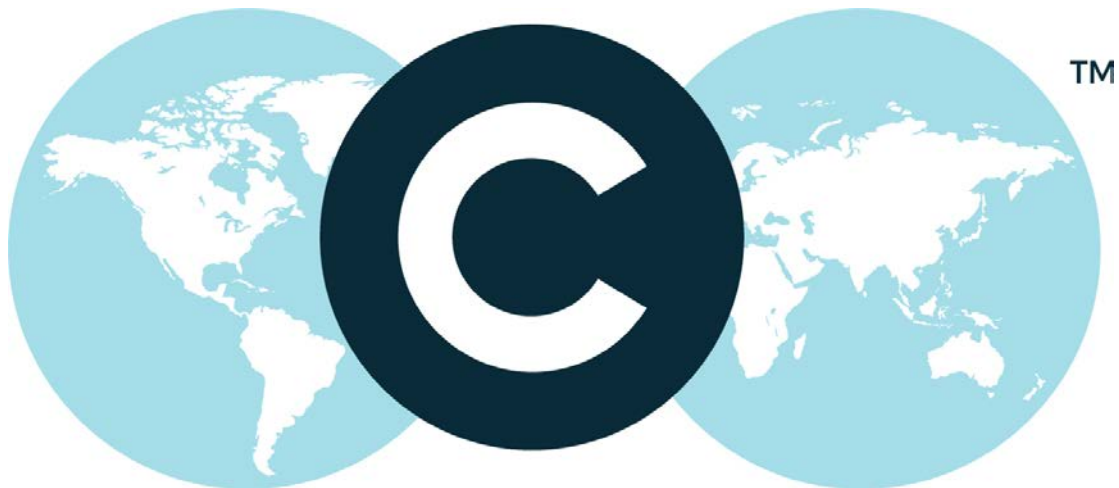


# **2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT**



**SUBMITTED FEBRUARY 8, 2018  
TO THE  
UNITED STATES TRADE REPRESENTATIVE  
BY THE  
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**



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February 8, 2018

*Submitted via regulations.gov Docket No. USTR-2017-0024*

Ms. Elizabeth Kendall  
Acting 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 2018 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Comment and Notice of Public Hearing, 82 Fed. Reg. 61363 (Dec. 27, 2017)**

Dear Ms. Kendall:

This submission by the International Intellectual Property Alliance (IIPA) is made in response to the above-captioned Federal Register Notice, which requested public comments regarding intellectual property protection and market access barriers in U.S. trading-partner countries, as part of the "Special 301" review.<sup>1</sup>

IIPA has filed comments in the Special 301 reviews for three decades since the 1988 Trade Act created this process. In that time, the technologies available for the production and distribution of copyrighted materials have changed dramatically, and with them, the diversity of methods through which the copyright industries disseminate their creative output—including literary works, music, movies and TV programming, video games and software—to consumers. As evidenced by the growth of revenues, the copyright industries have embraced all means of digital technologies to produce and distribute their works and recordings, including launching new businesses, services, and apps to meet consumer demand. More legitimate copyrighted material is now available to consumers, and in more diversified ways and with more flexible pricing than at any time in history.<sup>2</sup> This consumer appetite for copyrighted materials does not stop at our borders. To meet worldwide demand, the copyright sector, more than any other in the U.S. economy, has moved aggressively to digitally deliver its products and services across borders, inextricably linking "digital trade" with trade in copyright-protected material.<sup>3</sup>

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. The purpose of the Special 301 review process is to help the U.S. Government identify "foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection."<sup>4</sup> The ability of U.S. creators to reach foreign markets through legitimate digital (and physical) channels is why the Special 301 review of countries—those denying

<sup>1</sup>IIPA will file under separate cover a Notice of Intent to Testify at the February 27, 2018 public hearing on Special 301.

<sup>2</sup>For example, there are now over 40 million tracks and hundreds of digital music services now available according a 2017 study: IFPI, *Music Consumer Insight Report 2017*, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>. For more information on the proliferation of services, see, e.g., <https://www.mpaa.org/watch-it-legally/> (movies and TV content); <http://www.whymusicmatters.com> and <http://www.pro-music.org/> (music); and <http://www.theesa.com/purchasing-legitimate-digital-copies-games/> (video games).

<sup>3</sup>A January 2018 Department of Commerce study, using the latest available year (2016) data, found that charges for the use of intellectual property, which includes copyrighted content, accounted for \$124.5 billion of a total of \$403.5 billion of potentially ICT (information and communications technology)-enabled services exports, or 31%. It also found that charges for the use of intellectual property accounted for \$80 billion out of a total trade surplus of \$159.5 billion of potentially ICT-enabled services, or over 50%. See, Department of Commerce "Digital Trade in North America" at 4, available at: <https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf>.

<sup>4</sup>19 U.S.C. section 2242(a)(1).

legal protection or enforcement, or which are in engaged in activities blocking market access to American creators and producers—is so critical at this time. The goal of the Special 301 review is, ultimately, to open markets for American (and other) copyrighted materials in digital and hard copy formats. The goal of the review is not to catalog trade barriers, nor to admonish foreign governments for deficient laws or enforcement regimes.

For the copyright industries to flourish abroad, foreign markets need to: (i) have copyright laws that meet high standards of protection; (ii) provide efficient copyright enforcement and sound legal structures to enable healthy licensing of works and recordings; and (iii) eliminate market access barriers and unfair competitive practices. Markets with these features also help our trading partners to develop, nurture, and enjoy the benefits of their own local cultural and creative output, ultimately for the benefit of consumers. Unfortunately, as detailed in this filing, some rights holders and copyright-dependent services confront deficient local laws, weak enforcement, and market access barriers (or other discriminatory or unfair competitive practices). These shortcomings enable parties to engage in piracy, some on a commercial scale, because it is a high-profit, low risk enterprise, unencumbered by the considerable costs associated with either producing and licensing works, or protecting them against theft.<sup>5</sup>

This year, as in past IIPA filings, we provide public comments on the acts, practices and policies of our key trading partners that present obstacles to achieving the goals of satisfying consumer demands for U.S. creative materials in foreign marketplaces. This filing recounts, by country, the deficiencies of legal regimes and enforcement practices, and recommends improvements. Dynamic market conditions and ever-changing technologies continue to create enormous opportunities, with huge potential to further expand economic growth and creative activity in key foreign markets. But that potential will only be reached if these protection and enforcement shortcomings, and market access barriers, can be corrected. IIPA's recommendations include, where possible, emerging best practices to address these issues and provide successful strategies applicable both to developed and developing country markets.

## **I. IIPA RECOMMENDATIONS ON DESIGNATIONS AND A SUMMARY OF COUNTRY REPORTS**

The focus of the 2018 IIPA submission is on markets where IIPA members believe active engagement by the U.S. Government can reap positive results for creators and the industries that support and invest in them, either by improving the legal regimes, the efficiency of enforcement, and/or lessening market barriers. The country reports also contain short summaries of specific obligations taken by each country with the United States in bilateral or multilateral trade agreements or in other fora, but which remain unfulfilled. Overcoming the challenges to the creative industries identified in these reports will help to create more good-paying jobs, promote U.S. exports and foreign sales, and contribute generally to healthy economic growth in the U.S. and abroad.

IIPA members appreciate that USTR has made the Special 301 process a positive catalyst for change to address the challenges faced by the creative industries in key markets around the world. To highlight progress, we include a section below on “positive developments” in particular countries, identifying specific instances of improvement. IIPA members also appreciate USTR's efforts to maintain Special 301's focus on improving and strengthening copyright protection and enforcement in the reported countries, which is clearly what the statute requires and what Congress intended.

IIPA's 2018 Submission includes this letter and two appendices.

In Appendix A, IIPA provides detailed reports on 19 countries that it recommends for designation in the USTR's Special 301 report this year.<sup>6</sup>

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<sup>5</sup>See, e.g., USTR, 2017 National Trade Estimate Report on Foreign Trade Barriers (March 2017), for the leading U.S. Government report on many market access and other trade barriers around the world. The report is available at: <https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf>.

<sup>6</sup>Country reports and Annex entries were prepared by counsel to the IIPA, including, Kevin Rosenbaum, Dima Budron, Naomi Beckman-Straus, Steven Metalitz and the undersigned, and are based on information furnished by IIPA's member associations. We thank Pamela Burchette for her contribution in preparing,

In addition, Appendix A includes an Annex Report combining short summaries on seven countries: **Barbados; Costa Rica; Egypt; Guatemala; Jamaica; Turkey; and Venezuela**. Each of these seven countries were identified in the USTR's 2017 Special 301 Report, and previous IIPA submissions have provided detailed analyses of legal and enforcement regimes in these countries. Because IIPA members were aware of no new developments that would lead us to revisit the present designations under Special 301, or IIPA's proposed designations, the Annex focuses on one or two key issues in short blurbs on these countries. IIPA does not recommend any change in the Special 301 status for these countries.<sup>7</sup>

Appendix B provides an historical chart of Special 301 designations since 1989.<sup>8</sup>

Regarding the 19 full country reports, the IIPA's recommendations are as follows:

IIPA 2018 Special 301 Recommendations	
Priority Watch List	Watch List
Argentina Chile China India Mexico Russian Federation Taiwan Ukraine Vietnam	Brazil Canada Colombia Ecuador Indonesia Peru Switzerland South Africa Thailand United Arab Emirates
9	10

## II. ABOUT IIPA AND IIPA'S INTEREST IN SPECIAL 301

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.theesa.com](http://www.theesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association of America ([www.mpaa.org](http://www.mpaa.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)). 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 recorded in all formats (from digital files to CDs and vinyl), for streaming and download services, or synchronization in audiovisual materials; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

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producing and distributing this submission, and Alesha Dominique, Albina Gasanbekova, and Theresa Bowman for reviewing and editing the report. The country reports and Annex contain information which should not be construed as providing legal advice.

<sup>7</sup>Venezuela is currently on the USTR's Priority Watch List; all others are currently on the Watch List.

<sup>8</sup>A number of countries/territories have appeared on a Special 301 list each year since 1989, or for a considerable number of years. 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.

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. Given the importance of digital delivery to the copyright-based industries, this sector has the potential to multiply its export revenues if our trading partners provide proper copyright-protective environments. In 2015, the copyright 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.<sup>9</sup> Studies such as these 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.

### III. KEY CHALLENGES FOR THE COPYRIGHT INDUSTRIES – PROTECTION, ENFORCEMENT AND MARKET ACCESS ISSUES

The U.S. copyright industries face complex challenges in overseas markets, but they can be organized into three distinct but overlapping categories:

**Legal Reforms:** Copyright and related laws (e.g., civil and criminal codes, and procedural codes) must meet current and evolving global standards and commitments, in order to adequately and effectively address all forms of piracy in a fast-changing technological environment.

**Enforcement:** These laws must be vigorously and effectively enforced. As a minimum standard, the WTO TRIPS Agreement requires “effective action” and “remedies that constitute a deterrent” to infringement, through civil, administrative, and criminal channels, and effective adjudication in the courts.<sup>10</sup> Enforcement tools must robustly meet current infringement challenges, including those presented by pirate operations based online and/or outside the jurisdiction, cybercrime syndicates, and organized criminal enterprises; and enforcement resources, training and capacity building must be deployed at a level commensurate with the scale of the piracy problem.

**Market Access:** Barriers, investment restrictions, and discriminatory treatment that make it difficult for U.S. producers and distributors to compete on a level playing field in foreign markets must be dismantled.

<sup>9</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at: <https://iipa.org/reports/copyright-industries-us-economy/>. 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 also well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of the Copyright Industries: Overview*; and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology. See, [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2014.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf) and <http://www.wipo.int/copyright/en/performance/>. The WIPO 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/>. There have been other studies prepared, including some in the music and video game industries. See, e.g., UK Music’s *The Economic Contribution of the Core UK Music Industry* (2013), available at: [http://www.ukmusic.org/assets/general/The\\_Economic\\_Contribution\\_of\\_the\\_Core\\_UK\\_Music\\_Industry\\_WEB\\_Version.pdf](http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry_WEB_Version.pdf) and PWC’s *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available at: <http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf> and Stephen Siwek’s *Video Games in the 21st Century: The 2017 Report* (2017), available at: [http://www.theesa.com/wp-content/uploads/2017/02/ESA\\_EconomicImpactReport\\_Design\\_V3.pdf](http://www.theesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf).

<sup>10</sup>See WTO TRIPS Articles. 41, 61. There are many obligations for civil, administrative and criminal remedies in Articles 41 through 61, including for provisional relief and judicial procedures (e.g., injunctive relief), which are particularly critical for online enforcement.



Here is a summary, in turn, of the major challenges across the global markets in each of these three categories: (1) legal reforms; (2) enforcement; and (3) market access.

## **A. LEGAL REFORMS**

### **1. *WIPO Internet Treaties***

The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT) set the global minimum standards for providing copyright holders with a full panoply of exclusive rights in the digital networked environment. The treaties also include an overarching commitment to deterrent levels of enforcement of those rights online as well as offline. In the 22 years since their adoption, 96 countries have acceded to each of these critical treaties. There are a number of large trading partner countries that have not acceded to the treaties at all, including: **Brazil, India, Pakistan, Saudi Arabia, Vietnam, South Africa and New Zealand**, as well as smaller markets, such as **Bolivia, Kuwait and Lebanon**. Many more countries, while they have joined the treaties, have yet to implement the treaties' obligations into their national laws, including **Algeria** (2014), **Ecuador** (2002), **Mexico** (2002), and the **UAE** (2004). IIPA commends **Nigeria's** accession to the WCT and WPPT in January 2018; it now faces the task of implementing the treaties into its national laws. The U.S. Government should make it a priority to encourage all U.S. trading partners both to accede to and fully implement the WIPO Internet Treaties.

The WIPO Internet Treaties were the catalyst for the global consensus on the need to provide legal protection to technological protection measures (TPMs) that copyright owners use to control access to their works. As discussed below, these access controls are key enabling technologies for the range of online digital services that have brought more creative works than ever to consumers. IIPA urges the U.S. Government to remain vigilant on this issue, especially in reviewing legislation purporting to implement the WIPO Internet Treaties, and when reviewing copyright reforms being undertaken in our trading partner countries. In particular, TPMs protections should be adopted in ways that protect access controls independent of whether there is an accompanying copyright infringement. Only in this way can effective TPM legislation establish a practical and enforceable anti-circumvention prohibition.

### **2. *Copyright Principles and Norms Under Threat***

IIPA urges the U.S. Government to continue to press for reform and modernization of national copyright laws that have failed to keep pace with market and technological trends. Unfortunately, there has been a trend in recent years to use these copyright reform initiatives in some countries to weaken, not strengthen protection. 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."<sup>11</sup> 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 report 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 it threatens to produce further instability and a bar to investment in important content in **Canada**. Another glaring example of this trend is **Ecuador**,

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<sup>11</sup>As 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 Article 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Article 10 (same, as to all Berne exclusive rights and all exclusive rights granted under the WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Article 16(2) (same, as to all rights provided for under WPPT).

where the government adopted legislation substantially weakening copyright protections with overly broad exceptions, and made the overall scope of protection very unclear; the problems are detailed in the country report in Appendix A.

Versions of some of the Canadian amendments also surfaced in a 2017 draft copyright law revision floated in **South Africa**, which features 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. The bill appends—on top of a proliferation of extremely broad new exceptions and limitations to copyright protection, and the country's existing “fair dealing” system—some version of “fair use” applied to eight broad and unclear “purposes” of use, such as “scholarship, teaching and education,” and “expanding access for underserved populations.” The proposed “fair use” system lacks the decades of legal precedent that have served to define, refine, and qualify that doctrine in the United States. The effects of this bill and its overlapping exceptions, limitations, and so-called “fair use” provision would imperil the legitimate markets for educational texts, locally-distributed works, and online works in general.<sup>12</sup> 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.

### 3. *Evolving Global Norms*

Many of our trading partners have moved their laws into line with the evolving global trend with respect to the 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 Organization for Economic Cooperation and Development (OECD), already meet or exceed this norm for some or all categories of creative works. The U.S.' trading partners in the Trans Pacific Partnership (TPP) negotiations agreed to bring their laws up to this standard for all copyright materials. Even though the U.S. has withdrawn from the TPP, it is hoped that, in particular, **New Zealand, Vietnam and Malaysia** will take this step on its merits; that **Canada and Japan** will complete the process of extending terms of protection for all works and sound recordings; and that each of these countries will apply extended terms to U.S. works and sound recordings.

### 4. *Unfulfilled Obligations to the United States*

The growth of the U.S. copyright industries in recent decades—and their out-sized contribution to the U.S. economy—is linked to 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 on-the-ground 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, and as technologies have developed and changed, our trade agreements also need to evolve as a vehicle for the promotion of copyright protection and enforcement in all (new) media. These agreements, when timely implemented, have not only helped U.S. copyright industries to compete fairly in foreign markets, they

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<sup>12</sup>In addition, the 2017 draft includes provisions that directly threaten the development of the digital music marketplace, including a *de facto* compulsory license for the sound recording producers' making available right. The making available right is essential to the music industry, and at the core of the WIPO Internet Treaties. The proposed collectivization of this right would not only be incompatible with the international standards, but would directly undermine the South African music market and serve as a terrible precedent for the African continent. 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 the new draft proposal, as well as similar proposed incursions on copyright norms in other jurisdictions.

have also created the conditions in which our trading partners can develop their domestic copyright industries, for the benefit of all parties. When they have not been timely implemented, the overarching objective should be on improving protection and enforcement, even if the precise solutions contemplated in past agreements have been superseded by more modern remedies and enforcement solutions.

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.<sup>13</sup> 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. Some of these latter agreements (or, in some cases action plans), such as with **Russia and Ukraine**, are specific to digital protections and online enforcement schemes. While the enforcement mechanisms for this diverse collection of treaties and other 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, and often with deadlines to implement those commitments.

The full benefit of implementation of these agreements would be to open markets and help to grow economic development. However, these benefits 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 IPR enforcement action 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 2018 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. Implementation of FTA-based IP commitments is also essential to rebalance the effects of trade agreements with those countries that have failed to honor their side of the grand bargain which an FTA represents. To assist the U.S. Government in this effort, IIPA has identified in each of its country reports 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 (FTAs) with the United States is particularly problematic. For many years, 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

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<sup>13</sup>See, for example, the intellectual property rights agreements compiled by the Commerce Department's Trade Compliance Center, available at: [http://tcc.export.gov/Trade\\_Agreements/Intellectual\\_Property\\_Rights/index.asp](http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/index.asp). Other bilateral agreements 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](https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf).

country reports in Appendix A, notably those for **Chile, Colombia, and Peru**, they are also felt in the markets of other FTA partners.

For example, **Costa Rica** has not implemented key provisions in the Dominican Republic–Central America FTA (DR-CAFTA), more than six years after the obligations came into force. To highlight some of these key provisions, Costa Rica has not created meaningful legal incentives for inter-industry cooperation to deal with online infringements, and has not improved the level of copyright protection and enforcement online. Instead, Costa Rica's law protects ISPs and others, even allowing identified infringing activity to remain on their systems for as long as 45 days (that is the timetable for forwarding infringement notices to ISP subscribers). In addition, there are many instances where the Costa Rican Top Level Domain (ccTLD) registry has provided a safe haven to notorious online enterprises dedicated to copyright infringement.<sup>14</sup> 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.

While it is critical that the U.S. Government ensure in 2018 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. The re-opening of NAFTA that commenced 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. This re-opening of the agreement should not be allowed to weaken protections or enforcement in those two important markets, or to incorporate “solutions” that were adopted decades ago, at the outset of the digital marketplace, but which have been found not to work, or not to work effectively to protect copyright material in the online world.<sup>15</sup>

## **5. *Laws and Regulations Governing Collective Management Organizations (CMOs)***

As the content industries have transitioned and evolved the past two decades, 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 of their exclusive rights should always remain the baseline, in limited circumstances, certain rights and uses are most effectively exercised on a collective basis, e.g., through CMOs, especially in the music sector. Public performance rights are a good example, because there are a large of licensees and users (from cafes and restaurants, to hundreds of radio stations), and the value of individual transactions may be relatively small. As income from these rights has become an increasingly important source of revenue for music rights holders, and this source of income has become important for production of new works, the need has heightened for efficient, transparent, and accountable collective management services and the ability to charge fair market prices. Rights holders must be in a position to set up and govern their CMOs themselves, with a governmental role limited to enabling efficient, fair and non-discriminatory operations, and ensuring that CMOs properly conduct their business and license users within their relevant markets.

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

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<sup>14</sup>Costa Rica was the last DR-CAFTA country to ratify the agreement, which came into force for Costa Rica on January 1, 2009. The agreement granted Costa Rica a 30-month transition period to upgrade its legislation needed to improve online copyright enforcement; however, that transition period expired in July 2011.

<sup>15</sup>Issues to be addressed in such modernization should 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.

- Collective management should never limit exclusive rights or direct negotiations, as a general matter, by always being voluntary and allowing rights holders the ability to organize as efficiently as they wish to do so;
- CMOs should only be established (and should only be governed) either by rights holders or by associations directly representing them;
- CMOs may not discriminate in policy or practice 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.<sup>16</sup>

Appendix A details serious concerns about some or all of these issues in a number of countries, including **Ukraine, Russia, Taiwan, Switzerland, Vietnam and Brazil** (albeit for different reasons). IIPA is also concerned about developments in **South Korea and India**, where rulings by government agencies are attempting to extend the scope of mandatory collective management of rights and statutory license fees for certain types of digital music services. A separate problem concerns the number of CMOs in some countries ranging from those countries where governments have shown a reluctance to control the proliferation of CMOs, for instance in **Ukraine, Kazakhstan and Thailand**, to **Malaysia**, where the government has forced music different categories of music rights holders CMOs to operate through a single entity. Lastly, in the **UAE**, the government has prevented rights holders from exercising their rights through a CMO.

The motion picture industry is particularly concerned that mandatory licensing is on the rise in Latin America, under pressure from collective management organizations representing authors and performers, seeking to establish new revenue streams to enhance both their members' compensation and their own infrastructure. While the scope of these laws vary, they tend to vest collective management organizations with a statutory right to enforce remuneration claims against third party platforms (i.e., licensees of producers). These claims are impacting all exploitations of motion pictures and television programs, and are a restraint on trade for U.S. works, because author and performer compensations are collectively bargained for and keyed to worldwide exploitation. These schemes, when applied to American works, undermine the exercise of exclusive rights as set out in international copyright treaties and negotiated agreements with unions and individual creators. In short, these laws are encumbering distribution and adding unnecessary costs that get are passed on to consumers. The recording industry is also concerned about these developments for their unintended consequences as well as the impact on the proper licensing of music videos as "audiovisual works."

## **B. ENFORCEMENT CHALLENGES**

Some of the challenges confronting rights holders, such as new modes of copyright piracy, are a by-product of changing and developing technologies, and the means pirates use to either evade or capitalize on these technologies. This evolution and development of new technologies continues to create welcome opportunities for rights holders for the creation and dissemination of their works and services. The copyright industries are actively developing and using technologies for new consumer services and business-to-business applications upon which consumer services are built. These technologies and applications include: high-resolution audio and visual delivery

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<sup>16</sup>See <https://valuethemusic.com/> for recording artist statements and related materials on the "value gap" concerns; additionally, for information on the prevalence of recording artists on and value to social media, see <http://www.musicfuels.com/>.



and play-back systems, 360° video, and virtual reality. These technologies require new digital infrastructures through the value-chain from content capture, post-production, format standards, delivery and consumer consumption. Other technologies keyed to content delivery include: cloud-based data processing, storage, software applications, new communication services, as well as TPMs.

As one example, innovative digital cinema technologies, which include encryption, compression, and high-speed data networking and storage, have been increasingly deployed in theaters around the world in order to distribute and project the latest motion picture content. It is estimated that now well over 90% of the world's cinema screens are capable of digital exhibitions. As another example, video game hardware and software manufacturers have built game engines that have subsequently been used as platforms for others to use in the development and production of enterprise applications, improved cinematic experiences and high-quality video games for consoles, mobile devices and personal computers. Video game companies have also given consumers choices in how to access gaming content by, for example, launching new tools that enable cross-platform play, or through a console-based Internet television service, or through cloud gaming. In the music sector, rights holders have worked with digital platforms to develop the Digital Data Exchange (DDEX) standards, which are used ubiquitously to deliver content and metadata to consumer-facing platforms. A current focus is developing the specific metadata to further empower voice-activated delivery via "smart speakers." Unfortunately, these technologies have been adapted and exploited to facilitate new forms of piracy. As described below, for example, cloud computing and streaming technologies have been used for stream ripping applications by circumventing TPMs and converting streamed content into downloadable content.

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

As USTR observed in its 2017 Special 301 Report "[o]ne key area of economic growth for the United States has been the development of legitimate digital platforms for distribution of copyrighted content...However, technological developments have also made the Internet an extremely efficient vehicle for disseminating infringing content..."<sup>17</sup> The entrenchment of infringing services (including those avoiding licensing based on a misconception of the law) is a 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.

A September 2017 study for the International Federation of the Phonographic Industry (IFPI), keyed on 13 major music markets worldwide, found that 45% of consumers had engaged in licensed audio streaming in the past six months (up from 37% in 2016), showing the growing popularity of new services that offer huge libraries of licensed music content to consumers.<sup>18</sup> In addition, licensed video streaming services (including user upload services such as YouTube) were responsible for more than half (55%) of all on-demand music streaming time across these markets. Much of this consumption took place on mobile devices: according to the study, 91% of smartphone owners in **Mexico** used their device for music consumption in 2017 (up from 77% in 2016); in **Brazil** the numbers increased to 85% in 2017 from 69% in 2016; in **South Korea** 80% used smartphones to listen to music in 2017 compared with 75% in 2016. But, 40% of consumers in these 13 markets still accessed unlicensed music, with the piracy rates highest in Mexico and Brazil. Based on data from comScore, it is estimated that stream ripping led to more than 2.8 billion unlicensed or pirated downloads of music files worldwide during 2017, while file sharing through BitTorrent, downloads through cyberlockers (such as *Zippyshare* and *Uploaded*), and web sites that offer unlicensed mp3 files for download, led to an additional 3.7 billion downloads in 2017.

Massive online infringement of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in industry monitoring of peer-to-peer (P2P) and direct download activity. For 2016, **Russia, Brazil, Ukraine, India, and Kazakhstan** were identified as the top five

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<sup>17</sup>USTR 2017 Special 301 Report, at p. 14 (April 2017), available at: <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>.

<sup>18</sup>IFPI, *Music Consumer Insight Report 2017*, available at: <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

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. There are many countries with capable legal regimes to address Internet and mobile network piracy, but which fail to engage in effective enforcement. Some examples of these countries include: **Bulgaria, Greece and Romania**, in particular.

To address the problem of Internet and mobile network piracy, IIPA supports a multi-step approach including: (1) identifying markets and actors engaged in these activities, especially criminal syndicates—and closing down operations and using criminal enforcement against them; (2) creating legal frameworks that prevent the operation of services that promote or otherwise induce infringement, and that create incentives for neutral network service providers to work with rights holders to curb the use of their proprietary networks and services for infringing purposes; (3) providing injunctive relief, especially where notorious online marketplaces are hosted in one country but target consumers in another; and (4) engaging in inter-industry cooperation, wherever possible.

The first step, the identification of large-scale illegal markets, has been effectively undertaken by USTR as part of its “Special 301 Out-of-Cycle Review of Notorious Markets” which identifies such online (and offline) marketplaces.<sup>19</sup> As detailed in the country reports, there have been many successes in the closure of Internet sites and services identified as Notorious Markets by USTR. In addition, IIPA members routinely identify their own notorious online markets for all categories of works, or those sites that traffic in unlawful devices or services that circumvent TPMs used by copyright owners. The IIPA members include their list of such sites in filings with the USTR as part of the annual “Notorious Markets” review, as they did in October 2017. We continue to 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, and that such actions (i.e., shut downs) are followed where possible, by criminal enforcement actions.<sup>20</sup>

Creating legal frameworks to prevent the operation or emergence of illegal services is itself, multi-staged, including: (a) providing the relevant panoply of exclusive copyright and related rights as mandated by the WIPO Internet Treaties which set out minimal protection standards; (b) recognizing online piracy as a form of cybercrime; and (c) fostering cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration. While arrangements for notice and takedown of infringing materials are in place in many markets, they do not prevent reappearance of content and are often invoked by clearly pirate services, or viewed as the only means of online enforcement, which they are not. Moreover, some services attempt to rely on notice and takedown procedures to avoid standard copyright licensing. Clearer primary and secondary liability rules are necessary to discourage abuses and to remove the safe harbor as an unjustifiable excuse for inaction or license evasion. 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.

A third effective step, especially for illegal marketplaces hosted in one country but targeting consumers in another, is injunctive relief. This is necessary because of the failure of the host country for services based there to take effective action against their own “homegrown” notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed 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 countries are employing a wide spectrum of judicial and administrative means to impose such restrictions under defined circumstances when other domestic remedies are insufficient, and this deserves the close

<sup>19</sup>The most recent report is USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at: <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf> (“USTR NM 2017 Report”).

<sup>20</sup>Research indicates there is a correlation between shutting down a major suspected piracy service, or improving enforcement legislation, and increases in legitimate distribution of copyright materials. See, e.g., Danaher, Brett and Smith, Michael D., *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales* (September 14, 2013), available at: SSRN: <http://ssrn.com/abstract=2229349> or <http://dx.doi.org/10.2139/ssrn.2229349> (“we find that the shutdown of Megaupload and its associated sites caused digital revenues for three major motion picture studios to increase by 6.5-8.5%”). See also, <http://idea.heinz.cmu.edu/2013/03/07/megaupload/> (blog post summarizing similar research).

attention of the U.S. Government.<sup>21</sup> In addition, legal systems should ensure that injunctive relief orders are available that direct ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

The fourth step is the development of inter-industry cooperation, since Internet services (including piratical services) are enable by and interlinked with 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 can do much more than they are currently doing to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer, cleaner online marketplace.

## ***2. Illicit Streaming Devices (ISDs)***

USTR's most recent Notorious Markets report spotlighted the growing problem of illicit streaming devices, concluding that they "pose a direct threat to content creators, sports leagues, and live performance, as well as legitimate streaming, on-demand, and over-the top media service providers."<sup>22</sup> ISDs are media boxes, set-top boxes or other devices that include software programs allowing users to stream or download unauthorized content from the Internet. These devices (and corresponding software programs) take many forms, but have common features, and have become 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 and development of the piracy apps and add-ons that weaponize them in the service of piracy. They are not only distributed domestically, but are also exported to overseas markets, and what was once a problem centered mainly in Asian markets has now proliferated worldwide. As noted in the Notorious Markets report, government and industry estimates place the ISD market penetration rate at 6.5% in North America and a shocking 19% in the United Kingdom, with annual losses inflicted by the ISD piracy ecosystem on the North American entertainment industry estimated at \$4-5 billion.

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 over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual and other 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. Marketplaces (both online and physical) where such devices are sold should be targeted; indeed,

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<sup>21</sup>These countries include: the United Kingdom, France, Denmark, Portugal, Spain, Italy and Ireland.

<sup>22</sup>USTR 2017 NM Report at 8-9.



although hard goods piracy, including optical disc (OD) products, continues to inflict losses, especially in certain markets with lower Internet penetration rates, many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling ISD piracy, and/or stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material or piracy-enabling apps onto any device. 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.

### **3. *Circumvention of Technological Protection Measures (TPMs), Including Stream-Ripping Services***

A major reason why so much legitimate material is now available to consumers, and in so many formats and platforms, is because of the widespread use of TPMs by content producers and (licensed) services. TPMs have fostered many of the innovative products and services available online by allowing creators and services to control and manage access to copyrighted works, as well as to diversify products and services and the pricing of them. In short, 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 and video games), 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. A salient example, highlighted by USTR in its 2016 Notorious Markets report, is stream-ripping.<sup>23</sup> Stream-ripping services infringe the making available right and circumvent the TPMs used to prevent download of streaming music. These services have proliferated in the past few years, such that stream-ripping is now the dominant method of music piracy, and 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 on a video website such as YouTube, and then allow that consumer to listen to it whenever and wherever they wish, without paying for a licensed download or a premium streaming subscription. They thus inflict damage both on legitimate streaming services and legitimate channels for authorized downloads. Globally, consumer research conducted in 13 major music markets for the recording industry found that stream-ripping is now used by 35% of all Internet users (up from 30% in 2016), and by 53% of 16-24 year olds.<sup>24</sup> In 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. The site closed in September 2017 after its owner agreed to cease operations and not to infringe copyrights in the future.<sup>25</sup> However, many other stream-ripping sites still exist across the world and many of those benefitted from the closure of *YouTube-mp3.org* as users sought alternatives.

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 a developed country that has failed to adopt any protection whatsoever in this field.

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<sup>23</sup>See <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>24</sup>IFPI, *Music Consumer Insight Report 2017*, available at: <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

<sup>25</sup>See, <http://www.ifpi.org/news/Worlds-largest-music-stream-ripping-site-shuts-down-after-successful-international-legal-action>.

#### **4. *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 2017, the Motion Picture Association of America identified 447 total illegal recordings of its member company titles from cinemas around the world, including both video and audio captures—this was a decrease of 11% from 2016, when 503 titles were recorded. These figures do not include numerous independent or foreign films that were illegally camcordered.

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 reports 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. But enactment of criminal legislation is not by itself enough, enforcement of these laws remains critical.

#### **5. *Piracy of Books and Journals***

The book publishing industry continues to face 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 that are state-funded or state-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 reports in [Appendix A](#), publishers note significant problems in **India, Indonesia, and Malaysia**, where the growth of the publishing market is undercut not only by widespread unauthorized photocopying of educational materials, but also by unauthorized reproduction of academic textbooks for export, including to the U.S. via online vendors.

#### **6. *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, has been a long-standing problem for the motion picture and recorded sound industries. 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 **Albania, Egypt, the 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.

### C. MARKET ACCESS BARRIERS

In addition to the key challenges noted above pertaining to copyright protection and enforcement, which constitute *de facto* market access barriers, the U.S. copyright industries also suffer from a variety of formal market access barriers 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;
- 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 formal market access barriers like these are discussed in a number of the country reports 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 cement strong loyalties with consumers, making them 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.

### IV. POSITIVE DEVELOPMENTS

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

**Indonesia:** While Indonesia remains on the Priority Watch List, the Government of Indonesia publicly committed to address online piracy through the implementation of Copyright Law and Regulations Nos. 14 and 26 of 2015. Since making that commitment, enforcement authorities have effectively blocked 215 infringing websites (that either infringe or facilitate infringement of copyright works). While digital piracy remains a significant concern, and persists at high levels, the move to address online piracy through implementation of the 2015 law is a positive step. On another positive note, the film industry has seen improvements in foreign direct investments in film exhibition, following the removal of film and recording studios from the Negative Investment List.

**Brazil:** There was one bright spot in Brazil in 2017, demonstrating a political willingness to combat movie piracy: the Minister of Culture announced a new anti-piracy working group tasked with delivering recommendations for ANCINE, the national film agency. Unfortunately, there has otherwise been little improvement on enforcement, and a number of promising bills to address copyright protection and enforcement are languishing in Congress.

**China:** IIPA is encouraged by some actions taken in China to combat online piracy, including the continued crackdowns by the National Copyright Administration of China (NCAC) on unlicensed music platforms. Also encouraging were the steps taken by the Beijing Copyright Enforcement Department to shut down an entity offering an unauthorized “subscription service” to universities of online ebooks and journal articles. In addition, there have been some positive steps taken to combat the problem of unauthorized camcording in Chinese cinemas. Nonetheless, piracy, in all its forms—including the growing piracy “app” ecosystem, which enables both mobile and Illicit Streaming Device (ISD) piracy—remains a critical problem. The process to amend the Copyright Law appears, at last, to be moving forward, and rights holders hope the draft proposals will be further strengthened to provide much-needed updates to existing protections.

**India:** Against a backdrop of a massive backlog of cases clogging the judicial system in India, action by law enforcement and administrative bodies is particularly needed. Positive developments include the establishment, in 2016, of a Telangana Intellectual Property Crime Unit (TIPCU), and, in 2017, a Maharashtra Cyber Digital Crime Unit (MCDU). These state-level crime units are meant to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, in order to address digital piracy problems. Additionally, on April 29th, 2017, the Telugu Film Chamber of Commerce (TFCC) launched an enforcement operation to protect a then just-released regional Telugu language film entitled *Baahubali: The Conclusion*. During the operation, investigations by TFCC and the Hyderabad Cyber Crime Cell confirmed a connection between a major crime syndicate and piracy of that film; as a result, six arrests were made, but there is no further information on the disposition of that case. In another positive development, the Delhi High Court and the Madras High Court each issued injunctions to block infringing websites. In October 2017, an all-studios injunction was filed against two piratical websites (*1337x.to* and *torrent2.eu*), and received a permanent injunction order from the Delhi High Court to block these sites. This is the first site blocking case in India involving multiple plaintiffs, and where a court directed the Government of India to facilitate compliance. Overall, rights holders report that over 75% of ISPs in India have complied with the order, and there has been a nearly 90% reduction in total traffic to these blocked sites.

**UAE:** The UAE Cyber Crimes Law has been used effectively against virtual private networks (VPNs), DNS “masks” (that hide domain names) and Tor (anonymous) networks—all used to disguise piratical sites and activities from enforcement officials. Application of the Cyber Crimes Law has resulted in some severe and deterrent penalties. Enforcement officials have also taken action against social media accounts selling counterfeit and pirated materials. Additionally, an IP special unit was established in the Customs Department in 2017 to pursue copyright infringements at the border; and the Emirates IP Association, in cooperation with Interpol, have hosted IP training sessions with public and private entities in the UAE.

**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. Separately, IIPA encourages Israel to finally move forward on pending legislation to extend sound recording protection to 70 years, in line with its major trading partners.

**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 AGCOM regulation procedure, which addresses large-scale piracy, AGCOM disabled access to a large number of copyright infringing websites following rights holders’ requests. Following legislative amendments from 2016, the government is now consulting on amendments to the regulation to implement a “stay down” obligation and to improve the existing procedure. While certain rights holders generally support the proposal, some important improvements will be necessary, and in any event the current system in place should not be put at risk. IIPA recognizes recent decisions from the IP specialized courts clarifying the scope of ISP safe harbor protections, and imposing enhanced duties of care on certain online services to prevent infringements (such as obligations to better ensure that infringing content remains inaccessible). However, high levels of piracy in the country persist, including the availability of stream-ripping sites and sites offering

the sale of devices to circumvent technological protection measures (TPMs) protecting video games. Overall, however, Italy continues to provide a powerful example of effective coordination of administrative and judicial copyright enforcement in the digital era.

Although all of the above are positive developments, IIPA emphasizes that, for several of these countries, serious issues remain to be addressed. In most cases, these are spelled out in the respective country reports in Appendix A of this Submission.

