

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### VIETNAM

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

#### **EXECUTIVE SUMMARY**

Having recently passed its one-year anniversary of accession to the World Trade Organization (January 11, 2007), the government of Vietnam has made some progress on promises made in the area of protection of intellectual property rights. Signs of progress in 2007 included an agreement by the government to procure legal software, actions taken by administrative authorities against unauthorized use of software by businesses and in government agencies, reductions in signal theft due to the removal of pirated international channels from local operator VTC, and continued consideration of modifications to Vietnam's judicial system, administrative regulations, and criminal regime to deal with IP infringements.

Nonetheless, the Vietnamese market remains largely closed due to high copyright piracy rates, overall lack of enforcement against copyright piracy, and market access barriers that make Vietnam one of the most restrictive markets in the world for U.S. content. An organized campaign, including stiff deterrent criminal remedies against large-scale producers and distributors of pirate product in Vietnam, and market opening measures, would send the message to foreign right holders that their investment in Vietnam's future is welcome.

#### **PRIORITY ACTIONS FOR 2008**

- **Commence Anti-Piracy Campaign:** While Vietnam made some improvements in enforcement of copyright, in the area of software in particular, the government should take stricter measures in 2008 to provide a "deterrent" against infringement by commencing an anti-piracy campaign against organized piracy activities in the country, including targeting sources of pirate production, like the optical disc plants in operation in Vietnam, pirate distribution warehouses, and pirate retail shops selling CDs, DVDs, and illegal reprints or photocopies of books. Remedies should include tough administrative fines, license revocations, and shop closures, and criminal penalties through targeted prosecutions.
- **Confirm Criminal Remedies for Copyright Piracy (TRIPS Requirement) and Lower Thresholds:** The Vietnamese government has failed to issue a long-promised Circular to confirm that at least willful infringements of copyright on a commercial scale, i.e., that are detrimental to the interests of right holders, and other violations of the IP law as deemed necessary to provide a deterrent, shall be subject to criminal remedies in Vietnam. In addition, as Vietnam looks to amend its Criminal Code in 2008, maintenance of the Circular's coverage should at least be maintained, and the relevant provisions should allow criminal prosecutions to be brought more easily, since, to date, very few if any copyright infringements have been handled criminally.
- **Afford U.S. Right Holders With Access to the Vietnamese Market:** Various market access barriers exist in Vietnam today, the most serious being the limitations on foreign companies' setting up subsidiaries to produce or distribute "cultural products." Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry. Vietnam must eliminate existing foreign investment restrictions and other barriers to entry to allow foreign right holders to participate in the Vietnamese market with respect to the production, importation and distribution of physical product as well as the importation and distribution of digital

product via online and mobile networks in order to provide a legitimate alternative to pirate product. Foreign companies should be permitted to establish and/or establish in Vietnam for the purpose of importing and distributing copyrighted materials, including to license their content to Vietnamese internet or mobile content providers for sale to the public.

- **Pass Optical Disc License Regulation:** IIPA understands that a draft regulation on optical disc management has been under consideration by Vietnam for some time. Given that the OD piracy situation remains serious in Vietnam, such regulations should be passed forthwith. Vietnam now has between five and seven optical disc plants with capacity to produce that far outstrips any rational legitimate domestic demand. A comprehensive regulation on the licensing of optical disc manufacture is urgently needed that includes the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, and provisions prohibiting the unauthorized commercial burning of content onto CD-R.
- **Join the WIPO Internet Treaties, the WCT and WPPT:** Vietnamese government representatives have indicated they are still studying whether to join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (WPPT). However, the 2005 IP Code includes the major implementing components for those treaties, so Vietnam should be encouraged to join its regional neighbors and join these important treaties as soon as possible.

