for storage and sharing of illegal files also continue to be a concern in Switzerland, such as Cyando AG, operator of *uploaded.net*, and, in the case of *oboomb.com*, hosting is via SwissBrothers AG. Additionally, Switzerland is used as the fake domicile by ISPs such as the very widely used Private Layer, which provides hosting services for numerous BitTorrent sites including *bitorent.am*, *bitsnoop.com*, and *1337x.to*, who benefit from access to P.O. box services and possibly server capacity. These distributors of pirated content rely on and refer to Switzerland's legislation that sets high value on privacy protection. While the Government of Switzerland has demonstrated a willingness to pursue pirate sites on the .ch domain (the Swiss country code TLD (ccTLD)), formerly problematic sites on this domain, such as *Torrented.ch*, now migrate to websites using other domains. Other problematic sites, such as *Torrentflow.com* and *torrentproject.org*, also no longer utilize .ch domains, but are hosted by Switzerland-based ISPs—Rook Media GmbH and Private Layer, respectively. IIPA recommends that the Government of Switzerland expand its enforcement actions, as their jurisdiction is not necessarily limited to sites with a .ch domain.

Moreover, piracy activities targeting the neighboring markets of Germany, France, and Italy also affect the markets in the respective language communities in Switzerland. For example, Italian language platforms, even those blocked in Italy, are accessible and popular in the Italian-speaking regions of Switzerland. There is no clear legislation and no tested court practice for disabling access to such platforms in Switzerland.

COPYRIGHT 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. With some exceptions, prosecution services tend to consider copyright enforcement cases as non-priority. Obstacles to enforcement include the *de-facto* ban on IP address based evidence following the *Logistep* decision, and the legal complexity of copyright cases.² Right holders are currently proscribed from collecting and 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. While some prosecutors do pursue investigations against cyberlockers and structurally infringing sites, they seem unsure how to enforce existing laws and lack resources to freeze assets or secure evidence residing on servers (which may contain significant quantities of infringing materials). Prosecutors—although now beginning to voice their own frustration with

²While enforcement of copyright law against private users may still be technically possible, as highlighted by the Government of Switzerland in its public comment regarding the 2016 Special 301 report, industry sectors report that prosecutors remain unsure how to reconcile the *Logistep* case with the need for IP address based evidence.

the situation—have interpreted the precedent broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases.

COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND

Copyright Reform

Logistep: The 2010 *Logistep* decision by the Swiss Federal Supreme Court held that the IP addresses of Internet users sharing pirate material over publicly available networks—a crucial piece of information needed to bring an online infringement action—are protected by Switzerland’s strict data protection laws. The decision, issued by Switzerland’s highest court and supported by the Swiss Data Protection Authority (FDPIC), required Logistep AG to stop collecting the IP addresses of suspected infringers that it had turned over to right holders to pursue civil actions. In the aftermath of *Logistep*, online copyright enforcement in the country came to an effective halt.

History of AGUR12: Two years after the *Logistep* decision, the Federal Department of Justice and Police, recognizing the magnitude of the enforcement deadlock arising out of the case and other concerns surrounding copyright, initiated AGUR12, a stakeholder working group made up of artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations, 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 copyright reform—a significant accomplishment given the variety of viewpoints that were represented in the working group.³

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.⁴ The project of law was to be open to public consultation until the end of March 2016, at which point the government was to evaluate stakeholder input and prepare the draft Copyright Act amendments together with a report for the parliamentary lawmaking process. Instead, given the contentious nature of the draft amendments, discussed below, another round of committee discussions are taking place.

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.⁵ This draft suggested a statutory notice and take-down, counter-notice and put-back procedure and a self-regulation organization for hosting providers (e.g. structurally infringing services); stay-down duties for not self-regulated hosting providers, an administrative procedure for website access blocking and a double-notice warning and disclosure procedure for infringing individuals. However, the proposals were rendered toothless by unreasonable thresholds for enforcement, such as tests for heavily infringing platforms, or legal online availability of the infringed content as a prerequisite for enforcement; by limitation to P2P technology; and by critical cost burden. The proposal also was burdened with ancillary proposals including new copyright limitations such as “extended collective licensing,” and research uses. Moreover, it did not address term extension, removal of caps and restrictions on performance rights, or the recognition of an independent status of producers’ performance rights. The contentious draft amendments generated a very high volume of responses during the consultation period. Substantial revisions to the draft amendments are needed to adequately address right holder concerns.

Revived AGUR12 Copyright Reform Committee (AGUR12 II): As a result of the strong reactions to the draft amendments, in 2016 the Federal Institute of Intellectual Property began leading consultations with a revived AGUR12 copyright reform committee (AGUR12 II), which includes efforts to bring together right owners and ISPs. Members of the reform committee include consumers, users, producers, distributors, Suisseculture, collecting

³See https://www.ige.ch/fileadmin/user_upload/Urheberrecht/d/Schlussbericht_der_AGUR12_vom_28_11_2013.pdf for the complete AGUR12 report recommendations. See https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Medienmitteilung_zum_Schlussbericht_AGUR12_EN.pdf for an English summary of the recommendations.

⁴The Government of Switzerland press release is available at: <https://www.admin.ch/aktuelle/00089/index.html?lang=fr&msg-id=53259>.

⁵The draft amendments are addressed in greater detail in IIPA’s 2016 Special 301 submission, available at <http://www.iipawebsite.com/rbc/2016/2016SPEC301SWITZERLAND.PDF>.

societies, and ISPs. The group has met three times since September 2016, and will have met five times by March 2017. It is tasked with creating a specific legislative proposal, together with the Federal Institute of Intellectual Property, to be issued shortly thereafter. The content of the draft is meant to follow the compromise reached by the AGUR12 in 2013. However, it has become apparent that there is fierce resistance to robust anti-piracy provisions in the revised Act, mainly from ISPs, *EconomieSuisse*, the data protection commissioner and consumer advocacy groups.

IIPA urges the participants of AGUR12 II and the participating government bodies to reach a compromise formula that will address many of the most pressing issues as to ISP liability, in accord with the compromise recommendations of the AGUR12 dated December 6, 2013. IIPA further urges an accelerated implementation of AGUR12's core enforcement proposals, in order to adequately address the current enforcement issues.

Interim Measures Needed: Given the protracted time frame for copyright reform under AGUR12, IIPA urges the Government of Switzerland to take interim steps to protect against online piracy. A standing opinion of the FDPIC made in the wake of the *Logistep* decision—even as it stood by the Federal Court's opinion—underscored, in the context of online piracy cases, that “we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing.” 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 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). In the meantime, until such amendments are implemented, the Department of Justice should endorse the FDPIC opinion and clarify for its prosecutors that the *Logistep* decision was a narrow case that, under the Swiss data protection law, does not foreclose criminal or civil online copyright enforcement actions.

The current lack of ISP liability legislation, and strong privacy laws, operate in favor of ISPs and tend to protect even repeat infringers from prosecution. The website hosting industry's trade association established a code of conduct a few years ago, which it administers autonomously and defends against interference by government or rights owners. Trade association affiliated hosting providers purport to be taking down notified content, while “Sharehosters,” such as *Uploaded.net*, practice takedown regularly but do not prevent from (and even support) quick re-upload, avoiding effective stay-down. Informally, cooperation is being offered in action against infringing hosting providers via enforcement of business-to-business contracts with telecommunications/access providers. These provisional measures in principle could work well, but fail to be effective in halting online infringement due to the lack of clear and tested liability rules. The Government of Switzerland should encourage ISPs to work together with right holders to improve the voluntary notice and take-down process, but should also move as swiftly as possible to implement legislation establishing such a process and imposing liability for ISPs that host infringing content.

Finally, AGUR12 recommended a public awareness campaign about copyright. To be effective, such a campaign would require technical, operational and financial support from the Swiss government. So far, such campaign has not been initiated. IIPA suggests that this would be beneficial in the interim.