## **V. 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. As noted, 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. IIPA continues to 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 necessary political commitments and 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,

/Eric J. Schwartz/

Eric J. Schwartz, Counsel  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** Argentina assumed the G20 Presidency for 2018, announcing a commitment to international cooperation, and in December 2017, the United States ended Argentina's suspension from the GSP, which had been in place since 2012. In order to make good on these commitments, the Government of Argentina must make copyright protection and enforcement a priority. Long-standing deficiencies in IPR protection continue, in particular as to online piracy. The figures are startling. According to the last available data, the overall content piracy rate in Argentina was 33%, and 1 in 6 Argentine Internet users visited music stream ripping sites. The Government of Argentina did crack down on hard goods piracy in 2017, with high-profile arrests of two alleged leaders and many associates of the notorious open-air market *La Salada* in June and October, followed by largescale enforcement operations in December 2017. However, digital piracy remains a serious concern, and there were no online investigations promoted or supported by federal or local authorities, and no website removals in coordination with Internet Service Providers (ISPs). This inaction regarding online piracy, due to a failure of inter-agency cooperation to address the issue, has resulted in numerous pirate sites that are growing, adapting, and developing resiliency. Fighting piracy must be prioritized to promote a positive shift in the market and the growing economy. Moreover, the Government of Argentina should promote cross-agency law enforcement cooperation in both the offline and online arenas, tackling some of the most relevant and known markets.

### PRIORITY ACTIONS REQUESTED IN 2018

- Devote increased resources to fighting online piracy, and develop a coordinated antipiracy campaign at the federal and local level to address online piracy.
- Undertake routine inspections and raids of physical markets, and *ex officio* actions to stop physical and online piracy.
- Continue to uphold the liability of online service providers for infringing content stored on their services, pursuant to the new Civil Code.
- Improve market access by removing quotas for motion pictures and computers and electronic devices.
- Instruct collective rights organizations in the audiovisual sector that the U.S. provides reciprocal protection, and that royalties collected for U.S. motion pictures should be remitted to U.S. directors and performers.

### THE NATURE OF PIRACY IN ARGENTINA

Piracy in Argentina is pervasive and takes many forms.

**Online Piracy.** Digital piracy is endemic and continues to increase. Both online and on mobile phones, digital piracy in Argentina takes many forms, including torrent sites, downloading, streaming, cyberlockers, and linking sites. The prevalence of piracy fundamentally undermines the emerging digital economy in the country.

The U.S. Government has 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

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<sup>1</sup>For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.





expanded to include a mobile streaming application. Enforcement against *Cuevana* gained momentum in December 2017, with the indictment of a key figure in the case, but this has taken years to accomplish. The lack of a level playing field in the digital content market stymies the growth of legitimate services, which struggle to compete when vast quantities of copyright material are available from a multitude of sources. Argentina has the highest Internet penetration rate in the region, but its prospects for a robust legitimate online content market will remain bleak until the government makes concerted efforts to address rampant piracy issues.

Argentina is a heavy consumer of BitTorrent and pirate streaming websites. Following a regional trend, Argentina has seen an increase in usage of Illicit Streaming Devices (ISDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television.

The video game industry has seen the emergence of online marketplaces offering illegal video games and entertainment software, from video game titles to consoles and other devices. For some U.S. video game companies, Argentina is among the top ten countries globally for listings of game copiers and modified consoles via online marketplaces such as *Mercado Libre*. Argentine users are estimated to represent over 20% of the global audience for the most popular Spanish-language illegal online marketplaces for video games.

There are currently 13 legal digital music services in Argentina, including Spotify, Apple Music, Tidal, Personal Música, Claro Musica, and Deezer, but the online music market in Argentina is still performing below the regional average. While Argentina has a relatively large physical and public performance rights market, demonstrating the country's appetite for music consumption, digital sales are currently well below potential. For example, in 2016, digital music accounted for only 24% of sales revenue by trade value, compared with a regional average of 49% and global average of 50%. Despite promising growth in streaming revenue (for example) in recent years, it is plain that the digital market cannot flourish while widespread piracy undermines it.

**Physical Piracy.** According to local reports, there are more than 650 illegal open-air markets in the country, and 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. While some industries are not concerned about hard copy piracy, for many, it remains a significant concern.

A bright spot in enforcement has been an increased enforcement against piracy in several open-air markets in Buenos Aires, including *La Salada*, one of the largest black markets for pirated goods. As reported by USTR, in January 2017, Buenos Aires city authorities, with the support of Argentina's national government, evicted 2,000 illegal street vendors from the Once neighborhood.<sup>2</sup> These street vendors were relocated to nearby commercial facilities and provided with a stipend and a two-month business-training course organized by the Argentine Confederation of Small and Medium-Sized Enterprises. Nearly one-half of the evicted street vendors are now operating legally from two new locations in Buenos Aires. The high profile arrests of two alleged leaders and many associates of notorious market *La Salada* in June and October 2017, followed by largescale enforcement operations in December 2017, show a renewed governmental interest in cracking down on marketplaces known for counterfeit and pirated goods.

**Camcording.** While no illicit recordings of MPAA member films were sourced from Argentine cinemas in the period of January—November 2017, and only two camcords have been sourced to Argentina since January 2015, Argentina is home to a number of release groups which source camcorded material from all over the region and resell it online.

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<sup>2</sup>USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

## COPYRIGHT ENFORCEMENT

The creative industries report that, as in previous years, there were no significant enforcement actions in 2017. In its April 2017 Special 301 Report, the U.S. Government noted long-standing deficiencies in Argentina's 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." 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. These problems persist.

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. *Ex officio* action by enforcement agencies remains 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.

The general perception is that while enforcement actions remained at the same, very low level as in previous years, there is improved government initiative to (1) tackle organized crime; and (2) promote a legitimate digital market in Argentina that could be used to improve IPR protections generally. However, law enforcement agencies lack human and technical resources, and without adequate resources, agencies have a difficult time investigating and enforcing against IPR crimes.

**Online Piracy.** Particularly as to online piracy, there is a noticeable lack of action by either federal or local law enforcement. There is also a jurisdictional issue between local and federal police forces when it comes to online piracy cases. Both local and federal authorities suffer from a lack of technical support and human resources able to tackle the problem on a large-scale level.

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; (iii) ensure that the law establishes sufficient liability for known infringements and permits courts' access to incriminating data regarding online piracy; and (iv) create and train special working groups on federal and local levels for police and prosecutors. Overall, the government should, at the highest levels, commit to developing and implementing a coordinated antipiracy campaign that addresses hard goods and online infringements as a matter of national priority. Currently, there is no official initiative with respect to Argentina's huge Internet piracy problem.

While there are agreements related to U.S.-based companies with DMCA-style requirements for content removal, ISPs typically ignore takedown notices submitted by rights holders. Moreover, these agreements should be updated to counter rising piracy levels, especially for repeat infringers.

**Physical Piracy.** As for piracy of hard goods, there are simple measures that the Government of Argentina can take to reduce piracy. Market organizers should be required to restrict licenses to vendors selling legitimate products. Routine inspections followed by raids are needed for markets in Buenos Aires that offer counterfeit goods, including illegal copies of video games, film and television DVDs, and pirated sound recordings. The enforcement of the existing laws on IP protection by local and federal authorities, including active participation by prosecutors on such actions, would create a positive impact in the short term on the local market and also allow for more long term cases. Active involvement by the AFIP, the Argentinian Customs Office, is needed to reduce hard goods piracy, including the broad and open importation of illegal video game devices and consoles.

**Civil and Criminal Prosecution.** Criminal and civil prosecution of pirates present significant procedural hurdles in the criminal and civil courts. Reform is needed to help cases move through the system. For example, criminal cases can take up to six years to reach a final verdict. In the *Cuevana* case, filed in August, 2013, it took over four years to obtain an indictment of the operator of the website. This renders criminal prosecution of cases relatively non-threatening. Providing authorities with information on digital piracy could potentially improve the duration and success of criminal prosecution. The Criminal Code needs reform, including legislation to clearly criminalize camcording activities.

Civil action is often the only available recourse, particularly for obtaining preliminary injunctions. Procedural hurdles persist here as well, such as the high cost of conducting civil cases, high cost for obtaining a bond, and very long processes. In 2014, the Pirate Bay case seemed to set a positive precedent for site blocking, but no website blocking injunctions have issued recently. Authorities should take *ex officio* initiative.

A new Civil Code, entered into force 2015, provides for general principles of secondary liability and due care. Applied effectively to online infringement cases, this Code has the potential to activate cooperation by various intermediaries whose services are used by pirate operators who otherwise risk liability.

**Working Group.** Finally, IIPA welcomes and encourages continued 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.

## **COPYRIGHT ACT AND RELATED LAWS IN ARGENTINA**

In April 2017, the Government of Argentina launched a public input process to gather views on how, if at all, Argentina should update its copyright law. After receiving submissions from various stakeholders, it does not appear that any legislative changes will be proposed. Should the Government of Argentina proceed with any reform of the copyright law, the Government of Argentina should ensure adequate opportunities for relevant stakeholders to contribute to the process, and insist on adherence to international agreements. IIPA urges the U.S. Government to closely monitor this process.

There have also been recent legislative proposals that, if enacted, would be a step backwards for Argentina's protection of creative content. A troubling bill would have established an expansive safe harbor protecting a wide range of online intermediaries from content-related liability. While ostensibly intended to secure ISP liability, in fact the bill defined "ISP" broadly enough to include nearly any company with an online or cloud presence, and would have severely compromised the ability of rights holders to quickly remove infringing content from websites by requiring them to initiate judicial proceedings and obtain a court order before a service provider was required to remove illegal content. The Bill, if adopted, would make online copyright enforcement unworkable in Argentina. While developments in Argentina suggest a diminution of activity in the Congress on this bill, IIPA urges the U.S. Government to be vigilant to ensure that the troubling provisions of this draft legislation do not resurface. If such a bill were approved, there would be serious consequences to the local digital market and Argentina would risk becoming a safe harbor for even greater numbers of infringing sites and platforms.

## **MARKET ACCESS**

An official decree in February 2017 (Official Decree 117/17) reduced to zero tariffs on imported information technology hardware, including computers, tablets, and electronic devices, in an attempt to stimulate the local market and spur foreign investment. IIPA commends the Government of Argentina for taking this action in increasing market access and equalizing the market landscape.

In November 2017, the Board of Directors of the National Entity for Communications (ENACOM), under significant pressure from a coalition of local representatives of the audiovisual industry, passed resolution 4773

E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the Media Law and accompanying regulation (Decree 1225/10), effective January 1, 2018. The quota regime requires free television licensees to show eight Argentine feature films per calendar year, or, for certain licensees, to pay 0.50% of the previous year's annual turnover to acquire, prior to filming, the broadcast rights to new independent Argentine film and TV movies. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.50% of the previous year's annual turnover to acquire the broadcast rights to independent Argentine film and TV movies.

The article and regulations are retroactive, meaning that the motion picture industry could be held accountable for screen quota compliance, including investment and screening, for the entire year 2017. The quota mandate was incorporated in the 2009 Media Law but has not been previously enforced. As of this writing, U.S. stakeholders are engaging ENACOM to explore ways in which this resolution may be mitigated, or postponed pending further consultation. IIPA recommends that the quota provision be eliminated and a new Media Law be developed to replace the 2009 framework.

## **COLLECTIVE RIGHTS AND COLLECTIVE MANAGEMENT ORGANIZATION ISSUES**

DAC, an Argentine collective management organization representing directors of audiovisual works, has been collecting significant amounts of royalties from theatrical and television exhibitors on behalf of directors, including for U.S. audiovisual works. However, DAC has refused to accept claims to those royalties asserted by U.S. directors, represented by the Directors Guild of America (DGA), arguing that reciprocity is required and does not exist. DAC's denial of payment to U.S. directors is contrary to Berne and WIPO Copyright Treaty obligations binding on Argentina. Those treaties require national treatment of U.S. authors, and as a result, prohibit reciprocity requirements that would limit protection of U.S. author rights holders. In addition, U.S. law does provide reciprocal protection of Argentine directors' rights in their works under the retransmission compulsory licenses arising in sections 111 and 119 of the U.S. Copyright Law.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** Since the U.S.-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, trade between the U.S. and Chile has increased by more than 350%, with two-way trade in goods and services totaling close to \$30 billion. However, Chile has yet to establish, implement, and maintain a copyright law and enforcement regime in line with 21st century norms and continues to disregard the major obligations it assumed under the FTA with respect to improving the level of copyright protection and enforcement online.

As a result of the inaction of the government, Chile continues to have a serious Internet piracy problem. Chile also remains the only country in Latin America that does not have a dedicated and centralized national copyright authority. This structural gap has profound effects on the ability to achieve progress on copyright matters and fight against piracy. Copyright matters are handled by four entities, operating under different ministries, and remain poorly coordinated. Some examples of piracy in Chile are significant levels of stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, and illegal use of cyberlockers. Cooperation with *Carabineros* (the national police service) remains positive, but as piracy moves to the digital environment, actions on the streets are scarce. Although there has been a slight improvement in illicit camcording, Chile continues to be a hub for online piracy and trafficking in circumvention devices, including free-to-air boxes, which decode encrypted satellite signals of copyrighted programs and broadcasts.

Chile's copyright law contains major gaps, which include a lack of protections against circumvention devices; inadequate secondary liability standards to give Internet Service Providers (ISPs) incentives to cooperate with rights holders in combating online piracy; meaningless notice-and-takedown obligations, with ISPs only being required to takedown content following a court order; the lack of deterrent remedies against infringement, including injunctions against intermediaries; and overly broad exceptions to copyright. Even after Chile adopted amendments to its copyright law in 2010, these issues remained glaringly unresolved. Chile's copyright law deficiencies prevent a fruitful collaboration with ISPs to combat online piracy because the law lacks the necessary mechanisms to encourage participation. Additionally, Chile does not have a law directed at illicit camcording in theaters, which would provide a useful deterrent for this type of activity. Chile's enforcement regime is ill-equipped, causing its police and court personnel to ineffectively bring cases even in the areas where Chilean law is adequate to bring action against certain copyright crimes. Training is required to assist the national police service to prepare digital piracy cases.

Making matters more challenging, when cases are successfully brought before the court, judges continue to impose insufficient and non-deterrent remedies. It is undeniable that a robust digital economy is essential to compete in today's global marketplace; yet, Chile repeatedly ignores the basic needs necessary to achieve such a goal. As Chile continues to work to build its local creative industries and its international reputation as a reliable trading partner, it can no longer carry on in this manner and must address the issues in its copyright enforcement regime, including with respect to its obligations under the FTA.

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<sup>1</sup>For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## PRIORITY ACTIONS REQUESTED IN 2018

- Adopt technological protection measures (TPMs) legislation and enforce anti-circumvention provisions (both criminal and civil) to satisfy the 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 to enable and meaningfully incentivize service providers to enter into voluntary cooperation with rights holders against online infringement, including through the implementation of filtering technologies and similar effective measures. The current meaningless notice-and-takedown system should be overhauled, too, to ensure that the removal of copyright infringing content, or the disabling of access to it, does not require court orders. Other necessary improvements to Chile's copyright law include the introduction of deterrent civil and criminal sanctions for copyright infringement; the establishment of statutory damages; improved injunctions, including injunctions against intermediaries; 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 is the first member of the OECD from Latin America and has a developed economy. Internet use per capita is one of the highest amongst Central and South American countries.<sup>2</sup> These high numbers in Internet usage coupled with Chile's serious Internet piracy problem is a dangerous combination that does not befit a country at this level of economic development. The piracy in Chile remains consistently prevalent as in past years and involves various modes of infringement such as Illicit Streaming Devices (ISDs), high levels of stream ripping, file sharing of infringing content over P2P networks, hosting of unauthorized material on websites, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention devices for use with illegal video game files, and, increasingly, illegal mobile and smart phone downloads. Chile is among the top ten countries for video game copier listings on online marketplaces, such as *Mercado Libre*. The most popular piracy sources in Chile are foreign based stream ripping sites, linking sites using the most popular cyberlocker platforms such as *Mega*, *Mediafire* and *4shared*, and P2P networks such as BitTorrent. In other words, piracy sites affecting the Chilean market are largely foreign, which highlights the need to strengthen Chile's national law to protect against outside infringers. 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 primarily posted on infringing, Spanish-language websites, regardless of the location of the hosts and operators of the websites. In 2017, *thepiratebay.org*, fully operational in Chile, received approximately 30 million visits from Internet users within Chile, and the top 180 Spanish-language audiovisual piracy websites received 379 million visits from Chile. 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 and modified consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. The modified consoles include the Nintendo 3DS, Sony PSP and PS3, and Xbox 360. 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 by a local, Santiago ISP, *Magnetizarte Ltd.*, continues to be a leading purveyor of circumvention devices and "unlocked" or modified consoles, 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 video 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 2017, Chile placed 22nd in the world in terms of the number of peers participating in the unauthorized file-sharing of

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<sup>2</sup>See <http://www.internetworldstats.com/stats15.htm#south> and <http://www.internetworldstats.com/stats12.htm#central>, estimating that 77% of Chileans were Internet users as of June 30, 2017, the fifth highest proportion in Central and South America.

select video game titles through personal computers on public P2P networks. Notably, Chile ranked 11th in the world in P2P infringement of console-based video games.

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. Such activity undermines 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. The recording industry, independent of the government, recently conducted an Internet anti-piracy campaign with promising, but modest, results. In 2017, 68 illegal music sites dedicated to piracy were removed and 80 are under monitoring. Also, 8.4 million pages offering illegal music were delisted from Google, and 3,400 links to local music were removed as a result of 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 meaningful notice-and-takedown system in Chile. While the recording industry has had some success working together with foreign ISPs, the official 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. Chile has improved in this arena. In 2017, there were no illicit camcords of MPAA member films traced to Chilean theaters, down from five in 2016. Even with this positive turn around, IIPA continues to urge the Chilean Government to enact specific legislation that would criminalize illicit camcording in theaters, including deterrent penalties, and to strengthen its enforcement regimes so that these positive gains can be sustainable in the face of ever-changing criminal behaviors. Such measures should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

The pay-TV industry in Chile also continues to experience problems with signal and content theft. One prolific method is 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. Additionally, ISDs have been introduced into the market. Such devices are extremely problematic because the sale of the devices can be legal if used with legitimate services and programming, but the simple download of software on the device opens the door to countless infringing material. Similar to free-to-air boxes, law enforcement against ISDs is lacking because of the dual legal and illegal use of the device.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Chile's FTA with the United States entered into force January 1, 2004, and it was intended to achieve a higher level of copyright protection and enforcement in Chile; yet, for the past 14 years, Chile has failed to meet its FTA obligations in this respect. With the demise of the Trans-Pacific Partnership (TPP), Chile's failure to meet the objectives and obligations of the FTA with respect to online copyright has reached a new level of significance and importance. The concerns IIPA has repeatedly voiced 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.<sup>3</sup> Chile adopted amendments to its Copyright law eight years ago to implement some of its FTA obligations. However, significant gaps still remain in the following areas:<sup>4</sup>

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

<sup>4</sup>These legal requirements and the 2010 Copyright Law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <https://iipa.org/files/uploads/2017/12/2013SPEC301CHILE.pdf>.

**No protection for TPMs:** (This obligation is provided in FTA Articles 17.7.5 (a) and (c), as well as the WIPO Internet Treaties.) Chile's continuous disregard for its obligation under the FTA to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work is still disappointing to rights holders across various creative sectors. The lack of protection under the current law allows for the continued, unrestricted sale of circumvention devices online and in specialty markets. In particular, the sale of video game copier devices on online marketplaces is increasingly prevalent. Also, music rights holders are left without support to tackle the problem of stream ripping sites that allow for users to download content, without authorization, through circumvention of TPMs. There has been some movement toward amending the Telecommunications Law to address the sale of devices that 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:** (See FTA Article 17.11.23.) Current law in Chile is inadequate for the 21<sup>st</sup> century online economy because service providers are only required to remove copyright infringing content or disable access to it following a court order.<sup>5</sup> In addition, the notice-plus-notice architecture under Chile's copyright law is entirely inadequate because it merely encourages ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences with respect to repeat infringements for typical online piracy. The law also does not provide any consequences for an ISP that fails to act after gaining knowledge of infringement through a notification. The system is simply too costly and time consuming with very ineffective results. Rights holders' only option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. Such a remedy also improperly directs the focus of enforcement on the user and away from unlicensed platforms that play a critical 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 because rights holders were not in a position to bring court cases against each individual uploader. Therefore, music rights holders decided to stop sending such notices. The notice-plus-notice system is not compliant with the FTA and is not the kind of precedent that should be set in the region to combat Internet piracy. The experience in Chile shows that such a system does not produce results. Unfortunately, since Chile's adoption of the 2010 amendments attempting to establish ISP liability and deterrent criminal penalties, the government has failed to come back to the table to develop a meaningful strategy for tackling copyright infringement online, including, but not limited to, an FTA-compliant notice-and-takedown system.

**No statutory damages or civil *ex parte* remedy:** (See FTA Article 17.11.9 and Article 17.11.12.) Under the FTA, Chile is required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products. Yet, Chilean Copyright Law does not establish adequate statutory damages nor does it strengthen the civil *ex parte* search remedy, which are major missteps in Chile's attempt to act in compliance with the FTA.

**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 to ensure that exceptions and limitations are not overbroad.

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<sup>5</sup>The 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, as discussed in the text, but lacks incentives for compliance; thus, standing alone, is simply an inadequate response to widespread Internet piracy.



**Additional gaps in Chile's obligations:** Several other FTA obligations 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.<sup>6</sup> This is a welcomed 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.

**Cooperation with Intermediaries:** One key component to defeating online piracy is the collaboration with and cooperation of intermediaries, ranging from traditional passive ISPs, to search engines, advertisers and domain registrars. In Chile, the struggle with ISPs is not their lack of cooperation, as they are quite willing to work with rights holders to fight against piracy, but rather it is the Chilean law that hinders the effectiveness of this working relationship.

**Implementation of the Larrain Bill:** In 2008, Chilean law introduced unwaivable and unassignable remuneration rights for various acts of exploitation of audiovisual works in favor of audiovisual performers. In 2016, Chile implemented the Larrain Bill, which extended the reach of the 2008 law to include audiovisual authors (directors and script writers). The remuneration rights introduced by this legislation apply to audiovisual works communicated to the public by TV broadcasters, cinemas and possibly ISPs through on demand services, as well as performances in public venues and public lending. In 2017, following implementation of the Larrain Bill, a national collective management organization (CMO), ChileActores, began contacting local distributors of U.S. audiovisual works to demand remuneration in the form of a 2% tariff on box office revenues. This is done with respect to the remuneration rights of performers only. IIPA has no knowledge as to whether any author remuneration demands have been asserted thus far. While ChileActores may validly represent remuneration rights of Chilean performers and performers of other nationalities, ChileActores does not represent any members of U.S. performer guilds or unions. Moreover, the Chilean law, as implemented, does not require mandatory collective management of these remuneration rights. This means CMOs such as ChileActores are not automatically deemed to represent performers, but rather they must have a specific mandate to do so. Thus, attempts by ChileActores to claim remuneration on behalf of U.S. performers are not supported by any valid representation or other authorizations. MPAA is collaborating with the U.S. Government's regional IP Attaché to challenge any invalid or unsubstantiated claims and to educate the Chilean Government about the contractual frameworks U.S. producers of audiovisual works employ to provide ongoing, equitable and contractually agreed upon remuneration to performers, authors and directors.

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<sup>6</sup>The 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/apps Senado/templates/tramitacion/index.php#> (search for 10294/15).

## COPYRIGHT ENFORCEMENT IN CHILE

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. Police and customs officials continue to involve rights holders in legal procedures. The copyright industries maintain 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). While 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, in 2017, one video game company had three sizeable seizures totaling 8,300 products. The products included fake Wii U tablets and infringing hardware consoles with built-in video games. This is a positive result and such actions should continue; however, because of the shift to online piracy, authorities should redirect some enforcement energy to pursue more enforcement actions against Internet sites distributing infringing products and content (including by streaming, stream ripping, and download). Civil actions are often delayed by procedural obstacles, so increased criminal enforcement would be welcomed.

In early January 2016, Chilean Police took action against one of the world's largest release groups, which had been in operation since 2008. This group 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. The operator of group was convicted in April 2017 and sentenced to 71 days in prison. This sentence was replaced with a one-year obligation to pay a monthly fine to the state, attend weekly meetings at the reformation unit in his home city, and keep the local police informed of his whereabouts. Failure to fulfill any of these obligations would result in an immediate reinstatement of his initial imprisonment sentence.

**Criminal Enforcement Obstacles:** There are several specific and significant impediments to effective criminal enforcement in Chile, including: (1) the IPR Prosecutor's Office does not dedicate the time and resources to understand and build Internet piracy cases, (2) the National Prosecution Office lacks a special branch to investigate intellectual property cases, (3) the *Carabineros*, the prosecutor's office and the judicial police suffer from a lack of sufficient human resources, (4) judges continue to impose the minimum available penalties, which are non-deterrent, even with higher penalties available under the 2010 amendments, and (5) 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.

Some rights holders have found that the most cost-effective course to bring a border enforcement proceeding is to file a criminal complaint. Unfortunately, though, the criminal process is plagued with long delays. Additionally, in some cities, the storage of seized products is the responsibility of the brand owner, which increases the expense tied to customs enforcement and seizures.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2018 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The commercial potential of China's ascendant marketplace for creative works has yet to be fully realized. As part of the largest Internet user base in the world, Chinese consumers have access to a vast array of legitimate music, movies, TV programming, and other works through an increasing number of licensed digital services. In addition, having recently exceeded the United States, China now leads the world with over 50,776 movie screens, many of which offer enhanced formats such as IMAX and 3D. While improved enforcement efforts, particularly against unlicensed music services, have contributed to accelerated gains for certain sectors, copyright piracy remains a critical issue in China, continuing to hamper the market for legitimate content and severely depress licensing revenues. At the same time, China's third comprehensive Copyright Law amendment process has entered a critical stage, and the future development of the creative industries and China's market for creative content hangs in the balance. Moreover, China's policies that deny fair and equitable market access to U.S. content producers and distributors threaten to undermine the hard fought progress that has been achieved.

IIPA is encouraged by certain actions China has taken to combat piracy, particularly the continued crackdown by the National Copyright Administration of China (NCAC) on unlicensed content platforms. In 2018, NCAC should step up efforts to address the piracy "app" ecosystem, which enables both mobile and Illicit Streaming Device (ISD) piracy and has emerged as the most damaging method of accessing pirated audiovisual materials in China. Disrupting the piracy app ecosystem requires a targeted and sustained response. China's ongoing failure to adequately address blatant online piracy of scientific, technical, and medical (STM) journal articles and academic texts has led to more sophisticated copycat services that pollute the scholarly and professional publishing market.

The Copyright Law amendment process is vital because its outcome could lay the foundation for a successful future for the creative industries in China. To achieve that goal, China must not weaken the protections outlined in the most recent public draft, particularly regarding rights for broadcast and public performance. Instead, China should strengthen those protections, including by providing a term of protection in line with international trends; effectively address its evolving piracy challenges, including the problem of apps that facilitate piracy; and bring its standard of protection and enforcement into compliance with international norms and best practices.

China should abandon recent proposals that would erect additional barriers to its online marketplace, and should eliminate current impediments to its market, which exacerbate its piracy problem by impeding access to sought-after U.S. creative content. For example, China should reconsider the revised Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke several recent measures that discriminate against foreign film and television content.

IIPA seeks further reforms to improve access for U.S. film producers to China's growing theatrical film market. China must fully implement the 2012 U.S.-China Film Agreement. Incomplete implementation thus far, combined with new barriers to authorized online distribution of imported films and TV programming, create a fertile environment for widespread piracy of films sought by Chinese viewers. In addition to immediate fulfillment of its commitments under the Agreement, improvements to the pact are needed as part of ongoing consultations on the Agreement, commensurate with commitments made by China in bilateral engagements.

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<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2018**

### **Enforcement:**

- Take further effective action, with increased transparency, against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *ttmeiju.com*, *meijutt.com*, *dy2018.com*, *28mtv.com*, *hdmv.cc*, *truemv.com*, *m3bst.com*; plugin player *xigua* and its related piracy ecosystem; and apps such as *KVOD*, *TVFan*, *3DBoBoVR*, *TVPlus*, *TVBrowser*, *KuaiKan*, *mmbox* and *Haiyao Music*.
- Bring more targeted and deterrent actions, with transparency, against ISD piracy (including against dedicated piracy apps), unauthorized camcording, unauthorized broadcasting of movies, unauthorized movie broadcasts in Video on Demand (VOD) mini theaters, 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); 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; expanding 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; and improving the performance of local cultural enforcement departments, particularly the Beijing Cultural Enforcement Department, to ensure effective action is taken against infringement reported by rights holders.

### **Legislation:**

- Enact comprehensive copyright law reform to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular, ensuring a remedy against apps facilitating infringement; adopting clear rights of public performance and broadcast 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.
- Issue a judicial interpretation or amend the law appropriately to reject the “server principle” in cases involving aggregation apps, which provide unauthorized access to copyrighted contents hosted remotely.

### **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 content approval regulations for mobile games—that discriminate against foreign content by imposing requirements such as registration, 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.
- Ensure full implementation of all commitments contained in the U.S.-China Film 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.<sup>2</sup>

**Online Piracy Takes a Variety of Forms:** China's online piracy problem persists, and continues to evolve. Piracy websites include 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. In addition, large quantities of infringing content are stored in cloud storage services in China, to which links are disseminated through social media platforms. Applications (apps) facilitating piracy are available on a myriad of devices. And ISDs (e.g. media boxes or set-top boxes) allow users to access infringing content, usually through a television.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions) has been expanding at an alarming rate. Apps that aggregate infringing content hosted on remote servers are proliferating. Examples of such apps include *TVPlus*, *TVBrowser*, and *KuaiKan*, listed by the U.S. Trade Representative (USTR) in its 2017 Out-of-Cycle Review (OCR) of Notorious Markets.<sup>3</sup> Other piracy apps include *KVOD* and *TVFan*, which facilitate infringement of audiovisual content, and *mmbox* and *Haiyao Music*, which facilitate infringement of music. 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. An example of such a site is *3DBoBoVR*, which was cited by IIPA members in their Notorious Markets OCR filings to USTR in the fall of 2017. In 2017, the music industry reported 243 infringing apps to mobile app marketplaces in China. 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. Notorious piracy sites that disrupt the audiovisual marketplace include *zimuzu.tv*,<sup>4</sup> *dytt8.net*, *ttimeiju.com*, *28mtv.com*, *hdmv.cc*, *truemv.com*, *m3bst.com*, *dy2018.com*, *dYGang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.net*, *dysfz.net*, and *lbldy.com*. Streaming sites continue to increase. Some music streaming services, including *yymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their location and have stopped responding to takedown request notices. Other sites, such as *Kinghou.com*, *cdbau.net*, *88liu.com*, and *mu6.me*, have begun to adopt the same strategy. Infringement of audiovisual materials (i.e., music videos) is also a problem. The music industry reports that based on their monitoring, 77% of the 518,813 infringing links they discovered in 2017 were to infringing audiovisual content. For the music industry, licensed streaming and digital piracy compete side by side, with 9 in 10 Internet users consuming licensed audio streaming and 9 in 10 users engaging in piracy. Music piracy consists mainly of illegal downloads through cyberlockers, international P2P sites, and streaming of pirated content from user-uploaded content (UUC) sites. As discussed below, the misapplication of safe harbors to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on these sites.

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<sup>2</sup>See, e.g., IIPA's 2017 Special 301 submission on China ("IIPA 2017"), available at <https://iipa.org/files/uploads/2017/12/2017SPEC301CHINA.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 (82 Fed. Reg. 36071, August 2, 2017)*, September 20, 2017, available at [https://iipa.org/files/uploads/2018/01/2017\\_Sep20\\_ChinaWTO.pdf](https://iipa.org/files/uploads/2018/01/2017_Sep20_ChinaWTO.pdf).

<sup>3</sup>For the most recent report, see USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

<sup>4</sup>According 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.

In a more 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). An example is the *xigua* plugin player.<sup>5</sup> A Content Management System (CMS) website helps users to easily create their own derivative websites embedded with the proprietary video player, and a Video Collection Resource (VCR) website provides these derivative sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the proprietary video player embedded into these websites links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities must investigate and take action against these so-called "clone pyramid" 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:** ISDs 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 content. The devices may be pre-installed with apps that facilitate infringement, either prior to shipment, prior to sale by the vendor, or as an after sale service. Alternatively, users themselves can obtain instructions on where and how to access 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 copyright 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 originating source of this problem spreading around the world, the Chinese Government should take immediate actions against key distribution points for devices whose primary purpose and function is to facilitate copyright piracy.

**Worsening Online Journal Piracy:** The problem of online journal piracy remains a significant challenge. China's failure to take effective action against KJ Med, including the Beijing Municipal Procuratorate's failure to prosecute, underscores the lack of effective criminal remedies against even the most egregious infringers in China.<sup>6</sup> 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 NCAC, which was subsequently delegated to the Guangdong Provincial Copyright Bureau, against a

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

<sup>6</sup>The KJ Med entity, which offered scientific, technical and medical (STM) journal articles for purchase and delivery by e-mail without authorization from nor compensation paid to journal publishers, was first brought to the attention of Chinese enforcement authorities in 2006. After the original investigation languished, the current investigation began in 2011, but was not referred to criminal enforcement authorities until 2014. Despite the scope, scale, and clear criminal intention of KJ Med's infringing activities, in December 2015, 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.

new entity, Metstr, which appears to have ties to the operators of the now defunct KJ Med.<sup>7</sup> Although the case remains under investigation by Chinese enforcement authorities, there has been no progress. Operating undeterred, these infringing services generate increasing revenues, and their operators profit from their illegal activity, thus encouraging these entities 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 *syjy.com* and Baidu Paperhelp. 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. China must do more to combat this unlawful activity. In a positive development, in June 2017, following a referral by the publishing industry, the Beijing Copyright Enforcement Department took down the UReader platform, finding it was infringing, and imposing a fine of RMB 400,000 (\$58,000).<sup>8</sup> This case is a good example of the importance of enforcement officials engaging with rights holders, and illustrates how such cooperation can lead to success.

Pirated print publications and compromised log-in credentials unfortunately continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks market and sell their illegal products to overseas buyers. Furthermore, 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 and copyright registration documents.

**Circumvention Devices:** As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass technological protection measures (TPMs) in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing 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, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. Providing deterrent-level criminal sanctions and penalties for the manufacturers and suppliers of circumvention devices is necessary to have a meaningful impact in stemming the trade in infringing games.

**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.<sup>9</sup> Also fueling the growing camcording problem is the increasing problem of people in Chinese movie theaters using cameras, including those on handheld mobile devices, to live-stream theatrical broadcasts of films online. The motion picture industry has raised the camcording issue with relevant Chinese Government agencies, e.g., SAPPRFT, NCAC, and with the China Film Distribution and Exhibition Association (CFDEA). 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 Industry Promotion Law, which took effect on March 1, 2017, allows cinema personnel to take action against camcording. Unfortunately, the law fails to provide for any sanctions, thus 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

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<sup>7</sup>The publishing industry recently discovered corporate filings that show a former KJ Med officer listed as a shareholder in Metstr.

<sup>8</sup>In May 2017, following a referral by the Association of American Publishers (AAP), the Beijing Copyright Enforcement Department (CED) raided the offices of UReader, an online platform that was making available for viewing unauthorized copies of ebooks and journal articles. UReader was marketing itself to universities, undermining the legitimate subscription services provided by AAP member publishers. Following the CED's analysis of the entity's servers and their contents, CED determined that UReader was infringing the complaining publishers' copyrights.

<sup>9</sup>In 2017, a total of 36 audio and video camcords were forensically matched to cinemas in China, a significant increase from 2016.

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 is no longer a significant problem, 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 in addressing pirate document delivery services. Production of pirated and counterfeit copies of academic textbooks has increased in recent years, with these illicit goods marketed and sold through e-commerce sites, and exported to several markets, including the U.S. 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-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical disks, sold through popular Chinese and international online marketplaces.<sup>10</sup>

**Unauthorized Movie Broadcasts:** Some Chinese pay-TV operators or licensees of digital content distribute U.S. content to hotels or to increasingly popular VOD mini-cinemas and cinema chains for unauthorized public viewing. In April 2017, the government issued regulations on the business operations, licensing, and management of these mini-cinemas and chains, and released a draft of a second set of such regulations in June 2017. Rather than legitimizing the operations of these businesses that are violating the copyright law, China should severely penalize them or shut them down.

## **ENFORCEMENT UPDATES IN CHINA**

IIPA remains encouraged by China's recent actions to combat piracy and an overall improvement in the climate for enforcement since 2015, which have contributed to commercial gains in some creative sectors; but more must be done. As of June 2017, China had the largest Internet user base in the world, estimated at 751 million users, including 724 million mobile Internet 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, and hampered the monetization of legitimate services.<sup>11</sup>

**Notable Progress, But Challenges Remain:** As we have highlighted in recent submissions, since 2015 there have been some notable improvements in enforcement against online piracy in China, particularly regarding efforts to combat unlicensed music. NCAC's 2015 Notice required online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, including works that have been previously

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<sup>10</sup>Shenzhen Optical Media Lab has previously worked with right holders to help identify the source of seized products, but on-going changes in management structure has made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>11</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach.



removed, works that are the subject of a notice and takedown, and works specifically listed by NCAC.<sup>12</sup> The 2015 version of China's "Sword Net" anti-piracy campaign resulted in the take down of significant amounts of unlicensed work from music platforms and spurred an encouraging wave of licensing activity.<sup>13</sup> In July 2016, the music industry monitored 16 major cyberlockers (i.e., online storage providers) and, of the 16, 9 had been closed and 4 had shut down their file sharing functionality.<sup>14</sup> The three remaining cyberlockers that still provide for file sharing are *pan.baidu.com*, *ctdisk.com*, and *vdisk.weibo.com*. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for ISPs to ensure this content stays down permanently. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *ali213.net*, *yxdown.com*, *gamersky.com*.<sup>15</sup> 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.

The following are key enforcement actions taken in late 2016 and in 2017 against online piracy services that were causing substantial harm to the audiovisual industry in China:

- In November 2016, pursuant to a case jointly referred by the motion picture industry and Tencent, the Zhenjiang police in Jiangsu province arrested three suspects based across three separate provinces in the cities of Changsha, Xiamen, and Guangzhou, who were responsible for the operation, technical support, and supply of content for four piracy websites.<sup>16</sup> The police seized 18 servers and blocked three bank accounts. NCAC recognized the case as one of its 2016 Top 10 cases, and the Ministry of Public Security is supervising the criminal investigation. In August 2017, local police held a press conference in Zhenjiang City, Jiangsu Province to publicize the successful crackdown. CCTV and other Chinese media reported on this case.
- In August 2017, in decisions stemming from civil actions launched in January 2015 by the motion picture studios against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles, the Shenzhen Nanshan District People's Court found Xunlei, a large online content and service provider in China, liable for copyright infringement. The court found Xunlei infringed by providing the studios' titles to the public without authorization on its websites *f.xunlei.com* and *kuai.xunlei.com*; enjoined Xunlei from further infringing activity; and awarded damages totaling RMB1.4 million (US\$209,860) and litigation costs of RMB162,400 (US\$24,340) to the studios. Xunlei has appealed the verdict, which is pending, and the motion picture studios have cross appealed.

Recent innovative industry approaches to the problem have included China's Capital Copyright Industry Alliance (CCIA), which now includes more than 400 organizations and individuals who have joined together to strengthen copyright protection. Under its auspices, the recording and motion picture industry associations began operating the "Qingyuan Action" in 2014, working with Baidu, the number one advertiser in China, to stop advertising support of infringing websites. The local recording 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. Hundreds of links have been reported since the action began in 2014. According to the music industry, 6636 links have been reported to Baidu from the launch of Qingyuan Action through

<sup>12</sup>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. In December 2017, NCAC began requiring service providers to report licensed content on their services and the details and nature of the licenses to improve monitoring.