<b>VIETNAM</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2003-2007<sup>1</sup></b>										
<b>INDUSTRY</b>	<b>2007</b>		<b>2006</b>		<b>2005</b>		<b>2004</b>		<b>2003</b>	
	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>	<b>Loss</b>	<b>Level</b>
<b>Business Software<sup>2</sup></b>	82.0	90%	53.0	88%	21.0	90%	30.0	92%	24.0	92%
<b>Books</b>	17.0	NA	18.0	NA	16.0	NA	16.0	NA	12.0	NA
<b>Motion Pictures</b>	NA	NA	NA	NA	NA	NA	10.0	NA	7.0	100%
<b>Records &amp; Music</b>	NA	95%	NA	95%	NA	95%	NA	NA	NA	NA
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>TOTALS</b>	<b>99.0</b>		<b>71.0</b>		<b>37.0</b>		<b>56.0</b>		<b>43.0</b>	

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

The Vietnamese government made some progress in the fight against business software piracy and pay TV signal theft in 2007. The efforts of the government are also reflected in an increasingly transparent modus operandi with respect to all aspects of copyright protection, including enforcement, through a comprehensive revamping of the website of the Copyright Office of Vietnam (<http://www.cov.org.vn/Vietnam/home.asp>) and the provision of most of the information in English translation (<http://www.cov.org.vn/English/home.asp>). In addition, a government Decision No. 51, contains goals for Vietnam to reduce its piracy rate to at least meet the level attained by other countries in the region.

The latest reporting from the website indicates that in the first nine months of 2007, the government of Vietnam oversaw the following enforcement results:

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf). For information on the history of Vietnam under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at ([http://www.iipa.com/pdf/2008SPEC301HISTORICAL\\_SUMMARY.pdf](http://www.iipa.com/pdf/2008SPEC301HISTORICAL_SUMMARY.pdf)) of this submission.

<sup>2</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Vietnam, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

- The Vietnamese government reported that the Inspectorate of the Ministry of Culture, Sports, and Tourism (formerly the Ministry of Culture and Information) and inter-agency inspection teams of local provinces and cities inspected 14,677 facilities doing business in cultural items and discovered and handled 4,952 facilities found to be in violation of the law. In all, 267 facilities were warned, 123 facilities had their business licenses suspended, and 43 facilities had their practicing certificates temporarily seized.
- The government reported that 802,990 disks and tapes of all types, 454,424 packages and labels, 14,603 books, 13 computers and 23 hard disks were seized. The total of all administrative fines was reported to be 15 billion VND (approximately US\$940,000) during the first nine months of 2007.

Industry reports that in 2007, the government began *ex officio* actions in the form of unannounced sweeps of shops dealing in pirated DVDs, VCDs and CDs.

Notwithstanding the increased activity in 2007, unfortunately, piracy levels in Vietnam for other sectors continued to rank among the highest in the world. The music/sound recording industries reported piracy rates of over 90%. Major piracy issues include optical disc piracy (both factory and burned), book piracy, and business software end-user piracy. One anecdote that typifies the situation involves the closure of a store selling pirate movies, at 12A Hai Ba Trung, in Hanoi. The reason for the store's closure was stated in big banners announcing that the shop moved to a bigger and better location.

**Optical Disc Production and CD-R “Burning” in Vietnam:** Technological advances in Vietnam and lax IP laws have made Vietnam an attractive place for pirate optical disc manufacture in recent years. Between five and seven optical disc plants operate in the country, and while some production is legitimate blank CD-R production due to migration from other locales,<sup>3</sup> the estimated production capacity of at least 42 million discs per year (12 production lines as of January 2007) dwarfs any rational legitimate domestic demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products have been found in other Asian countries,<sup>4</sup> Canada, the Czech Republic, and Poland.

The industries have intelligence that syndicates outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam) largely in response to Vietnam's booming economy. Apparently these underground plant operators are increasing production in order to respond to higher disposable income rates in Vietnam and a resulting desire among Vietnamese consumers for the latest western music and movies. Another indicator that physical piracy is growing stems from the number of CD/DVD/VCD players that are entering the country from China. The availability of these inexpensive players in the market place can be taken as an indicator of greater demand for music and movie products in the optical disc format.