Additional Concerns Under the Copyright Act and Related Laws

In addition to the developments regarding proposed amendments to the Copyright Act to address online piracy, 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:

Private Copy Exception: 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 wide open for individuals to download from illegal sources without consequence or penalty of any kind. Such a broad private copying exception together with serious concerns regarding the protection of TPMs (see below) constitute significant hurdles for the protection against stream ripping services that dominate the list of top pirate services. Moreover, the Swiss Federal Arbitration Commission has imposed a levy on catch-up TV, placing these services within the scope of the private copy exception. This precludes direct licensing by right holders, including the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to catch-up TV services impinges on the exclusive making available right, and thus may violate Switzerland's international obligations, including under the WIPO Copyright Treaty (WCT).

Circumvention of Technological Protection Measures (TPMs): 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 far too broad, particularly given the inappropriately wide scope of the private copy 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.

Discrimination Against Neighboring Rights: 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 unjustified in the present reality of the music markets. The discrimination against the neighboring rights leads to 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 Swiss legislature to set these caps based on a political assessment. 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 Government of Switzerland 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. 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 any online services. Extended collective licenses undermine individual licensing, which is the norm for online services. An opt-out provision, as proposed, does not render an extended collective license as 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 could 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.

Insufficient Term for Sound Recordings: IIPA is disappointed 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, all of the other European Free Trade Association (EFTA) states (even neighboring Liechtenstein), 28 out of the 32 Organisation for Economic Co-operation and Development (OECD) member countries, and 9 out of the top 10 music markets (by total revenue in 2014).

Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right: Article 12 Section 1*bis* of the Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right—e.g., if a motion picture audiovisual work is still in the theaters. An explicit criminal sanction for the violation of this principle is needed, 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: On January 1, 2016, amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act) took effect,⁶ extending the existing "unique distributor clause" and related regulatory provisions for the Swiss film market from theatrical to other forms of exploitation. The "unique distributor clause" requires theatrical distributors to acquire distribution rights for the whole of Switzerland (i.e. for all language versions and regions exploited in Switzerland), and the amendment extended this to apply to DVD/physical home entertainment distribution and all forms of online licensing of theatrical (and direct-to-DVD/online) movies, with the exception of linear television broadcast. While many aspects of the amended law have remained unclear and its interpretation has been a matter of controversy between various stakeholder groups and the government, some of its features are likely to have adverse effects, mostly in online distribution.

The law has interfered with existing licensing practice allocating online exploitations to platforms by language regions or other multi-territory platforms where each may have a different set of language versions. In practice, it may require exclusive licensing, interfering with non-exclusive licensing practices, and is understood by some to require package licensing of various forms of online distribution (such as transactional video on demand (TVoD), SVoD and advertising video on demand (AVoD)) to one entity, thus interfering with the current practice of different licensing channels and windows for each of these platforms. Instead of facilitating a consistent film offering across the entire country, this regulation may make it more difficult and unattractive to market films in Switzerland at all, leaving market potential untapped. The amended law also extends registration and detailed reporting obligations (from January 1, 2017) for films exploited in Switzerland in physical home entertainment distribution and online licensing, to which both platforms and their licensors will be subordinate, including those domiciled abroad. This is likely to cause substantial additional cost and effort to enter the market.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Switzerland is a member of the Berne Convention, TRIPS, WCT, and the WIPO Performances and Phonograms Treaty (WPPT). It is thereby obligated under these international agreements to provide "effective" remedies to prevent and deter infringement. Under Article 41(1) of TRIPS (and similarly the WCT Art. 14(2) and WPPT Art. 23(2)) it is required to "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." It is not currently doing so, as explained in this report, especially in light of the *Logistep* case, which severely curtailed enforcement procedures against online infringers.

⁶See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.
International Intellectual Property Alliance (IIPA)

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Thailand be lowered to the Watch List in 2017.¹

Executive Summary: After amending its copyright law in 2015, the Royal Thai Government continued to press forward with copyright reforms intended to help Thailand meet the challenges of the digital age, passing amendments to the Computer Crime Act (CCA) that include an administrative, no-fault remedy to disable access to infringing content. IIPA is very encouraged by this development as well as other measures introduced by the Royal Thai Government that indicate it is beginning to recognize the seriousness of its growing online piracy problem and the importance of a thriving creative industry. The establishment of the new Suppression of Intellectual Property Infringement Subcommittee offers hope for enhanced coordination and renewed prioritization of enforcement, particularly regarding complex online piracy cases. The Department of Intellectual Property (DIP) recently introduced an intellectual property roadmap that, among other things, calls for intensifying efforts to combat piracy. IIPA is also encouraged by DIP's efforts to improve intermediaries' cooperation with rights holders. IIPA further welcomes Thailand's introduction of long-awaited incentives of up to a 20% rebate for international motion picture productions.

Thailand must build on these reforms to make progress against its escalating online piracy problem. Thailand consumers are rapidly gaining access to the Internet, creating opportunities for the creative industries, but also posing challenges. Worsening online and mobile piracy threatens the sustainability of legitimate digital platforms in Thailand. The movie industry estimated that during one three-month period, there were twenty times more page views to top piracy websites than visits to the top legitimate platforms in Thailand. As in much of the region, Illicit Streaming Devices (ISDs) are proliferating. 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) continues to damage the market for films, and rogue collective management organizations (CMOs) continue to undermine the market for music, negatively impacting both users and music rights holders.

More needs to be done to address these mounting concerns. Thailand should use all available tools, including the new CCA remedy, to take action against online piracy. Thailand must initiate more upstream investigations that target criminal organizations at the root of much of the piracy; eliminate irregularities in enforcement; and ensure courts impose deterrent penalties against infringers. IIPA urges Thailand to address shortfalls in its copyright law through robust implementation of the 2015 amendments and through additional amendments. In particular, Thailand should ensure the copyright law provides an effective remedy to address the problem of online intermediaries that facilitate infringement and an efficient and effective notice and takedown process. Thailand should also introduce a measure addressing the establishment and governance of CMOs to bring order to the chaotic panoply of music collecting societies that are distorting the market. Finally, to further its ambition to accede to the WIPO Internet Treaties, Thailand must ensure that it adequately protects against the circumvention of technological protection measures (TPMs) and that it adequately protects rights management information (RMI).

PRIORITY ACTIONS REQUESTED IN 2017

Enforcement

- Ensure proper implementation of the CCA when it enters into force in May 2017.

¹For more details on Thailand's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Thailand's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



- Encourage DIP to continue to promote and coordinate voluntary arrangements between rights holders and intermediaries, including Internet Service Providers (ISPs), payment processors, ad placement agencies such as The Digital Advertising Association of Thailand (DAAT), and search engines to foster immediate cooperation against piracy sites operating inside and outside of Thailand. Such voluntary programs should be easily accessible to all rights holders.
- The Internal Security Operations Command should take actions against IP violations, focusing on Internet and mobile piracy and on upstream criminal enterprises, and use the Money Laundering Prevention and Suppression Act in key cases to enable enhanced remedies such as asset seizure.
- Bring effective enforcement actions against camcording pursuant to the new law (and encourage enhanced efforts of cinema owners); and against notorious piracy markets (“Red Zones” and “Yellow Zones”), closing them down and prosecuting uncooperative mall owners.

Legislative

- Address shortfalls to Copyright Act in order to:
 - Ensure that measures addressing Internet piracy promote intermediary responsibility, such as requiring intermediaries to take down infringing content without a court order.
 - 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.
 - Ensure (through revision of the existing camcording provisions) that measures addressing camcording effectively 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 that any exception 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 copyright 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.
 - Bring order to the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including by adding a measure addressing the establishment and governance of CMOs.
- The DIP should formally publish a statement to the public clarifying that a public performance license is required when a business plays music for a commercial purpose, including when the music is played from TV or radio.

Market Access and Related Issues

- Formally remove market access barriers impacting foreign audiovisual content, including:
 - fixing (or withdrawing) the problematic Film Act;
 - relaxing investment/ownership restrictions that impede legitimate distribution channels; and
 - easing television advertising restrictions.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain a more detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.² Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2016.