<sup>13</sup>See IIPA 2017 at 6. Sixteen Chinese online music platforms including Baidu, Alimusic, Kuwo, Kugou, QQ Music, Xiami, TTPod and NetEase released statements claiming that they had taken down all unlicensed material from their sites, while Kugou and QQ Music stated that they had 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.

<sup>14</sup>In 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.

<sup>15</sup>These sites are all registered business entities in China, and host content and link to other sites with infringing video game content. Over 90% of the traffic to the sites originate in China. In response to takedown notices from the video game industry *ali213.net* takes down only 3% of infringing content, *yxdown.com* takes down 27% of infringing content, and *gamersky.com* takes down 25% of infringing content.

<sup>16</sup>The motion picture industry has verified 1793 member titles infringed by the four websites. Since January 2014, the three suspects had gained illegal income of RMB8 million (US\$1.26 million) from ad revenue.

December 2017, and Baidu has taken down its advertisements on the reported infringing websites.<sup>17</sup> In addition, pursuant to the 2016 Sword Net campaign, NCAC began monitoring 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, these three and a fourth top advertising network, 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. Baidu has also provided a simplified and expeditious takedown tool for motion picture and television content, and pledged to demote infringing video listings of new release titles on the top ten pages of Baidu search results. The motion picture industry is working with Baidu on reducing infringing content on the cloud storage service Baidu Pan. The takedown rate is satisfactory, and Baidu has indicated it will do more, including full implementation of the 2015 NCAC Notice, to prevent uploading and sharing of infringing content on Baidu Pan.

Notwithstanding these actions, as noted above, dozens of notorious piracy websites remain, disrupting the legitimate market for creative content. Furthermore, while China’s progress in cracking down on unlicensed music services has helped contribute to substantially increased revenues for the music industry, the legitimate music market in China is still nowhere near its potential. Unlicensed music is still available 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 12th globally, behind much smaller markets such as South Korea and the Netherlands. 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 shipments from China continue to negatively affect other marketplaces, e.g., in Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

**More Progress Needed, Especially to Disrupt Piracy App Ecosystem:** Since the 2015 Sword Net campaign targeting unlicensed music, subsequent Sword Net actions have been run on a case by case basis, with enforcement considered only for services that rights holders have specifically notified to NCAC. While these actions are often effective, the process lacks transparency. Rights holders submit evidence of infringing websites, but do not receive feedback regarding the progress of the procedures; and more information is needed on the impact of the action to determine whether infringing content has reappeared. In 2017, the music industry filed 264 administrative cases with NCAC which, as of January 2018, have resulted in: closure of 14 infringing websites; punishment against 9 music websites; 17 websites changing to non-music content; and deletion of infringing tracks with warnings issued by local law enforcement for 73 websites.<sup>18</sup>

While the actions of NCAC and other enforcement authorities have made some progress against infringing websites, the Chinese Government needs to increase efforts to combat the growing problem of infringing apps. The Cyberspace Administration of China (CAC) has launched a program to register Internet app marketplaces, and these marketplaces are required to ensure that their apps are legal. In 2016, the CAC took down around 5,500 illegal apps, but there is a lack of transparency regarding these actions and it does not appear that any of these actions were directed towards copyright infringing apps. The motion picture industry notifies app marketplaces of infringing apps, but the marketplaces simply forward takedown notices to the app operators. In 2017, the music industry reported 243 infringing mobile apps to mobile app marketplaces, mostly Android Markets.<sup>19</sup> The operators of app marketplaces need to be more proactive, and implement rules and procedures to ensure piracy apps are not trafficked on their marketplaces. In a positive development, the Shenzhen Nanshan District Court found the operator of the app *MoreTV*, Shanghai Qianshan Network Technology Development Co., Ltd., liable for circumventing TPMs to aggregate unauthorized content, and ordered it to pay RMB100,000 (US\$15,781) to the plaintiff, Tencent Video. Importantly, the court declined to apply the “server principle” in this case, raising hopes that this case will set a

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<sup>17</sup>Unfortunately, infringement on most of these websites still remains.

<sup>18</sup>Difficulties in Internet enforcement in China include evasive techniques of the proprietors of the infringing sites. While all Chinese websites have to register with *miibeian.gov.cn*, and while one can search the proprietors (people or companies) by using their registration number, domain name, IP address, or “Whois” data, many infringers use fake registration information, making it much more difficult to locate the actual person or company.

<sup>19</sup>The music industry reported 45 infringing Apple apps, and 198 infringing Android apps.

precedent for similar actions against operators of infringing apps. 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. More needs to be done, including an effective, sustained enforcement campaign against “rogue” app developers found to facilitate copyright infringement. China should also issue a judicial interpretation rejecting the server principle in cases involving aggregation apps, which provide unauthorized access to copyrighted contents hosted remotely.

**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, including injunctions against intermediaries, 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.

In addition, the music industry reports that certain local cultural enforcement departments, particularly the Beijing Culture Enforcement Department, have not been taking actions against infringement.<sup>20</sup> This raises the prospect that infringing services will make use of these weak links and, for example, move their activities to Beijing to evade enforcement. NCAC should investigate this issue to improve the performance of the local enforcement teams, particularly the team in Beijing.

As noted above regarding the growing problems of ISD piracy and clone pyramid piracy websites, the piracy challenges in China are constantly evolving and increasing in complexity. 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.<sup>21</sup> Given the ongoing prohibition on foreign right holder investigations into piracy, it becomes even more incumbent upon the Chinese Government to enhance its own resources.

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<sup>20</sup>The music industry has filed a total of 135 cases with the Beijing Culture Enforcement Team from 2015 to 2017 regarding infringing activities in or related to Beijing, but the team has taken no action on any of these cases.

<sup>21</sup>IIPA notes that NCAC has organized several training events on copyright enforcement in 2017 in which the creative industries have participated, but more is needed.

## COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>22</sup> 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 Strengthened, Not Watered Down:** After years of IIPA and other stakeholders pressing for progress on amendments to the copyright law, the process appears to have entered a critical stage. The State Counsel Legislative Affairs Office (SCLAO) is expected to publish a revised draft of the bill, followed by a short public consultation. The bill can then be entered on the legislative agenda for the National People's Congress (NPC). IIPA understands that the NCAC has been instructed to assist the SCLAO with shortening the current draft purportedly "to remove the most controversial elements."

There are a number of significant provisions in the last publicly available draft that we hope will remain in any draft released by the SCLAO. These include provisions that 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. Such provisions would make it possible to efficiently remove infringing materials from the Internet as well as to halt people from engaging in massive infringements, although much would depend on implementation.<sup>23</sup> Many other important topics are taken up in the draft. In particular, the NCAC has proposed introduction of the rights of 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. It is critical for the future of the music industry in China, including both foreign and domestic rights holders, that these important provisions remain in the bill.

Furthermore, we hope that any alteration of the draft addresses certain deficiencies. 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 Copyright Law amendment 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. 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, liability should attach when 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, and to ensure that copyright owners have standing to bring suit in cases in which the TPM was employed by a licensee platform. Apps that allow a user to access unauthorized content undermine business models that are essential to a healthy online ecosystem. We are hopeful that the *MoreTV* decision noted above, in which the court declined to apply the server principle, will set a precedent for similar actions against operators of infringing apps. Therefore, to the extent current law on the right of "communication over information networks" and access controls does not clearly permit

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<sup>22</sup>See, e.g., IIPA 2017 at <https://iipa.org/files/uploads/2017/12/2017SPEC301CHINA.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 their opening day until June 2017, these three IP courts accepted 46,071 cases, of which 33,135 have been closed. A new IP court opened in Shenzhen in December 2017. China launched its first cyber court in Hangzhou in August 2017, which accepts all Internet-related civil and/or administrative cases (including online copyright infringement disputes) within the jurisdiction of Hangzhou City, as well as those assigned to it by higher people's courts.

<sup>23</sup>The draft had deleted the reference to "blocking" which was in previous drafts, but retained 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.").

action against apps that facilitate unauthorized access to copyrighted works, the amendment should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

In addition, some of the proposals in the last publicly released draft may require revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices.<sup>24</sup> For example, the ISP liability provisions should be revised to ensure that 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 must either have no knowledge of the infringement or, upon notice or otherwise obtaining knowledge, promptly take reasonable steps to limit, stop, and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement; 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. As previously reported, 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) established the current ISP liability framework in China,<sup>25</sup> and IIPA hopes that much of this framework will be reflected in the amended Copyright Law. Unfortunately, UUC sites that are not neutral or passive intermediaries have been able to avail themselves of the Network Rules' safe harbors, which has negatively impacted the music market and contributed to the proliferation of pirated content, such as music videos, available for streaming on these services. The Network Rules should be clarified to ensure that the safe harbors are only available for online services that function as passive intermediaries, and, as noted above, this requirement should similarly be reflected in the Copyright Law amendment.

Other changes that should be made to the draft include updating China's outdated term of copyright protection to bring it in line with evolving global norms.<sup>26</sup> It is also crucial to ensure that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope, and are otherwise consistent with the WTO TRIPS three-step test. The Copyright Law should also 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:** China's recently adopted Ninth Amendment to its Criminal Law ("Ninth Amendment"), added a potentially helpful secondary liability provision: 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. 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

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<sup>24</sup>The 2015 IIPA submission identified a more comprehensive list of concerns and suggestions regarding the draft legislation including, notably, regarding the collective management provisions, which includes the fraught concept of "extended collective management" and improper limitations on right holder remuneration and compensation. See IIPA 2015 at 21-22 available at <https://iipa.org/files/uploads/2017/12/2015SPEC301CHINA.pdf>. 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.

<sup>25</sup>See IIPA 2013 at 42 available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CHINA.pdf>.

<sup>26</sup>China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (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. More than 80 countries protect some or all creative materials per the terms stated, including 30 out of the 32 member countries of the OECD, and 9 out of the top 10 music markets.

Law reform process. This was a major missed opportunity, and we urge the Chinese Government to adopt further reforms that address shortcomings in China's criminal enforcement framework that IIPA has identified in previous reports.<sup>27</sup>

**Draft E-Commerce Law:** In 2017, the NPC released a second draft E-Commerce law for public comment. The draft law is wide in scope, intending to broadly regulate e-commerce activities, although it does not cover the online dissemination of digital creative content. The draft includes provisions on the protection of intellectual property rights (IPR) that outline procedures permitting right holders to take action against sellers for IPR violations occurring on e-commerce platforms. The draft requires platform operators to take "necessary measures" against infringing goods or services based on preliminary evidence of infringement. Importantly, the draft indicates that the required standard of knowledge for a platform operator to take action is that the platform "knows or should know" that the content is infringing. Because ISDs are sold online, it is critical that rights holders are able to take action to prevent the illegal trafficking on e-commerce platforms of these devices, which are primarily used to access unlawful pirated content. To the extent this draft law does not allow such action, it should be amended. 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 and 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.

**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 China will implement them swiftly.

**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

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<sup>27</sup>See, e.g., IIPA 2017 at 15. Shortcomings include: (1) Thresholds are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold); (2) 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, and, thus, 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; (3) 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; (4) Presumption of copyright ownership is inadequate and creates unnecessary substantial burdens on rights holders, impeding effective enforcement; (5) Criminal accomplice liability with respect to imports and exports is limited (with lower penalties available); (6) There are uncertainties regarding increased penalties against repeat offenders; and (7) 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.

transfer regulations should expressly include the “reasonable suspicion” rule, and they should ensure this rule is consistently applied by both transferring administrative authorities and receiving criminal authorities.<sup>28</sup>

**Enhanced Administrative Copyright Enforcement:** The amended draft Detailed Measures on Implementation of Administrative Penalties for Copyright Infringement (Detailed Measures) could be a positive step forward for copyright administrative enforcement in China if brought into force. Although it remains to be seen how the Detailed Measures will be interpreted in practice, the amended draft, among other things, provides for punishment of 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 enforcement actions China has recently taken 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 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.<sup>29</sup> Yet many core activities of copyright industries remain restricted or prohibited.<sup>30</sup> While IIPA has been hopeful China would address longstanding market access barriers, the Government of China has recently been moving in the opposite direction.

**Increasing Online Market Access Barriers:** As we noted last year, SAPPRFT’s Online Publishing Rules, which took effect in March 2016, appear to expand the scope of longstanding restrictions on the involvement of foreign entities from online publishing activities.<sup>31</sup> The full impact of these measures on activities newly covered under the revised regulations are not yet clear; unfortunately, 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.<sup>32</sup> Furthermore, in July 2017, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production of audio-visual products and “network publication services” remained on the “Prohibited” list.

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<sup>28</sup>Presently, even when administrative authorities do seek to transfer a case, the local Public Security Bureau (PSB) does not necessarily accept it. Practices vary among different PSB offices, but too often the PSB adopts strict acceptance criteria, effectively requiring complete or nearly complete evidence that a crime has been committed, rather than using a reasonable suspicion standard.

<sup>29</sup>China 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.

<sup>30</sup>For example, the Negative Investment List in the Shanghai FTZ expressly prohibits investment in “online audio and video programs,” as well as so-called “Internet cultural business,” while the rules also indicate, “Foreign investors are forbidden to be engaged or involved in operation of online video games directly or indirectly.” 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.

<sup>31</sup>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.

<sup>32</sup>For 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>.



China has also 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.<sup>33</sup> 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.

This flurry of discriminatory measures follows other measures China has introduced in the last couple of years to restrict the online distribution of foreign audiovisual content. The September 2014 SAPPRFT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas 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 accompanying 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” releases<sup>34</sup> 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.

**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.<sup>35</sup> Moreover, 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 television and radio content will negatively impact U.S. producers and appears to contravene China’s WTO obligations.

China needs to change course from its current protectionist path. 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.

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<sup>33</sup>The 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.

<sup>34</sup>“Day and date” release refers to releasing a film in theaters and making it available on a Video on Demand service the same day.

<sup>35</sup>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. Foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform, may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (\$100,000). 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.

**U.S.-China Film Agreement Implementation:** China still has not implemented certain key provisions of the 2012 US-China Film Agreement that would bring broad reforms and introduce competition, for example, to the distribution marketplace, which would benefit producers of both revenue-sharing films and flat-fee films imported into China. Furthermore, China is obligated to provide further meaningful compensation to U.S. industry. Despite the rapid growth in the number of screens in China and the strengthening of domestic productions, the market is still 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 them. China committed in the Agreement (and reconfirmed part of that commitment at the June 2015 S&ED) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State Owned Enterprise, including China Film Group (CFG) and Huaxia. Although CFG’s distribution arm, China Film Company Ltd. (CFC), held an initial public offering in 2016, the majority of shares are still owned by the Chinese Government. Inadequate implementation of this commitment has resulted in many U.S. producers (principally independents) having very limited export opportunities to China, and imported releases have seen a decline in market share.

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 for private third party Chinese distributors; 2) substantially 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 substantially better access to the rapidly growing marketplace for films in China; 4) eliminate informal restrictions on the number of imported “flat fee” films so that more independent 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 receive timely responses to quota allocations and censorship determination, and effective 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.<sup>36</sup> In particular, China must do more to open its 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.<sup>37</sup> 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

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<sup>36</sup>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>.

<sup>37</sup>In 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>.

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 Comprehensive Economic Dialogue (CED), 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.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** In December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “if tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double.”<sup>2</sup> Today, India remains a market with significant concerns for the copyright industries, but one with great potential. India is currently the second largest Internet market in the world after China, and the second largest smartphone market in the world.<sup>3</sup> India should undertake some necessary legal reforms to make it suitable for the digital age and better aligned with international best practices. The lack of effective enforcement and legislation; high number of online pirate services—dominated by torrent and linking sites; the existence of illegal textbook copying businesses; problematic regulations; illegal camcording networks; pirate mobile applications (apps) and chat apps; Illicit Streaming Devices (ISDs) (e.g., set-top boxes); and infringing cable operators—all are undermining the Indian marketplace.

India’s laws make available temporary injunctions to disable access to infringing sites, which is a more advanced approach to online enforcement than in some countries, but needs better enforcement measures in place. Additionally, while India is attempting to choke ad revenue going to pirate sites by implementing an Infringing Website List (IWL), it still needs to consider stronger measures to encourage cooperation and meaningful engagement between rights holders and intermediaries. The Department of Industrial Policy and Promotion (DIPP) is doing more to coordinate and improve India’s state-level enforcement to address copyright piracy, and certain states such as Telugu and Maharashtra have taken the lead in tackling piracy issues. That said, India’s current judicial system does not provide effective or efficient relief against online piracy. Moreover, India has a massive backlog of civil IPR infringement cases awaiting a hearing before Indian courts. Thus, judicial procedure reforms should be adopted to reduce onerous documentary burdens (such as the requirement to sign every page of an affidavit, which can number in the tens of thousands) and speed up the processing of court cases. Additionally, improvements to India’s administrative and criminal enforcement regimes are essential, as is increased cooperation between rights holders and law enforcement agencies to combat hosting of unauthorized content online.

India made a public commitment to improve its IPR regime when the government released its long-awaited “National Intellectual Property Rights Policy” in May 2016. 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 to DIPP. This change has already resulted in improving the visibility of, and resources available for, better copyright protection and enforcement. The National IPR Policy outlines the government’s long-term plans to improve IPR with seven key objectives. The plan, if successfully implemented, will improve the legal regime for copyright owners in India, strengthen enforcement (especially in the online environment), and modernize the government’s management and services related to IPR. Unfortunately, the plan lacks details regarding concrete steps for timely implementation.

<sup>1</sup>For more details on India’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of India’s Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at <http://www.usitc.gov/publications/332/pub4501.pdf>.

<sup>3</sup><http://www.thehindu.com/sci-tech/technology/india-now-second-largest-smartphone-market-in-world/article19926744.ece>.



## **PRIORITY ACTIONS REQUESTED IN 2018**

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2018:

### **Enforcement**

- Establish a National Copyright Enforcement Task Force, including Enforcement Directorate and the Central Bureau of Investigation (CBI), that is overseen by DIPP and directed at online and mobile copyright infringements. Currently, India has the Cell for IP Promotion and Management (CIPAM), but should focus on engaging Digital Crime Units in copyright enforcement actions, beyond activities directed at raising awareness of IP.
- Establish a uniform, state-level cybercrime law and enforcement procedures and a state level, centralized IP crime unit, similar to the enforcement initiatives started in Maharashtra (Maharashtra Cyber Digital Crime Unit (MCDU)) and Telangana (Telangana Intellectual Property Crime Unit (TIPCU)), across all Indian states to ensure proper investigation of IP crimes, including Internet piracy.
- Reform the judicial processes to speed up the handling of cases.

### **Legislation**

- Accede to and fully implement the WIPO Internet treaties, by amending the Copyright Act and Criminal Procedure Codes, as follows: (i) adopt definitions and provisions on technological protection measures (TPMs), including civil and criminal penalties, which should apply to acts of circumvention, and trafficking in devices, components and services; (ii) adopt definitions and sanctions for unauthorized removal of rights management information (RMI); (iii) adopt legislation and procedures for fair, efficient, and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India and “copycat websites”; (iv) repeal the statutory license for broadcasters under section 31D of the Copyright Act, or at minimum amend the provision so it is compatible with TRIPS by withdrawing the September 2016 administrative memorandum, that places all digital music services under a statutory license for traditional broadcasters, in contravention to treaty obligations and international norms; (v) ensure the private use exception is compatible with the three-step test; and (vi) amend Section 52c of the Copyright Act to bring it in line with the existing safe harbor provisions in the Information Technology Act and with international standards relating to the temporary copying exception.
- Other key legislative reforms include: (i) amend the Information Technology Act to expressly include infringement of IPR as grounds for administrative site blocking under Section 69A and make copyright infringement a predicate offense; (ii) revise the safe harbor provisions under Section 79 to only apply to truly neutral services and to ensure ISPs engage in take down measures that have been demonstrated to be effective in preventing or restraining infringement; (iii) 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; (iv) adopt enhanced penalties for “pre-release” piracy and appropriate statutory damages for copyright piracy generally; and (v) amend state organized crime laws (e.g., Tamil Nadu’s Goonda Act) to include book, music, video and videogame piracy.

### **Market Access**

- Eliminate market access barriers, including: (i) the “must provide” rules in the pay-TV sector; and (ii) high tariffs on video game software and hardware.
- Implement new Goods and Services Tax (GST) rules to remove Local body entertainment Tax (LBET) and other related taxes for motion pictures and music; restrict differential tax rates for foreign films; and simplify compliance rules.
- Encourage a single window mechanism for cinema construction that simplifies the approval process and encourages private operators to build cinemas across all states in India.

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

**Digital Marketplace:** India is the second largest Internet market in the world and the second largest country in mobile app downloads.<sup>4</sup> Under the government's "Digital India" initiative to speed up Internet accessibility in India, the current growth rate of Internet is 7-8% with over 450 million Internet users in India.<sup>5</sup> In January 2018, the Telecom Regulatory Authority of India (TRAI) reported 350.7 million broadband subscribers, a number that continues to grow exponentially, offering a great opportunity for the creative industries from both domestic and foreign sources to thrive in the market. According to the 2017 IFPI Global Music Report, the music market in India grew by 26.2% to US\$111.6 million in 2016. Total music streaming revenues grew by 52.9% in 2016 and made up 47.5% of the total recorded music market in India; however, legitimate platforms in India's online marketplace such as Netflix, iTunes, and Wynk face stiff and unfair competition from illegal offerings that continue due to a weak IPR legal and enforcement regime.<sup>6</sup> Internet piracy continues to remain the greatest threat to the music, film, and television industries in India because the launch of 4G services, cheaper data rates, and increased smartphone penetration has made digital piracy easier and more common. A September 2017 consumer survey of active Internet users in India showed that 94% of those surveyed downloaded pirated music content in the last six months. Google was used by 87% of Internet users to find free music, most of whom searched explicitly for pirated music. Video piracy also continues to dominate data consumption and is expected to grow in the future, significantly impacting the revenue stream of the entertainment industry.<sup>7</sup> In a one-month period, the motion picture industry estimates that 63 million visitors accessed the top five piracy websites (mostly torrent sites) in India for motion picture and television content, accounting for 440 million page views.

Video streaming websites, such as *fmovies.is* (which was mentioned in USTR's 2017 Notorious Markets Report),<sup>8</sup> and linking websites are the most popular types of pirate sites, and largely depend on advertising and subscription revenue. Torrent sites such as *thepiratebay.org* and *yts.ag* still dominate the marketplace. Stream-ripping websites, which offer Internet users the ability to make free permanent downloads of music from streaming video services, are also a major problem. Use of many of these platforms adds to the continued presence of pre-release piracy of music and film. Additionally, Indian ISPs are often involved in hosting pirate services. *Hostpalace* lists that its head office is in India. Many piracy sites use *Hostpalace* with little to no recourse for rights holders. Law enforcement contact with *Hostpalace* would be helpful to ensure cooperation in investigations into pirate services hosted on its servers. Other forms of piracy include mobile phone downloading on memory cards, SIM card pre-loading, and mobile apps. In the Badvertising Report by Verisite, forty mobile application marketplaces were scanned to identify piracy apps, and fifty-three mobile apps were found to distribute pirated content, including Hollywood and regional films and TV series.<sup>9</sup> Twenty-five mobile apps were supported by ad networks and advertisers. The video game industry reports that India placed fifth in the world in 2017 (down from fourth in 2016) 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. India remains second in the world when it comes to mobile infringement of games.

**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. This affects the economic performance of the film, the distribution cycle and jobs. Video camcording incidents in India have been on a decline since 2015, with 32 video camcording incidents reported between 2015 and 2017, compared to 113 video camcording incidents between 2011 and 2014. There has been a significant shift to audio camcording in the last three years. In 2017, so far there have been 32 incidents of camcording out of which 24 are audio camcords in

<sup>4</sup>App Annie's 2017 Retrospective Report: <https://tech.economictimes.indiatimes.com/news/internet/ettech-morning-briefing-india-app-downloads-whatsapp-business-microsoft-kaizala-more/62563153>.

<sup>5</sup>Internet Users by Country available at <http://www.internetlivestats.com>.

<sup>6</sup>IFPI, *Global Music Report 2017*, p. 96, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

<sup>7</sup>KPMG LAIFC FICCI Report: The 'Digital First' journey: [http://www.laindiafilmcouncil.org/og-content/uploads/documents/1507100573The%20Digital%20First%20journey\\_Print.pdf](http://www.laindiafilmcouncil.org/og-content/uploads/documents/1507100573The%20Digital%20First%20journey_Print.pdf)

<sup>8</sup>For the most recent report, see USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

<sup>9</sup>[http://verisiteglobal.com/Badvertising\\_Report.pdf](http://verisiteglobal.com/Badvertising_Report.pdf).

various languages including English, Tamil, Hindi, and Telugu. Camcording in India is largely a sophisticated criminal operation that requires an effective criminal enforcement response. Arrests resulting from enforcement operations in 2013, 2015, 2016 and 2017, show some willingness on the part of state authorities to tackle this pervasive problem. Despite these arrests, India remains a major source of unauthorized camcorded material, because of the absence of clear anti-camcording legislation, and the lack of enforcement action on copyright cases by local authorities. In 2016, the Central Board of Film Certification's (CBFC) decision to accept digital cinema packs (DCPs) instead of the DVDs has been a deterrent to source piracy. However, camcorded copies of new releases sourced from Indian theaters continue to leak online during the films' opening weekend, resulting in losses for content owners. In addition, unauthorized camcords are often retransmitted by rogue cable or pay-TV systems.

**Signal Theft:** 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. In 2016, Star India filed over 100 complaints across various Indian states, which led to law enforcement raids of cable operators that resulted in arrests and seizure of equipment. Restraining orders issued by the Delhi High Court against entire networks 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.

**Illicit Streaming Device Piracy:** 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). These devices have emerged as a significant means of accessing pirated motion picture and television content in homes around the world. ISDs are either pre-loaded with apps that allow users to access infringing content, or users can easily obtain the apps themselves. Enforcement against ISDs is either through the use of anti-circumvention sanctions, via third party liability, or any other effective means. The focus should be aimed at key distribution points, piracy app producers, or vendors who preload the devices with apps to facilitate infringement.

**Circumvention Services:** Circumvention services and activities, which 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 Internet 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. Access controls are a key enabling technology for digital content delivery services, so innovative legal protections for their integrity are crucial.

**Unauthorized Book Copying:** Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books (some destined for the export market) remain significant piracy problems for 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. Unfortunately, these lower-priced editions are often exported to more developed markets—such as the Middle East, Africa, Europe (including the United Kingdom), and the United States—and disrupt publisher sales in those markets. The longstanding system of providing less expensive reprints exclusively for the Indian market is also jeopardized by the increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into the U.S. 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.

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 commercial production of course packs, which Delhi University outsourced to a commercial, for-profit, copy shop. On September 16, 2016, the Delhi High Court ruled that the reproduction and distribution 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 court did not enjoin the copy shop and Delhi University from commercial acts of unauthorized photocopying and distribution of course packs. The ruling exceeds the well-established three-step test to which India has acceded under the TRIPS Agreement and Berne Convention.<sup>10</sup> The publisher plaintiffs appealed the Delhi High Court determination, but the appeal was denied. In 2017, the Indian Reprographic Rights Organization (IRRO), an intervenor in the first appeal court, filed an appeal with the Supreme Court challenging the 2016 judgment, but this appeal was also dismissed.

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 to place journal orders. 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:** Although the main threat is online piracy, retail piracy continues and takes many forms such as infringing content on optical discs, mobile devices, and flash or pen drives; 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. India should establish enhanced penalties for such pre-release piracy.

**Domain Registry Outreach:** In June 2017, Motion Picture Association (MPA) and Motion Picture Distributors Association (MPDA) representatives held a joint meeting with the National Internet Exchange of India (NIXI) and DIPP's CIPAM. NIXI, in charge of the .in domain registrations, agreed to take action on whois information with fake addresses as a quick and easy way to suspend a domain that is also involved in piracy. This strategy focused on domains that are in breach of their legal obligations to maintain accurate and complete whois info. Since June 2017, MPDA has reported 44 website names containing infringing content to NIXI. NIXI has suspended 15 out of the 44 domains with the help of Registrars. The websites were inaccessible after suspension, thereby proving that this process can be an effective disruptor to combat online content theft.

**Standardizing State and National Enforcement Strategies:** Now that the Government of India has revealed its National IPR Policy, it needs to fully and properly implement it in a timely manner. 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, including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at online and mobile copyright infringements; and (iii) enforcement task forces at the state level to work together in a coordinated, systematic, and efficient manner. Currently, India has the CIPAM, but should focus on engaging Digital Crime Units in copyright enforcement actions, beyond activities directed at raising awareness of IP. The task force should be unencumbered by the usual jurisdictional enforcement boundaries and permitted to collaborate across state lines to ensure protection of intellectual property. Thus far, two state-level crime units (the TIPCU in Telangana State in 2016, followed by the MCDCU in Maharashtra State in 2017) were established to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, in order to address digital piracy problems. Because enforcement is a state issue, these

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<sup>10</sup>See Article 13 of the TRIPS Agreement.

initiatives taken by Telangana and Maharashtra should be replicated across other Indian states. Many states also have laws against organized or immoral crimes, including the Maharashtra Prevention of Dangerous Activities Act of 1981, and the Goonda Act in Tamil Nadu. IIPA recommends that films, television and OTT content, books, music, and video games should be clearly covered under these laws, or new laws, to protect these industries at a State level, should be enacted. As stated above in the digital marketplace enforcement section, a more coordinated and synchronized effort across all states must be taken to ensure proper IPR protection throughout India.

There is no enforcement coordination or standard operating procedures at the national level for IPR criminal cases. Rights holders often face varying capabilities of enforcement officials and divergent outcomes on cases throughout the country, and there is often no clear delineation of the proper office to approach with respect to online piracy or hard goods and source piracy. Also, the police do not take *ex officio* actions, and there are usually no dedicated police or prosecutors for copyright infringements. Response to a "First Information Report" (an initial criminal complaint made by a rights holder) is often too slow for effective enforcement, sometimes taking four days or more (with one filing relating to online infringement taking two months for the enforcing agency to respond). Additionally, it can take police up to a year to prepare a charge sheet after an arrest. Moreover, post-arrest investigations are often cursory, and many times high-risk targets receive 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 divergent procedures invariably lead to different results, often a duplication of efforts and low conviction rates. Defendants can often resume business shortly after the initial arrest. If and when charge sheets are finally presented in court, cases are routinely dismissed. The Commerce and Industry Minister developed a toolkit to help resolve issues resulting from the lack of standardization (see Training and Public Awareness section below for more information).

Despite these issues, Hyderabad Cyber Crime Cell officials in the State of Telangana, with assistance from the Telugu Film Chamber of Commerce (TFCC), carried out a successful enforcement operation that resulted in the arrest of a major piracy syndicate head. TFCC worked in close coordination with the MPDA in India for this operation. According to the forensic data, the piracy syndicate head was associated with pirate releases of MPAA Member Company content from India at least six times in 2016 alone. On April 29th, 2017, TFCC launched an enforcement operation to protect a regional Telugu language film, *Baahubali: The Conclusion*, released that same week. During the operation, investigations by TFCC and Cyber Crime Cell confirmed the connection between the piracy syndicate head and piracy of that film. As a result of these successful investigations, six people have been arrested to date.

**Criminal and Civil Enforcement Reforms:** Given the scope of the piracy challenges discussed above, the Government of India should prioritize online and mobile piracy cases and ensure proper tools are in place to address hosted and non-hosted infringements of domestic and foreign sites. Because online copyright infringements in India are often large-scale commercial operations tied to organized cybercrime activity, the most proper approach is criminal enforcement. However, IPR enforcement has been a low priority for India's law enforcement. Criminal copyright cases in India have generally not yielded effective and deterrent results. While copyright piracy is a non-bailable offense, bail is often secured on the first day after arrest. Also, there are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be seized. Criminal prosecutions often take years, and during this time relevant witnesses become untraceable and secured evidence 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). India also lacks enhanced penalties for pre-release piracy. 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. Recommendations include training and retaining a cadre of police officers for cybercrime, as well as dedicated IP expert prosecutors and investigators. Last, IIPA recommends that the Government of India appoint special IP judges or panels in courts throughout the country and that these judges be properly trained (the copyright industries are willing to assist with training).

In general, the High Courts in Delhi, Mumbai, Chennai, and Kolkata have developed good civil law jurisprudence for copyright infringement.<sup>11</sup> Innovative approaches have included Anton Piller orders, John Doe orders, Norwich Pharmacal orders, and Mareva injunctions, all of which have assisted IP owners in securing infringing goods, as well as assisting with police raids, sealing evidence, securing bank account details of defendants, and requiring the disclosure of passwords for IT resources. Additionally, civil claims are dismissed frequently enough to deter rights holders from initiating cases even in these courts. Some 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 of familiarity with the related evidentiary requirements); and difficulty with enforcing civil court orders. Civil awards are most often wholly inadequate to compensate the rights holder for the harm or deter further infringing activity.

While typically 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, the motion picture industry experienced a victory when the Delhi High Court ordered ISPs to block two piracy websites, *1337x.to* and *torrentz2.eu*, in response to an injunction filed by the MPDA on behalf of all the studios, in October 2017. The Delhi High Court also issued an order for the Department of Telecommunications to ensure proper implementation of the block order. The court order applied to the entire websites, as opposed to only specific titles or events. Additionally, it allowed studios to seek leave to add variants (redirects or proxies) of the two sites after the order is in force. This is the first site blocking case in India involving multiple plaintiffs and where a court directed the Government of India to facilitate compliance. As a result of this action, 78% of ISPs have complied with the order, and there has been an 89% reduction in the total traffic to the blocked sites. Unfortunately, another 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, a Delhi High Court appeals court bench overturned an earlier decision involving the liability of the social networking site MySpace, ruling that MySpace had no liability for users' posts of plaintiff's copyrighted content absent "actual knowledge" and a failure upon actual knowledge to remove the infringing posts. Super Cassettes India Ltd. (SCIL) was ordered to provide MySpace with a "specific" list of copyrighted material, and MySpace had 36 hours to remove the content in accordance with existing notice and takedown guidelines.

## **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. For accession to the treaties, India needs to: (i) adopt definitions and provisions on technological protection measures (TPMs), including civil and criminal penalties, which should apply to acts of circumvention and to trafficking in circumvention devices, components and services; (ii) adopt definitions and sanctions for unauthorized removal of rights management information (RMI); (iii) adopt legislation and procedures for fair, efficient, and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India and "copycat websites"; (iv) repeal the statutory license for broadcasters under section 31D of the Copyright Act, or at minimum amend the provision so it is compatible with TRIPS and WPPT obligations by withdrawing the September 2016 administrative memorandum, which opines that Section 31D applies to all online transmissions, placing all digital music services under a statutory license for traditional broadcasters, in contravention to treaty obligations and international norms; (v) ensure the private use exception is compatible with the three-step test; and (vi) amend Section 52c of the Copyright Act to bring it in line with the existing safe harbor provisions in the Information Technology Act and with international standards relating to the temporary copying exception. Additionally, the extension of new compulsory licenses to foreign works, in favor of local broadcasters, and the extension of such licenses to the Internet, is of concern. These compulsory licenses appear inconsistent with India's commitments in the Berne and TRIPS agreements.

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<sup>11</sup>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 discussed above).

## 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 and fall short of adequately granting and protecting IPR. Policy proposals on the digitization of the Indian broadcast sector are expected, with TRAI running a public consultation in 2017. Also, DIPP has indicated that the recently announced Copyright Board under the Intellectual Property Appellate Board (IPAB) should have become functional by the end of 2017. While these are steps in the right direction, more changes are needed.

**Statutory license for broadcasting under Section 31D of the Copyright Act:** The 2012 amendments to the Copyright Act of 1957 introduced (in a new Section 31D) a statutory legal license to use musical works and sound recordings in broadcasting. Section 13 of the Copyright Act treats sound recordings as objects of copyright protection and grants to copyright holders exclusive rights to control a number of acts with respect to the work. Under Section 14, an exclusive copyright will apply to the act of “communicating the sound recording to the public.” However, Section 31D has effectively downgraded the exclusive nature of the broadcasting right to a mere remuneration right, since no prior authorization is needed from the right holder for broadcasting, and the license rate is not determined by the right holder, but rather by the Copyright Board. This legal license scheme is inherently incompatible with Sections 13 and 14, and undermines the value of rights holders’ broadcast rights. Furthermore, the September 2016 DIPP memorandum, which opines that Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations,” should be withdrawn, as it creates a misperception that the provisions could apply to online transmissions of recorded music. Some prospective licensees have sought to rely on the DIPP Memorandum to influence licensing negotiations and mischaracterize the relevant uses as “broadcasting.” The DIPP Memorandum, while not legally binding, is harmful to the industry and creates confusion in the market; it should be withdrawn, and the definition of “broadcast” should be clarified to delineate from “making available” and other online uses. IFPI has written to DIPP to point out these problems, and that Section 31D and the DIPP Memorandum are incompatible with international treaties. As of January 2018, DIPP has not formally replied, nor has it withdrawn the DIPP Memorandum.

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. Additionally, the rate fixed by the Copyright Board may not (and does not) reflect the market rate, as illustrated by India’s global ranking as 35th for producer and performer revenues from broadcast music.<sup>12</sup> According to IFPI’s data, the new regime for broadcast licensing has led to a decline in broadcast licensing revenues by 50%, from €3.2 million (US\$4.0 million) in 2011, to €1.6 million (US\$2.0 million) in 2014. This happened despite the fact that the Indian broadcasting industry continued to grow during this period. According to PwC Media Outlook, India’s FM broadcasting sector grew by 50% from US\$200 to US\$300 million over the same period. Under Section 31D, rights holders have no choice but to allow broadcasters to use their works, even though they have the exclusive property rights. Thus, Section 31D should be removed, and the pre-existing status (negotiations between sound recordings copyright owners and broadcasting organizations based on exclusive rights and equal footing) should be restored. The Copyright Board jurisdiction should be limited to situations where (i) rights are licensed collectively, and (ii) the collective management organization’s tariffs are challenged by the users.

**Camcording:** The 2012 Amendments to the 1957 Copyright Act fell short on anti-camcording provisions. The legislative “fix” would require a new amendment to the 1952 Cinematograph Act, to include a clear prohibition against unauthorized camcording. The 2013 Draft Cinematograph Bill should have provisions which 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

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<sup>12</sup>IFPI 2017.

by using slides with anti-camcording messaging before screenings, messages on theater tickets and the like. Such efforts have been undertaken and have raised awareness, but more needs to be done.

**Technological Protection Measures:** Section 65A of the Copyright Act provides protection against circumvention of effective technological measures. However, the 2012 amendments intended to meet the minimum threshold requirements of the 1996 WIPO Internet Treaties were inadequate. The use of the phrase “effective technological measure” is undefined and, thus, does not expressly cover common measures such as access controls. The section also fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices, which would allow legal action against all persons in the piracy chain, and does not distinguish between access control TPMs and copy control TPMs. Additionally, Section 65A makes circumvention a criminal offense, but excludes a civil cause of action and consequently civil remedies. We would suggest that the provision include civil causes of action, as well. Lastly, the exception provided under Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act,” is overly broad and vague. In 2017, the MPA made a submission to DIPP, Ministry of Commerce and Industry seeking such amendments.

**Term of protection:** Under Section 27 of the Copyright Act, the term of copyright for sound recordings is 60 years from the beginning of the calendar year following that in which the sound recording is published. This is shorter than the 70 year term in the UK (and the EU), which is the recent international minimum standard.