**Business Software End-User Piracy:** Business software end-user piracy – the unauthorized use of software by businesses – remains the most damaging form of piracy in Vietnam for the business software sector. In 2006 the Vietnam authorities, including the IT Crime Unit of the Department of Economic Police of Vietnam, and the Inspectorate of the Ministry of Culture, Sports, and Tourism, began running raids against end-user piracy targets, as well as against hard-disk loading at retail, with some

<sup>3</sup> See *Taiwanese Optical-Disc Makers Facing EU Anti-Dumping Probes Eye Vietnam*, at Investment & Trade Promotion Centre, Ho Chi Minh City, August 17, 2005, at [http://www.itpc.hochiminhcity.gov.vn/en/business\\_news/business\\_day/2005/08/folder.2005-08-17.7878435323/news\\_item.2005-08-17.5001252474?b\\_start:int=20](http://www.itpc.hochiminhcity.gov.vn/en/business_news/business_day/2005/08/folder.2005-08-17.7878435323/news_item.2005-08-17.5001252474?b_start:int=20) (noting that “once EU adopts some anti-dumping sanctions that might hamper optical-disc exports from China, Vietnam is expected to become another rising production” for optical discs, and noting that Ritek already operates a plant in Vietnam, and that Gigastorage Corp. had investigated whether to move into the Vietnamese market).

<sup>4</sup> *Bootleg DVD Movie Kingpin Jailed for Life*, The Standard Online, November 25, 2006, at [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=3&art\\_id=32633&sid=11044738&con\\_type=1&d\\_str=20061125](http://www.thestandard.com.hk/news_detail.asp?we_cat=3&art_id=32633&sid=11044738&con_type=1&d_str=20061125) (a recent smuggling ring was uncovered in Guangxi Province, which borders Vietnam); one defendant was convicted to life in prison in China; the case was reported in Vietnam at <http://www.toquoc.gov.vn/vietnam/showPrint.asp?newsId=9385>).

success.<sup>5</sup> Industry reported that in 2007, the government conducted four raids against end-user piracy.<sup>6</sup> The government also reported that in the first five months of 2007, the MCST investigated eight facilities dealing in hard-disk loading of pirate software onto computers in Ho Chi Minh City, as well as Nghe An and Ha Tinh Provinces, resulting in removal of pirate software in 117 computers. However, in all of these software cases combined, the government meted out only 110 million VND (US\$6,900) in fines, and each individual case, even the one involving 6.5 billion VND (US\$408,000) worth of illegal software, the maximum fine is limited to only 100 million dong (about \$6,275). Fines generally have measured from 15-30 million VND, or about US\$940-1,880. This overall lack of deterrence remains a major problem in Vietnam which must be addressed in 2008. In addition, government actions have been undertaken primarily by the Economic Police and the Inspectorate of MOCST based in Hanoi. IIPA would like to see more actions taken by local authorities in major cities such as Ho Chi Minh City, Da Nang, and Hai Phong.

#### **Government Legalization of Business Software and Other Copyright Materials:**

Increasingly, as copyright markets evolve into the digital environment, losses due to unauthorized uses in the workplace mount for all the copyright industries; especially problematic is the unauthorized use by governments of business software. In many countries, government agencies, contractors, and employees – which can represent a large percentage of workplace users depending on the country – are not doing their part to ensure that uses of software and other copyright materials are legitimate. IIPA thus looks to governments to employ strategies to legalize use of business software and other copyright materials.

**Book and Journal Piracy:** Book and journal publishers continue to suffer from overwhelming piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copyshops all sell illegal copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers who engage local production. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations.

Universities could take a more active role in ensuring that illegal reproduction is not happening on campuses. Some publishers report positive steps in this regard by particular universities in Hanoi. This type of responsiveness is to be commended. State-sector publishers also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. This type of misuse hurts legitimate local and foreign publishers alike, resulting in distribution of unauthorized books through the mainstream state bookshops. Government publishing houses could help reduce piracy by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy.