²See, e.g., IIPA, *Thailand*, 2016 Special 301 Report, February 5, 2016, at <http://www.iipawebsite.com/rbc/2016/2016SPEC301THAILAND.PDF>.

Rights 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.³

Worsening Internet and Mobile Piracy: 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.⁴ Almost 44 million people use fixed Internet in Thailand.⁵ Access to the Internet, including through both fixed and mobile Internet access, continues to increase.⁶

Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of television content, video games, published materials, and broadcasts. As noted above, the movie industry estimates that there are twenty times as many page views to top piracy services as there are page views to the top legitimate services in Thailand, ranking among the worst in Asia.⁷ Legitimate services are simply unable to compete. The use of social media is on the rise, and has become a popular platform for distributing and accessing pirated content. Streaming unauthorized content is the most popular form of piracy, whether through social media and streaming websites, apps, or ISDs. The Thai site *IpPlayBox.tv*, which was 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 2016, has changed to *Doo4k.tv*. It is a portal that allows users to download an app that provides access to pirated content, including the latest run motion pictures, television content, sporting events, and live streamed PPV events and concerts.⁸ Free programs that allow users to download infringing content from YouTube (i.e. stream ripping) 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. BitTorrent index and tracker sites, cyberlockers, and BBS/forums also remain problematic, although the popularity of peer-to-peer (P2P) networks, including BitTorrent, has declined mainly due to the increase in stream ripping. Internet Protocol Television (IP TV) has also become a popular platform for digital piracy.⁹

The motion picture industry has reported that many piracy websites are 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*, *mastermovie-hd.com*, *nungmovies-hd.com*, *seriesubthai.co*, *037hd.com*, *siambit.tv*, *dedbit.com*, *tt-torrent.com*, *newmovie-hd.com*, *3.mampost.com*, *subthaiseries.com*, *doo4k.tv*, *series24hr.com*, and *donang-hd.com*. 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 continues to take its toll on the market for legitimate creative content.¹⁰ Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult. Takedown rates for hosted content remain relatively high (the music industry reports nearly an 85% takedown rate with the 20 or so ISPs with which they work, and the motion picture industry reports a

³For example, the motion picture industry participated in a number of public awareness events and trainings, most relating to the challenges of combatting digital piracy.

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

⁵The number of Internet users in Thailand in 2016 is available at http://ttid.nbt.go.th/internet_db.html.

⁶The percentage of households with access to the Internet increased from 34.7% in 2014 to 52.2% in 2015 according to *Measuring the Information Society Report 2016*, International Telecommunications Union, at p. 243, available at <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2016/MISR2016-w4.pdf>. According to Internet Live Stats, Thailand's Internet penetration rate was 42.7% in 2016, up 6.2%. See <http://www.internetlivestats.com/internet-users-by-country/>.

⁷Studies have shown that such websites containing copyright piracy materials also peddle in high-risk advertising, including malware or click-fraud schemes.

⁸The site, which is extremely popular, requires users to pay a monthly subscription fee and draws estimated revenues of US\$8.6 million a month.

⁹IP TV allows streaming of television content over the Internet, and the illegal content is typically distributed using BitTorrent while collecting a monthly fee from subscribers. The television content may be streamed through a stand-alone server streaming the content to subscribers through a proprietary website that is typically difficult for enforcement authorities to trace, or through caching in a cloud service, such as Google Drive, which is also very difficult for enforcement authorities to trace.

¹⁰For example, the music market total revenues in Thailand decreased by nearly 6% in 2015, including a 4% decline in digital sales, continuing an alarming trend of year-on-year decreases in Thailand's music market.

takedown rate of 90%, involving thousands of notices), but the same cannot be said for non-hosted infringement. Stronger action is needed against non-hosted infringement and piracy sites hosted outside of Thailand.

IIPA is encouraged by actions the government has taken to ensure the copyright ecosystem in the online and mobile environments in Thailand is workable and supports legitimate business models. In particular, recent amendments to the CCA, which will enter into force in May 2017, will permit disabling of access to infringing websites. In addition, DIP has taken positive steps, including organizing a September 2016 seminar, to facilitate discussions between rights holders and intermediaries, including ISPs, payment processors, and advertising services (i.e. DAAT), to institute voluntary arrangements to address hosted, non-hosted, and foreign piracy sites and services. Additional efforts are needed, as there is not yet an agreement in place with intermediaries to address infringement on their services.

IIPA also welcomes DIP's recently introduced intellectual property roadmap, particularly the call to intensify efforts to combat piracy. To further this goal, the Internal Security Operations Command should proactively spearhead more digital piracy investigations, including into upstream criminal organizations.¹¹ The new Suppression of Intellectual Property Infringement Subcommittee 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 handling digital piracy cases, particularly to improve understanding of newer technologies such as stream ripping and content delivery networks, 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 remains a significant concern, harming 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; and Sukhumvit Road. Also noted for piracy are Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai.¹² 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 have conducted raids.¹³ Unfortunately, those raids have generally not been 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. Unfortunately, hard goods piracy takes place at certain government-supported activities or events, such as Silom Walking Street on Sunday. The Royal Thai Government should review the effectiveness of its anti-piracy efforts (including the designations of "Red Zones" and "Yellow Zones"), and seek improvements.

Illicit Streaming Device (ISD) Piracy Growing: ISDs¹⁴ are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from

¹¹By 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.

¹²Many of these markets are notorious for availability of pirated materials and were identified as Notorious Markets by the Motion Picture Association of America (MPAA). See MPAA *Written Submission Re: Request for public comment on the 2016 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2016-2013 October 7, 2016.

¹³The music industry group Thai Entertainment Content Association (TECA) reports 43 total raids in 2015, resulting in 21 arrests and 21 indictments.

¹⁴In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world, and they have become an increasing problem in Thailand. China is a hub for the manufacture of these devices. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users to connect to a supporting 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. ISDs sell at low prices at the malls, and may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Consequently, Royal Thai authorities must increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement, and taking action against key distribution points for devices that are being used illegally.

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 2016. Pirate syndicates continue to minimize risk by focusing almost exclusively on Thai audio captures, which are then added to video camcords found on the Internet. In 2016, there were 22 audio captures in Thailand: a 100 percent increase in audio forensic matches over 2015. 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. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. If strongly implemented, the Copyright Act amendment, which deems camcording an infringement of copyright, could help.¹⁵ While the movie industry conducted nine training sessions for 515 cinema managers and staff in 2016, enforcement remains weak. There was one interdiction and arrest for unauthorized camcording in 2014, but no arrests in 2015 or 2016.

Book Piracy Problems Abound: The book and journal publishing industry continues to face photocopy piracy, especially in and around university campuses, as well as unauthorized translations and print piracy. Unauthorized photocopying activities at copy shops around university campuses continue 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 with the lack of Royal Thai Government efforts to address these problems, the situation in Thailand is worse than 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 four years. The case has been long mired in drawn out mandatory mediation sessions (often used by the defendant to further delay proceedings) and court delays.

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.¹⁶ Pay-TV content also continues to be freely stolen

¹⁵Unfortunately, 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.

¹⁶These 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.

and re-sold by many provincial cable operators.¹⁷ Public performance piracy also continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. Bars and restaurants have added “private” rooms to screen motion pictures illegally.

Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts: While the establishment of the Thai IP&IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies 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. The burdens of proof in Thailand, from proving copyright ownership to losses and damages, do not appropriately take into account presumptions and are 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.¹⁸ 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 practice of rotating out IP&IT court judges with judges from the provincial courts has eroded the specialized expertise of the IP&IT Court. As a result, copyright cases are often heard by judges with little understanding of copyright law or the copyright industries. We recommend the IP&IT Court build expertise by retaining specialized judges trained in adjudicating IP cases.

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.