**Clarification of the safe harbor provisions:** Safe harbor provisions can be found in the Copyright Act and the IT Act. Section 79 of the IT Act exempts liability of an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. The conditions are that, amongst others, the intermediary does not initiate or modify the transmission and observes due diligence while discharging its duties (as set out in the Information Technology (Intermediaries Guidelines) Rules, 2011). Section 79 does not apply if: (i) the intermediary has conspired, aided, abetted, or induced the commission of an unlawful act; and (ii) upon receiving actual knowledge or notice of copyright infringement, the intermediary fails to expeditiously remove or disable access to that material. These principles in Section 79 of the IT Act are reasonable to some industries, but more effective remedies should also be part of the system. The provisions in Section 52 of the Copyright Act should be amended to align with these.

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 to address 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 too long of a period for some forms of piracy such as pre-release piracy. The ISP liability framework should be improved to require timely and effective means for preventing or restraining online infringement. India should also provide authority for injunctive relief orders that would direct service providers to take measures to combat online piracy such as disabling access to specifically identified infringing materials.

**Administrative website blocking:** Under Section 69A of the IT Act, intermediaries may be required to block public access to any information generated, transmitted, received, stored, or hosted in any computer resource if the government is satisfied that blocking is necessary to the interest of sovereignty and integrity of India, defense of India, security of the state, friendly relations with foreign states, public order, or to preventing incitement to the commission of any cognizable offence relating to above. Section 69A does not expressly cover intellectual property infringement as a predicate offense. The express inclusion of intellectual property infringement as a ground to direct

website blocking is important. Currently, website blocking requested by the sound recording industry mostly goes through the judiciary route, i.e. the court, but there is a very serious backlog in the courts in India and an injunctive order may take years to be granted. Some cases are pending now for hearing in 2022. The industry therefore needs a faster and less costly way to curb online piracy, which can be through Section 69A of the IT Act. India should further amend this provision to permit administrative *suo moto* action by the Ministry of Communication and Information Technology (MeitY), enabling MeitY to act without judicial orders to disable access to structurally infringing websites. Such a provision is especially needed in light of the Section 65A amendment, which fell short of effective provisions on technological protection measures and to tackle the issue of structurally infringing websites. Fortunately, preparatory work on the possible revision or clarification of Section 69A of the Information Technology Act, 2000 (the "IT Act") is beginning.

**Internet Service Providers (ISPs):** 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. Also, ISPs have been unable to limit the reemergence of the blocked websites through proxy domains that use redirection; sites that were blocked for years on court orders, like songs.pk, have reemerged, meaning the implementation of block orders by ISPs is not effective. To our knowledge, there are no applicable MOUs between government agencies and ISPs for site blocking. John Doe court ordered injunctions against named and unknown infringers are issued to the government agency, who, in turn, instruct the ISPs to block access to the sites or order the ISP to take down the infringing content. The enforcement of court-mandated take downs is left to the claimant to serve orders on the ISP, who can usually be relied upon to comply for a short period, after which compliance tends to fall off.

## **MARKET ACCESS ISSUES**

Market access barriers imposed on the motion picture and video game industries result in an unfair playing field for all rights holders. In a high level US-India trade meeting in October of 2017, USTR urged India to liberalize the economy to facilitate US exports, noting market access restrictions and issues with IPR protection and enforcement. 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 noted in prior submissions) 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.
- TRAI price caps for pay channels in areas with set-top-boxes and 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), which stifles the growth of the industry. TRAI says it will relax the price controls once other television platforms are widely adopted (satellite TV, Internet TV). TRAI should make a strong commitment to "adopt targets" for when it will relax price controls as the U.S. Federal Communications Commission did when the U.S. deregulated cable TV rates. This matter is currently under consideration in the Chennai High Court.
- 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.
- Local Body Entertainment Tax (LBET): In September 2016, the Indian Parliament passed the GST Constitutional Amendment Bill, paving the way for the much-awaited introduction of a new GST to unify India's complex tax system. On July 1, 2017, India rolled out the GST nationwide based on a four tier structure: 5%, 12%, 18% and 28%, with different rates applying to different parts of the film value chain. All indirect taxes (including entertainment tax, service tax and VAT) were subsumed into the GST with the exception of LBET at the state level, which remains outside the scope of the GST. Thus, state governments are empowered to tax entertainment over and above GST. In 2017, in the State of Tamil Nadu, LBET was introduced with differential tax rates for foreign films versus local language. The GST legislation should reduce the regulatory burden imposed upon the copyright industries in India with a uniform rate.

- The rate of GST applicable on physical and digital formats of music, i.e. 18% on physical (GSTN Code HSN 8523) and 12% on digital (GSTN Code HSN 00 44 0613), which are too high and have an adverse effect on the sales of music products and the development of the music industry.
- Price fixing on tickets in South India, as well as quotas on the number of screenings per title per day.
- Onerous regulations on uplink and downlink of satellite signals beaming into India.
- High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement which will reduce tariffs on goods that enhance digital trade in India.
- Cinema Licensing Laws: For years, the construction of cinemas in India has been hampered by numerous impractical and outdated regulations, contributing ultimately to India's low screen density. To obtain approval for cinema construction, an exhibitor has to go through approximately 70 different clearances for approval of a single theater/multiplex. Furthermore, India's 29 states have different regulations on cinema construction. There is a need for a single mechanism that simplifies the approval process and encourages private operators to build cinemas. For example, in 2016, the State of Andhra Pradesh introduced a mechanism that provided for a deemed clearance for cinema construction after 21 days, if approvals were delayed.
- Primacy of Copyright: Pertinent to Broadcasters as they are subjected to orders from the TRAI in contravention to the Copyright Act.

## **TRAINING AND PUBLIC AWARENESS**

Enforcement of IP related crimes continues to be a low priority for law enforcement officials. This is likely due to the need for sensitization and training of enforcement officials, and the lack of a uniform enforcement structure for IP crimes. 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. Some effort has been made on this, but it must be consistently applied throughout the country.

In January 2017, the Commerce and Industry Minister, Nirmala Sitharaman, launched India's first Copyright Enforcement Toolkit for Police. MPDA—in association with the Federation of Indian Chambers of Commerce and Industry (FICCI), Star India and local counsel—worked with CIPAM DIPP to develop the toolkit, which aids police officials across India in dealing with copyright, trademark and counterfeiting crimes. It will be utilized during training programs conducted for police officers across the country. In addition to detailed explanations of various offenses, it provides a checklist for registering a complaint and conducting search and seizures, outlining general guidelines for search and seizure protocols in criminal IP cases. The initiative attempts to solve the biggest challenge facing IP enforcement—the lack of uniform procedures and awareness of relevant statutes across the country. CIPAM has disseminated the Toolkit to all State Police Departments and major industry associations across the nation. Going forward, the Toolkit will be an effective tool to assist enforcement agencies in dealing with the cases relating to Trademarks and Copyright infringement.

CIPAM carried out several IPR awareness workshops in schools and colleges as a part of their campaign, using the hashtag #LetsTalkIP. CIPAM has also held several IPR training programs for law enforcement officers (with cooperation from the industry, including the MPA). These programs have been held at Police Training Academies in Kolkata, Bhopal, Shillong (North East Police Academy), and Telangana. In August 2017, CIPAM DIPP organized the First National Workshop on IPR, which saw participation from Ministers from the Government of India and industry associations. The workshop used awareness videos—featuring popular animated characters created by MPA member company Viacom 18's flagship kids' channel, Nickelodeon—to raise awareness that content piracy is equivalent to stealing. MPA also participated in several copyright forums in association with the USPTO, FICCI, and other industry bodies.



# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** The Mexican legal regime for IPR protection is both antiquated and administered with weak enforcement, which is stifling the growth of the digital marketplace. The problems are two-fold: first, the IPR regime is insufficient to protect right holders or to provide adequate enforcement tools against online piracy (e.g. injunctive relief), and court procedures falling far short of international standards (e.g. presumptions of authorship and formalities). Second, the enforcement authorities do not have a coherent and coordinated plan to address online piracy, and, continue to focus on hard goods piracy. Improvements in the law and enforcement would benefit Mexican consumers of film, music, video games and books online. As in other countries, Mexican consumers have embraced the digital age at an exponential pace in the last decade, especially for streaming services for copyrighted materials.

The current IPR legal regime is at least two decades behind international norms. For example, Mexico has not fully implemented the 1996 digital copyright and neighboring rights treaties (which it ratified in 2002), much less adopted the full panoply of necessary legal provisions and procedures commonplace in most countries that allows a healthy marketplace to thrive. Protection against the circumvention of technological measures and rights management information—two key components of the digital treaties which allow streaming and on-demand services to function properly—are neither defined nor clearly protected under the Copyright Law of Mexico. Civil cases are expensive and difficult for rights holders to undertake, even against clear infringers, because there are no explicit provisions providing compensatory remuneration (e.g., pre-established or additional damages), making damages hard to prove and collect. Proving copyright ownership, a basic starting point of litigation, is also an obstacle in Mexican civil and criminal cases. Even when prosecutors are willing to commence criminal cases—a difficulty by itself due to a shortage of resources—success depends on proving a “direct economic benefit” by the infringers, instead of showing the harm caused by the infringement; this is a difficult hurdle to overcome. Additionally, injunctive relief is a problem because there are no procedures for preliminary injunctions in Mexican law (including *ex parte* preliminary injunctions). Last, although there are administrative provisions for taking down infringing material and web-blocking infringing sites, this remedy is now in limbo after the Supreme Court reversed an agency ruling blocking a clearly infringing site because the site also contained some legitimate content.

Basic tools for cooperation between rights holders and website owners and service providers are lacking. For example, there are no clear principles of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions, and no mandated provisions for notice and takedown of infringing content and no penalties for non-compliance with such notices even when infringing content is identified. Meaningful reform of the Copyright Law (and related laws), especially on digital enforcement issues, has been long-stalled, including full implementation of the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). These reforms cannot wait any longer.

Although the copyright industries report continued good cooperation with some of the Mexican federal authorities in actions against hard copy piracy, there is frustration that enforcement actions and resources have not shifted, after two decades of digital piracy, to online enforcement. And, as with digital piracy, the hard goods

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<sup>1</sup>For more details on Mexico's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



enforcement that is taking place does not target major distribution networks. Enforcement efforts against digital infringement has been further hampered by nationwide budget cuts in 2017 (as in recent years) in various agencies, including several IPR enforcement agencies. In 2015, the Government of Mexico created an IP crime sub-unit within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), to focus on improving digital enforcement. This was a positive step, but the sub-unit has not been properly staffed and resourced, and without a government-wide strategy against online enforcement, its work will not be effective. Another example is the Institute of Industrial Property (IMPI), the specialized agency for intellectual property, which is authorized to take administrative actions against infringers but is under-resourced and hampered by outdated procedural rules. 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. This would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including in local entities that rarely work on combating piracy at all.

Mexico is now the number two foreign source for unauthorized camcords (behind Russia) in the world, and the number one source in Latin America. In 2017, 81 American (MPAA-member) feature films were sourced from illicit camcords in Mexico—this is significantly more than the 40 films sourced from Mexico in 2015, and, down only slightly from 84 in 2016.

## **PRIORITY ACTIONS REQUESTED IN 2018**

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2018:

### **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 including 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 Attorney General's Office (PGR); and, properly resource UEIDDAPI and its new sub-unit. The PGR also needs to improve its forensic standards for digital enforcement; and, mandated registration (as a practice, if not a legal requirement) for criminal cases needs to be eliminated.
- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

### **Administrative Enforcement**

- Provide IMPI with: (i) *ex officio* authority to investigate infringement; (ii) additional resources and political directives to issue decisions more expeditiously, including actions to takedown and block infringing websites; and (iii) allow its regional officers to conduct local raids. Provide INDAUTOR (the National Author's Rights Institute) with more resources to increase and strengthen its mediation capabilities.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders as a starting point to develop clear third party liability rules, proper injunctive relief, and incentives for 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); focus on prosecuting online service operators, repeat infringers, and 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. PGR also needs to improve

its forensic standards (especially for online piracy). Lastly, there needs to be increased prosecutorial training in IPR cases (with a focus on digital enforcement matters).

## 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 (“direct economic benefit”) requirement (and onerous authorization standards) as a prerequisite to criminal liability for large-scale copyright infringements; and, remove any such limitations on the making available right which is barred by the WIPO Internet Treaties.
  - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that PGR and Customs can and will act against so-called “goods in transit.”
- Enact an amendment to Article 189 of the Industrial Property Law allowing IMPI to notify defendants via e-mail for administrative IPR violations online. A bill is currently pending in the Congress to accomplish this change.
- 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 (making the act itself illegal).
- Enact legislation to provide clear rules establishing third party liability, including for parties contributing, inducing or promoting infringement of copyright and related rights.

## COPYRIGHT PIRACY IN MEXICO

**Online Market Outlook:** In the past 15 years, Internet use in Mexico has risen steadily from 2.7% in 2000 to 45.1% in 2016, and it is estimated there were 69.9 million Internet users in 2017 (and, there has been an explosive growth of mobile phones and smartphones). The music industry reports (IPSO Connect Report 2017) in 2016, 66% of recorded music industry revenue in Mexico was from digital music services (24% from physical formats); unfortunately, the per capita spending on music in Mexico is only US\$1.10 per year (compared with US\$16.40 per capita in the U.S.). A 2015 study by the Mexican Institute of Competitiveness (IMCO) noted that in the last ten years, the copyright industries and distribution networks were responsible for close to 7% of the Mexican GDP.

According to a 2017 study conducted by CLAC, more than 37 million people consumed pirated music in Mexico in 2016.<sup>2</sup> So, instead of allowing legal services to grow, illegal services are flourishing in Mexico and harming other marketplaces in Latin America. There are a wide variety of popular pirate services available in Mexico including cyberlocker services, stream-ripping services, sites offering unauthorized downloading and streaming of music, film and videogames, 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. Although there are some local websites,

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<sup>2</sup>See: [http://docs.wixstatic.com/ugd/5b1d95\\_00c541f17c1f4af99e3fb21c5d1d90d9.pdf](http://docs.wixstatic.com/ugd/5b1d95_00c541f17c1f4af99e3fb21c5d1d90d9.pdf). The study included 1,200 nationwide interviews in order to get an accurate snapshot of the problem of Internet piracy in Mexico.

many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), but 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. For some video game companies, Mexico is now among the top countries for peer-to-peer sharing of infringing video game files, which has slowed the growth of the legitimate online marketplace in Mexico. Improving the legitimate marketplace, would improve the local economy.

The most widespread source of music piracy is stream-ripping (including music videos posted on YouTube and other similar platforms) as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links to infringing content, a trend that has been increasing. These platforms are also very popular distribution channels for pre-release piracy. The Motion Picture Association (MPA) reports that subscription television piracy and the use of illicit streaming devices (ISDs) are a growing problem in Mexico. 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. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is getting more sophisticated and more ubiquitous. This includes the use of web browsers and video apps to allow playback of files of films and television programming. There are over 170 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *Pelis24.tv* (formerly, *Pelis24.com*), one of the world’s most popular pirate streaming Spanish-language sites for films and television programming, with a huge audience in Mexico, and another site (*Series24.tv*), were raided in September 2017 in Lima, Peru. There are no reports, yet, of a criminal case commencing against the site operators. 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 2017, Mexico ranked 15th overall in the world (down from 14th in 2016) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fifth (a decrease from 2016) in unauthorized file sharing using consoles, 12th using mobile devices (up from 14th in 2016), and 18th using PCs (a slight increase from 2016).

**Hard goods piracy:** Hard goods piracy continues in manufacturing and distribution networks on the street and at markets (even as digital piracy far eclipses hard copy piracy). In January 2018, as it has since 2012, the U.S. Government named two Mexican physical markets to its “Notorious Markets” list: (1) Mercado San Juan de Dios in Guadalajara which is the largest indoor market in Latin America with close to 3,000 vendors selling pirated films, music and videogames, and including videogame circumvention devices (sold by a majority of the market’s vendors); and (2) El Tepito in Mexico City, an open-air 80 square block market in the middle of Mexico City selling video games, modified consoles and game circumvention devices, and which, as the U.S. Government acknowledges, has become too dangerous for rights holders to enforce their rights.

The motion picture industry is also concerned about these street markets: Lomas Verdes, Juarez or Central Camionera, Toreo Subway Station (State of Mexico) and Salto del Agua and Toreo Markets (Federal District) because they are major 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.

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. Cheaper offerings are now available for “virtual chip” installation (an alternative version of soft mods) for 150 to 250 Pesos (US\$8 to US\$11) for installation services and pre-loaded games. 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. Even when infringing online listings are removed, sellers continue to relist their offerings with little deterrence.

**Camcord piracy:** As noted, Mexico is now the second largest foreign source of illegally recorded films, and the largest source in Latin America, with 81 MPAA-member feature films sourced from illicit camcords in Mexico in 2017. 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. A draft bill was introduced in October 2017 to amend Article 424 of the Criminal Code for camcording activities; unfortunately, it contains the “for profit” language found elsewhere in the code for IP criminal violations. One positive step (in 2016) was an agreement between rights holders and PGR to screen warning notices before exhibiting films in many 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 (ISDs) including 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, are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they 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 imported into Mexico 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. 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 signals 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, and for activities involving the sale or distribution of ISDs. One focus of the Government of Mexico should be enforcement actions against vendors and illegal channels.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

As highlighted, Mexico does not have a centralized coordinator for copyright enforcement, nor any coherent plan of action. At present, three federal agencies are engaged 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 (and can conduct mediation proceedings for aggrieved rights holders). In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaria de Gobernacion*) have also assisted rights holders by providing information on illegal software websites (and have also moved to seize domain names of infringing sites.) In 2016, the Scientific Police ordered the Network Information

Centre Mexico (NIC.mx), 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 with plans to address digital piracy.

## Criminal Enforcement

In the past few years, Mexico has been transitioning to a more adversarial justice system, with judges undergoing training to improve the adjudication of 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. 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). Yet, in spite of better cooperation with rights holders, IPR prosecution at PGR has been hampered because it is not a priority, and PGR suffers from outdated procedures, insufficient resources, inadequate training of new agents, 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, but some industries are reporting improvements, especially by the PGR. A formal coordination process between the government agencies (PGR, the Mexican Tax Administration (SAT), IMPI, and local police forces) is needed to improve the government's ability to efficiently address the distribution of infringing content. In 2017, PGR commenced a criminal enforcement operation against an illegal streaming website (*peliculasmas.com*) offering thousands of movies and television programs; this is one of the first such activities against a streaming service.

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*); this is done as a general practice even though the law does not explicitly require it. 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 and the *peritos* have in the past been reluctant to cooperate with investigations and prosecutions. Additionally, the law should recognize and apply a clear presumption of ownership in civil (and criminal and administrative) matters, and without the need for a mandated registration. In practice, copyright registration certificates are required by Mexican prosecutors to commence criminal cases.

**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. Hard copy piracy (for example, at the well-known street markets, labs and distribution centers) is still a concern, but only for some of the copyright industries; digital piracy is now the priority for all of the industries and should be the focus of enforcement priorities. Five years ago, a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. It needs to be updated and implemented, and preferably given one central authority to direct enforcement. Criminal enforcement needs to be undertaken with a coordinated plan among PGR, SAT, IMPI, Federal Bureau of Consumer Interests (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.

A second recommendation is to significantly improve the PGR's criminal enforcement actions, especially outside of the main cities, and especially aimed at digital piracy activities. 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 UEIDAPI (in PGR) needs resources and training (focused on technology) to properly undertake and to focus on criminal investigations on digital piracy. It was formed initially with five public prosecutors from within the PGR which pledged to fully staff the

UEIDDAPI sub-unit, but other key IPR enforcement units in the PGR and the police are understaffed. In 2017, UEIDDAPI filed 578 investigations for copyright-related crimes. 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 Office of Attorney General for Federal Crime Investigation (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is under-resourced and thus unable 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.

A third recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. Of Mexico's 32 states (consisting of 2,400 municipal governments), only five of the 32 state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. Otherwise, the states and municipalities have ignored copyright offenses in their jurisdictions.

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, 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); 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. Since 2013, the Copyright Law has allowed 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 (e.g., additional or pre-established 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:** Beginning in 2014, IMPI used its administrative authority to take down an infringing website (*ba-k.com*) and issued an order to block access to the site. A monetary fine was imposed against the website administrator, and the website removed the infringing material. A court later upheld IMPI's action and authority. In 2015, IMPI again used its authority this time 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). But the action by IMPI against *mymusic.com* triggered a court case when two ISPs failed to comply with the IMPI order. The court lifted the web-blocking order against *mymusic.com*, and this ruling was upheld by the Supreme Court on the basis that it was disproportionate because the site had some non-infringing material. Rights holders are now working with IMPI and the courts to refine the ruling in that case, and to clarify IMPI's authority to takedown material and block access against sites if a majority of the content on a site is unauthorized. One other limiting factor is that IMPI can only act against an operator with a physical address in Mexico. While the cases and IMPI authority have been sorting out, there have been no other instances for the past two years of IMPI acting to block access to infringing websites. However, with improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines.

One legislative reform (that resulted from the CLAC) would improve enforcement by IMPI and is pending in the Mexican Congress. The draft bill would amend Article 189 of the Industrial Property Law to permit IMPI to notify defendants via e-mail in cases where IPR violations are committed via an electronic network; it is supported by the copyright industries. Currently, the remedy is of limited use because civil and administrative procedures require site operators to be notified by writ sent to a physical address (which pirate services do not disclose). This antiquated procedure needs to be corrected.

**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. The recording industry reports that INDAUTOR has been helpful with its mediation procedures (known as *juntas de avenencia*) allowing music producers (via their collecting societies) to meet with users. INDAUTOR also is responsible for supervising the collecting societies in Mexico. In 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). Unfortunately, the Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and ISPs. It has been almost ten years since 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the 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 that include notice and takedown, third party liability, 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.

Instead, at present, 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 services completely deny liability. Some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), 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 should not be a substitute to avoid direct liability).

In addition, 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.

Online criminal enforcement faces many obstacles. For example, 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. One such example has been the *demonoid.me* case against a BitTorrent operator that has been long-stalled; and, there are no new Internet piracy criminal cases to report. For file sharing, the two major ISPs (Telmex Infinitum 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 2017 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. Unfortunately, the government proposals offered in recent years for a "notice and notices" system would have instituted a weak notification system to infringers. Additionally, as noted, IMPI claims to only have authority to address local websites (when their administrators or owners are located in Mexico), limiting its 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. 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. IIPA also 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 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.

Customs officials seized 1,615 items in 2016; in 2017, in 81 separate seizures, over 17,000 infringing game consoles were seized. Eight of the importers were "repeat" importers, attempting multiple shipments of infringing (Nintendo) products into Mexico. One such importer attempted 14 separate shipments. One challenge for rights holders to pursue recidivists is the false information provided to Customs by these importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers, and to work with Customs officials on these cases. Customs chain-of-custody procedures is another hurdle, especially for criminal enforcement. Under existing procedures, Customs officials first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors then order the police to inspect the packages. However, police and prosecutors have been reluctant to commence criminal cases because the packages were previously opened by Customs officials and not (as the PGR office responsible for the Mexico City International Airport requires) in the presence of police witnessing the opening of (each) package. This interpretation that the chain of custody is "broken" has forced rights holders in the video game industry to appeal decisions (incurring additional legal expenses) that terminated cases and investigations. The solution is for the PGR to develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered.

### **Hard Copy Enforcement**

To properly conduct enforcement against hard copy piracy for the motion picture and video game industries, IIPA and the U.S. Government agree that procedures regarding expert reports need to change, customs officials need the proper authority to commence cases, and most importantly, the Mexican authorities need to coordinate their enforcement directed against high-level targets in the distribution chain. Such efforts should also make use of the forfeiture law, under which landlords aware of criminal activity on property they own, must either stop the activity, notify the authorities, or face liability.

## **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 the WCT and the WPPT, although it did not publish its ratification of those treaties with the Agreed Statements.

Over 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 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 (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. TRIPS (Article 61) also requires that there be effective criminal remedies, including “imprisonment and/or monetary fines,” available in cases of “willful ...copyright piracy on a commercial scale.” The remedies in Mexico for commercial scale piracy have not been effective, and are hampered by procedural hurdles (proof of ownership and “for profit” motives).

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. The renegotiation of NAFTA, should it conclude, provides an opportunity to update and improve these obligations for the age of digital networked access to copyright materials (i.e., digital trade issues), as well as including other global copyright norms for protection and enforcement.

## **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 circulated (the most recent 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 2018 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 as well as appropriate civil and criminal sanctions; (ii) clarify the making available right for works in Article 27 of the Copyright Law (for producers of phonograms it is 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” (direct 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 strong incentives for the operation of effective and efficient notices and takedowns; (x) add sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) create presumptions of copyright ownership in civil, administrative and criminal cases (instead of the current practice of requiring certified copies of copyright registrations). There are also provisions in the Copyright Act in Articles 150 (transmissions of works) and 151 (neighboring rights) that provide exceptions to infringement for certain public performances where: a retransmission is not “for profit-making purposes” (Article 150) and “no direct economic benefit is sought” (Article 151). These exceptions are too broad exceeding what treaties permit, and should either be severely restricted or eliminated.

In addition, adding clear third party liability is needed to provide an effective incentive for neutral ISPs (and others hosting or providing digital services) to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be accomplished by limiting monetary damages relief for qualified third parties, and only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and are neither controlling, initiating, inducing or directly infringing copyrighted material. Providing proper injunctive relief can prevent the dissemination of illegal copies (including those made available prior to legitimate release), and is a crucial element of an effective digital enforcement scheme.

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. There were two such troubling bills introduced in the Congress in 2017 to: (1) introduce a 20% screen quota for non-Mexican films; and (2) revise the VAT tax effectively lowering theater ticket prices for local (Mexican) films, discriminating against U.S. and other foreign titles.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 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 2018.<sup>1</sup>

**Executive Summary:** The copyright industries have three intellectual property rights (IPR) priorities in Russia, which if properly addressed, could significantly improve the Russian marketplace for copyrighted works and recordings. First and most important for all of the copyright industries is to dramatically improve enforcement against online piracy—for hosting sites and streaming services, including, in particular, those directed to users outside of Russia. Second, Russia needs to address the collective administration problems that have long thwarted the ability of music rights holders to effectively control the licensing of their recordings via the collecting societies in Russia. The state accredited Russian collecting societies are not operating with transparency or good governance consistent with international norms. Third, the problem of camcording motion pictures has risen dramatically over the past three years (200% since 2015) with many feature films being illegally copied in theaters and migrating online. Addressing the camcording problem requires changes in the Russian legal framework, and dedicating sufficient resources and government willpower to engage in effective enforcement.

In 2017, legal reforms were enacted to further improve civil enforcement in Russia against online piracy. These reforms are consistent with improvements in 2013 and 2014 which established procedures and streamlined processes for websites to comply with takedown notices from rights holders. In recent years, Russian courts (in particular, the Moscow City Court), working in cooperation with a key government ministry, have also disabled access to infringing sites for users within Russia. The 2017 legal reforms allow these court orders to be applied (without a reapplication to a court) to clone, proxy and mirror websites containing infringing content. The 2017 legal reforms also require online search services to delete search results to blocked websites. These latest reforms should improve digital civil law enforcement. Unfortunately, in recent years, the new procedures and processes have been directed only at online piracy by users within Russia. This has resulted in a substantial and persistent international copyright piracy problem that needs to be addressed by the Russian Government to target illegal sites and streaming services that operate in Russia, even if the users are abroad. One key missing legal reform that could be effective against online infringing websites and services would be a clarification of the legal liability of Internet Service Providers (ISPs).

Several sectors of the copyright industries and the U.S. Government report that overall IPR criminal enforcement in Russia has continued to decline in recent years, and that the focus on enforcement remains too skewed to physical piracy, not online piracy. For the past several years, however, the Government of Russia has stopped providing annual reports or enforcement statistics, so it is difficult to accurately gauge enforcement activity as a whole. The copyright industries can definitively report that in the absence of a clear nationwide governmental directive on enforcement, criminal and administrative enforcement practices have varied, and will continue to vary, considerably from region to region within Russia.

It has been six 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

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<sup>1</sup>For more details on Russia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Russia's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



Russia. The USTR concluded in its annual Russia WTO compliance report to Congress in December 2017, that Russia had fallen short of its WTO IPR obligations, especially with regard to online enforcement.

## **PRIORITY ACTIONS REQUESTED IN 2018**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2018:

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, including a focus on deterrent criminal actions against organized criminal syndicates. Also, criminal actions should target those involved in piracy retail chains that continue to sell pirated entertainment software, music and movies.
- Increase the number of administrative actions (in addition to the criminal actions, per above) 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 and non-commercial enterprises that provide services with the clear intent to promote or induce infringement, regardless of whether the servers (or users) are located in Russia.
- 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 the Civil Code, Part IV, to:
  - clarify 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, as well as clarifying the definition of the activities that qualify intermediaries to benefit from safe harbors, to prevent knowing facilitators from enjoying these safe harbor benefits; and
  - provide additional legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks. Article 1253 of the Civil Code provides that intermediary services facilitating the widespread dissemination of unauthorized content cannot benefit from the liability privileges, if they know or should have known of an infringement (so, Article 1253.1 provides only very general principles of ISP liability).
- Amend the Civil Code in Article 1229, and the Presidium Decision (2009), to additionally 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 the unauthorized camcording of motion pictures; (ii) against principals in legal entities, including for IPR crimes (the Civil Code limits civil liability to the legal entities, not the principals of those entities); 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) one to three year penalties disqualifying managers of legal entities from their managerial responsibilities.

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

**Internet Piracy:** The legal and licensing regime in Russia needs to catch up to the explosive growth in Internet and mobile usage in order to allow legitimate markets for copyrighted content to develop and thrive. In 2009, it was estimated that 29% of individuals in Russia were using the Internet. In 2017, that figure grew to 76.4%, and there has also been a huge growth in the number of Russians that have mobile broadband subscriptions—according to the International Telecommunications Union (ITU) (December 2017 Report).

Despite the laudable 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 and streaming sites, linking sites, and cyberlockers, that offer access to pirated music, film, video games, books and journal articles. Many of these sites cater to English-speaking and other non-Russian users, harming markets outside of Russia. Because the new legal reforms and court-ordered injunctions have been directed at sites within the Russian market, some BitTorrent and other pirate sites (especially those hosting unauthorized motion pictures or television programs) have moved their sites to foreign hosting locations.

As in years past, the U.S. Government placed several Russian online sites on its Notorious Markets List in 2017 (the report was released in January 2018). USTR retained *rapidgator* and *rutracker* on the 2017 list—both have been on the Notorious Markets annual lists since 2012.<sup>2</sup> As USTR noted, the cyberlocker “Rapidgator collects revenue through its premium membership and subscription plans and employs rewards and affiliate schemes to compensate users based on downloads and sales of new accounts” and the operators of the site net “millions of dollars annually.” The book publishing, motion picture and recorded music industries all cited *rapidgator.net* in their October 2017 Notorious Market filings, and many also cited *rutracker.org* (formerly *torrents.ru*) as well. *Rutracker.org* is a BitTorrent portal that first launched in 2010 in response to the takedown of *torrent.ru* by the Russian enforcement authorities; it has an estimated 14 million registered users and is one of the world’s most visited websites. It has also been subject to blocking orders by the Moscow City Court (a permanent injunction). After the court order, it moved its operations to several mirror sites. 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.

As detailed below, the Moscow City Court has issued a number of injunctions in the past few years, including permanent injunctions against various Russian websites. For example, in addition to *rutracker.org*, permanent injunctions have been issued against: *rutor.org*, *ex.ua* (a Ukrainian site, popular in Russia), *ru-ru.org* and *new-rutor.org*. However, workarounds still exist and thousands of Internet users have obtained access via mirror sites and VPNs. It is hoped the 2017 legal reforms will help reduce this access in the future.

The recording industry also notes many stream-ripping services believed to be sourced from Russia including *Flvto.biz*, *2Conv* and *Fly2mp3.org* (all three are essentially the same service operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany).

Another problematic site is the Russian-hosted *firestorm-servers.com*. Rights holders have observed 8,800 active users on this site playing *World of Warcraft* without having to pay the monthly subscription fee established by the owners of the online video game. Most ISPs and website owners do not respond to takedown requests for these sites; these include direct MP3 downloading sites (such as *mp3eagle*). There are a few exceptions. For example, the video game industry reports 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 fifth consecutive year, Russia was first 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. Russia is first in the world when it comes to the unauthorized file sharing of video games on PCs with more than four times as many illicit downloads to PCs in Russia compared to the second highest country, Brazil. In 2017, users with Russian IP addresses accounted for more than 33% of the global volume of detected infringements occurring on public P2P networks.

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<sup>2</sup>See, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.



The recording industry reports that paid download sites are still a source of piracy in Russia (in addition to the P2P services and cyberlockers already noted). Some sites offer unauthorized on-demand streaming as well as downloads (and include pre-release music). Two such examples are: *newalbumreleases.net* which has a large library of newly-released popular music available, and *mp3va.com* which has the look and feel of a legal music site like Amazon or iTunes, but sells downloads of single tracks for less than 15 cents (and albums for \$1.50). Some of the other unlicensed pay-per-download sites include: *mp3panda*, *mp3fiesta* (hosted in Russia, but operated from Cyprus) and *mp3eagle.com* (one third of this sites' users are from the U.S.). In the past two years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps (Apple and Google) do not respond quickly (on average two to three weeks), or, in some cases, at all, to takedown notices. Draft legislation that would block mobile apps (as current law does for websites) would significantly improve this particular problem. According to a recent global music report (IFPI Global Music Report 2017), Russians spend on average 44 cents per person per year on music; in comparison Americans spend \$16.41 per person.

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 2016 and again in 2017. The U.S. Government noted that despite "positive signals," VK reportedly continues to be a "hub of infringing activity" noting, in particular "thousands of infringing motion picture files on the site." *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, including film materials. It is available in many languages, including English, and has a dedicated content search engine that enables searches and instant streaming of content (and, for years, it permitted third party "apps" to enable non-members to search, stream and download the content available on the site). In 2016, *vKontakte* also took steps to limit access to such third party apps, making it more difficult for users to download content directly. It has also experimented with content recognition technologies. *vKontakte* also blocks infringing sites from accessing videos stored on *vKontakte*, but third party pirate sites can still stream illegal content from another service operated by the same parent company. Thus, the motion picture industry concurs with the U.S. Government's assessment of *vKontakte* as still serving as a major infringement hub for illegal film materials. One encouraging sign has been *Mail.ru's* overtures to some rights holders to address piracy on *vKontakte* and other *Mail.ru*-owned services.

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. It also includes thousands of unauthorized audiovisual and print materials. This site and *vKontakte* alone host more than half of the unauthorized audiovisual material in Russia, so much more needs to be done to engage in effective enforcement against these sites. For example, *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. There are many other Russian-originating websites that offer movies for downloading and/or for streaming. For example, *movie4k.tv* is a popular streaming linking site with thousands of American movies, that has been identified by the motion picture industry as a notorious market.

Book and journal publishers remain very concerned by the prevalence of online piracy in Russia (consisting of pirated copies of books and scientific, technical and medical (STM) journal articles), particularly on hosted-content websites that are operated by Russian residents. The most egregious example is the search engine/locker site *Sci-Hub* (formerly *Sci-Hub.org*) and the group of sites known as the "Library Genesis Project" (*libgen.org*) which now makes available for free over 62 million copyright-protected journal articles (more than 90% of existing publisher content) and over 6 million books. To further its infringing activities, Sci-Hub gains unauthorized access to university systems and publisher databases through compromised user credentials, and obtains copies of copyrighted journal articles, which it then hosts on its own server network, as well as cross-posting it to *Libgen.io*. The Libgen site encourages the creation of mirror sites of all of its content, and several such sites exist. *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). Although the U.S. court granted the publisher a preliminary injunction in 2015, the site quickly resurfaced under the *sci-hub.io* domain. In 2017, the U.S. court granted a permanent injunction, and awarded the publisher \$15 million in damages for the 100 sample works included in the suit. Also in November 2017, following a complaint filed in June 2017 by another American publisher, a district court in Virginia issued a second default judgment against Sci-Hub (then at *Sci-Hub.io*) of \$4.8 million for the 32 sample works included in that suit. The court enjoined Sci-Hub and “those in active concert or participation with them” from infringing the publisher’s copyright, and also ruled that “any person or entity in privity with Sci-Hub and with notice of the injunction, including Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which Sci-Hub engages in unlawful access to, use, reproduction, and distribution” of the publisher’s trademarks or copyrighted works. While these actions and related enforcement efforts have disrupted Sci-Hub’s infringing activity, the lack of clarity in the Russian enforcement landscape has hampered efforts to take action against the operator and the site in Russia.

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 exclusively with 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 are 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 include 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 2017 to 78 (up from 63 in 2016). By comparison, in 2015, there were 26 camcords sourced from Russia. Most of the Russian camcords come from Moscow, Kazan, Tatarstan, St. Petersburg, Ekaterinburg, Saratov, and some of the Siberian cities. The illicit camcords that are sourced from Russia are only of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets) within a few days of theatrical release damaging revenues worldwide and across the economic lifecycle of the film. In 2017, the Russian-Anti Piracy Organization (RAPO) assisted with 14 interdictions by security personnel (trained by RAPO). Four criminal cases were initiated against the camcoders, and a conviction in any of these cases could serve as a precedent. Importantly, the Government of Russia needs to amend Article 146 of the Criminal Code to more effectively address illicit camcording in theaters (a 2013 amendment was never adopted). The government should also properly resource and undertake more effective enforcement against illegal camcording of motion pictures.

**Enforcement Against Internet Piracy:** To be more effective, IPR enforcement in Russia should be better coordinated, and should focus on *ex officio* criminal actions targeted at large-scale commercial enterprises, as well as on taking administrative actions and strengthening administrative penalties. Focusing on criminal enforcement 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 its annual report to Congress entitled “Implementation and Enforcement of Russia’s WTO Commitments” (December 2017), USTR concluded that the “current IPR enforcement environment in Russia remains weak” and highlighted “online piracy” as a “significant problem in Russia.” It further summarized that overall IPR enforcement had “decreased, rather than increased, over the past few years” noting especially, criminal enforcement.

The agencies that can commence criminal cases—which include 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 the 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 an absence of 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 or streaming 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 (only the Economic Crime Police are now doing this). 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 on 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.

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. In recent years, police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (and especially have had difficulty proving intent, or in identifying the individuals responsible for criminal activities). As a result, few such cases are ever brought and even fewer tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. An intensification of criminal investigations and criminal convictions against principals of organized commercial pirate syndicates is sorely needed. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

Civil judicial remedies have significantly improved in the recent years because of the 2013, 2014 and, now 2017, reforms. 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, is the agency responsible for enforcement of these laws. They have been effective and cooperative with rights holders in implementing the 2013 and 2014 laws, as well as the new 2017 law, in coordination with the Moscow City Court.

In July 2017, President Putin signed new legislation into law (Federal Law No. 157, in force October 1, 2017) to address the problems of clone, proxy and mirror sites by broadening the Russia court ordered (civil) injunctions to cover these sites as well as the original infringing site. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to RosKomNadzor identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor can also block these sites. No special request to a court is needed from a rights owner; rather, a list of qualified blocked websites is provided by rights holders via an online mechanism to RosKomNadzor (although it is limited to 50 or 60 site blocks per day) under regulations it adopted (effective October 17, 2017). The ministry's decisions—which must be made within 24 hours of receipt by a rights holder—can be appealed in the courts. In addition, the 2017 legislation requires, upon request by rights holders to RosKomNadzor, search engines to remove links to infringing content on sites that have been subjected to an order under the existing laws.