**Internet and Digital Device Piracy:** Vietnam has seen rapid growth in Internet usage as well as mobile device penetration; Vietnam now boasts over 18 million Internet users (21.4% Internet penetration),<sup>7</sup> and has 106,772 individual web hosts (as of 2007)<sup>8</sup> and 30,000 hosted websites.<sup>9</sup>

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<sup>5</sup> Specifically, the government conducted its first two administrative raids in Vietnam against end-user software piracy in 2006. On October 5, 2006, the MOCI and the Economic Police successfully raided a joint venture company in Hanoi. Forty-two computers were examined during the raid. The total value of pirated software used by the infringing company was estimated at about VND1 billion (approximately US\$62,750). In early December 2006, a ceramics company in Ho Chi Minh City was raided, and 30 computers containing unauthorized software applications were confiscated. The estimated total value of the illegal software found amounted to 1.5 billion VND (approximately US\$94,000).

<sup>6</sup> Details of four end-user software piracy are as follows:

- On March 27, 2007, two companies in Ho Chi Minh City were inspected by authorities and infringing software was discovered, and 24 hard disks and 150 CDs containing pirated software were seized.
- On October 26, 2007, an inter-agency squad inspected a design company, and discovered 82 computers with unlicensed software amounting to over 6.5 billion VND (US\$408,000). A small administrative fine was issued in the case.
- On December 11, 2007, an inter-agency squad inspected a company in Ho Chi Minh City and discovered 17 computers with unlicensed software. Pirated software valued at US\$50,200 (800 million VND) was found at this site. An administrative fine was imposed in the case.

<sup>7</sup> See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources.

According to VNNIC, as of the end of November 2007, there are over 1.2 million broadband Internet connections in Vietnam,<sup>10</sup> a rapid expansion compared with previous years, so it is crucial that the government take proper steps to protect against illegal uses of copyright materials over the Internet and by digital and mobile devices. Internet and mobile device piracy is affecting more sectors, with new reports from the publishing industry this year of growing electronic piracy of textbooks and dictionaries, among other published products. Unauthorized deep-linking sites (in which the website contains links to pirate material hosted by third-parties), such as Socbay.com and Zing.vn, which make available infringing deep-links from third party illegal sites to the public, are becoming prevalent in Vietnam. These sites offer large number of infringing recorded music files including local, regional and international repertoire.

One way to make headway into damaging Internet piracy is to permit legitimate copyright owners to participate in the growing mobile and Internet markets for copyright materials. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers, and foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users.

**Signal Piracy:** IIPA is pleased to report that Vietnam saw a “dramatic fall” in illegal connections as estimated industry losses declined from \$38 million in 2006 to \$10 million in the first ten months of 2007.<sup>11</sup> The improvement has been attributed largely to the removal of pirated international channels from local operator Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telematics.

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

There have been no cases brought to IIPA’s knowledge under the Criminal Code involving copyright infringement in Vietnam. In order to truly tackle copyright piracy in Vietnam, it will be necessary for the current laws to be applied to their maximum extent. In addition, it is hoped that the amendment to the Criminal Circular will open the way for more availability of the criminal process in copyright cases.

Finally, IIPA understands that a process is underway to review and revamp the judiciary in Vietnam. Building IP expertise should be a part of this effort.

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<sup>8</sup> See World Factbook, Vietnam, at <https://www.cia.gov/library/publications/the-world-factbook/geos/vn.html>.

<sup>9</sup> Vietnam News Service, *WTO Ushers Viet Nam Into World Economy*, Nov. 22, 2007.

<sup>10</sup> See Internet World Stats, at <http://www.internetworldstats.com/asia.htm#vn>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources.

<sup>11</sup> *Pay-TV Piracy Deprives Industry of \$US1.54 Billion for 2007*, November 5, 2007, at <http://www.onscreenasia.com/article-2065-paytvpiracydeprivesindustryofus154billionfor2007-onscreenasia.html>.