Protection Needed for Legitimate Licensees: The music industry has heard that many operators of restaurants, bars, shops and other commercial establishments have been harassed by “rogue” entities, despite having obtained licenses from legitimate CMOs and paid royalties for the use of sound recordings played on their premises. These “rogue” entities, often accompanied by threatening individuals, or sometimes even police officers, harass and threaten to sue the legitimate licensees for copyright infringement, or even imprison them, if they do not pay additional fees to obtain additional purported licenses. Often, the legitimate licensees have felt that their personal safety was in jeopardy. We urge the Royal Thai Government to take appropriate actions to protect these legitimate business operators from such unlawful threats and intimidation, which also harms music rights holders and users in Thailand.

COPYRIGHT LAW AND RELATED ISSUE UPDATES

CCA Amendment: In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) adds IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment was passed by the National Legislative Assembly (NLA) and signed by His Majesty King Rama X on January 24, 2017; the law is set to enter into

¹⁷The industry association Cable and Satellite Broadcasting Association of Asia (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.

¹⁸Section 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.

force on May 25, 2017. IIPA looks forward to working with the Royal Thai Government to ensure this provision is implemented to provide an effective remedy against foreign piracy sites.

Copyright Act Remains Deficient: Amendments to the Copyright Act, B.E. 2558 (2015), which entered into force in 2015, have not achieved the goals of 1) effectively addressing online piracy; 2) prohibiting circumvention of TPMs and protecting RMI, important benchmarks pursuant to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), which Thailand has not yet acceded to or ratified; and 3) effectively addressing unauthorized camcording of an audiovisual work in a movie theater. The amendments also included a new, overly broad exception to provide access to works for those who are “unable to access” a work due to visual, hearing, “intellectual” or “learning” disabilities. Unfortunately, the amendments did not include 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 of the amendments 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 with the amended Copyright Law that need to be addressed in implementation, in technical amendments, or in additional legislation to ensure that Thailand achieves its stated goal of a modernized copyright law¹⁹ that brings Thailand closer into compliance with its international obligations and implements the WCT and WPPT:

- **Service Provider Liability Is Ineffective:** 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 law has provided little more than court-ordered notice and takedown (if that). Although it provides for liability for ISPs that directly infringe, 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.²⁰ Unfortunately, unlike most countries in the world and contrary to global best practices, this provision has not allowed for a notice and takedown approach. In all cases, the ISP must remove infringing works or stop infringement upon a rights holder obtaining a court order, and the evidentiary burden for rights holders has proven to be substantial in the first test cases.²¹ As noted above, DIP is working to facilitate cooperation between rights holders and intermediaries, but an effective voluntary system for notice and takedown has been elusive. IIPA urges Thailand, either through implementation or technical amendments, to ensure an effective remedy to address the problem of online intermediaries that facilitate infringement.²²
- **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. IIPA understands that Thailand

¹⁹We 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.

²⁰Furthermore, the definition of “service provider” includes the qualification “whether the services [to access the Internet] are provided on its behalf,” raising questions regarding whether the exemption of liability applies only to passive intermediaries.

²¹For 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.

²²IIPA encourages Thailand to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which permits injunctive relief against intermediaries to remove access to infringing content.

intends to join the WCT and WPPT, which would be a positive step, but Thailand must first address the following shortcomings to ensure proper implementation:

- **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.²³ 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 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 RMI appear to be extremely overbroad, which risks undermining important protections for rights holders and raises serious questions regarding consistency with the three-step test governing exceptions and limitations under the WCT and WPPT treaties.²⁴ IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.²⁵
- **Camcording Provision Should Be Revised:** The provisions 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, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited. 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

²³Preferably, 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 technological protection measure (TPM).

²⁴Section 53/3(2) allows deletion or modification to the rights management information (RMI) 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).

²⁵The IIPA understands that the Department of Intellectual Property (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).

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.²⁶ In particular, legislation should address the establishment and governance of CMOs to provide at least that (i) only entities whose ownership or membership comprises rights holders or bodies representing them may operate as CMOs, (ii) rights holders or bodies representing them must be represented in the governing bodies of the CMOs, and must have fair and balanced representation in the supervisory bodies of the CMOs, and (iii) the management, including collection and distribution practices, of the CMO must be transparent and accountable. Further information on good practice is available in the WIPO Collective Management Organizations Toolkit and IIPA urges the Royal Thai Government to implement international best practices in this area, not least to address the problem of rogue entities masquerading as legitimate CMOs, which is damaging to users and music rights holders alike. In addition, DIP should take measures to ensure the accuracy of its copyright registration system, such as by developing a Copyright Registration Database System allowing examination of the accuracy of copyright owners and the registered contents to ensure accuracy and protect consumers from rogue CMOs.

- **New Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The amendments added 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. DIP has revised this provision to include allowing beneficiaries to communicate works to the public underscoring concerns regarding the scope of the exception. This 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 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.²⁷ 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:** Regretfully, the amendments also failed to extend Thailand’s term of copyright protection to be in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years.

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.

²⁶IIPA understands that DIP is in the process of setting up a Working Group to review previously drafted legislation (a 2007 bill) amending the Copyright Law to address this issue.

²⁷The 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 Department of Special Investigation (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.”

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.²⁸ 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.” Such administrative guidance should be kept within the legal bounds of existing exceptions, and it is imperative that affected publishers and stakeholders 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.²⁹ 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. DIP has made an effort to clarify informally, but the situation has not improved. We urge DIP to issue a formal, written guideline or clarification.

MARKET ACCESS ISSUE UPDATES IN THAILAND

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

The Act would also impose 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 rights 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 would place 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\$28,536) 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,

²⁸A 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.

²⁹In 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.

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.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Many of the deficiencies in Thailand's enforcement framework described above—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—run afoul of Thailand's obligations under the TRIPS enforcement provisions, particularly Articles 41, 42, 45, and 61.

UNITED ARAB EMIRATES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 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 2017.¹

Executive Summary: Trafficking in hybrid set-top-boxes (STBs), which enable unauthorized access to both legitimate and pirated movie and TV channels, and other forms of television piracy are increasing, both within UAE and in transshipment to other markets. It has been 15 years since the UAE passed federal legislation providing for the possibility of collective rights administration. However, the Federal Council of the UAE has failed to issue an operating license to any such entity, or to right holders themselves, leaving music right holders without the possibility of exercising their rights under local copyright law and collecting compensation for the commercial use of their music. 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 and good jobs in the media sector. The government needs only to issue an operating license to a collecting society to enable music right holders to start licensing and collecting royalties. 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 Council to conduct reviews expeditiously. As broadband penetration has increased, Internet and mobile piracy have flourished, discouraging legitimate services in the market. UAE's copyright enforcement structure needs to be updated to counter this threat.

PRIORITY ACTIONS REQUESTED IN 2017

- Take immediate action to approve a collecting society so that right holders can finally begin collecting royalties under the UAE Copyright Law.
- Expedite the 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.
- Proactively enforce against Internet piracy, including by properly instructing the Telecommunication Regulatory Authority (TRA) to disable access to illegal websites and IP addresses.
- Modernize the Copyright Law to ensure adequate protection against circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, devices, components, or services, and to harmonize the copyright term with the emergent international norm.

COPYRIGHT PIRACY IN UAE

Roughly 92% of the UAE population now uses the Internet.² Mobile penetration is widespread, with well over 200 mobile subscriptions per 100 inhabitants. These numbers, and the affluence of the population, 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.

¹For more details on United Arab Emirates' Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of UAE's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.

²See <http://www.internetlivestats.com/internet-users-by-country/>.



Online Piracy

Several notorious online piracy sites are among the top websites accessed in the UAE, including *123movies.is*, a streaming website that embeds popular movie and series content from third-party cyberlockers, and is the 29th most accessed site in the UAE. 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 Ministry of Economy (MOE) stopped issuing such directives, and enforcement ceased. Piracy and illegal circumvention activities online have increased since then, even though the Cybercrime Department of the Dubai Police has stepped in during the lapse in enforcement. Online piracy of books continues to increase, with file-sharing and User Generated Content (UGC) sites the primary online source of such unauthorized digitized (scanned) copies.