Separately, a law was introduced in the Duma in April 2017 to provide monetary penalties (up to US\$12,000), for attempts to bypass website blocking orders under the law applicable to anonymizers and virtual private network (VPN) services. The VPN law went into force in November 2017. The other law providing penalties has not yet been enacted, but passed its first reading in the Duma in October 2017. The Federal Tax Service (FTS) also has the authority to block the use of anonymizers and to create a list of banned resources to bypass blocked websites, but its jurisdiction is specifically limited to acting against online illegal gambling operations. The FTS can also request that RosKomNadzor block anonymizers, so there is in place effective authority to take action against online piracy if the Government of Russia chooses to apply it.

In 2017, the Moscow City Court ordered over 1,100 site blocking orders (compared with 679 in 2016). Since the 2017 mirror site law has been in force (in October), 255 mirror sites have been blocked. In addition, 786 website links have been removed by search engines following the new procedures. As noted, previous court orders have included the permanent shut down of key piratical Russian websites including (in 2015) against *rutor.org* the BitTorrent tracker. Official data for 2017 is not yet available, but it is estimated that, to date, the court blocking orders of the past few years have resulted in over 630 infringing websites (including about 260 music sites) being permanently blocked, with over half of these coming in 2017.

In 2017, RAPO used the new procedures to take down 58 websites and assisted with the commencement of several criminal cases against the owners of pirate sites (including against *goodzzona.co*, torrent tracker *netnsk.ru*, *kuzbassvsem.ru* and *fast-torrent.ru*). Mostly, however, private parties have to rely on civil, not criminal actions, using the new anti-piracy laws and court procedures by the Moscow City Court. 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.

As a result of the 2013, 2014 and 2017 legal reforms, many of the copyright industries reported that civil enforcement on balance improved in 2017. In 2013, a Memorandum of Understanding was signed by RAPO, the *Mail.ru* Group and other Internet platforms, and the Government of Russia (RosKomNadzor). As a result, the motion picture industry reports that, in 2017, most ISPs in Russia voluntarily cooperated and responded to RAPO cease and desist letters for their works (however, it often takes between one to three days). The ISPs are also complying with RosKomNadzor blocking orders. Unfortunately, however, some copyright industries report that some ISPs either merely forwarded notices to users without taking down material, or did not respond at all. Further, even with clear

evidence of infringement, there has been little cooperation with advertising agencies and payment processors who financially support infringing sites.

**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 2017 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, 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 video game industry continues to report delays in examination reports from government experts, due to a lack of technical expertise. For the video game industry, enforcement efforts are also complicated by other issues including new legislation, changes in jurisdiction or new personnel. 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 (a 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 clarify guidelines on the destruction of goods and 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 conclusion. This would also help to improve criminal enforcement nationwide, since expertise and

enforcement practices vary widely throughout the country, especially against digital piracy. A similar step to improve this problem would be the establishment of an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement. 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 is 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.

Russia's current Criminal Code does not allow for corporate entities to be held criminally liable for infringement. Only a natural person (usually a corporation director) can be found criminally liable, 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 of 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 of 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 this type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries (as it has 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 damages 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.

One very troubling development is a proposal to lower fines (statutory damages) from their current levels, below the minimum levels set in the Civil Code (currently US\$170) per infringement. Awards are already too low as imposed by the courts; further lowering the permissible levels will not provide deterrent penalties. This proposal, adopted at a first reading in the Duma in October 2017, is under consideration for final passage (Amendments to Article 1252 of the Civil Code). It should not be adopted.

**Administrative Enforcement:** The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles, US\$26 to US\$35), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$175 to US\$350), and on legal entities themselves (30,000 to 40,000 rubles, US\$526 to US\$702), as well as permits 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.

**Collective Administration:** In 2017, legislation was enacted to address problems of the state accreditation system and governance of collecting societies. Unfortunately, the new law falls far short of providing transparency to rights holders and good governance consistent with international norms and best practices for collecting societies. The 2017 legislation was adopted by the Duma in November 2017 and will come into force in May 2018. It amends

the Civil Code and the Administrative Code to revise the make-up and activities of collective rights management organizations (RMOs). One obvious failure of the new law to provide transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

The new law creates “supervisory boards” for each of the various authors’ collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and “user” group representatives. This will not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO, and would include international rights holders with local representatives on the board. Instead, partial control by the Russian Government will deprive rights holders of their ability to control the licensing and collection of monies for their works and recordings, and likely result in less, not more, money flowing to authors and producers. Lastly, the so-called fiscal control improvements, including regular audit reports, will not improve accountability, because the audit obligations are only to the government (for taxation purposes), not to those rights holders.

## **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.

Existing 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. As noted, legislation was adopted by the Duma in October 2017 (amending the Civil Code and Administrative Code) to provide collective rights management reforms, but the new provisions do not provide the necessary corrections required in the Working Party Report.

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. As the U.S. Government noted in its annual report to Congress (December 2017), the Russian “collecting society regime remains nontransparent and burdensome” and, this is one of several WTO obligations (including effective enforcement) that Russia has yet to fulfill.

In 2014, based on a proclamation by then-President Obama, Russia was removed from eligibility for trade benefits under the Generalized System of Preferences (GSP) program because its economic developments exceeded the statutory qualifications for GSP benefits. As a result, in 2014, 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. Thus, the removal or suspension of GSP benefits for IPR deficiencies is no longer a trade enforcement tool.

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

Russia has made progress on legal reforms during the lead up to WTO accession, and the more recent Civil Code, Part IV revisions (2013 through 2017), but gaps remain 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, in 2017, the web-blocking law was expanded to cover clone, proxy and mirror sites (without the need for additional court proceedings), and to require search engines to remove links to infringing content on sites that have been subjected to a court order.

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; lastly, it does not clearly define secondary liability. In fact, the only pending proposals regarding ISP liability and safe harbors would extend the safe harbors to search engines (within Article 1253 of the Civil Code). 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 (or who directly infringe). 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.<sup>3</sup>

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<sup>3</sup>For a detailed list of IIPA’s prior comments specifically on the Civil Code (and some of the related laws), see <https://iipa.org/files/uploads/2017/12/2010SPEC301RUSSIA.pdf> at page 138.



Article 1229 of the Civil Code (in conjunction with the Presidium's decision No. 5/29 (October, 26, 2009)) prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). It applies to devices and services that are advertised or offered for sale, but only if advertised or sold exclusively as circumvention devices. The law needs to be expanded so that liability applies to the commercial trafficking in all variety of circumvention devices and services, not just those advertised and marketed as "circumvention devices." In addition, commercial trafficking in circumvention devices—including by importation—should also be criminalized.

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. Lastly, IIPA recommends that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.

## **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 affect state-owned television channels (because they do not rely on advertising revenue), it will 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 in lieu of licensing, to compensate rights holders for massive online infringement of their works. The proposal was put on hold, and it is hoped it will not resurface or be allowed to move forward (because it would have, among other things, violated TRIPS and the WIPO treaties). Instead, the Government of Russia should focus on improving enforcement against infringing parties and those who enable infringement, to promote opportunities for voluntary licensing and the development of market conditions, to create a robust online marketplace.

In May 2017, a new law was adopted by the Duma (Federal Law No. 87, in force July 1, 2017) which regulates (licenses) online film websites, including streaming platforms, and which limits foreign (non-Russian) ownership to 20% of such sites. The law applies to operators of all online audiovisual services, if their Russian audiences are below 50% of their total users (and, if Russian users are below 100,000/day). How to calculate this usage is very unclear, and it will impose very burdensome regulations on the operators of legal sites. When it was proposed, the law drew opposition from both Russian and foreign film distributors (as a violation of international treaties) and website owners of legitimate content, fearing that, if adopted, it would become a tool to limit legal websites while alternatively resulting in more, not fewer, piratical film sites.

Additionally, the Ministry of Culture has released a proposed draft law (that it hopes to enact in 2018) intended to promote the local film industry. The proposal would amend the current law "On State Support of RF Cinematography" to modify the timing of film deposit requirements and require all recipients of film distribution certificates (both foreign and domestic) to submit to mandatory payments (i.e., non-tax payments) of RUB 5 million (approximately US\$87,707), for every film with at least 100 film screenings. The monies would be placed into a special reserve for the development of cinematography in the country. A second proposal, also intended to advance domestic exhibition of films, would limit film screenings in both multiplexes and monplexes in Russia to 35% of the total number of screenings of all films exhibited in a multiplex during a given day; and, to 35% of the total number of screenings of all films that are exhibited in a monoplex during a calendar month. Neither of these proposals, if implemented, will advance the government's goal of improving the local film industry.

The Ministry of Culture's plan to charge a fee (of approximately US\$80,000) for each foreign movie released in Russia was revoked by the Ministry. However, at a 2017 Presidential Council of Culture meeting, the Minister of Culture announced plans to introduce a new system of support for domestic films. It would charge a 3% tax on theatrical box office fees. The text and details of this proposal have not yet been made publicly available.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** The market for creative works in Taiwan continued to worsen in 2017 due to the unrelenting growth of digital piracy, which has become so pervasive that legitimate content producers are finding it difficult to compete in the marketplace. This is particularly unfortunate because Taiwan was once a regional leader in establishing policies that fostered and rewarded creativity. Over the last several years, however, Taiwan's government has languished in the face of a growing online piracy threat that is eroding creative investment, whether foreign or homegrown. Notwithstanding some nominally positive steps, the Government of Taiwan has been unwilling to take the measures required to confront Taiwan's critical Internet piracy problem.

It is clear that Taiwan's online piracy situation requires urgent action. The motion picture industry estimates that during October 2017, there were over eleven 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 its high levels of online piracy and the government's obvious 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 software applications (apps) that facilitate copyright piracy, including stream ripping, are proliferating. Online piracy of reading materials is booming. In addition to e-book piracy, copyrighted teaching materials are increasingly made widely available without authorization on university digital platforms, and are often printed out to students without permission. This new type of infringement 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 draft amendments to the Copyright Act recently passed by the Executive Yuan and sent to the Legislative Yuan for final consideration fail to provide the statutory tools necessary to effectively address Internet piracy, particularly the problem posed by piracy websites hosted outside of Taiwan. The current draft amendments would also move Taiwan further away from international norms and best practices in key areas and raise questions regarding Taiwan's commitment to its existing international obligations, particularly regarding the draft's many overbroad exceptions and limitations. Taiwan has also been unwilling to include in the amendments many needed reforms, including adding a remedy, similar to those employed in many parts of the world, to combat foreign-hosted websites that facilitate infringement; bringing its term of protection in line with evolving global norms; and correcting unfair practices regarding collective management.

It is also unfortunate that 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 tends to view copyright piracy as a minor offense, resulting in suspended sentences in 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 2017 Oxford Economics study showing local film and television sectors directly contribute US\$5.9 billion to Taiwan's GDP, support 104,200 jobs, and generate approximately US\$490 million in tax revenues. Moreover, Taiwan is a hub of music production for the Chinese speaking world and a major exporter of "C-pop." IIPA urges the Government of Taiwan to reinvestigate its commitment to protect and nurture this important contributor to Taiwan's economy.

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<sup>1</sup>For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## PRIORITY ACTIONS REQUESTED IN 2018

### Enforcement:

- Ensure that the Criminal Investigation Bureau (CIB) focuses on piracy cases and that the Criminal Investigation Brigade (CIBr) is provided with sufficient training, funding, manpower, and equipment to investigate online piracy cases.
- Increase trainings for judges and prosecutors on specific issues related to online copyright infringement.
- Take action against infringement of reading materials at educational institutions, including against providers of on-demand printouts of pirated e-books or teacher resource materials, and against digital infringement occurring on online education platforms.
- Bring and conclude a greater number of ISD piracy cases under Articles 87(7) or 91 of the Copyright Act, as “aiding or abetting” cases under the criminal law, or through other measures and enact legislation to specifically address this growing problem.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to websites and apps that facilitate infringement of copyright, including stream ripping, and bring cases under that provision.

### Legislative:

- Ensure that the proposed Copyright Act amendments:
  - Permit judicial authorities to grant injunctive relieve, including no-fault injunctions, to order Internet Service Providers (ISPs) to disable access to foreign-hosted infringing websites (including amending the Civil Procedure Code and the Intellectual Property Adjudication Act to overcome potential civil procedure restrictions).
  - make Internet piracy a “public crime” to permit *ex officio* action against infringement;
  - clarify ISP liability provisions to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notice of infringement, ISPs are required to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
  - remove the condition “and to receive benefit therefrom” under Article 87(7) of the Copyright Act to ensure this provision may be more effectively used in copyright infringement cases.
  - 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 reduce criminal liability standards;
  - do not extend exceptions beyond what is permissible under Taiwan’s TRIPS and Berne obligations (i.e., ensure exceptions are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions; and
  - provide exclusive rights for public performance and retransmissions of sound recordings.
- Revise the Communication Security and Surveillance Act to eliminate overly restrictive requirements for investigators to obtain a court order to solicit information, such as IP addresses, from ISPs.

## 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.<sup>2</sup>

**Mounting Piracy, Especially Online:** Piracy remained a significant problem in Taiwan in 2017, particularly piracy over the Internet and on mobile devices, which continue to mushroom. Foreign websites, such as *eyny.com*, (the 15<sup>th</sup> most accessed site in Taiwan according to Alexa), *youtmaker.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,<sup>3</sup> blog, deeplinking, peer-to-peer (P2P), BitTorrent, and cyberlocker sites, which are used to infringe copyright in movies, music, video games, and books and journals. There is still no effective means to combat P2P sites, and sites such as *jivod* and *xfplay*, hosted in China and elsewhere, are popular with local users. “Stream ripping,” where users of legitimate online music platforms use tools, such as an app or a website, to illegally “rip” the streamed content, is a growing problem.<sup>4</sup> 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 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 prior inspections merely consisted of self-assessment by universities. In late 2015, MOE included publishing industry representatives in the limited number of 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 conduct more campus inspections and continue to allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders.

The problem of unauthorized photocopying of textbooks at universities is diminishing slowly. Unfortunately, this is not due to improved efforts by university administrators to better address the problem, but rather to the rise of an even more pernicious form of piracy consisting of the proliferation of on-demand printouts of pirated digital textbooks and teacher-resource materials. 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,<sup>5</sup> and there are a number of services that sell unauthorized copies of digital textbooks on optical media.<sup>6</sup> This growth in piracy has contributed to decreases in textbook sales and revenues

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<sup>2</sup>See, e.g., *IIPA, Taiwan, 2017 Special 301 Report*, (February 9, 2017), available at <https://iipa.org/files/uploads/2017/12/2017SPEC301TAIWAN.pdf>.

<sup>3</sup>Forums 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.

<sup>4</sup>The 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 (regulation) clearly specifying that Article 87(7) provides a legal basis for liability against apps or websites that facilitate copyright piracy, including stream-ripping.

<sup>5</sup>For 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.

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

derived from those sales.<sup>7</sup> 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.<sup>8</sup>

**Illicit Streaming Device (ISD) Piracy:** The sale of ISDs (i.e., media boxes, set-top boxes, or other devices and their corresponding apps and services), which facilitate piracy, has increased considerably in Taiwan. ISDs originating mostly from China are available openly throughout Taiwan, including at so-called “3C” shops that sell computers, software, and peripherals, and via online retailers, and facilitate unauthorized streaming of motion pictures and television content through apps that direct users to pirated content. These devices often contain, or can connect to, a hard disk to store the downloaded content, and often have an SD card slot, which helps novices connect to foreign piracy sites. Motion picture industry staff have detected more than 30 different brands of such devices now available in the marketplaces in Taiwan. TIPO has previously indicated that ISD piracy can be addressed through current provisions of the law, but legislation is needed to address this growing problem.<sup>9</sup> The IP Court issued a decision in 2015 that held an ISD distributor violated Article 87(7) of the Copyright Law by distributing ISDs equipped with specialized software enabling access to unlicensed programs and copying of copyrighted works through P2P networks. In other cases, however, courts have found defendants not guilty for distributing ISDs that did not contain specialized software, even though defendants were providing users with links to the illegal apps that facilitate piracy. In 2017, the motion picture industry initiated a case against an ISD known as “terminator.” That case involved a raid by CIBr and is currently being investigated by the Tainan Prosecutors Office. The local motion picture industry has worked well with enforcement authorities on ISD cases, and IIPA is hopeful enforcement authorities continue to pursue such cases. Taiwan must still do more to eliminate this illegal activity.

**Enforcement Hampered by Inadequate Legal Framework and Lack of Will:** While the takedown rate remains extremely high for domestically hosted content, Taiwan’s Internet users obtain unauthorized content primarily from websites located overseas. Cooperation with ISPs is ad hoc, and it is generally good for domestically-hosted infringement. One problem, however, is ISPs have been reluctant to effectively enforce against repeat infringers as required by law.

Regarding foreign-hosted infringement, however, Taiwan’s legal framework is inadequate. While injunctive relief is apparently available for domestically-hosted infringement, no remedy is available to address the problem of foreign-based infringing websites, which cause so much harm to the Taiwanese marketplace. Taiwan Government officials and stakeholders have had discussions with major ISPs about the problem and various voluntary approaches have been suggested. Unfortunately, most ISPs believe they cannot take action without an official government communication directing them to deny users access to infringing foreign-based sites. Government involvement and support is, therefore, essential. Taiwan has become an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem. Though it may be possible that existing remedies under the Copyright Act could be used more effectively to address the significant problem of foreign websites that primarily infringe, courts have failed to adopt a judicial interpretation that allows for disabling access to such sites.

In a positive development, while cooperation with ISPs has not progressed in 2017, rights holders have been working with advertisers on an Infringing Website List (IWL) initiative to eliminate advertising on piracy websites. Although not all have joined, it is hoped that four advertiser groups will participate, including the Taipei Association of Advertising Agencies (TAAA), Digital Marketing Association (DMA), Media Agency Association (MAA), and the Association of Accredited Advertising Agents of Taipei (4A).

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<sup>7</sup>Initial estimates for 2017 indicate that textbook sales are down 10% from 2016.

<sup>8</sup>Cram 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.

<sup>9</sup>Actions could be brought under Articles 87(7) or 91 of the Copyright Act, as aiding or abetting cases under the criminal law, or through other measures. It would also appear that allowing devices to use apps that provide access to infringing content is a violation of the anti-circumvention provisions in Taiwan’s Copyright Act.

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, expertise, manpower, equipment, or funding 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 investigators can obtain from an ISP without a court order.<sup>10</sup> Investigators for the local motion picture industry report that the number of enforcement actions continued to decline in 2017 mainly because most of the piracy is due to foreign-hosted web sites, underscoring the need for a remedy to address the problem. The music industry reports that CIBr actions against music piracy have been significantly reduced in part because domestic takedown notice recipients have become more responsive.<sup>11</sup> 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.

**IPR Police 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.<sup>12</sup> 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, including allocating funds to purchase modern equipment and to provide training for investigators. 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 such goals be subdivided by subject matter, such as: Internet piracy, book piracy,<sup>13</sup> 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 rights holders; and

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<sup>10</sup>The 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. In a recent case, the IP Court found a defendant not guilty because the IP address of the defendant was not solicited with a court order in violation of the Act.

<sup>11</sup>The Criminal Investigation Brigade (CIBr) brought 18 piracy cases in 2016 (2 physical and 16 online), and 10 piracy cases in 2017 (3 physical and 7 online).

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

<sup>13</sup>As 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.

primers on ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

## **COPYRIGHT LAW AND RELATED ISSUES**

The dominant concern in Taiwan remains 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, and to otherwise improve the draft amendments to the Copyright Act in order to address other pressing needs and bring Taiwan's legal framework in line with international norms and best practices.

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against 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. Around thirty 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 has been 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.<sup>14</sup>

**Draft Digital Communications Act:** In October 2017, the Executive Yuan approved the draft Digital Communications Act and forwarded it to the Legislative Yuan where it is pending. This Act is part of a legislative effort to consolidate regulation of telecommunication, Internet, television, and radio platforms; but, unfortunately, the draft does not appear to address the urgent need to authorize disabling access to foreign-hosted infringing sites. Moreover, the draft includes broad ISP safe harbor provisions, which, although the draft indicates that the ISP liability provisions in the Copyright Act supersede those provisions, could have negative implications for copyright enforcement.

**Proposed Copyright Amendments Inconsistent with International Norms:** In October 2017 the Executive Yuan passed draft amendments to the Copyright Act and forwarded them to the Legislative Yuan for consideration. These draft amendments, unfortunately, do not address many of the criticisms IIPA provided in comments on the previous drafts that TIPO had released for public comment. IIPA understands that the Legislative Yuan is to consider the draft amendments in the first quarter of 2018.

Although the draft retains many of the positive features of Taiwan's modern copyright regime, it remains flawed in fundamental aspects. For example, the draft amendments, if enacted, would not strengthen Taiwan's enforcement framework to address non-hosted infringements, nor would they address the urgent problem of foreign rogue websites directed at Taiwanese users. A new mechanism, such as judicial authority to issue injunctions disabling access to foreign hosted-infringing sites, is needed to deal with rogue websites that are specifically built to induce and encourage infringement and foreign hosted piracy sites that target users in Taiwan.<sup>15</sup> In addition, the draft should clarify Taiwan's ISP liability framework to ensure: (1) only neutral and passive ISPs that do not encourage infringement are eligible for safe harbors from liability; (2) ISPs adopt and implement meaningful repeat infringer policies; and (3) upon notification of infringement, ISPs are required to take measures that have been demonstrated

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<sup>14</sup>IIPA 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.

<sup>15</sup>To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property Case Adjudication Act.

effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.

The draft also fails to address many of Taiwan's other pressing needs, including: 1) deeming Internet piracy a "public crime" (as was so successfully done regarding optical disc piracy); 2) extending the term of protection for copyrighted works, including sound recordings, 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;<sup>16</sup> 4) making it a criminal offense to engage in unauthorized camcording of live musical performances;<sup>17</sup> and 5) correcting problematic TIPO practices regarding collective management.<sup>18</sup>

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 proposed draft includes numerous overbroad exceptions and limitations to protection (including, for example, a broad exception for distance learning, and compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts"), which would call into question Taiwan's compliance with its TRIPS obligations;<sup>19</sup> reduces 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);<sup>20</sup> 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. Further, Taiwan should bring its law up to the emerging international standard by providing producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings, as many other countries around the world have done. Exclusive rights are important to enable producers and performers to effectively enforce their rights against infringement, and to negotiate fair market terms for the exploitation of their works.

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.<sup>21</sup>

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

In 2017, Taiwan instituted a number of regulations that discriminate against U.S. audiovisual content. On January 8, 2017, NCC issued the Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Productive Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production

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<sup>16</sup>It 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.

<sup>17</sup>The music industry reports that infringement through camcording live concerts is increasing.

<sup>18</sup>Corrections should include allowing the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establishing judicial dispute resolution mechanisms in lieu of the requirement to have 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 rights holders to collect royalties. A detailed discussion of the shortcomings of the Act appears in previous IIPA filings.

<sup>19</sup>To ensure compliance, the three-step test (i.e., TRIPS Article 13) should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

<sup>20</sup>The 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.

<sup>21</sup>To further its then stated ambition to join the Trans-Pacific Partnership (TPP), in 2016 Taiwan was also considering a second set of amendments to the Copyright Law. Although not released for public comment, IIPA understands the draft included some positive aspects, including criminal penalties for circumvention of Technological Protection Measures (TPMs), making Internet piracy to a public crime, and prohibitions against signal theft, which, at minimum, should be incorporated into the current draft.



Programs. These regulations include significant local content requirements that limit the broadcasting of U.S. audiovisual content on terrestrial and satellite television.<sup>22</sup> In December 2016, the NCC issued the Television Program Classification Regulations, which require all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages regardless of the content being broadcast. This onerous requirement, which entered into force in 2017, is a significant barrier for non-Taiwanese content. In response to objections from international channels, Taiwan has indicated it will consider requests for waivers but such requests are discretionary on a case-by-case basis and are not always granted.

## **TRAINING AND OUTREACH**

Rights holders continue to work with the Taiwan Government, organizing dozens of campus outreach campaigns for students, as well as participating in training seminars organized by TIPO for judges, police, prosecutors, customs officers, and other law enforcement units, and organizing similar seminars themselves. Industry also provides assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from outside Taiwan, e.g., mainland China). Industry also supports raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors, including regarding the recent ISD “terminator” case referenced above. 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 2018, 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 proposed draft amendments to the Copyright Act 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.

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<sup>22</sup>The regulations require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm, local satellite TV channels to broadcast at least 25% of locally produced children’s programs between 5 pm and 7 pm, and at least 25% of locally produced drama, documentaries, and variety programs between 8 pm and 10 pm. Forty percent of these locally produced programs must be new productions.

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained on the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** Ukraine has been on the Priority Watch List since 2015 for long-standing deficiencies in its legal and enforcement regime. In 2013, the U.S. Government designated Ukraine as a Priority Foreign Country (PFC) triggering a year-long investigation of Ukraine's IPR regime as required by section 301 of the Trade Act of 1974 which cites to "acts, policies and practices" deemed "unreasonable and [which] burden or restrict U.S. commerce" including "the denial of adequate and effective protection of intellectual property rights." The U.S. Government identified three critical problems in Ukraine for its PFC designation 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." In March 2014, after completing its PFC investigation, the U.S. Government acknowledged 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, the U.S. Government decided to take "no action under Section 301" at that time "[i]n light of the current political situation in Ukraine," and instead placed Ukraine on the Priority Watch List.

The problems that triggered the PFC designation almost five years ago, continue unabated today, and are causing severe economic harm to U.S. copyright rights holders in Ukraine, as well as to Ukrainian rights holders. As a result, on December 27, 2017, by proclamation (citing 502(c)(5) of the Trade Act of 1974 regarding "adequate and effective protection of intellectual property rights"), the President suspended the duty-free treatment accorded certain products from Ukraine under the Generalized System of Preferences (GSP) program. The GSP suspension will become effective on April 26, 2018. Ukraine could avoid this suspension if, in the next few months, it moves decisively to address the long-festering problems of digital piracy and the poor administration of collecting societies.

In the past two years, there have been some positive enforcement actions, most notably the closure of major infringing websites and services. For example, in 2016, a transnational enforcement operation, including Ukrainian authorities, arrested the Ukrainian operator of *kickasstorrents* (*kat.cr*) in Poland. That website, which was one of the largest torrent sites in the world and considered by U.S. criminal enforcement agents as a "lucrative flea market" for "infringing movies, television shows, video games, music and computer software," is currently shut down. Other major sites and services with contacts to Ukraine have also been taken down in recent years, including: *ex.ua*, *torrent.net.ua*, *extratorrent.cc*, *fs.ua* (*fs.to*), and *hdclub.org*.

Last April, USTR's Special 301 Report acknowledged other positive steps taken in Ukraine including the creation of a specialized IP High Court and of a Cyber Police Department within the National Police Department, as well as cooperation by the National Police with FBI and INTERPOL on IP matters. However, the U.S. Government voiced its continuing frustration with Ukraine on the unauthorized collecting societies noting that "little has changed" and that many "rogue collective management organizations continue to operate freely in Ukraine" but holding out hope for legislative reforms. Those reforms never happened in 2017; now, there is renewed hope that the Government of Ukraine will act properly on the collective administration problem in 2018. One proposal that circulated last year would be a step backward if enacted; it would create a single state-run "super" collective management organization and should not be allowed to advance. A way forward is a draft bill (Bill #7466) which, to a large extent, is based on a favorable draft prepared by international experts in 2015.

<sup>1</sup>For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



One positive step was the passage of anti-piracy legislation in 2017. The first of two bills is entitled “On State Support of Cinematography” (Law of Ukraine #1977-VIII) and entered into force on April 26, 2017; it amends the Copyright Act, the Criminal Code, the Telecommunications Act, and the 2015 e-Commerce Law. It criminalizes camcording (Article 176 of the Criminal Code), as well as the financing of piratical operations. Camcording is a significant problem in Ukraine; but, the new law has some ambiguities and has not yet been put to use, so it is not yet clear if these problems can be overcome. The Copyright Law amendment did clarify that camcording in theaters is illegal, and it excluded camcording from any “private use” exception. The new law also created detailed procedures and timetables for takedown notices and responses. The notice and takedown provisions apply only to audiovisual works, musical works, sound recordings and computer programs (so e.g., not including literary works, or photographs), and the law has some deficiencies (most immediately, no administrative agency in charge of enforcing it). Separately, a judicial reform bill (Law of Ukraine #2147-VIII) was adopted on October 3, 2017 (in force, December 15, 2017); it included amendments to the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. The judicial reform bill also importantly established a High Court on Intellectual Property Matters (set to start its work in September 2018) for civil IP cases.

Additional legal reform is still needed to: (i) broaden the scope of works covered under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices, and to simplify and improve the process, especially if ambiguities in the law make the notice system unworkable; and (iii) add clear third-party liability for website owners and Internet Service Providers (ISPs) to encourage cooperation with rights holders. The Government of Ukraine needs to prioritize the establishment and funding of an agency to administer the new anti-piracy law, including the authority to impose sanctions (fines) for non-compliance. In addition, criminal enforcement, which several industries report worsened in 2017, needs to significantly improve in order to develop a legitimate marketplace for the digital distribution of music, films, television programs, video games, and books online in Ukraine for the benefit of foreign and domestic rights holders, Ukrainian consumers, and the local economy.

## **PRIORITY ACTIONS REQUESTED IN 2018**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2018:

### **Criminal enforcement:**

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of ISPs that host illegal streaming, pay-per-download, peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials; and (ii) the principals of collective management organizations (CMOs) operating without legal authorization from rights holders, including foreign rights holders; and (iii) the principals and participants of camcording operations.
- Coordinate key agencies, including the National Police 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 Department within the National Police (which needs a sub-unit dedicated to IP-related crimes); 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)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile existing conflicts to provide clear rules of liability for ISPs and other third party providers of online services pertaining to copyright matters.
- Enact the Law “On Collective Management” based on the draft first prepared by international experts in 2015, to require organizations to operate with proper transparency, accountability, and rules of governance. The government also needs to adopt proper accreditation procedures (based on the criterion of the largest

representation of domestic and foreign repertoire in active use) to rationalize the current chaotic situation of numerous competing CMOs.

- Repeal the requirement to manufacture film prints in Ukraine, as well as the other market access barriers that value films for the VAT based on projected royalties and that exempts Ukrainian (or Ukrainian dubbed) films.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

As technological advances have taken hold in Ukraine, and online services for copyrighted materials have grown considerably in recent years, the IPR legal regime has lagged behind. In 2009, only about 18% of Ukrainians had access to the Internet, now just over 50% of the population has access—according to the International Telecommunications Union (ITU) (December 2017 Report). Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both the European Union markets and other countries regionally. For example, *Gostream.is* (formerly *123movies*) was placed on the U.S. Government's list of Notorious Markets in January 2018; it is a cyberlocker offering hundreds of unauthorized popular movies and television content, and is believed to be hosted in Ukraine.

**Internet Enforcement:** Weak digital enforcement has resulted in an exponential increase in the number of illegal P2P hosting and website-based Internet piracy sites. Legal markets in Ukraine are being harmed by BitTorrent sites (some located in Ukraine) as well as by online streaming sites of music and movies. Some Internet pirates have purposefully moved their servers and operations to Ukraine in the past few years to take advantage of the weaknesses in the law. In 2017, 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 2016. Ukraine is also ranked third in the world for mobile infringement of video games, up from sixth in 2016.

As noted, the taking down of major pirate websites including *ex.ua* and *fs.us* (*fs.to*)—two of the largest and most popular pirate sites in Ukraine—has been a step in the right direction in Ukraine. For years, *ex.ua* had been one of the most popular sites in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content, and it was on the U.S. Government's list of Notorious Markets for years. One report is that *ex.ua* has resurfaced as a cyberlocker at *fex.net* and is a source of infringing material there. Another site, initially linked to Ukraine, that had been on the Notorious Markets list since 2013, and which was disrupting markets in India, Pakistan, and China among many other territories, was *extratorrent.cc* (*extratorrent.com*). It was removed from the U.S. Government's Notorious Markets list in January 2018 after its "operators announced in May 2017 that they were shutting down *Extratorrent* and its mirror sites."

There are many remaining pirate websites in Ukraine, and many of these are in English directed to Western markets, including streaming sites, torrent sites, cyberlockers, and linking sites such as: *mbxclusive*, *leakedearly*, *hiphopisdream*, *purplinks*, and *musicfire*. Additionally, there are a number of sites offering unlicensed pay for download musical recordings, including *mp3caprice.com*, which claims to have copyright licenses from the rogue collecting society AVTOR. The motion picture industry notes these sites as being particularly problematic: *kinofilms.tv*, P2P and tracker sites, such as *oday.kiev.ua*, *yify-torrent.org* hosted with *infum*, and *wvtl.to* hosted with *cw/protect*.

One major initiative that has been undertaken in cooperation with Ukraine's four major media groups, the largest television channels, and rights holders, has been to monitor advertising of well-known brands on pirate sites. The Ukrainian Anti-Piracy Association (UAPA) has started to monitor these sites and to notify major brands that are advertised on these sites to get the brands to pull their advertisements; UAPA is also sending similar notices to the advertising agencies. After a September 2017 conference that included many of these parties working cooperatively, a list of pirate websites was created for the brands and advertising agencies to readily identify sites to avoid (*blacklists.org.ua*); rights holders report that the initiative has, so far, yielded positive results.

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 fully 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.” Instead of creating incentives for ISPs to take action and cooperate with rights holders, the current law in Ukraine is premised on prescribing actions for rights holders to request, that ISPs have no obligation or legal incentives to comply with. 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. The 2017 amendments to the Telecommunications Act will only require defined “websites” and “hosting providers” to respond to proper takedown notices, but to otherwise retain their immunity from liability (so, the 2017 amendments did not revise Articles 38 or 40).

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). This is particularly true in eastern Ukraine. Until the passage of the 2017 package of anti-piracy laws, the copyright industries had, for years, sought private agreements (with governmental assistance) with ISPs to establish effective mechanisms to takedown illegal websites and slow illegal P2P traffic. In the absence of legislation on liability, these voluntary efforts generally did not succeed, although, some ISPs did delete links to infringing content upon request. For the past several years, conferences and meetings were organized to try to get ISPs, broadcasters, advertisers and rights holders (via UAPA) together to cooperatively agree on procedures to respond to takedown notices and to take effective action against unauthorized sites. Until the new laws were adopted in 2017, UAPA and the Motion Picture Association of America (MPAA) reported that about one in five takedown requests in Ukraine resulted in action (since there were no laws mandating compliance). Other industries report that, without a Memorandum of Understanding, and with laws essentially granting immunity from liability, the Ukrainian ISPs have not, to date, cooperated with rights holders.

Now, the 2017 law mandates responses by ISPs and hosting sites to properly submitted takedown notices from rights holders. The 2017 law requires that such notices must come from attorney’s for rights holders to hosting providers, and mandates that the hosting provider notify the alleged unauthorized user (website) within 48 hours, and then act within 24 hours to take down the content; it also provides for put-back provisions. The law also addresses repeat infringement problems, holding services liable if the same content re-appears twice within a three-month period. In addition, the 2017 law requires website owners and hosting providers to have contact information on their sites, and to participate with the whois database, and, it provides certain safe harbors if hosting providers properly comply with the law. Still, even with the 2017 amendments, the Telecommunications Law explicitly stipulates that these site and service operators have no responsibility for the content on their websites (even with knowledge it is infringing), except to respond to proper takedown notices. In 2017, UAPA issued 2,758 takedown notices and cease and desist letters to site operators and hosting providers, including 28 notices sent based on the 2017 law (Article 52-1 of the Copyright Law).

The new notice and takedown procedures will need to be properly implemented. In 2016, the Government of Ukraine abolished the State Intellectual Property Service of Ukraine (SIPSU) for poor governance and transparency problems. In addition, all of the state IP inspectors who had worked for SIPSU were fired. In 2017, as a result of a package of governmental reforms and funding issues, no new agency was assigned to replace SIPSU’s copyright enforcement authority. Thus, while SIPSU was a problem for rights holders for its governance issues, there is no

agency in place to fill the gap making it all but impossible to effectively use the new anti-piracy law. This does not bode well for better enforcement.

In addition, and more importantly, even as websites and hosting services have been taken down, and some advertisements have been taken off of unauthorized sites and services, criminal enforcement against the owners and operators of these websites or hosting services, has rarely been successful (or even seriously pursued). Further complicating enforcement, is a lack of resources by enforcement authorities (and, some large piratical operations have been set up in the eastern part of the country engaged in conflict, and out of reach of the Ukrainian police).

There were 18 criminal digital piracy investigations opened in 2017, compared to 55 in 2016 (and 31 in 2015). In addition, 45 pirate sites were closed by the police or site owners (compared to 78 in 2016 and 61 in 2015), although some were operational almost immediately after their closure.

The motion picture industry reported only two criminal verdicts in 2017 for online piracy: one against a streaming site (*live-films.in.ua* and *kinozal.tech*) in which the operators received a three-year sentence, with an additional year of probation; and another against another streaming site (*filmscop.tv*) with the same verdict.

Thus, more criminal enforcement will have to be undertaken if the problems in Ukraine are going to improve. Currently, the Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate 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 criminal 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, the Cyber Police Department was established within the National Police Department for the purpose of combating Internet crimes. In 2016, 30 investigators were recruited to join this unit; that number was raised to 200 investigators in 2017 (but the number, if any, dedicated to IP-related crimes is unclear). The formation of this unit was good news, but, to date, it has focused on non-IP related online crimes. Recently, a new dedicated sub-unit was formed to focus on IPR offenses (not general cybercrimes); that too is good news. Now it needs proper staffing and resources (e.g., computer equipment). All of these problems combined with a 2015 re-organization of the police nationwide, have left the police short of the resources they need to be effective.

For civil enforcement, it is hoped that the new High Court for IPR offenses, to be set-up by September 2018, will itself have the expertise to try IPR cases, and will also develop guidelines for judges in other courts. One reason for the new court is to avoid the current problem of defendants forum shopping for courts with little experience, and which, as a result, treat IPR offenses leniently. The new High Court needs to be properly staffed with qualified IP-trained jurists and resourced.

**Collecting Societies:** The current collective administrative system in Ukraine, with 18 competing collecting societies, is chaotic, and will not be corrected until a new law on collective administration is enacted and the accreditation procedures are fixed. Many of these CMOs grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. The unfair and nontransparent administration of rights was cited as a reason for the designation of Ukraine as a Priority Foreign Country. Unfortunately, none of the 2017 legal reforms addressed the collective administration problems, and this failure to act is the principal reason behind the Presidential proclamation in late December 2017 to remove Ukraine’s GSP benefits.

Collecting societies in the music sector, specifically in connection with broadcasting, public performances and certain other communications to the public, can provide cost effective services to both rights holders and users for licensing, collecting, and paying remunerations. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the existing accreditation procedure for CMOs licensing broadcasting and public performances for musical recordings. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in SIPSU (formerly known as the State Department of Intellectual Property (SDIP)). After SIPSU was dissolved, in May 2017, some of its IP portfolio was moved to 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 held that SIPSU had no authority to accredit authorized (registered) collecting societies. 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 national and international repertoire in actual use, as IIPA and other organizations have long suggested. The organization should be owned and governed by rights holders because of their direct economic interests in having a well-functioning collective management organization (CMO) and it should operate based on mandates from local rights holders as well as foreign rights holders either directly or through sister societies. IIPA's proposed solution is the enactment of a new Law “On Collective Management” consistent with the 2015 draft worked on by U.S., E.U. and WIPO experts (and consistent with all the major international rights holders organizations). The latest bill (broadly based on the 2015 draft is Bill #7466.