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries remained engaged in training in Vietnam of Vietnamese IP officials and officers in 2007.<sup>12</sup>

- The Business Software Alliance (BSA) conducted a software asset management (SAM) seminar, on December 13 in Ho Chi Minh City. The seminar in Hanoi reached a total of about 170 attendees, and the session in Ho Chi Minh City reached about 320 attendees, from the public sector, small and medium enterprises, and multinational corporations.
- On May 15, 2007, the Vietnam National Software Association (VINASA), the Vietnam Informatics Association, the Ministry of Posts and Telecommunications, and the former Ministry of Culture and Information organized a seminar on software copyright in the international economy, attended by many government officials and local and foreign software company representatives. BSA spoke and participated in the event, which was organized under the “Program for Increasing Awareness on Software Copyright in the International Economic Integration” in accordance with Directive No. 04/2007/CT-TTG of February 22, 2007 of the Prime Minister on the Strengthening of Copyright Enforcement for Computer Programs, and Decision No. 51/2007/QĐ-TTĐ of the Prime Minister Approving the Program on the Development of Vietnam’s Software Industry Through 2010, issued on April 12, 2007.
- A representative of Vietnam’s Copyright office attended the WIPO ASIA - Pacific Regional Seminars on the Issues and Recent Developments of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Representatives from the governments of Bhutan, Brunei, Cambodia, Laos, Malaysia (the host), Myanmar, Nepal, Pakistan, Korea, Sri Lanka, Thailand, and Vietnam were in attendance. Industry representatives from IIPA, the Recording Industry of Malaysia (RIM), the International Federation of Phonographic Industries (IFPI), and the Motion Picture Association (MPA) were in attendance.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law and Implementing Regulations to IP Code:** Copyright is governed by the “Intellectual Property Code,”<sup>13</sup> effective July 1, 2006, and an Implementing Decree.<sup>14</sup> In addition, the Civil Code still applies, as Article 5 of the IP Code retains a clause making the Civil Code supreme to the IP Code where inconsistent.

The law resulted in a number of advances in Vietnam’s copyright system. For example, it provided protection for temporary reproductions (Article 4(10)), and provided, for the first time in Vietnam, protection against circumvention of technological protection measures used by right holders to protect their works/subject matter in the digital environment (Articles 28(12) and 35(7)), as well as prohibitions against trafficking in circumvention devices (Articles 28(14) and 35(9)).

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<sup>12</sup> Training activities in 2006 included Business Software Alliance (BSA) seminars on software asset management in March 2006 in Hanoi and Ho Chi Minh City, for 460 IT experts and specialists from various domestic and international businesses and organizations, a September 2006 BSA training for 25 officers from the IT Crime Unit of the Department of Economic Police and the former MOCI on identifying illegal software and the collection of evidence in end-user software piracy cases, and Motion Picture Association participation in the November 2006 ASEAN-PTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.

<sup>13</sup> Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated 25 December, 2001.

<sup>14</sup> Decree Providing Detailed Provisions and Guidelines for the Implementation of the Civil Code and the Intellectual Property Law with Respect to Copyright and Related Rights, No. \_\_\_\_/2006/ND-CP March 31, 2006, effective.



However, the Law still contains some deficiencies, however, when evaluated on the basis of full TRIPS compliance and on the basis of the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).<sup>15</sup> The Vietnamese government should work to correct as many deficiencies as possible in the coming months. The following is a non-exhaustive list of issues outstanding:

## Substantive Issues

- **Restrictions on IP Rights:** Article 7(2) gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact creates inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties. The second half of Article 7(3) violates Vietnam's current and future obligations by permitting the State to restrict the ability of a right holder to exercise lawful rights, and could even result in an open-ended compulsory licensing to use copyright materials seemingly without limitation or reason. The provision should be deleted. The first clause of Article 8 also runs afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. That clause should be deleted.<sup>16</sup>
- **Civil Code Supremacy:** As mentioned above, the Civil Code is supreme to the IP Code, resulting in legal uncertainties and inconsistencies which endanger Vietnam's ability to fulfill its Berne, BTA and TRIPS obligations.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa. Article 35 of the implementing regulations reinforces the supremacy of copyright over related rights.<sup>17</sup>
- **Importation Right Not Provided (BTA Requirement):** Articles 20 and 30 fail to provide an "importation" right as required by BTA Articles 4.2(a) and 4.6(b).
- **Exceptions Overly Broad:** Certain exceptions, including Article 24(1) (personal use copy exception), (d)*bis* (library archive copies "for the purpose of research"), (g) ("[d]irectly recording and reporting performances for public information and educational purposes"), and (k) do not accord with the Berne Convention, TRIPS, and the BTA. For example, Article 24(1)(k) regarding personal use imports needs to be specifically narrowed in order to comply with TRIPS Article 60. Article 25((1)(e) is Berne and TRIPS-inconsistent, as it provides that it is permissible to put on stage "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns" as long as there is no

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<sup>15</sup> See Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA). The BTA required Vietnam to bring its copyright regime, including enforcement provisions, into compliance with the TRIPS Agreement by December 2003. Vietnam acceded to the Geneva Convention (the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms) on July 6, 2005 and the Brussels Convention in late 2005. Vietnam was also planning to accede to the Rome Convention at the end of 2005. There are no plans to accede to WCT and WPPT although Vietnam acknowledges that its law will comply with these and that Vietnam will eventually accede. For a complete analysis of the copyright law and remaining deficiencies, please see IIPA's 2007 Special 301 country report on Vietnam, at <http://www.iipa.com/rbc/2007/2007SPEC301VIETNAM.pdf>.

<sup>16</sup> We note that a new Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

<sup>17</sup> Article 35 provides,

Protection of related rights without prejudice to copyright provided in paragraph 4 of Article 17 of the Intellectual Property Law means that organizations or individuals using works subject to copyright protection for performances, phonograms or broadcasting must guarantee personal rights and property rights as specified in Articles 19 and 20 of the Intellectual Property Law.

admission charge; however, the provision that performers may not be paid was struck in the bill that was passed into law. It was already believed that “cultural gatherings” and especially “promotional campaigns” could be read in an overly broad way, but with payments being made, this provision runs afoul of the Berne three part test.<sup>18</sup> The implementing regulations worsen the situation, in that, under Article 25(2) of the implementing regulations, it appears the IP Code would allow the copying of a computer program “for archives in libraries for the purposes of research.” If this is what is intended by the implementing regulation, it would create a TRIPS-incompatible exception which must be remedied.

- **Impermissible Compulsory Licenses:** Article 25 enacts into law in Vietnam a broad broadcasters’ compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).<sup>19</sup> Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this legislation) for use of sound recordings and video recording for commercial “broadcasting” is in violation of international standards; 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne three part test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **Duration Provisions Are BTA-Incompatible:** Articles 27(2)(a) (with respect to cinematographic works) and 34(2) (with respect to phonograms) do not comply with BTA Article 4.4 since they do not provide the term promised under that Agreement.<sup>20</sup>

## Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and could impose a Berne-prohibited formality by requiring a registration certificate in order to enforce copyright. Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, *enforce* and exercise rights or benefits in respect of copyright and related rights.” Articles 208(1) (regarding provisional measures)

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<sup>18</sup> By contrast, Title 17, Section 110(4) of the U.S. Copyright Act permits “performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers” if there is “no direct or indirect admission charge” or if “proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.” Section 110(4) also provides right holders with an opportunity to object to such performances. The Vietnamese provision is much broader in the subject matter (“dramatic works and other forms of performing arts”), the setting (“cultural gatherings or in promotional campaigns”) and the payment scheme (payments not prohibited).

<sup>19</sup> The Article reads as follows:

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

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations,

2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.

3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

<sup>20</sup> BTA Article 4.4. provides,

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



and 217(1)(a) (with respect to border measures), since they apply the same standard of proof, also violate international standards.

- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”**: Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed (if permissible constitutionally). Article 202(5) of Vietnam’s IP Law provides that one application of civil remedies could include “Compelling distribution or use for non-commercial purpose of goods, materials and equipment used for the production and business of IPR infringing goods.” This provision falls short of what the BTA (and TRIPS) would allow, notwithstanding that the drafters added “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” There remains no possibility of seizure or destruction of the infringing goods, materials or equipment used in the infringing activity. With regard to administrative remedies, Article 214(3)(a) is similarly too broad, providing for the possibility of “distribution and use of the [goods/implements] for non-commercial purpose provided that such distribution and use does not affect the IPR owner’s capacity to exploit his/her IPRs.”
- **Administrative Remedies Too Low to Deter Piracy**: At a seminar held in Ho Chi Minh City on December 13, 2007, organized by the Business Software Alliance, the Deputy Inspectorate of the Ministry of Culture, Sports and Tourism acknowledged that the current administrative penalties of 20 to 30 million VND (US\$1,250-1,876) are too low, and they have asked that the fine levels be increased to up to “five times the value of the infringed material.” IIPA agrees with this proposal by the Ministry.

**Criminal Code of Vietnam**: Article 14 of the BTA requires Vietnam to “provide criminal procedures and penalties to be applied at least in cases of ... infringement of copyrights or neighboring rights on a commercial scale,” and to provide that “penalties *available* include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.” These BTA provisions essentially restate the TRIPS Article 61 test, which Vietnam is now also obliged to follow.<sup>21</sup> The IP Code unfortunately does not expressly provide for BTA or TRIPS-compatible criminal penalties. The Criminal Code (Article 131) is at best ambiguous, and the Supreme Court Circular on the Criminal Code establishes thresholds for criminal liability that make it unlikely that Vietnam could meet its TRIPS or BTA obligations without amendment/reinterpretation.

The Vietnamese government has been working since 2006 on a new draft Circular which it hopes will resolve the BTA and TRIPS issue. To date, agreement has been reached on providing that infringements/violations listed in Articles 28 of the IP Code would be subject to criminal penalties under the Vietnamese Criminal Code (Article 131), but no agreement has been reached to add related rights to that general statement. Further, the thresholds for criminal liability remain too strict, and not in compliance with the requirement to criminalize at least all copyright piracy carried out “on a commercial scale.”<sup>22</sup> Resolution of these issues is crucial to Vietnam meeting its TRIPS and BTA commitments, and to establishing a copyright enforcement system capable of deterring infringement and ultimately legitimizing the market for copyright materials in Vietnam.

IIPA understands that the Criminal Code will be amended, as early as 2008. IIPA hopes that the progress made in addressing the deficiencies in the current Code and Circular will not be forgotten as the drafters proceed, and that a workable system enabling enforcement officials to weed out copyright piracy in the country will be established and/or maintained.

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<sup>21</sup> Article 14.2 of the BTA also requires Vietnam to “provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.”

<sup>22</sup> It is reported that some government officials do not believe criminal enforcement for copyright infringement can be read into Article 131 of the Criminal Code, and that amendment of the Criminal Code is therefore required, but that relevant sectorial authorities have been given instructions to make renewed efforts to get the Circular issued.

**Optical Disc Regulations:** The Copyright Office has reportedly prepared a Draft Circular on Optical Disc Management, intended to regulate optical disc production. Effective prevention of optical disc piracy can only be achieved through targeted legislation or regulation and by the establishment of specific enforcement mechanisms. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production" in 2003, which contained many key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary. In addition, commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.
- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

## **MARKET ACCESS**

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

**Quantitative Restriction on Foreign Film and Other Restrictions Relating to Audiovisual Content:** Under current regulations, there are no explicit screen quotas or restrictions on the number of imported films. However, under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed

two-thirds of those domestically produced, which is a major restriction on the number of imported films allowed. Also, the number of foreign films projected by each cinema would only be allowed to reach two-thirds of the total projected films in any given year. Since the domestic films industry is underdeveloped and the number of domestic films produced has generally ranged between 10 and 15 films or less per year, these proposed restrictions would pose a significant barrier to the import and distribution of foreign films in Vietnam.