Television Piracy

With fast Internet bandwidth increasingly available in the UAE, media content is increasingly delivered through digital means rather than by satellite or terrestrial broadcast. Legitimate UAE platforms Etisalat, Du, and OSN Play offer satellite and streaming pay-TV to the UAE market. However, several different forms of piracy threaten the legitimate market for this content. Using the Internet as a low-cost form of delivery, pirates rip content feeds, upload the feeds on servers, and stream them through set-top-boxes that can decrypt the data feeds to be viewed on TV sets.

Hybrid Set-Top-Boxes: Hybrid STBs, which can receive both legal Free-To-Air channels and pirated TV channels if certain applications are installed in the device, have been entering the UAE market in large volume. These hybrid STBs operate over Internet protocol and are programmed to receive and decrypt specific digital feeds. They are illegally marketed, promoted, and sold to consumers through various sales channels including door to door, small retailers, and Internet sales. While the equipment and hardware for hybrid STBs are seemingly legitimate, the pre-loaded software allows access to pirated content. It is thus difficult to distinguish between legitimate STBs and illegal hybrid STBs preloaded with illicit software. Some of the common hybrid STBs in the UAE market are ones used for UKTV Abroad, UKTV Arabia, ip888tv.com and "Expat TV," which is gaining popularity amongst western expatriates in the UAE.

Circumvention of Territorial Restrictions: A number of pay-TV operators in Asia take advantage of the overspill of the satellites used to actively broadcast in their territories to promote, market, distribute and sell their services outside their licensed territories. These services are not authorized by their suppliers to sell in the UAE market, nor are they licensed by local regulators to operate and offer regulated services to the UAE public. The most blatant illustration of such illicit overspill services is India's Dish TV's operations in the UAE. Circumvention services, such as VPNs, DNS masks or Tor networks, which are widely available in the UAE, are also used to access and stream content from Internet-based TV and Video-On-Demand services that legitimately operate in different territories, but which have not been licensed for the UAE. This poses a direct threat to legitimate platforms which are currently offering the same content in the UAE.

Pirate Free-To-Air Channels: Pirate Free-To-Air channels in the region also harm the media industry. Free-To-Air channels are clear unencrypted channels which can be received and viewed without requiring a subscription. They are uplinked from many different locations across the region to satellites that have region-wide reach. It is difficult to apply consistent regulatory control to these satellites, which are not located in and do not have the rights to distribute the content to the UAE. There are an increasing number of these pirate Free-To-Air channels, and the multiple locations of satellites and lack of regulatory control for these channels makes it very difficult to control them or apply remedial measures for copyright infringement. Even when right holders are successful in closing down pirate Free-To-Air channels, the lack of regulatory control allows for these companies to reappear under a different channel or name. Two of the worst offenders are Majestic Cinema and Top Movies.

Impact on Legitimate Markets and Other Countries: Piracy of pay-TV and other media streaming channels not only affects right holders, but also harms cinemas, publishers, legitimate pay-TV service providers, and legitimate Free-To-Air channels which invest significant sums to license content and develop legitimate business models. These contribute to the economic development of the country, fund production of local content, create jobs and generate revenues for advertising and auxiliary industries. Outside markets such as India, Iraq, Iran, and the Gulf Cooperation Countries are also affected by piracy in the UAE. Dubai is a commercial hub for the region, and may affect legitimate markets in those countries by exporting copycat products and digital piracy equipment, such as hybrid STBs.

Hard Goods Piracy

While hard goods piracy remains a serious concern in the UAE, it is less prevalent for the music and film industries than digital piracy. Book publishers, particularly educational publishers, report that print book piracy remains a problem. Schools continue to use pirated copies of books, and educational institutions unfortunately continue to purchase pirated books from distributors. There appears to be an entire infrastructure supporting the distribution of pirated copies of books—beginning with printing presses producing and distributing pirated copies to distributors, who in turn peddle the infringing copies to educational institutions and to bookshops that sell the pirated copies.

COPYRIGHT ENFORCEMENT ISSUES IN UAE

Civil and Criminal Enforcement: While enforcement authorities in Dubai have undertaken a number of fruitful efforts, including the “open complaints” initiative of the Dubai Department of Economic Development (DED), many enforcement challenges remain in the UAE, particularly in malls outside the main cities and in Free Zone areas. In view of the high volume of goods imported to the UAE, as well as the territory being used as a regional hub for goods in transit, and given recent detections of high levels of counterfeit product in places like Dragon Mart 1, Dragon Mart 2, and the China Mall, UAE authorities must ramp up efforts to enforce against pirate and counterfeit traffickers in these locales with deterrent enforcement actions and enhanced controls with the customs authorities.

Industry sectors report that enforcement has somewhat improved in the past year. The DEDs in Dubai, Sharjah, and Ajman have been conducting intensive inspection raids of local retailers to ensure that their markets are free from counterfeit copyright products. The Criminal Investigation Department (CID) has been working closely with right holders or licensees to stop sales of hybrid STBs. This has reduced somewhat the use of unauthorized direct to home TV broadcasting services. CID established a special lab to investigate IP TV piracy for the economic crimes unit and has been coordinating with different authorities in order to collect evidence efficiently. However, in general, collecting information on instances of infringement remains difficult. Such operations require arrangements between different departments within CID, which slows down investigations. For example, the electronic crime unit is not allowed to correspond with organizations outside of the UAE, such as social media service providers, without a court order. Correspondence between the TRA and CID is also relatively slow, which impedes the collection of information and evidence in piracy investigations.

Publishers active in the market report that while hard goods piracy of books persists, UAE authorities have been responsive to publisher complaints against entities involved in book piracy. Unfortunately, action is predicated on a right holder filing a complaint, as the authorities do not initiate enforcement actions on their own initiative. In February 2016, the TRA disabled access to six websites facilitating access to unauthorized copies of books and journal articles, following an application made by publishers to the MOE. Additional sites have been submitted to the MOE, which is currently reviewing whether the content on the sites is in fact infringing. With respect to educational institutions, the DED and Abu Dhabi Educational Council (ADEC) have been willing to take measures to address piracy occurring in schools. For instance, certain UAE schools were inspected due to reports that these institutions were using pirated books. The educational authorities were agreeable to sending awareness-raising letters to

schools to inform administrators and students of the importance of using legitimate materials, and to discourage the use of pirated materials in schools.

The judicial system has also shown some signs of improvement. Prosecutors have been analyzing facts of IPR cases and referring cases to the courts on the grounds of violations of IP or cybercrimes related laws. However, use of VPNs, DNS masks, and Tor networks for piracy is increasing, and there is no serious enforcement of the Cyber Crimes Law against these actions. The government has proposed the establishment of special IP courts in some emirates. This would be a welcome addition, as currently criminal actions can take up to twelve months.

Sentences under the Cyber Crimes Law are deterrent, and include deportation for foreign expat violators in addition to imprisonment and fines of up to 1 million dirham (US\$272,000). Civil judicial remedies under the Copyright Law, on the other hand, are not very effective, as the practice is to impose a fine of only a few thousand dirham.

Collection of Royalties for Uses of Phonograms: Broadcasting and public performance (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.) are important uses of recorded music in the UAE. Revenue collected from such uses, estimated to be in the tens of millions of U.S. dollars if collection were allowed, is an essential element in supporting the development of local artists and in the UAE becoming a hub for the production of music in the region. Yet, due to government inaction and refusal to issue an operating license for collections, nothing is being collected today, substantially undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. It also means that U.S. music exported to the UAE cannot be monetized, and that various UAE businesses are not required to pay for music despite the protection recognized in UAE law.

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 MOE.

Twelve years later, no license for a collective licensing organization has been granted, and right holders still find themselves without the ability to exercise their rights, whether on a collective basis or individually. In 2015, it began to look as if a resolution were in sight. 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. However, no response was received from the MOE and the matter was allegedly considered at the federal level. The MOE should move swiftly to approve the application, which is supported by the music industry across the board.