Under a proper CMO law, 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 of rights and rights holders) would be appointed as the (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 or otherwise used), 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 halted the registration of any new societies, but did not solve the problem.

IIPA continues to recommend amending the procedure for authorizing a collecting society for private copying levies. The current regulation 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:** As highlighted already, one key to improve enforcement, especially against online piracy is to properly form a sub-unit dedicated to IPR crimes within the Cyber Police Department within the National Police Department of Ukraine, and to properly train, staff, and resource it. And, the unit must be allowed to engage in

enforcement actions against owners and operators of infringing websites and services without political interference. In November 2017, a State Bureau of Investigation was formed in the General Prosecutors Office. This bureau is an independent body with very limited authority against whom it can carry on investigations (e.g., state officials and judges), and most online piracy operations are outside of the scope of its authority. It is recommended, instead, that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained.

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 17,620 UAH (or US\$618). 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 and 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 (Article 242-6 requires an expert to calculate damages caused by a crime – and there is a scarcity of these experts); (4) the lack of presumptions that rights holders are the infringed (harmed) party to commence a criminal proceeding; (5) the lack of guidelines for judges on sentencing and developing expertise in IPR cases; and (6) a 2017 amendment (Article 242 of the Criminal Procedure Code) creating a procedural hurdle by requiring a court's permission before an investigator or prosecutor can offer forensic evidence.

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) the required proof of ownership in criminal and civil cases, 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 in 2017 – be represented by local counsel (no more *pro se* or power of attorney representations).

**Other Key Enforcement Issues:** The copyright industries continue to report persistent problems with the administration of the hologram stickering system (adopted in 2000). The holograms stickering 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. The 2017 Cinematography Law entered into force on April 26, 2017, so it is too early to tell if it will be effective. As noted, it amends Article 176 of the Criminal Code to criminalize camcording. But, there are definitional and other ambiguities in this law, so it is not yet clear if the law will actually be effective, as intended.

Between 2011 and early 2017, over 130 camcords (including audio only and video only recordings) have been sourced from Ukraine. In 2017, through October, there were at least seven videos sourced from Ukraine; in 2016 there were 13 illicit video recordings. 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). The 2017 amendments added definitions in the law for “camcording” and made it a clearly subject to criminal penalties. In



2017, there were 13 arrests for (and interdictions, where theater or security personnel stopped the activity of) camcording in theaters. In 2017, 10 theaters were ordered to close operations, and criminal cases against four theater owners were commenced (warning letters were sent to six other theaters).

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 Administrative Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). But, the administrative agency in charge of enforcement was dissolved, and no new authority has yet been established.

The Government of Ukraine should also increase the number of 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. Administrative fines for physical piracy (street piracy, retail stores, etc.) are low: most fines are from US\$40 to a maximum of US\$400. In addition, *ex officio* authority should be used to improve border controls, especially along the Russian border.

## **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 completely 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 fully and properly addressed by the Government of Ukraine. The 2017 Act does address some of these issues, with formal notice and takedown provisions and timetables, and penalties for noncompliance.

## **LEGAL REFORMS**

As noted, two major pieces of legislation—Law of Ukraine #1977-VIII (cinematograph law) and Law of Ukraine #2147-VIII (procedural amendments)—were enacted in 2017. These resulted in amendments to the Copyright Law, the Telecommunications Law (and the 2015 e-Commerce Law), the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code and the Administrative Code. IIPA recommends additional legal reforms in Ukraine, in addition to full WIPO Internet Treaty implementation.

**Copyright Law:** Now that the 2017 laws amended the Copyright Law (and other laws) to institute formal notice and takedown provisions, the procedures and penalties for noncompliance, need to be properly implemented. The 2017 amendments establish a notice and takedown regime, without the need for a state authority or court. Under the changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to takedown the material; there is also a put-back provision (unless the rights holder commences infringement litigation within ten days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity (safe harbor) from any (i.e., not just monetary) liability if it complies. The new law includes a “repeat infringer” provision, so that if the same material reappears twice within a three-month period on the same website or webpage, the owners of the site or page can be held liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

There are numerous concerns with the new procedures: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with an electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) it only requires the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition, to these burdensome procedures (and once an enforcement agency is established to administer the law), the Copyright Law needs to be amended to broaden the scope of works covered under the new notice and takedown procedures (and to improve those procedures), so that all copyrighted and related rights works are covered.

The bill also includes amendments to the e-Commerce Law enacted in September 2015 somewhat limiting the overbroad exemption from liability for ISPs and hosting service providers, which exceeded international norms. Under the 2017 changes, a provider of online services now can be held liable for copyright infringement if they do not comply with the notice and takedown rules. But, the definition of which services are covered is not clear. It is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., “webpages”) are covered; and, the new law has not yet been tested in the courts. Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be broad third-party liability (not just related to responses to takedown notices) applicable to website owners and Internet Service Providers (ISPs). Providing clear third party (ISP) liability is critical to effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including provisions to reasonably gather and retain evidence. Additionally, the new law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be added.

Other deficiencies in the Copyright Law require: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) 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 (5) 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 and enactment of a long-delayed draft Law on Collective Management, and that any such law incorporate the 2015 recommendations of European Union and U.S. experts in the music industry first

drafted by the experts in 2015, 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. As noted, it appears that these principles have been incorporated in the January 2018 draft bill (Bill #7466), based in large measure on the 2015 experts' draft.

**e-Commerce Law:** An e-Commerce Law was adopted in September 2015, and then amended in 2017. As noted, the 2015 law included 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). After the 2017 amendment, the only "liability" of ISPs is to comply with takedown notices. The law should be amended to provide for clear third party liability (in this law and in the Copyright Act), consistent with international norms as well as U.S. and E.U. laws.

**Criminal Code and Criminal Procedure Code:** In 2017, as part of the package of amendments, Article 176 was changed so that there are criminal remedies against online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and it added sanctions for camcording. The codes should be amended to provide: (1) remedies against repeat infringers (within 12 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 courts. 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 courts should be empowered 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.

In 2017, there were changes to the Administrative Code adopting new remedies: (1) Article 164-17 for failing to properly respond to takedown procedures for infringements by ISPs and websites; (2) Article 164-18 for "knowingly providing false information" for takedown notices; and (3) provisions pertaining to administrative violations of the new procedures (but, as noted, the authority to do this was vested in SIPSU which was closed down).

For physical piracy, 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.

**Customs Code:** The Customs Code of Ukraine has included some administrative improvements in recent years. IIPA continues to recommend the abolition of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement, especially for some industries. Another matter that has been a concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IPR infringements, may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). But in practice, this procedure is applied only in cases where rights holders notify Customs officials about alleged infringing material; the destruction is then undertaken at the rights holder's expense and in doing so, releases the infringer of any administrative liability, and thus any deterrence from repeating their infringing actions.

## **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. In July 2017, the law went into force: it suspends the VAT “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine.

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, the government revised the Customs Code and 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). Unfortunately, no changes to this valuation (or to the manufacturing of prints requirement) were made in the Cinematography Law enacted in 2017.

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

IIPA filed a petition in 2011 to have Ukraine’s Generalized System of Preferences (GSP) benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413) the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. Unless Ukraine makes substantial progress on its IPR regime, the GSP suspension will go into force on April 26, 2018.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2018.<sup>1</sup>

**Executive Summary:** As a result of worsening piracy and persistent market access barriers that exacerbate the problem, the market in Vietnam for creative goods and services is severely stunted. While Vietnam's Government has recently taken certain steps that indicate it is beginning to recognize the seriousness of its growing piracy problem, more substantial actions are needed. Vietnam has committed to ratifying the WIPO Digital Treaties, and, without delay, the government should take the necessary steps to ratify and implement them. It is long past time for Vietnam to make good on its political commitments and international obligations to improve copyright protection in the digital environment, 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 undertaking criminal prosecutions, beginning with major online piracy operations that are 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. IIPA hopes that the Government of Vietnam will support procedures developed by a group of motion picture rights holders in consultation with Internet Service Providers (ISPs) to ensure that online infringing content is taken down and such content does not reappear. The government should also address concerns with the Copyright Office of Vietnam (COV), which is grossly understaffed, and has not taken any action to reform the dysfunctional collective management organization for music producers. Vietnam should move to eliminate discriminatory barriers, and meet its copyright protection and enforcement obligations under its Bilateral Trade Agreement (BTA) with the United States and the TRIPS Agreement. Vietnam should also begin meeting the challenges of the digital age by acceding to the WIPO Digital Treaties, and taking additional steps to bring its standards for copyright protection and enforcement into alignment with evolving global norms.

### PRIORITY ACTIONS REQUESTED IN 2018

#### **Enforcement:**

- Ensure enforcement officials, including the Ministry of Information and Communication (MIC), Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and Ministry of Public Security (MPS) IPR/High-Tech Police and related police units, increase the number and the effectiveness of operations focused on online infringement, including against websites identified in this report and operators of such sites; issue administrative penalties for infringement sufficient to deter; and bring criminal prosecutions against commercial scale piracy.
- Encourage educational institutions to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks, other course materials, and copyrighted software.
- Deregister the Recording Industry Association of Vietnam (RIAV), and engage with local and foreign music producers to set up a new collecting society.
- Provide the COV with adequate resources, including additional staff, to develop and implement effective enforcement policies.

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<sup>1</sup>For more details on Vietnam's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Vietnam's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## Legislation:

- Make necessary changes to laws and implementing Decrees and Circulars, including the IP Code and the new 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 (1) apply to online distributions, including the unauthorized streaming of content; and (2) that the thresholds include infringement that is significant in its impact even absent a profit motive.
- Strengthen the legal framework to take effective action against digital infringement, including by:
  - affording adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT);
  - encouraging meaningful cooperation between rights holders and ISPs by ensuring that only neutral ISPs are eligible for safe harbors; providing clear legal incentives, including clear liability provisions, for ISPs to cooperate; making clear that ISPs must take action against infringing content without governmental intervention; and ensuring ISPs comply with requests to remove infringing materials and take other measures that have been demonstrated effective in preventing or restraining infringement;
  - increasing administrative penalties for copyright infringement to achieve deterrence; and
  - eliminating the legal and procedural impediments that interfere with the ability to take effective action against Illicit Streaming Devices (ISDs) and the apps, services, and platforms that contribute to ISD piracy.
- Extend the term of copyright protection for all copyrighted works, including sound recordings, in line with the international trend of 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 in the BTA.

## Market Access:

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

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

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

The Vietnamese Government has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”<sup>3</sup> Yet Vietnam’s actions to combat piracy (including actions taken pursuant to the 2012 MIC and MCST Joint Circular 07<sup>4</sup>) have not adequately addressed its piracy challenges, including those identified below. Vietnam must take more affirmative enforcement actions against piracy, such as issuing deterrent administrative penalties against infringing operations and spearheading criminal prosecutions, beginning with major online piracy operations based in Vietnam.

**Growing Online Marketplace Presents Challenges:** A significant and growing percentage of the Vietnamese population is online, with most of that access stemming from mobile broadband subscriptions.<sup>5</sup> 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. Indeed, a growing number of licensed Internet content providers are trying to take advantage of these opportunities, including *Zing.vn*, NCT (*nhaccuatui.com*), Viettel Media

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<sup>2</sup>See, e.g., IIPA, *Vietnam*, 2017 Special 301 Report, (February 9, 2017), available at <https://iipa.org/files/uploads/2017/12/2017SPEC301VIETNAM.pdf>.

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

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

<sup>5</sup>According to the International Telecommunications Union, the percentage of individuals using the Internet in Vietnam increased from 43.5% in 2015 to 46.5% in 2016, and active mobile broadband subscriptions were almost 47 per 100 inhabitants in 2016. See *Measuring the Information Society Report 2017*, International Telecommunications Union, at 145, available at [https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017\\_Volume1.pdf](https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf).

(*keeng.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 video-on-demand (VOD) services were launched in Vietnam in 2016: Film+ (“film plus”) and Dannet. Netflix and Iflix are also available. These channels for digital distribution offer huge potential for the creative industries; however, as discussed below, Vietnam must significantly improve its legal framework and enforcement efforts, and dramatically reduce market access barriers for this potential to be realized.

Vietnam faces the rising challenge of combating increasing online and mobile network piracy from download sites, peer-to-peer (P2P) networks, linking sites, streaming sites, search engines, cyberlockers, and on social media networks. Streaming of unlicensed music through websites and mobile apps is rising, and stream-ripping is also a problem. There are a vast array of these piracy services operating in the market, offering massive amounts copyrighted content. Most of these websites generate revenue through advertisements or through paid subscriptions for premium service. The harm caused from online piracy is significant and makes it nearly impossible for legitimate online platforms to compete with pirated websites and develop sustainable, properly monetized content distribution services. 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. Some particularly popular sites are listed below:

- One major global piracy site, *123movieshub.to*, is operating in Vietnam.<sup>6</sup> The movie industry noted *123movieshub.to* in its submission to The U.S. Trade Representative (USTR) for the 2017 Out-of-Cycle Review of Notorious Markets review.
- *Chiasenhac.com* (Alexa ranking 144) is the most popular pirate music site. It allows users to stream unlicensed Vietnamese and international music,<sup>7</sup> attracting 84% of its traffic locally and the remainder from territories including the U.S., Australia, and Japan.
- Other sites that provide unlicensed music and music video content for download and streaming include *nhac.pro.vn* (also *nhacpro.net*) (626th), *tainhacmp3.vn* (690th), *tainhacvemay.mobi* (2536th), and *ngheenhacvui.com* (new).
- Sites such as *phimmoi.net*, *phim14.net*, *xemvtv.net*, *bomtan.org*, *pubvn.net*, and *hdsieunhanh.com* remain of concern to the motion picture and television industry.

Even licensed websites inadvertently contribute to global piracy because most music sites do not have efficient geo-blocking systems and, therefore, the content becomes available elsewhere.<sup>8</sup> Some third party sites (especially open source sites) circumvent licensed sites’ technological protection measures (TPMs), including geo-blocking systems, to obtain music recordings for users to download or stream online without authorization both in and outside of Vietnam. This “deeplinking” problem appears to be under control through coordinated efforts of rights holders and the licensed sites, but this problem should be closely monitored since it could potentially fuel piracy both locally in Vietnam and around the world.

Vietnam has taken some important steps in its enforcement against online piracy over the past few years, demonstrating at least some willingness to cooperate with rights holders in enforcement actions and training and capacity building. In 2017, the Vietnamese Government issued Decree No. 17/2017/ND-CP (Decree 17) authorizing MIC to implement regulations in coordination with other authorities that would enable MIC to take actions against online infringement. MIC also issued Decision No. 1278/QĐ-BTTTT, which authorized a project to “strengthen MIC’s capacity to fight online infringement and online crimes.” Under this project, which will be implemented from 2017 to 2020, MIC and other relevant authorities will amend regulations to improve enforcement and conduct technical

<sup>6</sup>*123movieshub.to*, formerly known as *123Movies*, is a very popular streaming website operating out of Vietnam that embeds popular movie and series content from third-party cyberlockers.

<sup>7</sup>*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. Its infringing activities, however, continue.

<sup>8</sup>SimilarWeb estimates that visitors from the United States and Japan are the second and third top foreign visitors to Vietnam’s music sites.

trainings and institutional reforms to ensure MIC's inspector and other relevant departments are fully able to address online infringement. IIPA is hopeful that these developments will result in improved enforcement against online piracy. 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.<sup>9</sup> While the Joint Circular appears to have had some impact regarding other forms of infringement, it remains to be seen whether it will be effective in disrupting online copyright infringers. In addition, the MIC, in response to an administrative complaint, imposed a fine on an infringing website and ordered it to take down infringing content, although the process was slow and needs improvement. More such actions are needed, especially against the top infringing sites.

Unfortunately, however, rights holders note 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 under national law to provide contact and registration information of website owners in any WHOIS-style 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, 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.<sup>10</sup> The Inspector of MIC should use the authority granted under the JC and Decree No. 17 to sanction 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 (such as 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 ISPs has improved as some of these companies have started their own licensed services. The responsiveness of some licensed ISPs, such as *zing.vn*, to takedown notices has greatly improved, but other local hosting providers, including FPT, 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. Because, under Vietnam's legal framework, the government is the indispensable authority for taking action against illegal online content, it is incumbent on the government to take action. One way to better share this responsibility would be for Vietnam to amend the JC to enable greater cooperation between rights holders and ISPs.

In a positive development, in 2017, with support of MIC's Authority of Broadcasting and Electronic Information (ABEI), movie rights holders in Vietnam met with key ISPs, including VNPT, Viettel, FPT, and VCCorp, to discuss enhanced cooperation against online piracy. Although the meeting did not result in a Memorandum of Understanding, some ISPs agreed to improve coordination with movie rights holders to address online piracy of audiovisual content, including considering a procedure that ensures pirated content that has been taken down does not reappear. IIPA hopes that ABEI will officially endorse the procedure, encourage rights holders and ISPs to test the procedure, and take necessary steps to ensure the procedure is implemented effectively. ISPs should move forward on initial procedural steps to achieve concrete outcomes to combat online infringements. IIPA further hopes

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<sup>9</sup>See Joint Circular 14/2016/TTLT-BTTTT-BKHCN.

<sup>10</sup>Joint 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 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."



that this procedure will become available to other rights holders as well. In addition, 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 advertising revenue streams of piracy sites.

The absence of a more effective means of encouraging responsible practices, including 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 (e.g. *Chiasenhac*), has left the online music market in disarray and dominated by piracy. The situation for the motion picture industry is also difficult. While most ISPs do not openly place pirated films on their VOD services, much more needs to be done to address infringement on all the services they provide. For example, ISPs do not provide for the termination of services due to copyright infringement under the terms and conditions of the user agreements with websites they host; such a provision should be included in these agreements.

With the rapid increase in the number of mobile phone subscribers in Vietnam, mobile network piracy has significantly increased in over the past several years. Rights 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) the proliferation of “apps” designed to access infringing sites from mobile networks. For example, Socbay developed a mobile app called *Socbay iMedia*, which provides users with a variety of unauthorized entertainment content, including music files.

**Illicit Streaming Devices (ISDs) and Apps:** ISDs 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. Often camcording in cinemas is the source of the pirated material. 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. Research indicates that e-commerce websites such as *Lazada.vn* are the most common pathway to market for the promotion and sale of ISDs in Vietnam. The Vietnamese Government, including MCST and MIC, must 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:** Hard goods piracy has decreased in Vietnam, largely due to the shift to online and mobile network piracy, and, therefore, is not as commercially devastating as online piracy; nevertheless, 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 problem, mainly due to transshipments to Western markets. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions. If the Criminal Procedure Code does not permit *ex officio* actions, it should be amended.<sup>11</sup> In addition, because high-quality counterfeits are being imported into Vietnam (mostly from China), Vietnamese Customs authorities need to undertake *ex officio* actions to intercept such infringing imports.

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<sup>11</sup>Article 105 of the Criminal Procedure Code currently requires a formal complaint from a copyright owner as a condition for prosecution and acts as a disincentive to police and prosecutors, relative to other kinds of offenses. IIPA encourages Vietnam to ensure its criminal enforcement authorities are able to take *ex officio* action.

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers report continuing problems in Vietnam with unauthorized photocopying and 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. 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, which were distributed to several bookstores. Last year, the Ministry of Information Communication (MoIC) conducted an investigation against a number of bookstores, and industry is awaiting the outcome. Notwithstanding some apparent progress, the enforcement environment in Vietnam remains challenging for publishers. 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 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 commensurate with the magnitude of the problem. Implementation of appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students would be helpful 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, to IIPA's knowledge, police and prosecutors have never brought a criminal copyright infringement case 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. To date, there have 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 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 People's Court in drafting an "IP Manual for Vietnamese Judges," but that effort stalled. The manual should be completed 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 judicial reform efforts, to inform these officials about the commercial and economic harm that results from piracy, and to impress upon these officials the need for meaningful remedies in infringement cases. Finally, IIPA recommends that Vietnam's Government provide the understaffed COV with adequate resources, including additional staff, to develop effective enforcement strategies and policies to tackle online piracy.

**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 its exhibition in a movie theatre—usually very early in its theatrical release or even before 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.<sup>12</sup> 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.

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<sup>12</sup>Six other titles were found on his laptop including "Mad Max: Fury Road," "Pitch Perfect 2," "She's Funny That Way," "Helios," "Lat Mat," and "Spy."

**Collective Management:** Due to market access barriers, as discussed below, the local music industry is very small. As a result, the collective management entity accredited for representing record producers (RIAV) is made up of just a handful of local producers and is not able to function effectively and professionally. Locally, its membership has fallen from 69 to 10. COV should engage with foreign music producers to enable reform of collective management to put in place a more inclusive entity that represents all producers, foreign and local, and has the relevant expertise and technical capability to effectively perform collective management functions to the benefit of right holders and users alike. This would best be achieved by deregistering RIAV and facilitating renewal by setting up a new collecting society for producers in cooperation with both local and foreign rights holders.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (as last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative Violations Decree (No. 131) (2013).<sup>13</sup> The Civil Code of 2015 remains as a vestigial parallel law. Vietnam has indicated it will accede to the WCT and WPPT in 2018, and IIPA encourages Vietnam to take the necessary actions to join these treaties.

Vietnam has taken some recent strides, but it still must close the gaps between its current legal framework and its unmet international obligations, including those it committed to in the TRIPS Agreement and the BTA with the United States.<sup>14</sup> 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 Global Norms and with 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 for a term of protection for all copyrighted works, including sound recordings, in line with the international trend to 70 years after the death of the author, or, when the term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.<sup>15</sup>
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of "making available."<sup>16</sup>
- Enactment of the IP Code created an apparent inadvertent gap; 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 restrict the ability of rights holders to exercise lawful rights in broadly defined circumstances, and 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.<sup>17</sup>
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners, undermining the rights of the latter, which is inconsistent with Vietnam's obligations to provide certain exclusive rights to

<sup>13</sup>Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights, entry into force December 15, 2013 (replacing Ordinances No. 47 and 109).

<sup>14</sup>*Agreement 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.

<sup>15</sup>Article 4.4: "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."

<sup>16</sup>Article 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.

<sup>17</sup>Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances. Article 7(3) permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights. Article 8 establishes impermissible content-based restrictions of protection under copyright.

related rights holders, including producers, performers, and broadcasters, under international agreements, including the TRIPS Agreement and the Rome Convention. Article 17(4) should be repealed.

- 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 4.8 of the BTA.<sup>18</sup>
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for "non-commercial purposes," rather than destroyed. These provisions fall short of Vietnam's BTA (Article 12.4) and TRIPS Agreement obligations.
- 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 under TRIPS (Article 9(1) incorporating Articles 1-21 of the Berne Convention) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing for a presumption of ownership for an author whose name appears on the work in the usual manner).

**New Criminal Code May Have Moved Vietnam Further From International Commitments:** The National Assembly passed a new Criminal Code in November 2015, which was amended in June 2017, and became effective as of January 2018. Unfortunately, the new Criminal Code eliminated the phrase "on a commercial scale" from the previous law, reverting to a threshold approach to determine criminal liability for certain acts of infringement. This approach, which was nominally rejected by the February 2008 Criminal Circular, may take Vietnam further out of compliance with its international obligations, including TRIPS and the BTA.<sup>19</sup> Article 225 of the Criminal Code provides for criminal liability for "making copies of works" and "distribution to the public" of copyrighted works, subject to the thresholds.<sup>20</sup> The language of the new provision suggests that criminal liability may be available only for a limited range of infringing acts; thus, Vietnam must issue implementing regulations to ensure that criminal remedies are available for all acts of commercial scale piracy. In particular, implementing regulations should make clear that acts of "distribution to the public" include making infringing content available for streaming, and that no profit motive is required for criminal liability. Another concern is that proving the profits or losses required by the thresholds will be overly burdensome for rights holders. The bottom line is that the new Criminal Code on its face does not meet Vietnam's TRIPS obligation under Article 61 or its BTA obligation under Article 14 to ensure all infringement on a commercial scale and signal theft are subject to criminal liability.<sup>21</sup> The Vietnam Government should immediately issue implementing regulations for the Criminal Code to make explicit it applies to online distributions and other violations of the IP code, and that all "commercial scale" infringements are included, and are not limited to those 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.

**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. Also, the concept of "intermediaries" may be too broad, as it could encompass entities that are not neutral. The law should make it clear that any ISP that engages in any act restricted by copyright cannot rely on the ISP safe harbors to avoid liability. The JC does not include any requirement

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<sup>18</sup>Article 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.

<sup>19</sup>The 2008 Circular criminalized all acts of infringement "on a commercial scale and for commercial purposes." Article 170a of the previous Criminal Code criminalized "commercial scale" acts of "[c]opying of works, audio recordings and visual recordings" or "[d]istributing the copies of work, audio or video recording." Both TRIPS and the BTA obligate Vietnam to provide that criminal penalties for piracy on a commercial scale. See TRIPS Article 61 and BTA Article 14.

<sup>20</sup>To be eligible for penalties under the new provision, an infringer must have earned an "illegal profit" of over VND50,000,000 (US\$2,200) or "caused a loss" of VND100,000,000 (US\$4,400).

<sup>21</sup>In BTA Article 14, Vietnam 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.

for neutral intermediaries to take down infringing content in response to a notice received directly from a rights holder and the requirements of Article 5 of JC appear to apply only where the government has intervened. What is needed are clear legal incentives, including clear liability provisions, to ensure online platforms do not engage in infringing activities, especially regarding the making available right, and, also, that ensure neutral intermediary service providers will cooperate with rights 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 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 (but not limited to) notification from a right holder.

**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 in the amount of VND500 million (US\$22,115) for an organization. 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 forced suspension of business, consultancy, or service activities. Notwithstanding the reduction in the maximum, the government should employ these maximum fines to full and deterrent effect forthwith.

**Decree No. 85 Questions Remain:** Decree No. 85 (2011) amended certain provisions of the Civil Code.<sup>22</sup> While Decree No. 85 contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam’s compliance with international norms and best practices. Most notably, Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management that, if applied to foreign right holders, would be onerous and would conflict with the ability of collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>23</sup> It should also be clarified that the “Principles and methods of payment of royalty, remuneration, and material benefits,” added to 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 piracy is included among the Decree No. 72’s prohibited acts and, thus, eligible for a remedial action, including the remedy of disabling access to infringing websites.

**Certain Enforcement Provisions Inconsistent with the BTA:** A number of Vietnam’s civil, administrative, and border enforcement provisions remain 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

<sup>22</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

<sup>23</sup>For example, Article 41(4) of Decree No. 100 as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

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

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

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).

**Law on Cyber Security:** In 2017, the National Assembly drafted and discussed a cyber security law, which is expected to pass in 2018. To further the aim of the law to improve the health and security of Vietnam's online environment, IIPA hopes that the new law will include provisions that will improve copyright enforcement, including requirements for local and foreign ISPs to cooperate with Vietnamese authorities and comply with requests to remove infringing materials and take other measures that have been demonstrated effective in preventing or restraining infringement.

## **MARKET ACCESS BARRIERS IN VIETNAM**

Vietnam continues to generally restrict foreign companies from setting up subsidiaries to produce or distribute "cultural products." Restrictions on foreign investment quotas, and other entry barriers regarding production, importation, and distribution of copyrighted materials (whether in the physical, online, or mobile marketplaces) persist. The Vietnamese have indicated that they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.<sup>24</sup> Unfortunately, their restrictions on foreign investment in cultural production undermine this objective, impoverishing the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials.

The restrictions also fuel demand for pirated product. Vietnam's virulent piracy problems would be reduced if the country removed its highly restrictive market access barriers. By limiting access to legitimate content, these barriers push Vietnamese consumers' towards illegal alternatives. The restrictions instigate a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam's cultural sector and the development of a potentially very significant digital content market, 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 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.<sup>25</sup> This quota should be lifted or eased significantly.

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<sup>24</sup>See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, available at [http://www.nhandan.com.vn/english/culture/171208/culture\\_v.htm](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

<sup>25</sup>Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

**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.

### **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, there remains 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 previous trade negotiations 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, hinder anti-piracy efforts. These restrictions effectively mean the Vietnamese Government must enforce intellectual property rights related to U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam,<sup>26</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

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<sup>26</sup>The importation of cultural products like music is governed by Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural (promulgated together with the Government's Decree No. 10.V200/ND-CP of November 6, 2009). Decree No. 103 provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level MCST Departments. The Decree provides for application procedures. However, limitations on foreign companies' setting up

## **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 as required by 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 of 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 that BTA Article 5.

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subsidiaries to produce or distribute "cultural products" in Vietnam also thereby limit foreign companies' abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.



# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2018.<sup>1</sup>

**Executive Summary:** In another year of political tumult and economic stress in Brazil, there were no dramatic changes in the IPR protection environment for the copyright industries. Development of this large and potentially thriving market for legitimate content and content delivery services has been hampered by the continuing rampant piracy and a wide range of market access barriers for the creative industries. The coming year, culminating in an election, offers an opportunity for the government to commit to promoting a legitimate Internet marketplace for copyright materials and to take action against the extensive digital piracy operations targeting the Brazilian market. A legitimate Internet marketplace for copyright materials in Brazil continues to develop, and the economic potential of this market is enormous, but pervasive piracy operations targeting the Brazilian market and the lack of ratification of the WIPO Internet Treaties still hamper the healthy growth of e-commerce in creative works. While federal criminal enforcement took down three leading piracy websites in 2016, there were no such enforcement actions in 2017, and prosecution of individuals behind the piracy websites has stalled, with no trial date in sight. The online piracy ecosystem—including the growing phenomenon of “stream-ripping” services, a particular threat to legitimate digital music services—remained undisturbed by Brazilian law enforcement, with no significant enforcement actions. In 2017, illicit streaming devices (ISDs) became an important player in Brazil’s piracy ecosystem; the HTV box, for example, offers unauthorized access to the entire grid of live TV paid channels, as well as a video on demand (VoD) service with illegally sourced movies and TV shows. While there were some raids on notorious physical marketplaces (including in São Paulo) for products and services enabling widespread video game piracy, as well as for counterfeit optical discs, the overall landscape 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 implementation strategy. One bright spot demonstrating a new political will to combat piracy came mid-year, when the Minister of Culture announced a new anti-piracy working group, which will deliver recommendations for the National Agency for Cinema (ANCINE). Reportedly, the Ministry is also pushing for criminal enforcement against well-established pirate operators, and encouraging voluntary cooperation among all online players to work toward a cleaner and more legitimate marketplace. The congressional commission on cybercrime, *CPI do Cibercrime* (CPI), helped promote some of the needed changes to Brazil’s copyright and Internet legislation, including the proposal of a promising site-blocking bill. Early last year another site-blocking bill was presented at the Federal Senate, as a result of the latest campaigns in favor of the online anti-piracy mechanism. The Ministry of Justice’s National Council to Combat Piracy and Intellectual Property Crimes (CNCP) remains an underutilized resource. That could change if, in 2018, 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. Exorbitant taxes and escalating duties on imported video games and consoles continue to stunt the development of a legitimate market for video games in Brazil; ANCINE’s recommendations to ease these tax burdens is a promising step forward.

## PRIORITY ACTIONS REQUESTED IN 2018

### Enforcement

- Implement better border controls against the import of illegal streaming devices, such as the HTV box.

<sup>1</sup>For more details on Brazil’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil’s Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Build on the success of Operation Blackbeard and ensure that law enforcement agents are properly trained in conducting complex online investigations and have access to the necessary legal tools and framework to launch additional criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so. Support speedy resolution of pending prosecutions against individuals responsible for pirate sites taken down in 2015-2016, seeking strong penalties to raise awareness and deter future violations.
- Ensure that CNCP has the resources and political backing to engage on Internet piracy, and increase its efforts against hard-goods piracy, including continued expansion of the “City Free of Piracy” initiative. Revive that program’s coordinated attacks on retail piracy and distribution chains in some of the nation’s largest cities: São Paulo, Rio de Janeiro, Belo Horizonte, Fortaleza, Curitiba, Porto Alegre and Recife. Work with the National Forum against Piracy (FNCP) and local city governments to enforce local laws and place pressure on market owners to curb sales of pirated goods and electronics designed to support piracy.
- Encourage cross-industry efforts to combat Internet piracy using CNCP resources and the ANCINE anti-piracy working group, and support development of a new CNCP strategic plan, including an effective agenda for Internet anti-piracy actions incorporating feedback from right holders’ groups affected by digital piracy, and stepped up training on ways to combat digital piracy.
- As steps toward a deterrent enforcement system, implement a national program to train judges and prosecutors on IPR law and enforcement measures; adopt judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.
- Clarify jurisdictional issues regarding digital and online piracy for law enforcement, including through public policy decrees from the Ministry of Justice, and if necessary, legislation, to improve inter-agency coordination needed to effectively address online copyright theft.

### Legislation and Regulation

- Reinforce the relevance of the National Congress Anti-Piracy Caucus, as a tool to tackle infringement in the region.
- Enact pending legislation authorizing 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, and to criminalize signal theft in the home entertainment sector.
- Work to have a bill presented covering intermediary liability and advertisements placed on pirate sites; resist proposals that would undermine right holders’ rights (for example by introducing broad new exceptions and limitations).
- 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 ANCINE efforts to regulate intrusively the digital cinema sector; and relax audiovisual quotas that discriminate against non-Brazilian content.
- Accede to, ratify, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

## COPYRIGHT PIRACY IN BRAZIL

**Internet Piracy:** Internet access continues to grow in Brazil. Broadband access in Brazil is estimated to reach 30.5 million connections by the end of 2017.<sup>2</sup> Nearly 63% of all households are online, which translates to approximately 102 million Internet users in Brazil. Mobile internet access is now the most common way for Brazilians to access online services and platforms, with 92% of households now connected via mobile.

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<sup>2</sup>All figures from the Brazilian Steering Committee, June 2017, available at: <http://cetic.br/pesquisa/domicilios/>.

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. 52% patronized audio streaming services at some point in the last six months, with half using a paid audio streaming subscription.<sup>3</sup> Music industry digital revenues in Brazil increased by 45% in 2015, led by streaming revenue, and by 23% in 2016, the growth driven by rapid adoption of audio streaming services such as Spotify and Claro Musica. Revenue from music streaming made up 81.4% of all digital revenue and 63% of all recorded music sales revenues. Digital was the single largest contributor to recorded music industry revenues in Brazil in both 2015 and 2016, making the country the world's eleventh largest music market.<sup>4</sup> A dozen legal online music services compete to deliver recorded music to Brazilian listeners at compelling price points.<sup>5</sup> All of these positive developments, however, represent incomplete market recovery: in the mid-1990s, Brazil was the world's sixth largest music market. Since that point, music revenue per capita has fallen from \$8.5 in 1997 to \$1.12 in 2017—a price depression largely attributable to the stifling effect of online piracy on the legitimate online market. Monetizing the digital market for music in Brazil remains difficult in the face of piracy, and per capita spending on music is only 44% of the corresponding figure in Argentina, for instance.<sup>6</sup> 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.

Similarly, at least 40 free or low-cost online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime 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. Recent reports estimate that by 2020 the local online content consumption will reach US\$451 million. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, 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. There is an extensive piracy ecosystem in Brazil with multiple different business models, appealing to all tastes and consumer groups. 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) protocol,<sup>7</sup> and the shockingly high proportion of Brazilian Internet users who relied on illegal sources for their online music or audiovisual consumption.<sup>8</sup> 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 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.<sup>9</sup> Traffic statistics improved somewhat in 2017, after Operation Blackbeard II in November 2016 targeted the major websites dedicated to the Brazilian market, and accompanying industry outreach efforts to operators. In 2017 only the 47 top websites received over one million visitors per month, and while in 2016 the most popular website received more than 400 million visits, in 2017, the top website didn't reach 200 million visits.

<sup>3</sup>Ipsos 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>.

<sup>4</sup>IFPI, *Global Music Report* (April 2017), at p. 78, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2017").

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

<sup>6</sup>GMR 2017 at p. 78.

<sup>7</sup>See the TruOptik study summarized in IIPA's 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.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.

<sup>8</sup>See Comunicado do Ipea - 2012 - Maio - nº 147, *Download de músicas e filmes no Brasil: Um perfil dos piratas online*, available at [http://www.ipea.gov.br/portal/images/stories/PDFs/comunicado/120510\\_comunicadoipea0147.pdf](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 <https://iipa.org/files/uploads/2017/12/2013SPEC301BRAZIL.pdf> ("IIPA 2013").

<sup>9</sup>Tendências 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](http://www.mpaamericalatina.org/wp-content/uploads/2015/12/MPAAL_10_04_2016-english-fv.pdf).

Internet piracy in Brazil is characterized by three main types of distribution channels. The first involves sites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites). 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.<sup>10</sup> 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 right 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 2017 Special 301 Out-of-Cycle Review, and itself one of the 50 sites most visited by Brazilian users.<sup>11</sup> 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. Notable MP3 linking sites, such as *RecantoMp3.com*, *BaixarMusicasGratis.org*, and *BaixarMusicasBR.org* offer downloads of unauthorized music content to users. Finally, the stream-ripping site *PalcoXMP3.com* remains very active.

Infringing Portuguese-language linking sites for illegal video games (*parvenu* and *myboerse.biz*) are expanding their user bases, with the top 15 infringing sites accumulating over 85 million visits in the last year. In 2017, many of the popular infringing websites consolidated, and saw tremendous growth. Their user base rose by an estimated 41% in 2017. These websites provide links to offshore pirate repositories or torrents that “host” infringing copies of video games, and mostly monetize using online payment services, advertisements, and 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 of current and legacy games across multiple platforms. These sites offer free direct downloads of games (from off-shore cyberlockers and torrent sites), and produce monthly revenue ranging from US\$4,000 to US\$30,000 from subscriptions, donations and/or advertising revenue. Brazilians who seek video game content also often turn to local or foreign infringing websites, which remain popular. Examples include: *roxroms.net*, *mundoemu.net*, and *romsup.com*.

The second main channel for Internet piracy in Brazil is file sharing via illicit peer-to-peer (P2P) networks, which continue to thrive and pose a serious threat for the entertainment software industry as well as other sectors. The U.S. video game industry reports that in 2017, for the seventh straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized filesharing of video games on public P2P networks (99 percent of it using the BitTorrent protocol). The video game industry reports that Brazil is among the top ten countries for detected P2P swarms by volume, and may be outranked only by Russia.

Notably, Brazil topped the world’s list for volume of unauthorized file sharing using consoles; it ranked second for PCs and sixth 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*. One private paid torrent forum site focusing on music piracy is *manicomio-share.com*, while free torrent portals such as *Torrentz2* and *Rarbg* remain popular. The most popular such sites 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 94% of its over ten million visits per month from Brazil, according to the website audience monitoring service Similarweb.<sup>12</sup> In 2017, the top three most popular illegal movie and TV show streaming websites received approximately 506 million visits in total, while in 2016 the number was 786 million. The most popular streaming site, *redecanaís.com*, received an

<sup>10</sup>NetNames Ltd., *South American Television Piracy Landscape for Alianza Contra La Pirateria de Television Paga*, at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

<sup>11</sup>USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018) (“USTR NM”), at p. 12 and n. 27, available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

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

average of 15 million visits per month. Overall, the 2016 NetNames report found that “the Brazilian peer-to-peer landscape attracts 32.89 million of the country’s 109.77 million Internet users,” including some using “dedicated Portuguese language sites.”<sup>13</sup>

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, *baixavideos.com.br* received more than 2.5 million individual visits from Brazil between October and December 2017. Brazilian internet users also often turn to stream ripping sites that have a localized version but are hosted outside the country. While the closure of *YouTube-mp3* was a positive improvement, new stream ripping sites surfaced with notable audiences: *Youtubecomtomp3*, *Clipconverter*, *Flvto.biz*, *2Conv*, and *FLvmp3*.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyright works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.<sup>14</sup> 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 licensed sales revenue worth \$145 million in 2016.