In the television sector, foreign content is reportedly limited to 50% of broadcast time, although it is unclear whether this is enforced. In addition, foreign programming is not allowed during prime time viewing hours of 7:00 p.m. to 9:30 p.m.

Foreign investors are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. Only cinema exhibitors are allowed to import foreign films into Vietnam, but under the Cinema Law (Article 13(2)), foreign organizations and individuals and Vietnamese residing overseas may establish and manage “film distribution enterprises” and “film projection enterprises” in Vietnam, apparently with no ownership restrictions.<sup>23</sup>

**Sound Recordings and Musical Compositions:** Under present rules in Vietnam, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute “cultural products” is unclear. It appears that they must license a Vietnamese company. In addition, Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already available in the Vietnamese market. Thus, right holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted to establish wholly owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public.

Vietnam’s failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, we believe, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies can not do business in Vietnam, then pirates will form a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. right holders, but also the local artists.

## **OTHER REGULATIONS ISSUED OR CONSIDERED IN 2007**

In 2007, the Vietnamese government continued its active legislative and regulatory agenda, including in the area of IP. New regulations adopted in 2007 include:

- Directive No. 04/2007/CT-TTG dated 22 February 2007 of the Prime Minister on the Strengthening of Copyright Enforcement For Computer Programs. This directive instructs local governments to adopt measures to protect against copyright infringement of computer programs, and to budget funds annually for the purchase of software by government entities.
- Decision No. 51/2007/QD-TTG of the Prime Minister Approving the Program on the Development of Vietnam’s Software Industry Through 2010, issued on April 12, 2007.

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<sup>23</sup> This is in contrast to “film production” in which the Director or Director General must be Vietnamese.

- Many local provinces and cities issued local directives relating to intellectual property infringements (in furtherance of the Plan of Action No. 168/CTHD/VHTT, KH & CN, NN & PTNT, TC, TM, CA on Cooperation in Preventing and Combating Intellectual Property Violations From 2006 – 2010, issued by six ministries on 19 January 2006), including, e.g., Directive No. 19/2007/CT-UBND dated 3 August 2007 on Strengthening and Encouraging Intellectual Property Activities in Hai Phong City. These directives instruct local departments to conduct activities to improve public awareness and to increase enforcement activities against IP infringement.

Several draft regulations or guidelines remain under consideration in Vietnam. We recommend that the government expedite the issuance of these regulations, including the following:

- Draft Decree of the Government on Punishing Administrative Violations Related to Copyright and Related Rights. This decree will prescribe administrative sanctions for violations under the law on intellectual property. The Ministry of Culture, Sports and Tourism has submitted this draft decree to the Prime Minister for consideration and promulgation.
- Draft Interministerial Circular Providing Guidelines on Applying a Number of Provisions of the Law on Intellectual Property in the Resolution of Disputes on Intellectual Property in the People's Courts. This draft was presented in early 2007, and was generally praised by a number of experts. The current status or timetable for issuance is unclear.
- Draft Interministerial Circular to be Issued by the Ministry of Culture, Sports And Tourism and the Ministry of Planning and Investment Providing Guidelines on the Implementation of the Provisions on Economics and Finance in the Law on Intellectual Property and Decree No. 100/2006/ND-CP dated 21 September 2006.
- Draft Circular on Computer Programs. IIPA understands that the authorities may be working on a draft circular specifically related to computer program issues, including copyright, and looks forward to reviewing a draft.
- Draft Circular on IP Evaluators. Vietnam's law on intellectual property provides a role for "IP evaluators," akin to expert witnesses, to participate in the adjudication of IP disputes. It is unclear whether these individuals or organizations will provide testimony, or will also participate in deciding cases. This draft Circular is forthcoming.