Content Review of Book Titles. The book publishing industry faces a protracted content review process, particularly in Dubai. There appears to be no standard review process; instead, title monitors make determinations as to whether particular titles should or should not be sold in the country after what is often a lengthy process. A monitor is assigned to each retail establishment, and is required to inspect each title and write a summary of it before making a determination. 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. 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.

Challenges with Internet Service Providers (ISPs): The copyright industries report limited cooperation from the main UAE ISPs to combat online piracy. While the ISPs are open to hearing about the challenges right holders face, when infringement occurs they generally require that right holders bring an enforcement action through TRA, the government body that monitors ISPs, to achieve takedown. This process is much too slow, and takedown of infringing material generally takes months following notification to the TRA. Moreover, it is difficult to obtain an order for effective temporary measures to prevent further copyright infringement or to preserve related evidence. Telecommunication operators, ISPs and other relevant authorities in the UAE do not provide identification and contact data of identified IP addresses of their customers allegedly involved in Internet piracy activities, which hinders proper legal proceedings. Nor do they maintain any registry of repeat offenders or block their access. TRA should encourage ISPs to assist in disrupting the ecosystem for online infringement including by disabling access to illegal online services.

Training Programs: U.S. Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HSI), through the National IPR Coordination Center (IPR Center), and in conjunction with INTERPOL, conducted an enforcement training program in Dubai for the third time in November 2016. Further, U.S. Customs and Border Protection (CBP) provided IPR training sessions to Dubai Customs officials. OSN, a local company for pay-TV services, participated in a workshop related to copyright infringement and IP TV piracy. The workshop was organized by the Emirate Intellectual Property Association and INTERPOL.

COPYRIGHT AND RELATED LAW UPDATES

Amendments to the UAE Copyright Law: The MOE has in recent years contemplated amendments to the UAE Copyright Law³ 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 Copyright Law contains only rudimentary protections against the unauthorized act of circumvention of 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 materials⁴ 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;⁵ 2) ensuring compulsory license provisions are in conformity with the Berne Convention Appendix;⁶ 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)

³Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights.

⁴It 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).

⁵For 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.

⁶Article 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.

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, it does not expressly classify unauthorized content or pirated content, specifically copyright or trademark infringements, as illegal. Moreover, it does not include ISP liability for IP infringement carried out on the ISP. Implementing regulations should be issued clarifying that the Cyber Crime Law applies in cases of IP infringement.

Enhanced Remedies: A law should also be passed to set expeditious procedures for disabling access to pirate websites or illegal streams, and removal of unauthorized content if hosted locally.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The main trade agreement that UAE and the United States have in common is the WTO. Many of the shortcomings in the UAE copyright law identified above may constitute violations of UAE's obligations under the WTO TRIPS Agreement. UAE has also acceded to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and some of the shortfalls in its copyright law (e.g., with respect to the circumvention of technological protection measures) also raise issues of compliance with its obligations under those treaties.

ANNEX

ANNEX – SHORT COUNTRY SUMMARIES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The following countries were identified in the U.S. Trade Representative's 2016 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.

For each of these countries, IIPA does not recommend any change in 2017 from the current (2016) Special 301 status. The countries in this Annex are either currently on the U.S. Government's Watch List or Priority Watch List.

Argentina

In its April 2016 Special 301 Report, the U.S. Government noted long-standing deficiencies in IPR protection, and especially the lack of effective enforcement by the national government. The report noted that Argentine police do not take *ex officio* actions, prosecutions can stall, and cases may languish. In addition, it observed that “even when a criminal investigation reaches final judgment, infringers do not receive deterrent sentences.” The U.S. Government cited several open-air markets in Buenos Aires, which persist because city officials “received little assistance from the national government” and hard copy (optical disc) piracy lingers (witnessed by several successful warehouse raids). The U.S. Government said that Internet piracy rates approach 100% in several content areas, citing the example of the Argentine-run notorious market Cuevana, which offers pirated movies and TV shows and has expanded to include a mobile streaming application. In sum, the U.S. Government said that “[c]riminal enforcement is nearly nonexistent.” The U.S. Government cited weak laws, leaving rights holders dependent on trying to persuade cooperative Argentine online providers to agree to take down specific infringing works as well as seeking injunctions in civil cases.

The copyright industries concur that the Government of Argentina has not made copyright protection and enforcement a priority. In fact, the government has in the recent past, publicly lauded as “innovators” individuals who have stolen the content of creators, in violation of the language and spirit of the many international treaties to which Argentina is a member (Berne Convention, the WIPO Internet Treaties, etc.).

Digital piracy—via the Internet and mobile phones—exists in many forms including BitTorrent, downloading, cyberlockers and linking sites; but, the most prevalent for the music industry is stream ripping (including by services such as YouTubeMP3.org). The motion picture industry reports peer-to-peer (P2P) piracy as the most prevalent for motion picture and television piracy. This activity is certainly harming the legitimate vendors, which despite the rampant piracy, are trying to get a toe-hold in the marketplace. For example, there are 14 legal digital music services offering their services, including Spotify, Apple Music, Tidal, Personal Música, Claro Musica and Deezer. In addition, hard copy piracy is still rampant in major public markets and by street vendors (by some estimates hard copy piracy accounts for 60% of the illegal market). The copyright industries report that Internet Service Providers (ISPs) typically ignore takedown notices submitted by rights holders.

Legislation to address digital piracy is currently under consideration. Two bills were submitted to Congress in late 2016 (and subsequently merged into one bill) intended to deal with notice and takedown procedures and ISP liability. In fact, the legislation would make matters significantly worse, not better. The main concerns with the new legislation are: (i) it provides an overly broad safe harbor for a non-exhaustive list of service providers; (ii) the safe harbor provisions do not include any important threshold requirements (i.e., as are included in the U.S. law—the DMCA); (iii) definitions are unclear; and (iv) most troubling, it requires a court order for a service provider to “obtain



knowledge” of infringement and to be required to remove infringing content. The bill, if adopted, would make copyright enforcement unworkable in Argentina, and would leave rights holders without any protection against online piracy.

There are two collective rights issues causing concern for the motion picture industry. First, an Argentine collective management organization (SAGAI) has collected approximately \$40 million in royalties, including royalties for retransmitted U.S. motion picture and television programs, but has refused to pay U.S. performers any cable retransmission royalties collected for U.S. audiovisual works. This is contrary to Argentine law (Section 1 of Decree 1914/2006) mandating payments for audiovisual performers. In 2014, the Screen Actors Guild–American Federation of Television and Radio Artists (SAG-AFTRA), on behalf of its members (performers) filed a claim with SAGAI, but these claims have to date been denied. SAGAI claims, incorrectly, a lack of U.S. reciprocity with regard to Argentine works and performers. Second, another Argentine collective management organization (DAC), representing film and television directors, has rejected U.S. claims by the Directors Guild of America (DGA). They also cite, incorrectly, the lack of U.S. reciprocity. Their denial of payment is contrary to Berne and WIPO Copyright Treaty obligations. In both instances, U.S. retransmission royalties could be paid (via reciprocity) to Argentine performers and directors in accordance with the cable and satellite compulsory licenses under U.S. Copyright Law (sections 111 and 119).

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 of the government to address these problems. There were no reported improvements in enforcement in 2016. The industries report that *ex officio* action by enforcement agencies is non-existent; the police fail to comply with search warrants in a timely manner; and prosecutors fail to take criminal cases forward. All of this makes enforcement very difficult.

There are simple measures that the Government of Argentina can take, 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. For example, criminal cases can take up to six years to reach a final verdict. Civil actions, at least for preliminary injunctions, is often the only available recourse, but procedural hurdles persist even for civil actions. Thus, the Criminal Code and Civil Code need reforms, including legislation to clearly criminalize camcording activities.

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.

Finally, we welcome and encourage the continuation of dialog between the U.S. Government and the Government of Argentina under the Creativity and Innovation Working Group, including on how best to address digital piracy issues in Argentina.

Argentina is currently on the [Priority Watch List](#).