**Circumvention Devices:** 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*, *aogao.com.br*, and *playtronics.com.br*. Online marketplaces like *Mercado Livre* are also used to obtain infringing game controllers and circumvention devices. These websites rely on non-responsive host sites and torrent link index sites to distribute illegal copies of video games.

**Illicit Streaming Devices:** 2017 has seen the rise in of Illicit Streaming Devices (ISDs) in Brazil, exemplified by the increased market penetration of an IPTV box called HTV. HTV offers a grid of 170+ live pay-tv channels and also a VoD service that offers TV shows and motion pictures, many sourced through illegal camcording activity. 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. A significant amount of ISDs are sold on the Internet, mainly in online marketplaces such as *Mercado Libre*. The Motion Picture Association of America (MPAA) is working with the Brazilian Pay TV / Telecom Association (ABTA) on a voluntary cooperation agreement with *Mercado Libre* to prevent HTV and other known illegal boxes from being sold on their platform. Moreover, in partnership with ABTA, MPAA launched an HTV investigation in August 2017.

**Hard Goods Piracy:** Even though Internet piracy is 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. The HTV box and other ISDs have also entered the hard good piracy market. 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. Pirate titles for console platforms like Nintendo’s Wii are usually sold on discs that are locally burned and assembled

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<sup>13</sup>Supra n. 10 at p. 33.

<sup>14</sup>The 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.

(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*.<sup>15</sup> *Mercado Livre* is the source of a variety of circumvention devices with preloaded games as well as modified consoles. A search for “desbloqueio Nintendo” generates multiple listings of “unlocked” or modified Nintendo consoles, some with installation of games. Despite removal of infringing listings, repeat offenders simply add new infringing listings, with little deterrence. Mass infringement of entertainment software through the sale of flash drives loaded with huge quantities of illegal 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 infringing 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 infringement 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 infringing copies of games are produced in Asia and brought into Brazil or delivered through the same channels as modified game consoles. *Santa Ifigenia* Street in São Paulo is a leading retail venue for sales of these circumvention devices, and has approximately 70 vendors that specialize in these illicit products. Typically, sellers of the game copiers also include a memory card with up to 500 game titles that were illegally downloaded from the Internet. These circumvention devices are significant multipliers that exacerbate the levels of online infringement by enabling the use of unauthorized copies of game software.

As Brazil’s largest city, São Paulo is 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 Janeiro<sup>16</sup>, 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 burned onto DVD-Rs and distributed to Brazil’s many black markets. In 2017, 15 illicit recordings of MPAA member films were traced to Brazilian theaters, down from 31 during the previous year. While this trend is encouraging, Brazil should continue to strengthen its enforcement regime so that gains can be sustainable in the face of ever-changing criminal behaviors. 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. These camcorded copies continue to feed illegal online sites and businesses, including the sale of streaming boxes with “subscriptions” and apps that provide access to illegal content.

## **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—

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<sup>15</sup>For example, a Nintendo Sky3DS is typically offered for sale on *Mercado Livre* with 20 infringing games pre-loaded for BRL279.99 (US\$90).

<sup>16</sup>The *Camelodromo Urugaiana* covers four city blocks and includes over 1500 kiosks, many of them selling illicit optical discs.

largely undisturbed. This discouraging trend continued in 2017, with even less enforcement than in 2016. IIPA is aware of no new significant criminal prosecutions against online piracy in Brazil, at either the state or federal level, in 2017. Unlike with respect to hard goods piracy, discussed later in this submission, there is no Internet anti-piracy campaign.

In 2015 and 2016, federal police executed Operation Blackbeard, shutting down three major pirate sites in 2016. While this was a very promising development for enforcement, there were no new prosecutions of pirate sites in 2017. Moreover, IIPA is informed that the resulting prosecutions are proceeding slowly, and no trial dates have been set. In 2018, prosecutors and judges should redouble their efforts to crack down on widespread online piracy. Training, dedication of resources, and infusion of political will among police, prosecutors and judges, along with an overall national strategy for combating this form of cybercrime is needed. Lack of proper training continues to be a major issue preventing Federal and Civil Police from investigating more pirate sites and delivering well-prepared cases to prosecutors. The Ministry of Culture and the CNCP should play a central role in developing training activities with participation of experts in the private sector.

The concurrent jurisdiction of federal and state police and prosecutors over enforcement of the copyright laws online has presented an additional hurdle to enforcement. However, the relationship with federal and state law enforcement has continued to improve in the last year due to more frequent trainings and meetings with law enforcement agencies, hopefully raising their awareness of online infringement. The Belo Horizonte conference in March 2017, a closed law enforcement conference co-sponsored by the U.S. Embassy, provided an opportunity for stakeholders and U.S. Department of Justice's Intellectual Property Law Enforcement Coordinator for Latin America to use Operation Blackbeard as a case study to educate federal and state prosecutors and senior law enforcement authorities about investigation and enforcement of online piracy.

So far, most of the handful of successful prosecutions in recent years have taken place in federal courts, where police and prosecutors are more likely to have 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 and even city 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. There are also promising signs that U.S.-based hosting providers will honor injunctions issued by Brazilian courts. However, backlogs and delays in the civil justice system diminish the value of this preliminary relief and are insufficient to keep up with the dynamically evolving online piracy landscape.

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. While in recent years, CNCP has been relatively inactive, likely due to long term unfilled vacancies and unfilled positions on its staff, in 2017 CNCP obtained a new permanent staff. It is essential that CNCP develop a new 3-year strategic plan (the previous plan expired in 2016), and 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. CNCP has the opportunity to be the voice of the country regarding IPR issues, and should work to complement Congressional efforts to update legislation in this area.

Perhaps more crucially, the newly re-constituted CNCP should revive its long-dormant priority of encouraging cooperation and partnerships among right holders and other players in the Internet ecosystem, including ISPs, hosting providers, search engines, advertising networks, payment providers, and the like. The majority of international companies operating in Brazil, and a lesser proportion of local ISPs and online marketplaces, are already somewhat responsive when right holders bring infringements to their attention. There are a few informal agreements between certain U.S. companies and local ISPs to remove infringing content. But many 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. 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, as 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 recent commitment set by the Minister of Culture to combat piracy might positively weigh in on a national strategy. This could also be improved by admitting the content industry to the Internet Steering Committee (CGI.Br), and encouraging ISP and content industry cooperation. Unhelpfully, the majority of this committee's members are still resistant to any intervention in the Internet, with concerns related to censorship and freedom of expression.

The federal government and some state level administrations have indicated their support of volunteer cooperation among stakeholders and for new public policies regarding IP protection, representing an important shift in this area. The Ministry of Culture, which houses the Office of Intellectual Property, is reportedly pushing for stronger IPR protections and anti-piracy actions in coordination with the private sector. To examine ways to strengthen these initiatives, the Ministry of Culture has created a Working Group within the Audiovisual Board in the Ministry in cooperation with the private sector (specifically the national movie sector but also absorbing all other entertainment industries).

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. Brazil's government began to acknowledge in 2017 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.<sup>17</sup> The film industry was pleased to see National Cinema Council Resolution 3/2017, creating a working group on anti-piracy which will deliver recommendations for ANCINE. Moving forward, this initiative should be institutionalized as a permanent assignment of that body. Other government agencies, as well as the National Congress Anti-Piracy Caucus, are relevant players that should be energized to help tackle some institutional gaps.

### **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. Overall, hard copy raids and enforcement training increased in 2017. The National Forum against Piracy and Illegality (FNCP) has assisted authorities in raids and improved enforcement training efforts and results. In March 2017, FNCP joined forces with the National Institute of Ethical Competitiveness and the legislature's Caucus against Smuggling and Counterfeiting to launch the campaign "The Brazil that We Want" at the

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<sup>17</sup>See, e.g. TTV Summit: <http://www.todotvnews.com/news-video/Brasil-realiza-dos-grandes-anuncios-en-el-Summit-Antipirateria.html>; Federal Judges Association Colloquium on Digital Piracy: <http://epocanegocios.globo.com/Empresa/noticia/2017/12/brasil-perde-r-130-bilhoes-por-ano-com-pirataria-contrabando-e-comercio-ilegal.html>.

Ministry of Justice. The campaign's goal is to enhance legal markets and create more jobs. During the launch event, the sponsors signed a federal agreement to combat piracy and counterfeiting. IIPA welcomes this coordinated effort to address longstanding IPR challenges in Brazil. Another relevant campaign released by FNCP in 2017 was: "In Defense of the Brazilian Legal Market," with municipalities and other senior official as signatories.

According to the Brazilian Customs authority, there was a ten percent increase in raids and an 18 percent increase in seizures of counterfeit goods and infringing products in 2017. Also, according to the Customs Authority, there was a 200% increase in the value of "cracked" video game consoles seizures, from BRL4.1 million (US\$1.3 million) to BRL12.3 million (US\$3.8 million). In contrast, there was an approximately 33% decrease in the value of seizures of game devices from BRL2.4 million (US\$733,713) to BRL1.6 million (US\$489,142). However, some video game companies reported there were no seizures by customs of products infringing their video game products in 2017. In 2018, Customs should increase border enforcement against illegal streaming devices, circumvention devices, and other technology that primarily facilitates infringement.

There were a few raids on key markets in the main cities around the country, but the most relevant development in this respect was an awareness campaign generated by FIESP, the Federation of Industries of São Paulo, with the publication of its annual illicit markets report, discussing the size of the hard-good IP infringement market, tax evasion figures, and other related negative impacts of the illegal trade of pirated goods. This initiative should be a driver to generate new public policies and coordinated actions. Another positive development in São Paulo was the "Beautiful City" initiative, with a slogan that roughly translates to: "Nothing against popular commerce, everything against illegal commerce."

Also in São Paulo, initial meetings with right holders led to a number of raids on the *Rua 25 de Março* markets, and finally a sixty-day closure of the market in September through November 2017, pursuant to a judicial warrant. Federal revenue agents seized 900 tons of contraband and counterfeit goods. The market has since reopened, subject to probationary terms. These positive actions should be followed by civil and criminal prosecutions. IIPA would like to see similar coordinated actions taken against the main electronics markets in the major cities.

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.<sup>18</sup>

Ultimately, 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). Redoubled efforts are needed to modernize Brazil's police and courts, to propagate best practices,<sup>19</sup> and to train judges and prosecutors, before the Brazilian judicial system can play an effective role in addressing piracy.

## **LEGISLATION AND REGULATION IN BRAZIL**

As in years past, the Marco Civil da Internet law and implementation requires continued monitoring to ensure recognition of the importance of protecting copyright in the online environment and to ensure that implementation does not interfere with existing voluntary notice and takedown efforts or other constructive cooperation to combat piracy online. A number of bills remain pending in Congress that would significantly impact the

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<sup>18</sup>See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

<sup>19</sup>For 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.

content industries, for better or worse. The government should take advantage of the first part of 2018, prior to the election, to enact some of the more promising proposed legislation and to ensure the defeat of proposed legislation that would undermine copyright owners' rights.

**Site Blocking Bills:** One of the most important initiatives grew out of the work of the CPI. Bill 5204/16, introduced in 2016, and still under consideration, 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 awaiting report at the Committee on Science and Technology. Another promising site-blocking bill (no. 169/17), also authorizing court-ordered site-blocking, was introduced in 2017, and it too awaits report at the Committee on Science and Technology (likely to take place in 2018).

A different bill in Brazil's Senate (No. 200/16), as well as one in the Lower House (5130/2016), take a diametrically opposed approach. They would amend the 2014 Marco Civil da Internet law to expressly prohibit site blocking under any circumstances. While IIPA urges that those bills be rejected, its introduction underscores how vulnerable and ideologically driven the enforcement ecosystem in Brazil remains.<sup>20</sup> 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.<sup>21</sup> Inclusion under this rule 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 of Marco Civil were spelled out in implementing legislation, namely Decree 8771/2016. Unfortunately and despite some cross-industry efforts, nothing related to combatting online piracy was included. A similar risk exists with regard to implementation of Marco Civil's 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 of any ancillary legislation, including, but not limited to, data protection measures. In this regard, it is encouraging that the pending House Bills 5276/16 and 4060/2012, as well the Senate Bill 330/2013, secure the rights of private organizations, such as right holders groups, to carry out reasonable online monitoring activities to protect copyrighted content. Close attention to the legislative progress of those bills 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 to monitor these developments, not only to ensure that 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.

A number of other bills that could have serious implications for the content industries have been awaiting action for years, and it is unclear whether there will be any movement in 2018, an election year.

The Copyright Reform Bill of 2009 (No. 6117/09) proposes several changes to the Copyright Law that are inconsistent with Brazil's international obligations and would likely deter investment in Brazil's creative industries. This bill is potentially troubling for all right holders. It includes new exceptions and limitations to both authors' rights and neighboring rights that are overly broad and conflict with the widely accepted TRIPS three-step test, as well as a compulsory license that does not comport with Brazil's Berne obligations. The bill also appears to require the

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<sup>20</sup>In 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 2018, developments in it should be monitored.

<sup>21</sup>See IIPA 2015 at p. 77.

registration/recording of all assignment of rights, which would impose undue costs and burdens on assignors and may diminish the ability of assignees to exercise their rights. Further, the bill unnecessarily amends Brazil's current policy of national exhaustion of rights. The bill in its current form was submitted to the Committee of Culture in September 2017, and an extensive rapporteur's report was prepared and revised. Legislative discussion of the bill was expected to start early in 2018, but as of December 2017 various proposed meetings and public hearings had not yet occurred. This bill should be closely monitored, as if it is enacted in its current form, it will be highly detrimental to rights holders. Instead, any copyright reform legislation should effectively address online infringement and explicitly outlaw circumvention of technological protection measures and trafficking in circumvention devices and services.

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. It was approved by the House of Deputies in 2012 and sent to the Senate (now labeled Bill 63/2012), where 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 in an effort to expedite its passage.<sup>22</sup>

**Camcording:** The persistence of the problem of camcording of newly-released feature films in Brazilian cinemas, a leading source for illegal online dissemination of these works, including through unauthorized "subscriptions" for ISPs, 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. It awaits a report at the Lower House Committee on Constitution and Justice. Its enactment should be a high priority of the Brazilian Congress.<sup>23</sup>

**Public Performances:** Two bills, nos. 0206/2012 and 3968/1997 propose amendments to existing law to provide for additional exemptions to payments for public performances. These bills would be highly damaging for rights holders. Another bill of concern to the music industry is Bill 2850/2003, which proposes to replace the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella collective management organization (CMO), with a new, government copyright authority named CADD. The bill also proposes to create a "Fund for Supporting the Composer," taken from CADD collections. To do so would cause great difficulties for right holders. This is another troubling bill that should not progress.

In 2017, the Superior Tribunal Court (STJ) issued an important decision in the ECAD v. Oi.FM case, regarding certain online uses of recordings.<sup>24</sup> The STJ held that interactive and non-interactive streaming (including simulcasts) are separate acts, each requiring the separate consent of the right holder. This aspect of the decision is positive for right holders because it confirms that online streaming (including simulcasting) requires a separate license for interactive and non-interactive services. However, the STJ also held that both interactive and non-interactive streaming (including simulcasts) involve the public performance right, which as a default falls under ECAD's rights management mandate. This portion of the decision goes against the accepted interpretation of existing law: interactive streaming is deemed to involve acts which fall within the producers' exclusive distribution right. Thus, this decision may undermine right holders' freedom to license their exclusive rights. An appeal of the decision is pending before the Constitutional Court.

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<sup>22</sup>Among other improvements, various pending bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; and facilitate removal of infringing material from Internet sites.

<sup>23</sup>A proposed bill for penal code reform would also create a new criminal offense to punish the camcording of audiovisual works and/or soundtracks in movie theaters. But the same legislation would further erode the enforcement framework for Brazil's creative industries because it lacks effective punishment for copyright infringement. Action on this bill appears unlikely in the near future.

<sup>24</sup>ECAD v Oi.FM (Special Appeal No 1.559.264 – RJ (2013/0265464-7).

## 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 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.

## 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 2017. 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 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. ANCINE has recommended that some taxes, like IPI (tax on manufactured products) and ICMS (tax on the distribution of goods and services) should be reduced for the video game market production chain, and, in 2017, made recommendations in a report that can be implemented through legislation or presidential decree. Government agencies should begin a collaborative process on possible ways to reduce the tax burden on the video game industry in order to stimulate the development of local talent and creativity.

Finally, Law 157/2016 of December 2016 authorizes a tax on all digitally-delivered content services for the first time in Brazil. This law opened the door for local bills implementing an optional tax on content and digital services, which include online video games, mobile apps, and online audiovisual works. Under this optional tax, municipalities can apply a two percent increase on these online services, which has the ultimate effect of raising overall prices. In September 2017, São Paulo and Rio de Janeiro became two of the first municipalities to implement the tax. 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:** Effective September 2011, Law 12.485/2011 imposes local content quotas for pay television, requiring every qualified channel (those airing films, series and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime. Moreover, half of this content must originate from independent local producers. Additionally, one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE, are 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 if levied over VoD services, and will limit the choices available to Brazilian consumers in the nascent online content market. 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. The Ministry of Culture is expected to send draft legislation on VOD taxation to the legislature by March 2018.

**Digital Cinema Regulation:** Yet another ANCINE regulatory initiative launched in April 2014 threatens to create debilitating uncertainty in the audiovisual sector, to the detriment of the Brazilian economy. 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. The agency now has a new President, known to be a moderate and with a pro-market mindset. We encourage the new agency leader to continue working with industry to continue working with the new leader to oppose damaging interventions in the marketplace.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas imposes quotas for 2018 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. The U.S. film industry supports measures to broaden access to its productions and to better serve special needs patrons, and appreciates ANCINE's agreement 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. While the MPAA member companies acknowledge the lack of a security standard for those features to function, the organization continues to collaborate with the regulator and other affected parties to ensure timely and effective implementation of these accessibility tools in Brazilian theaters, preserve economic rights, and provide high-quality content for the targeted audience.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Special 301 Watch List in 2018.<sup>1</sup>

**Executive Summary:** While the legitimate digital marketplace for copyright materials continues to grow in Canada, the market remains hampered by widespread infringement, including stream-ripping services that undermine legitimate music streaming and download offerings; link sites and other online sources for unauthorized movies and TV shows; and illicit streaming devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and Video on Demand. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet players allow their services to be abused by pirates, and inter-industry cooperation remains suboptimal. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, and significant market access barriers impede U.S. film and TV producers and distributors. The full parliamentary review of Canada's Copyright Act, mandated by the 2012 Copyright Modernization Act and launched at the end of 2017, should be a vehicle for addressing many of these problems. The review provides a critical opportunity to assess both the strengths and shortcomings of Canada's current copyright regime on a host of issues, and to adopt needed measures to improve both the law and its enforcement. Among the most urgent problems to be addressed is the continued decimation of the educational publishing market and the climate of copyright impunity still permeating the country's educational institutions. In addition, the law should provide more effective incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement, including through effective takedown procedures, and the internationally unprecedented copyright exception for user-generated content should be repealed. Statutory discrimination against U.S. recorded music producers, and the unjustified radio royalty exemption for broadcast of recorded music, require correction. Canada's Copyright Board needs immediate reform to incorporate best practices in other developed markets, especially in cases where negotiated settlements have already been achieved. 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, and to respond to concerns left unaddressed in 2012, 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 2018.

### **PRIORITY ACTIONS REQUESTED IN 2018**

The statutory review of the Copyright Act should take a comprehensive approach, including:

- Addressing the crisis in the educational publishing market, including by clarifying the fair dealing amendments in the Copyright Modernization Act;
- Making further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- Identifying and implementing regulatory reforms and (where necessary) statutory amendments to make Copyright Board proceedings more efficient, predictable, and respectful of market solutions.

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<sup>1</sup>For more details on Canada's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.





- Ensuring that recorded music producers and performers are fully compensated for all forms of communication of their products to the public, including by elimination of the radio royalty exemption;
- Completing the process of bringing the duration of protection for copyright into conformance with evolving global norms.

In addition, Canada should be urged to:

- Prioritize enforcement against online piracy and the trafficking in illicit streaming devices/apps and other circumvention tools;
- Provide the Royal Canadian Mounted Police (RCMP), Crown prosecutors, and local law enforcement the resources and training required to implement this priority;'
- Make progress on easing long-standing market access barriers for U.S. movies and TV programming.

## **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 90% of Canadians use the Internet, with 87% of Canadians having broadband Internet connections at home.<sup>2</sup> More than three-fifths of the population spends at least one hour a day watching TV or movies online.<sup>3</sup> The growth of legitimate digital distribution of creative content remains robust. While the overall music market in Canada grew 12.8% from 2015 to 2016 (the latest year for which complete statistics are available), total revenues from online streaming of music burgeoned by over 150%, and its share of the total Canadian market more than doubled, to 34.7%.<sup>4</sup> Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Currently, more than 50 licensed services offer movies, TV programming, or both, online to Canadians.<sup>5</sup> Notably, nearly half of all Canadians report they subscribe to Netflix.<sup>6</sup>

However, evidence persists 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.<sup>7</sup> For instance, the uptake on legitimate subscription music services, while climbing to 39% of all Canadian music consumers in a 2017 survey, still lags well behind the levels in comparable countries surveyed.<sup>8</sup> Part of the explanation lies in the growing popularity of "stream ripping" services, now the leading form of music piracy in Canada<sup>9</sup>. Stream ripping allows users of streaming services like YouTube<sup>10</sup> to convert a stream into an unauthorized download that can be stored and replayed at will, with no royalty payment to right holders. By circumventing the technological measures employed by legitimate music streaming services to prevent copying and redistribution of the recordings streamed, stream-rippers undermine the legitimate markets both for streaming and for licensed music downloads, such as subscription services offering offline listening to music for a monthly fee. Dozens of websites, software programs and apps offer stream ripping services, and they find an eager marketplace in Canada, with 27%

<sup>2</sup>CIRA *Internet Factbook 2017*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

<sup>3</sup>Id. at <https://cira.ca/factbook/Canadians-online-behaviour/music-movies-and-tv-online>.

<sup>4</sup>IFPI, *Global Music Report 2017*, p. 80, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

<sup>5</sup>[www.wheretowatchincanada.com](http://www.wheretowatchincanada.com).

<sup>6</sup>CIRA *Internet Factbook 2017* at <https://cira.ca/factbook/Canadians-online-behaviour/music-movies-and-tv-online>.

<sup>7</sup>As CIRA notes, "Canadians are willing to tread on some legal grey areas to access the online content they want." CIRA *Internet Factbook 2016*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-internet-trends/internet-use-canada>.

<sup>8</sup>IFPI, *Connecting with Music: Music Consumer Insight Report 2017*, September 2017, p. 7, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf> ("Insight Report 2017").

<sup>9</sup>Stream 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) ("2016 USTR NM"), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>10</sup>Some 84% of Canadians who visited YouTube used the site to access music in 2017. See Insight Report 2017, *supra* n. 8., at p. 17.



of surveyed Canadians engaging in this form of piracy in 2017. Another 22% of Canadians used peer-to-peer (P2P) or cyberlocker sites to obtain unauthorized access to recorded music.<sup>11</sup>

As noted in last year's IIPA Special 301 submission, in recent years Canada has made progress in rectifying its previous long-standing reputation as a safe haven for some of the most massive and flagrant Internet sites dedicated to the online theft of copyright material.<sup>12</sup> However, sites associated with Canada still play a leading role in facilitating such theft. Examples include the stream ripping site *peggo.tv*, the BitTorrent site *Monova.org*, and the cyberlockers *Zippyshare.com*<sup>13</sup>, *VibecLOUDS.net* and *Openload.co*. While the true location of the hosting services for some of these sites is obscured through the use of reverse proxy services, all are registered by Canadian domain name registrars (*Peggo.tv*, *Openload.co*, and *Zippyshare.com* by Tucows, *Monova.org* and *VibecLOUDS.net* by easyDNS Technologies), and all five sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, MyPrivacy.net for the easyDNS sites). While these Canadian intermediaries have been notified many times about multiple customers who use their services to carry out massive online piracy, they have never provided any effective assistance to right holders.

Because so many of the sites dedicated to piracy, not only of music but of movies and TV programming, depend wholly or in great part on advertising to support their illegal activities, it is particularly concerning that Toronto-based WWWPromoter is the fastest-growing advertising network serving infringing sites. Among its clients are some of the most popular sites for Canadians seeking links to infringing audiovisual materials, such as *123movies.to* and *primewire.ag*. Such link sites have surpassed hosted sites and P2P download sites as the largest single category of websites dedicated to infringement of movies and TV programming, according to research commissioned by the motion picture industry. At a time when legitimate advertising networks are growing increasingly vigilant about abuse of their services by sites dedicated to copyright theft, it is discouraging to see a Canadian enterprise rushing to fill the void, or at best turn a blind eye.

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Carnegie Mellon University studies found that pre-release piracy of motion pictures decreases U.S. box office revenue by 19%, and that elimination of such theft during the window when films are available exclusively in theaters would increase box office take by 14-15%, or about US\$1.5 billion; there is no reason to think Canadian results would be significantly different.<sup>14</sup> Even though P2P download sites accounted for a slightly decreased share of the Canadian online audiovisual piracy problem in 2016, an estimated 168 million movies and 207 million TV shows were illicitly downloaded by Canadians that year using the BitTorrent application alone, according to MovieLabs data. A growing concern is the presence of deceptively marketed illegal online streaming sites, which offer a Netflix-like interface that enables users to stream and download movies and TV programs with a single click.

Both online and offline, the legitimate market is challenged by trafficking in set-top boxes (STBs) 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 large fairs and expositions, and in kiosks in reputable shopping malls, at prices as low as C\$100 (US\$80). Of course these pre-loaded devices 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. To make matters worse, Canadians appear to be increasingly involved in the coding and development of illegal add-ons that enable mass-

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<sup>11</sup>Music Canada, "The Value Gap: Its Origins and Impacts", at p. 23, available at <https://musiccanada.com/wp-content/uploads/2017/10/The-Value-Gap-Its-Origins-Impacts-and-a-Made-in-Canada-Approach.pdf>.

<sup>12</sup>See IIPA's 2017 Special 301 country survey on Canada, at pp. 94-95, available at <https://iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf> ("IIPA 2017").

<sup>13</sup>This major cyberlocker service remains, after more than a decade of operation, one of the world's leading sources of illicit recorded music files available before authorized release.

<sup>14</sup>Information Systems Research, An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box Office Revenue, September 2014, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1782924](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782924); Carnegie Mellon University, The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion, February 2016, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

market set-top boxes to access streaming services without authorization, as well as in the hosting of online repositories that make the illegal add-ons available to the public. As of the end of 2016, nearly 9% of all households in North America had at least one media player device (such as a “Kodi box”), and in more than two-thirds of these households, the device was configured to access unlicensed audiovisual content.<sup>15</sup> Although, as discussed below, legal actions against these abuses are beginning to bear fruit, the problem remains serious and widespread.

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, and recent court decisions enforcing these statutes, as discussed below. 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. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S., such as *Digitopz.com*, *Digitartz.com* and *Gamezway.com*, rely on Canadian ISPs such as Crocweb for hosting, thus evading enforcement action under U.S. law. 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 generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing videogame products sold via ecommerce sites that are managed through Canadian e-commerce service providers like Shopify.com or Browze.com. In addition, offerings for installation services (free games and hacking services) through online marketplaces such as kijiji.com have been on the rise in 2017.

## **KEY TOPICS FOR THE COPYRIGHT REVIEW**

In December, 2017, Canada’s House of Commons launched a comprehensive review of the country’s Copyright Act. This process has its roots in Canada’s Copyright Modernization Act, adopted in 2012, and fully brought into force in January 2015. Section 92 of the Copyright Act mandated that a parliamentary review of Canadian copyright law begin in 2017. The mandated parliamentary review provides an invaluable opportunity for Canada to assess whether its laws have kept pace with rapid changes in technology and markets, and to upgrade and improve them where they fall short of being fit for purpose for today’s digital environment. IIPA urges Canada to seize this opportunity and to review comprehensively, not only the significant changes made in the Copyright Modernization Act, but the legislative and regulatory environment as a whole, including issues that went unaddressed in the 2012 amendment process. We offer the following evaluations of the strengths and weaknesses of Canada’s current copyright law and enforcement regime, and urge the U.S. Government to encourage Canadian officials to take these issues fully into account in carrying out the copyright review. We encourage the Canadian Government to ensure that this review is carried out in a timely manner so that substantive reform is effectively achieved.

### **1. Strengths of the Canadian Regime—Recent Positive Developments**

Several recent decisions from Canadian courts reflect positive trends that the copyright review should affirm and seek to build upon. Some directly involve provisions of the Copyright Modernization Act.

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<sup>15</sup>See Sandvine Intelligent Broadband Networks, Spotlight: Subscription Television Piracy (2017), at p. 2, available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2017/global-internet-phenomena-spotlight-subscription-television-piracy.pdf> (6.5% of North American households accessing known subscription television piracy services).

## **A. New legal tools against TPMs circumvention**

In March 2017, Canada's Federal Court issued its first substantive decision on the provisions of the Modernization Act that codified (in Section 41.1 of the Copyright Act) meaningful prohibitions against trafficking in tools and service to circumvent technological protection measures (TPMs) used to control access to copyright works. In *Nintendo v. King*<sup>16</sup>, the court found an Ontario-based provider of game copiers, mod chips and modding services (both online and through a retail location) liable for trafficking in circumvention devices and services (as well as the act of circumvention) in violation of Section 41.1, and made important interpretations of several provisions of the new law. Notably, the court gave robust effect to the remedial provisions of the statute, deciding that statutory damages for the violation should be calculated on a per-work basis, and imposing the maximum C\$20,000 (US\$15,972) damages for each of the 585 Nintendo videogames protected by the circumvented TPMs. It also imposed C\$1 million (US\$798,665) in punitive damages, based on the violator's deliberate and recidivist sale of circumvention devices. IIPA hopes that this strong precedent will be followed in future cases, and urges that any efforts to weaken existing TPMs provisions in the law be firmly resisted.

## **B. Injunctions against retailers of illicit streaming devices**

Also in March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of "plug and play" set-top boxes preloaded with applications that allow consumers to access TV programs and movies without authorization or subscription.<sup>17</sup> The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes. While this decision, and orders subsequently issued in cases against repositories offering the public illegal add-ons enabling set-top boxes to access streaming video without authorization, indicate that effective remedies against such illicit streaming devices are available under current law, the copyright review should consider whether further enhancements are desirable to disrupt this growing illicit marketplace.

## **C. De-indexation of sites dedicated to intellectual property infringement**

The landmark June 2017 decision of the Supreme Court of Canada in *Google v. Equustek Inc.*<sup>18</sup> affirmed that Canadian court can issue global de-indexing orders against search engines to stem illegal activities on the Internet. The injunction required Google to de-index from search results (both in Canada and worldwide) the websites infringing Equustek's trade secrets. The court's conclusions—that "the only way to ensure that the injunction attained its objective was to have it apply where Google operates—globally" and that the search engine was "the determinative player in allowing the harm to occur"—set a favorable precedent for using Canadian courts to combat sites dedicated to copyright infringement as well. Google subsequently applied to the provincial court to vary the decision based on a U.S. court ruling it obtained, but as it stands, the injunction sets a positive precedent.

## **D. The "enablement" prohibition**

The Copyright Modernization Act provision (Section 27(2.3)) establishing civil liability for providing online services primarily for the purpose of enabling acts of copyright infringement was an important step forward. It continues to provide a useful tool for copyright industry efforts to shut down Canadian-connected sites dedicated to piracy, and to help purge the Canadian online environment of outlaw services that undermine legitimate digital markets for copyright materials worldwide. But, as will be discussed below, its scope is limited, and it falls well short of providing the cornerstone for an effective legal regime to confront the challenge of digital copyright theft.

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<sup>16</sup>2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

<sup>17</sup>Wesley dba MTLFreeTV.com v. Bell Canada, 2017 FCA 55, affirming Bell Canada v. 1326030 Ontario Inc dba ITVBBox.net, 2016 FC 612.

<sup>18</sup>2017 SCC 34.

## 2. How Canada's Legal Regime Falls Short

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime, and unintended adverse consequences from the Copyright Modernization Act, whose correction should be the main focus of the copyright review.

### A. 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. 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.

Previous IIPA submissions have extensively analyzed how the CMA amendments, in combination with extreme judicial interpretations of the pre-CMA fair dealing provisions, led to the destruction of the well-established collective licensing regime 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.<sup>19</sup> 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. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.<sup>20</sup> 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.<sup>21</sup> A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

How did this happen? Lawyers for primary and secondary school systems across Canada, giving both the new fair dealing amendment and recent judicial decisions under the old law<sup>22</sup> the "large and liberal" reading that the latter 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. 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."<sup>23</sup> 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.<sup>24</sup>

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<sup>19</sup>See IIPA 2017 at 97-100;

<sup>20</sup>Pricewaterhouse Coopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at [http://accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://accesscopyright.ca/media/94983/access_copyright_report.pdf) (hereafter "PwC").

<sup>21</sup>PwC at 6, 7.

<sup>22</sup>See especially *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>. Their impacts are detailed in IIPA's 2015 Special 301 submission on Canada, at pages 85-86.

<sup>23</sup>PwC at 6.

<sup>24</sup>Disturbingly, government actions at the provincial level are among the immediate causes of this national anti-copyright policy—specifically, the adoption by the Council of Ministers of Education, Canada, of the sweeping "fair dealing guidelines" that provide the legal justification for the cessation of licensing royalty payments. This council is an intergovernmental body consisting of ministers of education of all 13 Canadian provinces and territories. See [https://cmec.ca/11/About\\_Us.html](https://cmec.ca/11/About_Us.html).

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\$5,000 (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 insignificant in any copyright dispute with a school or university, further discouraging enforcement of rights.<sup>25</sup> 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.

A Canadian Federal Court decision issued on July 12, 2017 in the long-running case brought by Access Copyright against York University provided one glimmer of hope for ameliorating the disastrous impact on licensing in the educational publishing market. The main issue in the case was whether the university could copy materials within the limits of its "fair dealing guidelines" without regard to the tariff issued by Access Copyright for post-secondary institutions and approved by the Copyright Board. The court's answer was no, marking a clear rejection of the very expansive interpretation of the statutory exception favored by Canada's educational establishment. The court concluded the university's guidelines were "arbitrary and not soundly based in principle," and that Access Copyright had proved "that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors."<sup>26</sup> York University has announced that it is appealing the decision.

The sense of impunity from copyright responsibility that Canada's educational establishment increasingly displays has decimated not only copyright owners' licensing revenue for copying, but has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. While this was well documented in the 2015 PwC study,<sup>27</sup> a fresh example emerged in 2017, when it was revealed that Concordia University's Center for Expanded Poetics was creating high-quality scans of the entire contents of current books by at least a dozen contemporary Canadian and U.S. poets and making them available for free download, rather than purchasing them for use by students.<sup>28</sup> 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. 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 problematic Copyright Modernization Act provision for educational publishers. Besides the statutory damages cap discussed above, the broad 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 government is well aware of the dire state of its educational publishing market. Canadian federal authorities, and its Parliament, should be encouraged, as a matter of urgency, to address this crisis, and to clarify the scope of the education fair dealing exception. The goal must be an appropriate balance under which educational

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<sup>26</sup>See 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.

<sup>26</sup>Canadian Copyright Licensing Agency ("Access Canada") v. York University, 2017 FC 669.

<sup>27</sup>See PwC at 9, 71; see also *This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

<sup>28</sup>Kate Taylor, "Concordia University caught on the wrong side of copyright," <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.



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 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 this sector 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.

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 three-step test for permissible limitations and exceptions.<sup>29</sup> This provision compounds the problem (discussed below) of Canada's inadequate online liability regime, by giving incentives to digital services to make protected content available without licenses or on terms that do not reflect market value of the content. Its application threatens to lead to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing. Although enactment of the exception was 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 re-examining the Canadian user-generated content (UGC) exception in the context of the copyright review.

## **B. Incentives are Still Lacking for All Players to Cooperate Against Online Infringement**

Beyond enactment of the "enablement" provision in Section 27(2.3), the challenge of online infringement is a much broader one, to which Canada's Copyright Act simply fails to respond adequately.<sup>30</sup> 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 and their affiliated privacy/proxy registration services. As described above, these services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision itself is unduly limited. For example, because it applies only to the provision of services, it is far less than an optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in set-top boxes pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even in such software tools on their own, may fall outside the scope of the "enablement" prohibition. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision's significant gaps should be corrected to address all those in the value chain who enable acts of infringement.

Beyond enablement, the Canadian legal regime against online infringement relies heavily on the "notice and notice" system, which came into force in January 2015. There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so: it was intended merely as an educational tool aimed at end-users, but there is no evidence that it 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

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<sup>29</sup>See, e.g., Article 13 of the WTO TRIPS Agreement.

<sup>30</sup>The 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 <https://iipa.org/files/uploads/2017/12/2013SPEC301CANADA.pdf>, at 127-131, and other sources referenced therein.

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. Indeed, it creates little meaningful incentive for service providers to try to rid their service of illicit material, in effect providing free rein to build services on the back of such unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.<sup>31</sup> ISPs have insufficient incentive 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.<sup>32</sup>

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 law simply lacks effective incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement, including by implementing effective takedown procedures. 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 regime more effective, and to provide meaningful incentives to stimulate full inter-industry cooperation against online piracy.

### **C. Discrimination and Duration**

Other issues require attention as part of Canada’s statutory review.

#### ***i. Recorded Music Royalties Should be Extended to U.S. Repertoire***

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. Canada also refuses 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.

#### ***ii. The Radio Royalty Exemption Should be Removed***

An additional concern for the music industry is the cap on radio revenue in Canada. Canada’s nearly 700 commercial radio stations, regardless of their size, revenues, or profitability, pay only a nominal C\$100 (US\$76) statutory royalty for sound recording broadcasts on the first C\$1.25 million (US\$951,000) of annual advertising

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<sup>31</sup>See IIPA 2017 at p. 96 for a summary of concerns.

<sup>32</sup>See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

revenue.<sup>33</sup> Radio stations pay the Copyright Board-approved tariff only for revenues in excess of that limit. Even the Copyright Board concluded that there is no economic rationale for this provision, which it called a “thinly veiled subsidy” to “large, profitable broadcasters.”<sup>34</sup> No other Canadian businesses that publicly perform or communicate recorded music (such as satellite radio, restaurants or background music suppliers) benefit from such an exemption from paying royalties to sound recording producers or performers, and Canada is the only country in the world that grants such a subsidy to all its commercial radio stations. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of nearly C\$140 million (US\$111,649 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the “equitable” remuneration that Canada is obligated to provide by Article 15 of the WIPO Performances and Phonograms Treaty (WPPT).

### *iii. Term of Protection*

A notable example of a needed modernization of Canadian copyright law that simply was not addressed by the 2012 amendments 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 (TPP) 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.