Barbados

In its April 2016 Special 301 Report, the U.S. Government noted that while the legal framework in Barbados largely addresses IPR, the United States continues to have concerns about the illicit interception and retransmission of U.S. cable programming by local cable operators, without adequate compensation for U.S. rights holders. Also the U.S. Government urged the Government of Barbados to adopt modern copyright legislation that protects works in

both physical and online environments and to take steps to prevent signal piracy. A priority for Barbados' legal regime should be the ratification and implementation of the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). This is a necessary step to protect copyright and neighboring rights and to create a favorable environment for the digital marketplace in Barbados.

The motion picture industry reported in 2016 that there is ongoing widespread broadcast piracy of both free-to-air and premium services in Barbados. This includes the use of unauthorized decoding equipment and the unauthorized retransmission of signals. These activities are violations of both Barbados Copyright Law and of international norms.

Barbados is currently on the Watch List.

Costa Rica

As detailed in the IIPA submission cover letter, Costa Rica has fallen far short of meeting its obligations under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). Further, online piracy continues to harm the legitimate digital media market, with piracy rates of over 50% for music. USTR's April 2016 Special 301 Report urged Costa Rica to "take effective action against any notorious online markets within its jurisdiction that specialize in unlicensed works." The hospitality of Costa Rica's ccTLD registry to domain names for sites dedicated to copyright piracy remains a serious concern.

Costa Rica is currently on the Watch List.

Ecuador

In its April 2016 Special 301 Report, USTR moved Ecuador from the Priority Watch List to the Watch List. The U.S. Government commended the Government of Ecuador for its willingness to engage with the United States. The U.S. Government noted at that time, however, strong outstanding concerns with respect to Ecuador's draft Code of the Social Economy of Knowledge, Creativity, and Innovation ("COESCI"). After undergoing further revisions, a final version of the bill was approved on November 29, 2016. It is unfortunate that, despite clear messages from governments and rights holders, the National Assembly adopted a final text that contains extensive and expansive exceptions and limitations in the Intellectual Property Law, which will significantly weaken copyright protection in Ecuador. Many of these exceptions exceed the Berne and TRIPS compatible three-step test. With the passage of the new Intellectual Property Law (COESCI), there are now 30 exceptions and limitations on rights (up from 11 in the prior law), including a "fair use" clause. The Ecuadorian judicial system is, unlike the United States, without precedential case law (and judges have no experience or training) on the doctrine of fair use, and this will likely further undermine protection.

In addition, COESCI includes several other provisions that will weaken copyright protection. For example, the recording industry is particularly concerned by exceptions on the scope of the public performance right for certain "micro-businesses" (i.e., medium to small businesses which account for 90% of the businesses in the country), and "community radios" (that account for 30% of the total number of stations nationwide). These two changes alone could significantly damage the market for music licensing royalties. The Government of Ecuador should move to correct the COESCI deficiencies and shortcomings, in accordance with its international obligations.

In December 2016, the Ecuadorian National Assembly approved a report that ratified the country's accession to a trade agreement with the European Union (EU), Peru, and Colombia, which came into force January 1, 2017.¹ The trade agreement's copyright provision requires compliance with the Berne Convention, the Rome

¹<http://www.andes.info.ec/en/news/ecuadorian-national-assembly-gives-green-light-trade-agreement-european-union.html>.

Convention, the WCT, and the WPPT. It also provides for a notice and takedown system and potential ISP liability for infringing content posted by users.

Despite this legislative attention to copyright, enforcement of IPR in Ecuador remains very weak. A lack of deterrent sentencing continues to hamper effective enforcement against copyright piracy. Camcording is also a problem in Ecuadorian movie theaters. The motion picture industry reports that 27 illegal camcords of films were sourced from Ecuador in 2016 (through November); this is a doubling of the number from 2015, when 13 illegal camcords were reportedly sourced from Ecuador. Further, the recording industry reports that it is very often impossible to collect public performance royalties for music and sound recordings (including by state-owned broadcasters). The Government of Ecuador should set a good example and promote the fair payment of required license fees, which would support the development of Ecuador's creative industries.

Egypt

Some IIPA members report a sharp increase in piracy over the past year, in part because of the spread of more sophisticated piracy organizations as well as the growth of mobile devices and other technological advances. There are a number of unlicensed satellite channels that broadcast copyrighted works without a license, including U.S. works. In addition, unlawful decryption of encrypted signals remains an endemic problem. Copyright piracy in Egypt is widespread, including unauthorized websites, BitTorrent files and sites, and, indexing websites. Most ISPs do not respond to takedown notices. Camcording is also a problem in Egyptian movie theaters. The motion picture industry reports that from 2011 to 2016, there were 20 illegal camcords of films sourced from Egypt.

Cases drag on for years without resolution, and court procedures require experts to identify infringing material even though there are few qualified experts. Antiquated laws need to be reformed, including the Intellectual Property (Copyright) Law, the Civil and Procedural Code of 1968, and the Evidentiary Code of 1968. The industries report some cooperation with enforcement officials in 2016, including the Public Prosecutors Office, and with Customs authorities.

In its April 2016 Special 301 Report, the U.S. Government had two specific recommendations for improvement: (1) the need to "provide customs officials *ex officio* authority to identify and seize counterfeit and pirated goods at the border" and (2) to "establish and empower the specialized body that is responsible for IPR protection under the Egyptian Constitution of 2014."

One positive step, taken in 2008, was the establishment of an Economic Court to allow IPR cases to be heard by experienced judges (more expert than the general commercial courts). But the noted procedural hurdles and delays have hindered the effectiveness of this court. Another bright spot has been the management of the Copyrights and Artistic Works Investigation Unit of the Ministry of Interior, which undertakes *ex officio* actions against piracy.

IIPA members recommend three priorities in 2016: (i) to allow the establishment and operation of collecting societies in Egypt under the Intellectual Property Law (No. 82 of 2002, as amended); (ii) to create an expeditious content review procedure for clearing book titles for sale in the market, including properly resourcing the Copyright Office in the Ministry of Culture to create a central database of cleared titles to avoid repetition; and (iii) to augment enforcement against signal theft.

Egypt is currently on the [Watch List](#).

Guatemala

The digital music market in Guatemala is comprised of 11 services competing for consumers. From January to October 2016, the digital music market grew steadily compared to the same period in 2015 (approximately 37%).

In contrast, sales of physical products declined by 24% in the same period. The local collective management organization of record producers and artists (AGINPRO) continued its efforts to collect monies, and filed several legal actions (mostly criminal actions) to try to obtain compensation for public performances from businesses performing sound recordings as well as from cable operators. Support for these efforts from some of the enforcement authorities has generally been good.

In its April 2016 Special 301 Report, the U.S. Government noted that, overall, enforcement activities in Guatemala remain limited due to resource constraints and lack of coordination among law enforcement agencies. Additionally, the United States urged the Government of Guatemala to strengthen enforcement, "including criminal prosecution, and administrative and customs border measures." The report highlighted cable signal piracy as a serious problem that "remained largely unaddressed." IIPA members agree with this assessment.

Guatemala is currently on the Watch List.

Jamaica

In its April 2016 Special 301 Report, the U.S. Government noted that, in June 2015, Jamaica had made significant progress by passing amendments to the Copyright Act to fulfill its obligations under the WIPO Internet Treaties and to extend the term of copyright protection. Further it noted Jamaica as one of several Caribbean countries facing the ongoing problem of unlicensed and uncompensated cablecasting and broadcasting of copyrighted music. Jamaica maintains a statutory licensing regime for the retransmission of copyrighted television programming, but has not consistently enforced the payment of statutory royalties to rights holders. One positive step, taken in April 2015, was the public identification by the Broadcasting Commission of Jamaica of nearly 100 illegally transmitted channels, and the issuance of a directive to cable licensees to cease the illegal transmission of 19 of these channels by August 2015. While this 2015 phase of enforcement appears to have been widely complied with, subsequent removals have not been mandated and dozens of additional channels continue to be broadcast illegally by local operators.

In sum, for two years, the Government of Jamaica has discussed legitimizing its broadcast television ecosystem which is plagued by rampant signal theft. That it is willing to undertake reform is a positive step; unfortunately, no further action was taken in 2016. The Government needs to enforce the current law and fully implement its promised reforms.

Jamaica is currently on the Watch List.

Kuwait

In its April 2016 Special 301 Report, the U.S. Government retained Kuwait on the Priority Watch List. It noted that Kuwait had been elevated from the Watch List in November 2014 at the conclusion of an out-of-cycle review (OCR), because Kuwait had failed to introduce a copyright law consistent with international standards and had not resumed effective IP enforcement. It further noted that while some enforcement actions were resumed after the late 2014 OCR announcement, these activities significantly decreased in 2015 and have not resumed. Thus, Kuwait was retained on the Priority Watch List until the government undertakes improvements in copyright and trademark enforcement, and moves forward with long overdue copyright legislation that is consistent with Kuwait's international commitments.

IIPA is aware of no recent criminal cases for copyright infringement, nor any developments leading to the establishment of (long promised) specialized IP courts. The law revision process to bring the law into full compliance with the WTO TRIPS Agreement and enable Kuwait to ratify and implement the WCT and WPPT is no closer to resolution today than it has been for years. Kuwait did join the Berne Convention in 2014 (effective December 2, 2014), but this step alone is not sufficient for TRIPS compliance, let alone meeting international norms. Thus, the

Government of Kuwait's inaction is impeding the development of a legitimate online entertainment market, leaving a gap to be filled by unlicensed services.

Kuwait is currently on the Priority Watch List.

Turkey

Piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. Digital piracy—via the Internet, mobile phones, peer-to-peer (P2P), BitTorrent and linking and topsites—permeates the marketplace.

In its April 2016 Special 301 Report, the U.S. Government noted that Turkey was making “little to no progress” on IPR issues and enforcement of existing IPR laws, “particularly by the judiciary, remains extremely weak.” The U.S. Government was concerned further about the lack of progress on promised IPR legislative reforms and recommended several such reforms, including: (1) amending the copyright law “to provide an effective mechanism to address piracy in the digital environment;” (2) full implementation of the WIPO Internet Treaties; (3) that royalty collecting societies be required to have fair and transparent procedures (and, these societies should have fair membership criteria for foreign rights holders as well as good governance structures); and (4) giving the Turkish National Police (TNP) *ex officio* authority (which they do not have and which “impedes police from acting on obvious infringement cases”; and (5) to “ease the process for TNP to obtain search and seizure warrants for suspected IP infringement.”

There are two very specific issues of concern for IIPA members. First, are the discriminatory Turkish policies that prevent the full participation in the management and decision-making of collective management organizations (CMOs) in the music industry. Second, there are judicial decisions that have incorrectly interpreted the right of communication to the public, in violation of the Berne Convention, the WCT, and the WPPT, 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: (i) remove the membership discrimination within CMOs, and to enable full and fair distribution to all members in collecting societies; and (ii) 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. New legislative proposals for copyright reforms, including ISP liability (and the obligations of neutral intermediaries), have been anticipated for the past several years; there was no action taken in 2016. While it is unclear when the legislation will be considered, 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.

There have, in the past, been prosecutorial delays (or indifference) especially to takedown notices with ISPs or actions to remove links to pirate sites. However, there have been recent signs of improvement with notices now going to the Access Providers' Association instead of to individual ISPs; this has helped to funnel and streamline notices and responses (including takedowns). By one estimate, approximately 70% of takedown notices now are responded to with a removal of material. In addition, prosecutors have had some successes disabling access to some websites.

Book piracy is also rampant in Turkey. Entities involved in the production of pirated books operate on a large scale. After relevant titles are identified prior to the school terms (for private high schools and universities), a legitimate copy is obtained. Then, typically, the operations rent or buy photocopying machines and scanners, and install them in warehouses or on vehicles—ready to produce unauthorized copies to be sold through shops or apartments located near universities and these high schools. Unfortunately, tackling photocopying and digital reproductions are not an enforcement priority. The entire enforcement process is marred by endemic delays—from obtaining a search warrant to conducting a raid, to the assigning of a subject matter expert (and, there are not

enough), to assisting a court in determining whether piracy has occurred, to an actual judgment, which can take anywhere from five to seven years. The lack of personnel and expertise in prosecuting IP infringements thus contributes to the proliferation of photocopying and digital book piracy in the market.

Turkey is currently on the Watch List.

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 in 2016—approximately, 60% in local currency. However, this growth is deceiving since the rate of inflation has exceeded 300%.

In addition, for several years, Venezuela has been a source of many infringing camcords. In 2016, three video camcords and nine audio camcords were sourced from Venezuelan theaters. These copies then migrate online fueling international piracy. The problem of camcording, and enforcement weaknesses in general, were both noted by the U.S. Government in its April 2016 Special 301 report retaining Venezuela on the Priority Watch List.

Venezuela is currently on the Priority Watch List.

APPENDIX B
CHART OF COUNTRIES'
SPECIAL 301 PLACEMENT (1989 – 2016)
&
IIPA'S 2017 SPECIAL 301 RECOMMENDATIONS

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2016)
AND IIPA 2017 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																														
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
ALGERIA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL																				
ARGENTINA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL	
ARMENIA																WL	WL	WL												
AUSTRALIA																			WL	WL	WL	WL			WL	PWL	PWL	PWL		
AUSTRIA																				OO	OO									
AZERBAIJAN													WL	WL	WL	WL	WL	WL												
BAHAMAS												WL	WL	PWL	PWL	WL + OCR	OCR	OCR												
BAHRAIN																				WL	WL	WL	WL							
BARBADOS		WL	WL	WL	WL																									
BELARUS			WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO										
BELIZ											WL	PWL	WL	WL																
BOLIVIA		WL		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO								
BRAZIL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL	
BRUNEI						WL	WL	WL	WL																					
BULGARIA		WL	WL	WL	WL							WL	WL	WL							PWL	WL	OO	OO						
CANADA	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL	
CHILE	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
CHINA (PRC)	PWL	PWL	PWL	PWL+306	PWL	PWL+306	PWL	PWL	PWL	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL	
COLOMBIA	WL	WL+OCR	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	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	WL	PWL	PWL	PWL	PWL	PWL	WL	OO								
ECUADOR	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL				
EGYPT		WL	WL	WL	WL	WL	WL	WL	WL	WL	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	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	
GUATEMALA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL				
HONDURAS			OCR																		WL	WL	OO	OO	OO					
HONG KONG																				OCR	WL	WL	OO							
HUNGARY									WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL			
INDIA	PWL	PWL	PWL	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
INDONESIA	WL	PWL	PWL	PWL	PWL	PWL+GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	
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						

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2016)
AND IIPA 2017 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																													
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
ITALY					WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	
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	WL
JORDAN																			WL	WL	WL	OO	OO						
KAZAKHSTAN													WL	WL	WL	WL	WL	WL		OO									
KUWAIT		PWL	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											
LEBANON		WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
LITHUANIA											WL	WL	WL	WL	WL	WL	WL	WL											
LUXEMBOURG																						WL							
MACAU																	WL	WL	PWL	PWL									
MALAYSIA							WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
MEXICO	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
MOLDOVA																			WL										
NETHERLANDS																					OO								
NEW ZEALAND																WL	WL		WL							WL	WL		
NICARAGUA																				OO	OO								
NORWAY						WL	WL	WL	WL	WL																			
OMAN																			WL	WL	WL	WL	WL	OO					
PAKISTAN		WL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
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	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
PHILIPPINES					WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	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	WL	OO	OO	OO	WL						
RUSSIAN FEDERATION	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	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
SWEDEN																				WL	WL	WL							
SWITZERLAND	WL	WL																											

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2016)
AND IIPA 2017 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																													
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
TAIWAN	PWL									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		OCR	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
THAILAND	WL	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	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
TURKMENISTAN		WL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
UNITED ARAB EMIRATES	WL																WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
UKRAINE	PWL	PWL	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	WL											
VENEZUELA		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
VIETNAM	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
YEMEN																				OO									

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