## **D. 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. Tariffs currently pending before the Board have, on average, been outstanding for 5.3 years since filing.<sup>35</sup> These extreme delays make economic forecasting nearly impossible for stakeholders (including users as well as right holders), and have become a barrier to some copyright industries doing business in Canada. Because of these delays, collective management organizations (CMOs) often have to apply tariffs retrospectively, which makes it more difficult both to collect and to distribute license fees. A large part of the problem may be the broad jurisdiction of the Board, which mandates that even tariffs which have been negotiated among the parties involved must undergo a protracted and detailed analysis.

Furthermore, the Board’s process is unpredictable and lacks any specific rate-setting criteria, other than an overarching requirement that royalty rates be “fair and equitable.” Unlike comparable tribunals in the U.S. and around the world, the Board is not required to apply, or even to consider, the willing buyer/willing seller principle as a benchmark for determining the commercial value of the rights in question. Instead, the Board’s assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, and with corresponding decisions in comparable markets.

The “Tariff 8” proceeding regarding royalty rates for webcasting highlights both these challenges. The Board’s 2014 decision was rendered six years after the tariff (to cover the years 2009-2012) was proposed; and it set rates at a small fraction—one-tenth or less—of the rates negotiated in the marketplace or those applicable in neighboring markets. On June 28, 2017, the Federal Court of Appeal (FCA) upheld the Board’s decision, ruling that

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<sup>33</sup>See Section 68.1(1) of the Copyright Act.

<sup>34</sup>Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

<sup>35</sup>A Canadian Senate Committee found that “on average, the Board may take between 3.5 and 7 years to make a final decision,” and concluded that “the Board is dated, dysfunctional, and in dire need of reform.” Report of the Standing Senate Committee on Banking, Trade and Commerce, “Copyright Board: A Rationale for Urgent Review” at pp. iii, 7; available at : [https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright\\_e.pdf](https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf)



the Board is not obligated even to consider market rates in setting royalties.<sup>36</sup> The approved rates fall far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery.

A few key reforms could address these issues. The tariff-setting process should be streamlined to focus on contested tariffs. Tariffs that are agreed upon and uncontested should not be reviewed by the Board; this would respect freedom of contract and free up the Board's resources, enabling it to act as an efficient tribunal of last resort in those cases in which negotiated agreements are not possible. Specific decision-making criteria for the Board should also be adopted, notably that the Board must certify tariffs that most clearly represent the rates that would have been voluntarily negotiated in the marketplace between a willing buyer and willing seller for the rights in issue, considering the best evidence available from such negotiations for those or similar rights. Fixed timelines for completing hearings and issuing decisions should also be adopted. Both reforms would reflect best practices among comparable rate-setting and dispute resolution entities in major developed markets, and should yield tariffs that more accurately reflect the economic value of the rights in trade.

It may be possible to address some of these issues relatively quickly through regulatory reforms pursuant to Section 66.91 of the Copyright Act, which gives the Governor in Council authority to give "policy directions to the Board and establish general criteria to be applied by the Board or to which the Board must have regard." For example, the Governor in Council could issue regulations establishing that tariffs must reflect the terms that a willing buyer and seller would have agreed to. These regulatory reforms should be promulgated as promptly as possible, followed by any improvements that require the more protracted and uncertain legislative process

## **COPYRIGHT ENFORCEMENT**

The 2015 entry into force 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).<sup>37</sup> But Bill C-8 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 more than a decade, remain basically unchanged.<sup>38</sup>

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown counsel are now declining training offered by right

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<sup>36</sup>Re:Sound v. Canadian Association of Broadcasters, 2017 FCA 138.

<sup>37</sup>In practice, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 46 times in the first two years under the legislation, and in only 33 such cases were rights holders even contacted to assist in interdicting the infringing imports.

<sup>38</sup>For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/securp10/securp10-e.pdf>.

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.<sup>39</sup> The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism. And in too many cases, law enforcement action never materializes, even when notified of a sale of a physical product that threatens public safety (such as an illicit streaming device that fails to comply with electrical safety standards).

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, as noted above, increasingly involves widespread sale of illicit streaming devices, such as set top boxes pre-loaded with applications that enable significant infringement. 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 including through sites on Canadian e-commerce services. But since Canadian law enforcement authorities are almost completely unengaged in criminal 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.<sup>40</sup>

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, including specialized training regarding illicit streaming devices and other products that enable circumvention of TPMs. 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.

## **MARKET ACCESS**

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. These longstanding issues include:

- *Television Content Quotas*—The Canadian Radio-television and Telecommunications Commission (CRTC) imposes quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.
- *CPE Quotas*—In May 2017 the CRTC ruled that large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of the group's gross revenues from their conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. This standardization reduced the CPE quotas within some of the groups. In August 2017, in response to pressure from the Canadian production industry, the Federal Cabinet directed the CRTC to review this decision. The result of the review is anticipated in 2018. As their licenses are renewed, CPE obligations will be assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas will be effective September 1, 2018 and will be based on historical levels of actual expenditure.

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<sup>39</sup>This is another long-standing deficiency. The Industry, Science and Technology Committee of the House of Commons opined as long ago as 2007 that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so. There is no evidence that this has been done.

<sup>40</sup>As noted in text above, the affirmation of an interlocutory injunction against retailers of "plug-and-play" illicit streaming devices strikes a more positive note for enforcement through civil litigation.

- *Exhibition Quotas*—Private conventional broadcasters must exhibit not less than 50% Canadian programming from 6PM to midnight. The overall 55% exhibition quota was removed in 2017. Private English-language discretionary services (specialty and pay-TV), that are not part of a large private broadcasting group must exhibit not less than 35% Canadian programming overall.
- *Non-Canadian Signal and Service Restrictions*—Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian services.

BDUs must offer an all-Canadian basic tier for not more than \$25 per month, but may also offer an alternative basic tier that includes one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) signals. All other U.S. signals and services must be offered on a discretionary basis. A second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.

Otherwise, except as permitted in a BDU’s license from the CRTC, non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. A service may be removed from the Authorized Lists if it changes formats and thereby becomes competitive with a Canadian pay or specialty service; if it solicits advertising in Canada; or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code”. A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.

- *Broadcasting Investment Limitations*—The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) a licensee’s CEO must be Canadian; (2) at least 80% of a licensee’s Directors must be Canadian; and, (3) at least 80% of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the subsidiary must be beneficially owned and controlled by Canadians.
- *Québec Distribution Restrictions*—The Québec Cinema Act severely restricts the ability of film distributors not based in Quebec to do business directly in the province. Since 1986, MPAA member companies may apply for a Special License for any film produced in English that meets the less-restrictive requirements set out in an Agreement between the MPAA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

## **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).<sup>41</sup> 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”)<sup>42</sup>. 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.

<sup>41</sup>IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the Copyright Modernization Act into force.

<sup>42</sup>See TRIPS Article 13.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2018.

**Executive Summary:**<sup>1</sup> Under the U.S.-Colombia Trade Promotion Agreement (TPA), which the parties signed in 2012, Colombia enjoys unfettered access to the U.S. market in exchange for, among other things, the implementation of a copyright law and enforcement regime in accordance with global standards. As of now, however, Colombia has not fully implemented numerous intellectual property rights (IPR) obligations under the TPA, although all the transitional deadlines for Colombia's TPA obligations have passed. A Bill that would bring Colombia at least partially in compliance with the TPA has finally been proposed, but it does not yet achieve the relevant level of protection. The government should further engage with rights holders to ensure that proper language with adequate protection is realized. Colombia needs to implement key copyright protection and enforcement obligations under the TPA, and should pass legislation to: extend the term of protection; introduce technical protection measures (TPMs); ensure that rights holders have all the relevant exclusive rights (including exclusive rights for phonogram producers and performers with respect to communication to the public and broadcasting, which is currently missing in the proposed Bill) and that infringing services cannot avoid liability; and confirm that there is no "order of priority" between the rights of authors, artists and sound recording producers. IIPA urges the U.S. Government to prioritize its dialogue with Colombia to encourage this vital trading partner to fulfill its obligations under the TPA and demonstrate its will to protect creative sectors by combating the high levels of piracy persisting throughout the country.

While Colombia ignores its commitments, piracy and unjustified copyright exceptions continue to stifle the protection of rights and deny international rights holders of the benefits of the TPA. For example, legitimate music services have started operating and competing in the Colombian market, but the potential of the online market is fundamentally undermined by the prevalence of pirated copyrighted material. In addition, Colombian law enforcement is not putting forth a serious effort to prosecute administrators and owners of websites, blogs, and hubs involved in the distribution of illegal files. Illegal camcords also continue to occur in Colombian cinemas, both in the Medellin and Bogota areas. Another serious concern is the recent arbitrary and unfair interference by the Colombian Government with the freedom to contract agreements relating to audiovisual works. It is time for Colombia to honor its commitments under the TPA, revise its laws to secure IPR protection but allow for the freedom to contract, and make combatting online piracy a priority.

### PRIORITY ACTIONS REQUESTED IN 2018

- Implement Colombia's past due TPA obligations, including:
  - Modernize copyright enforcement avenues to provide a legal basis to require ISPs to take action against copyright-infringing websites (and assist in the removal of infringing material online) and ensure that infringing services cannot avoid liability;
  - Ensure appropriate liability for circumvention of TPMs;
  - Establish exclusive rights for works, performances, and phonograms (including for broadcasting and public performance) to bring Colombia's copyright law up to date in the digital environment; and
  - Extend the term of protection for neighboring rights to at least 70 years for all producers of sound recordings, including producers that are corporate entities.
- Devote law enforcement and prosecutorial resources to combatting online piracy and ensuring respect for existing legal protection such as the right of communication to the public.

<sup>1</sup>For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>



## **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. The piracy in Colombia comes in many forms such as significant consumption of pirated recorded music, movies, TV series and paid-TV channels through illegal streaming websites, direct download sites, and peer-to-peer protocols. One of the most popular stream ripping websites in the Latin American region, *Bajaryoutube.com*, is operated by a Colombian company. Numerous pirate websites have “.co” top level domain names and administered by a company appointed by the Colombian Government. The government should require its top level domain registrars to adopt and apply due diligence policies and cooperate with rights holders in tackling IPR violations by their customers.

The situation has now worsened as Illicit Streaming Devices (ISDs) have entered the Colombian market and represent a growing trend. The number of Internet users in Colombia continues to increase, with a population penetration of 58%.<sup>2</sup> E-commerce in Colombia grew 24% from 2014 to 2016, reaching 76% of all Internet users in Colombia (56% using credit cards), but many creative content industries do not reap proportionate economic benefits of this growth because of the high volume of piracy. In 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. 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.

Legitimate music services have started operating and competing in the Colombian market. While the digital music market is growing (offsetting a sharp decline in physical sales, where revenue has dropped over 50% in 2 years), much of the online market's potential is frustrated by the widespread practice of stream ripping, as well as other sources of pirated music available in Colombia. Internet piracy occupies the vast majority of the total digital music market. Stream ripping of music videos from online platforms such as YouTube is increasingly prevalent, as is the distribution of illegal links to cyberlockers via social networks, forums, blogs, and hosted sites. Although the recording industry has made a significant effort to license and promote more digital services, 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.

Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In 2017, nine illegal camcords of MPAA member films (down slightly from eleven in 2016) were traced to Colombian theaters.

## **COPYRIGHT LAW IN COLOMBIA**

**TPA Compliance:** Colombia's obligations under the U.S.-Colombia TPA, which entered into force on 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). Thus, as of May 15, 2015, Colombia is substantially out of compliance with the TPA. While steps were made to meet Colombia's obligations under the TPA, none of the proposed modifications of the copyright law, needed for compliance, have been implemented.

The government previously prepared a package of provisions to address the digital environment. Congress attempted to adopt them in 2012, but the Constitutional Court struck down that law in 2013 for procedural failures during the congressional approval process. In May 2013, the Colombian Government presented a Bill largely incorporating the substantive provisions of the 2012 law, but the Bill was archived due to time constraints during the legislative term. More recently, in August 2016, the Colombian Government published for consultation a draft bill to

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<sup>2</sup>See <http://www.internetworldstats.com/sa/co.htm>.

modify the copyright law to meet at least some obligations under the TPA. The Bill was supposed to be filed after a short consultation process of 30 days (which was then extended to 45 days), but was ultimately stalled.

Parliament is currently debating new amendments to its copyright law in connection with the FTA. This new Bill contains a number of positive proposals. For one, it includes an extension of the term of protection and detailed proposals dealing with the circumvention of TPMs. It also amends the existing law to eliminate any prioritization of the rights of authors and artists—aligning with international treaties, which do not recognize such “hierarchy” of rights. However, the music industry is deeply concerned that the Bill does not provide producers and performers with exclusive communication to the public and broadcasting rights, which might be an omission and should be corrected. The Bill has passed the first of four debates (in the Senate and House of Representatives) and will next be debated on March 16, 2018.

To enable Colombian performers and producers to thrive in the current global digital music market, the Bill must give them the exclusive rights they need to be able to negotiate fair deals with different users. The IIPA urges the government to act to ensure these rights, which are vital to successful operation in the digital environment, are included in any copyright legislation. The Rome Convention 1961 and the WIPO Performances and Phonograms Treaty (WPPT) provide the bare minimum protection for pre-existing broadcast rights. Those minimum standards were agreed to well before today’s digital environment was even conceivable and, as such, are insufficient.

The Copyright Office in Colombia (Nacional del Derecho de Autor (DNDA)) has already received a letter from the recording industry Colombian affiliate, APDIF Colombia, urging Director Carolina Romero to propose an amendment to the Bill in order to update the communication to the public right for performers and producers. The international recording industry stresses that amendments are needed to ensure that international (including U.S.) recordings benefit from protection under Colombian law, even if they are only distributed digitally, which is in line with the WPPT. Colombia should take prompt action to revisit the proposed amendments to its copyright law and bring Colombia in line with international norms for copyright protection.

**Other International Treaties:** On June 15, 2017, the Colombian Congress voted to ratify the Beijing Treaty (signed by Colombia in 2012), making Colombia the third country in the region to ratify the instrument after El Salvador and Chile. Back in 2000, Colombia ratified the WIPO Copyright Treaty (WCT) and the WPPT, but its full implementation is still pending, as demonstrated by the comments above. It is very important that Colombia properly implement the WPPT and WCT before implementing the Beijing Treaty. In particular, the music producers’ exclusive right to the making available of sound recordings and music videos (and other audiovisual works) should be safeguarded and included in the Colombian copyright legislation. These rights should be in line with the WPPT and WCT treaties, which effectively deal with the protection of authors, music performers, and music producers. Furthermore, the WPPT and WCT obligations regarding TPMs should also be implemented into the Colombian copyright law.

**Arbitrary Interference with Freedom to Contract:** In June 2017, Congress passed the “Pepe Sanchez” Law (No. 1835-Jun 9-2017). The legislation creates a new remuneration right for directors, screenwriters, composers, and other creators involved in the production of audiovisual works for the communication to the public, the making available of the works, and the rent of audiovisual works. The new remuneration will be collectively managed and apply to all audiovisual productions regardless of any contractual transfer of such rights. The law will apply retroactively. The law also includes a new exception that allows businesses to use audiovisual works in their premises for the entertainment of their employees.

This legislation covers music videos as audiovisual works, making it problematic for the music industry. Music videos account for a significant share of online, on-demand music consumption; according to an IFPI IPSOS study, over 50% of all on-demand streams are music videos. Music producers invest in the production of music videos, acquire the necessary rights from the contributing authors and performers, pay the agreed upon fees and/or royalties, and then exercise those exclusive rights to carry out music video licensing activities. The new Colombian

legislation, insofar as it applies to music videos, ignores the established industry practices in the music sector, unfairly disrupts the contractual balance between the parties, and unnecessarily adds complexity to the licensing process. Moreover, the law's application to the public performance of audiovisual works runs afoul to the three-step test enshrined in the international copyright conventions. It risks negatively impacting the public performance activities of music rights holders because the public performance of music videos is commonly licensed in various types of workplaces. The law amounts to an unfair intervention in the parties' freedom of contract and creates an obstacle to the development of the digital content market in Colombia. At minimum, the Government of Colombia should amend the legislation to clarify that music videos are not covered by its scope.

This legislation is equally problematic for the audiovisual sector where remuneration rights for creative participants in U.S. works are highly regulated and satisfied by contract. Mandatory remuneration rights unnecessarily interfere with negotiated agreements that already generate remuneration to creative participants—including authors, directors, and performers—driven by proceeds from the exploitation of U.S. works in every medium and in every world market. Imposition of a collectively licensed additional royalty chills the market for consumers (by increasing exploitation costs) and results in potential double payments for creative participants in U.S. works.

## **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 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. The Attorney General's Office established the 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 that 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. Further, the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of antipiracy cases. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to conduct enforcement actions. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case 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 of 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 the appellate courts. For example, in 2015, a national group of rights 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.

**ISP Cooperation:** While many ISPs are willing to cooperate with rights holders to combat online piracy, such cooperation is limited due to flaws in the underlying law. For example, Colombian law does not provide for any anti-camcording legislation. Another possible negative influence on ISPs is the Colombian President's failure to sign the national anti-piracy agreement. Colombia used to have a national anti-piracy agreement signed by every new president and all civil organizations representing rights holders. The agreement served as a clear indication to all official authorities about the existence of a policy towards the piracy problem. Also, the anti-piracy agreement granted some priority to actions destined to combat the problem. Unfortunately, President Santos never signed the agreement, which made the issue less important in the eyes of public servants in the country. Colombia must follow through with legal reform to incentivize cooperation by all intermediaries to end online piracy. To do so, it must modernize copyright enforcement avenues to provide for a legal basis that requires ISPs to take action against copyright-infringing websites. Such remedies exist in many countries around the world, including EU Member States, Mexico, Argentina, Australia, Singapore, South Korea, India, and Indonesia.

## **MARKET ACCESS**

In 2016 and 2017, an Actors Bill was proposed in Colombia's Congress. If passed, the Bill would have the effect of increasing production costs for film and television made in Colombia by imposing (i) excessive burdens on producers of audiovisual works in terms of costs and production schedules, (ii) limitations on talent engagement, and (iii) 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, render local production unviable, and make Colombia less competitive as a location for audiovisual production. Time ran out for this Bill in the 2017 legislative session, but it could be reintroduced as a new bill as early as July 2018.



# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2018.<sup>1</sup>

**Executive Summary:** Critical developments in Ecuador's intellectual property regime call for acute attention to ensure Ecuador improves or at least restores legal protection for copyright holders, which has been reduced compared to prior years. In 2016, the U.S. Government noted strong outstanding concerns with respect to Ecuador's draft Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI). Despite clear messages from governments and rights holders, the final text of the draft contains expansive exceptions and limitations to Intellectual Property Rights (IPR), which will significantly weaken copyright protection in Ecuador. Many of these exceptions exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. With the passage of the new COESCI law, there are now 30 exceptions and limitations on rights (up from 11 in the prior law), including a "fair use" clause. The Ecuadorian legal system, unlike the United States, is a civil law system and does not follow judicial precedent. Additionally, judges have no experience or training on the doctrine of fair use. This constitutes a fatal flaw for the operation of a fair use doctrine and will likely further undermine copyright protection and the predictability of the legal environment in Ecuador.

COESCI includes several other provisions that will weaken copyright protection. For example, the recording industry is particularly concerned with very damaging exceptions to the scope of the exclusive public performance and broadcasting rights attached to sound recordings (introduced through presidential amendment after the National Assembly's vote). The amendments exempt the following acts from authorization or remuneration requirements: (i) the communication to the public (including public performance) of sound recordings by "micro" and "small" enterprises (i.e., medium to small businesses, which account for about 95% of all the businesses in the country); (ii) the communication to the public (including public performance) of sound recordings in public transport vehicles; and (iii) broadcasting and communication to the public, including online, by "community radios" (that account for 30% of the total number of stations nationwide). These changes alone could significantly damage the market for music licensing royalties and further reduce legal certainty for rights holders. After an outcry from the music community in Ecuador, the government made promises to correct or minimize the impact of those exceptions through implementing regulations to the COESCI. Those regulations were expected to be circulated by the end of 2017, but have yet to materialize. The Government of Ecuador should take action to correct the COESCI deficiencies and shortcomings to comply with its international obligations.

The Ecuadorian Government should also direct considerable attention to its enforcement efforts to combat piracy and maintain a legitimate creative marketplace. Although improving slightly, camcording remains an issue, with Ecuador ranking third in the region for camcording, behind Mexico and Peru. Additionally, the largest, state-owned cable network in Ecuador, CNT, refuses to pay performance rights royalties to music rights holders. For content creators to have a fair shot at success in Ecuador's market, Ecuador must make large strides in strengthening its copyright protection and enable rights holders to exercise that protection in practice.

### **PRIORITY ACTIONS REQUESTED IN 2018**

- Encourage the government to urgently issue implementing decrees to reduce the exceptions and limitations in the COESCI, and, in the longer term, modify primary legislation to reverse this rollback of protection.

<sup>1</sup>For more details on Ecuador's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring any proof of commercial intent.
- Ensure that state broadcasters are not above the law and actually pay royalties for the music and sound recordings that they use.

## **COPYRIGHT LAW IN ECUADOR**

**Domestic Laws:** In December 2016, Ecuador adopted a new IP law known as the COESCI. The exceptions and limitations to copyright in the COESCI, enumerated in Article 211 (“Fair Use”) and Article 212 (“Acts that do not require authorization for use”), are extremely overbroad and risk undermining important protections for rights holders. They also raise serious questions regarding consistency with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention and Article 13 of TRIPS. The COESCI fair use provision appears to be modeled after Section 107 of the U.S. Copyright Act. Simply extracting the U.S. fair use law and implanting it in Ecuador is extremely problematic and risky because U.S. fair use is based on many decades of case law and precedent, which guides the application of Section 107. Ecuador is a civil law country and does not follow the legal principle of *stare decisis* nor is bound by judicial precedent in the same way as common law countries. This makes enactment of the fair use provision even more problematic. Moreover, to the extent that precedent is relevant to Ecuador’s application of fair use, Ecuador does not have, to our knowledge, an extensive body of case law on fair use to ensure implementation of this provision is compliant with the three-step test. The provision dictates that it is to be applied in line with International Treaties to which Ecuador is a party to, but in light of the issues discussed above, this will almost certainly not be the case. The problems and risks associated with Ecuador’s fair use provision are further exacerbated by the following additional element (not found in Section 107 of the U.S. Copyright Act): “The enjoyment and effective exercise of other fundamental rights.” This additional element complicates the application of Ecuador’s fair use provision and likely expands it beyond the scope of U.S. law.

This legislation introduced the concept of an open-ended fair use (“uso justo”) exception for the first time in Latin America. In addition to the fair use exception under Article 212, the new Ecuadorian copyright law contains a vast and extensive list of exceptions and limitations to copyright protection. This list is one of the most troubling areas of the COESCI. The President of Ecuador, using his presidential veto powers, increased Congress’s previous broad and far-reaching catalogue of exceptions and limitations at the last minute. Notably, the added exceptions were included for the benefit of about 95% of all businesses performing music in their stores, about 30% of all radio stations (“community radios”) competing in the broadcasting market, and for transport companies with respect to the public performance of sound recordings on public transport.

Pursuant to Articles 211 and 212, each provision is meant to be enforced without prejudice to the other. This means that beyond fair use, the law is granting 30 additional ways to limit copyright protection regardless of whether the use would be considered fair. The 30 additional exceptions are overbroad and cover uses that clearly fall outside the scope of the three-step test. Among others, the following exceptions call for specific concern and attention.

Exception 9<sup>2</sup> is one of the more troubling exceptions due to its breadth and far-reaching application. This exception allows libraries and archives to freely reproduce a copyrighted work for three purposes (including to deliver to another library or archive who also has the authority to make another copy of the work once received) and lists an additional eight actions that the library or archive can perform. Those actions include reproducing fragments of works at the request of the library or archive for personal use and creating translations of works, both of which, if the scope is not narrowed, can harm the legitimate market of publishers and copyright owners. Similarly, exception 10<sup>3</sup>, which allows for public lending of an audiovisual work by a video library, cuts into various potential markets for audiovisual

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<sup>2</sup>Under this exception, the individual reproduction of a work made by a library, archive, or museum is allowed so long as it fits within the long and far-reaching list of acts that a library or archive may perform.

<sup>3</sup>This exception allows individual public lending of an audiovisual work by video library or other collection of audiovisual works, when the corresponding copy is in the repertoire of the video library or collection.

rights holders. Permission to reproduce and lend copyrighted works in such broad terms does not align with the internationally accepted standards for exceptions and limitations.

Exception 26<sup>4</sup> plainly fails to comply with the three-step test. The exception conflicts with the normal licensing of sound recordings in various venues open to the public and fundamentally undermines rights holders' legitimate economic interests in 95% of the Ecuadorian market. Given the high number of enterprises falling within the scope of the microenterprise or small enterprise concept, it is inevitable that the exception would not be limited to "certain special cases" and would cause material harm to the economic interests of the rights holders.

As in the case of Colombia in 2016, exception 27<sup>5</sup> would remove music rights holders' ability to license to transport companies for the public performance of their works and recordings. This is especially the case with coaches and "busetas," which are popular forms of transportation in the region and a potential market for music rights holders. Public transport is a non-negligible sub-sector of the Ecuadorian economy and constitutes an important market for music licensing. Thus, excepting or carving out this entire market category from the scope of legal protection for music copyright holders would violate the three-step test because the exception would not be "limited" and would clearly conflict with the normal exploitation of rights. As such, it would negatively impact the legitimate interests of music rights holders.

Lastly, exception 30<sup>6</sup> is incompatible with the three-step test, meaning it also conflicts with Ecuador's obligations pursuant to Article 13 of the TRIPS Agreement. The radios covered by this exception account for about 30% of the radio broadcasts in the country. Therefore, the exception would not be limited or negligible in terms of its impact on the normal licensing and economic interests of rights holders. It is worth noting that the community radios operate as commercial businesses, sell advertising, and compete with other broadcasters. Thus, the introduction of this unwarranted exception is prejudicial not only to the music sector as content producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for "public communication," which is very broad and can encompass any means by which works are made accessible to the public, including through digital mediums.

The COESCI replaced the Intellectual Property Code of Ecuador, which was very comprehensive. The COESCI, on the other hand, is a chaotic text, full of political statements on public policies. These characteristics contribute to the difficulty in interpreting many of its legal provisions. Some rights holder groups in Ecuador have already called for amendments to the COESCI. Since the Ecuadorian music community pointed out fundamental legal and economic problems with the new law and urged the government to reconsider the fair use and exceptions and limitations provisions, there is an expectation that those problems might be corrected or minimized through implementing regulations. The government was supposed to circulate implementing regulations by the end of 2017, but nothing has been released yet.

**International Treaties:** 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 went into force January 1, 2017. The trade agreement's copyright provision requires compliance with the Berne Convention, the Rome Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (WPPT). It also provides for a minimum level of protection with respect to broadcasting and public performance rights in sound recordings that goes above and beyond the protection in the WPPT. Rights holders in the copyright sector have already pointed out the incompatibility of the various exceptions and limitations introduced

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<sup>4</sup>This exception permits communication to the public of sound recordings by microenterprises or small enterprises provided that a single, home-style device is used and that the use by enterprises in question is not for the purpose of affecting the ambience of the premises.

<sup>5</sup>This exception permits communication to the public in public transport vehicles that are not intended for tourism or entertainment use.

<sup>6</sup>This exception allows public communication, transmission and retransmission provided by a body of community broadcasting, as long as it conforms to the provisions of the relevant legislation. The relevant legislation is the telecommunications law that provides technical requirements for a station to obtain an operating license. It also states that "community radios" are not-for-profit entities. However, in recent years, community radios have started engaging in commercial activities by selling ads just like other commercial broadcasters do.

in COESCI with the obligations and minimum standards of protection under these international copyright conventions and the FTA with the EU.

## **COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN ECUADOR**

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains very weak. Rights holders struggle to enforce their copyright in practice, and attempts to do so through administrative authorities often linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continues to hamper effective enforcement and protection against infringing acts.

**Camcording:** Camcording is a problem in Ecuadorian movie theatres. In 2017, 22 illegal camcords of MPAA member films were traced to cinemas in Ecuador, down from 28 in 2016. This represents a slight decrease from the same period in 2016, but Ecuador still ranks third in the region after Mexico and Peru for camcording.

**Performance Royalties:** Further, the recording industry reports that it is often impossible to collect performance royalties for music and sound recordings, including from state-owned broadcasters like CNT. 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.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia be moved to the Watch List in 2018, in recognition of improvements made in the areas of market access and Internet enforcement. IIPA further recommends that the U.S. Government terminate the current Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system once it is satisfied that adequate progress has been made on the concerns outlined in this report.<sup>1</sup>

**Executive Summary:** The Government of Indonesia has recently shown commitment to improving IPR protection and market access. On June 12 and 13, 2017, the United States met with Indonesia under their Trade and Investment Framework Agreement (TIFA) and discussed a work plan for addressing U.S. intellectual property concerns, recognizing the urgency of needed progress in this area.<sup>2</sup> In 2017, the anti-piracy working group launched an Infringing Websites List program, which is designed to inform advertisers and marketers about websites that are primarily infringing and to encourage them not to support these pirate websites with advertising revenue. Website blocking, established by Regulations Nos. 14 and 26 of 2015, has proven an effective measure and demonstrates the government's cooperation with industry to combat piracy. Under these regulations, the government has enforced against hundreds of infringing websites that facilitated infringement of films and music; the government has been asked to further enforce against additional websites causing serious harm to the creative industries, and cooperation has been good. However, these Regulations should be improved by adding a provision to address the practice of "domain hopping." While the government's dedication to anti-piracy efforts is positive, the problem remains serious; on average in 2017 there were approximately 2.5 times the page views to the top piracy websites in Indonesia as there were page views to the top legitimate sites. While market access appeared to improve in 2016, when the Government of Indonesia issued Decree No. 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 could be undermined by planned implementation and enforcement of aspects of the 2009 Film Law that would impose significant barriers to market entry. These include a prohibition on dubbing of imported films for theatrical distribution, exhibition, and broadcast on television; the imposition of a 60% screen quota for Indonesian films; and other restrictions on the film industry. Finally, a number of troubling provisions in the 2014 Copyright Law remain unaddressed. Amendment is still needed to reconcile the Copyright Law provisions relating to the full transfer of rights with the provision on reversion of rights, which create legal and commercial uncertainty. In 2018, IIPA asks that the U.S. Government continue to engage the Indonesian Government to maintain focus on continuing effective actions under the law to address primarily infringing websites; provide clear guidelines to inhibit illegal live streaming and camcording in cinemas; amend the Film Law or its implementing regulations to remove significant barriers to market entry; set enforcement benchmarks (including judicial reform); and expand cooperation to address the concerns of all of the copyright sectors.

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<sup>1</sup>For more details on Indonesia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Indonesia's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>U.S. Trade Representative, Press Release, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/united-states-and-indonesia-agree-step>.



## **PRIORITY ACTIONS REQUESTED IN 2018**

### **Enforcement:**

- Continue enforcement of the Copyright Law under Regulations Nos. 14 and 26 of 2015, including blocking of additional primarily infringing websites.
- Commit to judicial reforms in Jakarta and other commercial centers, and establish special IP criminal courts.
- 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 prey upon legitimate pay television and newly-emerging over-the-top (OTT) platforms.

### **Legislation:**

- Amend Regulations Nos. 14 and 26 of 2015 on site blocking to prevent “domain hopping” by providing that additional domains, URLs or IP addresses that resolve to “materially the same website” as one already approved for blocking can be added to the blocking list quickly and easily.
- Eliminate Articles 18 and 30 of the Copyright Law, which provide that the rights in music and performances transferred by sale revert back to the author or performer after 25 years.
- Seek repeal of the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
- 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.
- Provide clear guidelines explaining that live streaming and camcording in cinemas is illegal and violate exclusive rights.
- 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 the OTT regulations comport with Indonesia’s treaty commitments and international best practices that protect copyright and related rights and do not interfere with the exercise of these rights.
- Clarify the government’s e-commerce roadmap launched in 2016, including Circular Letter No. 5 (2016) on user-generated content (UGC), and any related regulations with respect to takedown requirements and sanctions for failure to comply with regulations; 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.<sup>3</sup> Local industries report that in a given month, 18 million copies of pirated films, music, and software are circulating in the Indonesian market—mostly online but also appearing in shopping malls and markets.<sup>4</sup> 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.<sup>5</sup>

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** The Indonesian Government should be commended for its actions to address Internet piracy in 2017. These improvements will benefit all creators, Indonesian and foreign alike. Working with APROFI and ASIRI, the

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<sup>3</sup>See “Indonesian music sales now 95.7 percent piracy,” Jakarta Post (Sept 18, 2015), <http://www.thejakartapost.com/news/2015/09/18/indonesian-music-sales-now-957-percent-piracy.html>. See also “Piracy is now a massive issue in Indonesia,” Daily Seni, Astro AWANI (Oct. 4, 2015), <http://english.astroawani.com/entertainment-news/piracy-now-massive-issue-indonesia-75356>.

<sup>4</sup>See “Filmmakers, musicians join forces with police,” Jakarta Post (September 19, 2015), <http://www.thejakartapost.com/news/2015/09/19/filmmakers-musicians-join-forces-with-police.html>.

<sup>5</sup>See “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>.

government took effective action by disabling access to hundreds of primarily infringing domains between 2015-2017, following implementation of the Regulations Nos. 14 and 26 of 2015. As of December 2017, 391 infringing domains related to the film sector have been verified for blocking. These actions have resulted in a significant reduction of audiovisual and music piracy in Indonesia on the websites involved, with a reduction of traffic to the specific sites blocked by 74-94% when measured six months after access was disabled. However, data shows traffic to piracy sites is nevertheless increasing, as the well-known piracy sites employ a strategy of “domain hopping”—redirecting domains to circumvent the results of site-blocking efforts. Notably, access to *Planetlagu.info*, the most popular infringing website in Indonesia in 2017, was blocked in the second half of 2017 and saw its traffic drop 97% from its peak of 36 million monthly visits. However, the operators quickly switched domain names: first to *planetlagu.site*, then to *planetlagu.name*, and currently, to *planetlagu.blog*. Thus, digital piracy remains a concern, with tens of thousands of infringing-content URLs identified each year by the recording industry and numerous instances of domain-hopping: websites, once blocked, can quickly revive under other domains (for example, *planetlagu.info* also reappeared as *laguaz.net* and *lagu123.net*).

Broadband Internet access in Indonesia is still nascent compared to other emerging markets, but is sharply rising, while mobile penetration has exceeded 100% for several years.<sup>6</sup> The legitimate commercial market for online dissemination of copyright works is gaining a foothold: iTunes, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services operate in Indonesia. 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 legal distribution of creative output of foreign and local right holders.

**Book Piracy:** Continued piracy of published materials in the country makes Indonesia one of the worst markets in Asia for publishers. Unauthorized photocopying of academic textbooks remains a significant concern for publishers. While industry efforts to disrupt unauthorized photocopying at dozens of copy shops situated near universities in Jakarta and Yogyakarta were successful, sustained unauthorized photocopying activities unfortunately continue. The Government of Indonesia should encourage university administrators to adopt appropriate use and copyright policies in order 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.<sup>7</sup> Pirate cable operators in the provinces routinely rebroadcast channels without authorization. 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).

**Unauthorized Camcording and Live Broadcasting of Movies:** In recent years, camcording piracy has evolved to take advantage of mobile phones. Increasingly, piracy is taking the form of live streaming (broadcasting) of films directly from cinemas, using mobile social media apps, such as Facebook, Instagram & BIGO Live. The film industry reports that, in November 2017, a partial camcord/live stream was observed in Baturaja. In this instance, part of a film was captured and live-streamed on Facebook.

**Illicit Streaming Devices (ISDs):** ISDs<sup>8</sup> 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 are sometimes advertised as enabling infringement of

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<sup>6</sup>International Telecommunications Union, *Measuring the Information Society Report (2016)*, available at <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/mis2016.aspx>.

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

<sup>8</sup>In 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.



copyright or other illegal activities. Chief among these activities is 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 film industry reports that stores located in the *Ratu Plaza*, *Glodok Plaza*, and *Plaza Pinanangsia* are selling ISDs, which are also offered for sale on e-commerce sales promoting the sale of ISDs: *Bukalapak.com*, *Lazada.co.id*, *OLX.co.id*, *Q0010.co.id* and *Tokopedia.com*. The Indonesian Government must take steps to crack 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.

**Hard Copy Piracy:** Some industries report that retail piracy in markets, kiosks, and malls remains a problem in the major cities across Indonesia.<sup>9</sup> 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.”<sup>10</sup> 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, 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 onto various mobile devices or carriers.

## **ENFORCEMENT UPDATES**

While the online enforcement environment in Indonesia improved in 2017, 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 continue additional enforcement rounds in 2018 to allow legitimate online distributors the opportunity to increase their market share. Moreover, as discussed below, the website-blocking regulations should be revised to streamline applications to prevent “domain hopping.” It is important that the government maintain or establish regular channels of communications with all of the affected industries.

**Site-blocking (Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo)):** Implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015, which address infringing websites, continued to be successful in 2017. 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 at least 391 infringing domains reported by industry groups through December 2017 had been disabled and numerous additional infringing websites were referred to the government toward the end of 2017. So far enforcement has been promising, with excellent compliance by the seven largest ISPs. The music industry reports that about two-thirds of all infringing websites requested be added to the blocking list are now inactive.

**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 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 March, APROFI launched an anti-piracy video aimed at consumers.<sup>11</sup> IIPA

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<sup>9</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hot spots replete with pirate materials.

<sup>10</sup>See 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>.

<sup>11</sup>See Film Producers Association Launches Anti-Piracy Campaign, *Jakarta Globe*, March 15, 2017, available at <http://jakartaglobe.id/features/film-producers-association-launches-anti-piracy-campaign/>.



encourages the task force to include other industries, such as book publishers, which is damaged by piracy but to date has not received as much attention as other industries.

**Infringing Website List (IWL):** In October 2017, APROFI (Film Producers Association), ASIRI (Indonesia Recording Association) and PPPI Jakarta (Advertisers Association), supported by BEKRAF, launched an Infringing Website List (IWL) program. The IWL identifies key piracy websites for the purpose of informing advertising brokers and networks, and the brands that are advertised on them, of the illegal nature of these websites, and encouraging them not to place advertisements on such 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. IIPA commends the Government of Indonesia for supporting this joint effort to reduce funding to primarily infringing websites and will continue to monitor the progress and results.

**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.<sup>12</sup> 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 a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle piracy cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids.<sup>13</sup>

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

- The Anti-Corruption Commission should work with the Supreme Court Ethics Committee to appropriately draft guidelines for the court.
- Courts should publish judicial decisions to improve transparency.
- The Government of Indonesia should implement necessary training sessions 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,"<sup>14</sup> few cases proceed to a conviction, and most result in extremely low and non-deterrent criminal fines.

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<sup>12</sup>See Bekraf Forms Special Task Force to Counter Piracy, Tempo.co, Oct. 11, 2016, <https://en.tempo.co/read/news/2016/10/11/056811298/Bekraf-Forms-Special-Task-Force-to-Counter-Piracy>.

<sup>13</sup>At present, case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity and create deterrence in copyright infringement cases.

<sup>14</sup>Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, available at <http://www.regulations.gov>, under document ID# USTR-2010-0037-0059.

## COPYRIGHT LAW AND RELATED ISSUES

Passage of the Law Concerning Copyright (2014), which replaced the prior 2002 law and went into force in October 2014, and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning 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) are both welcome steps toward improving copyright protection and enforcement in Indonesia.<sup>15</sup>

However, some provisions of the Copyright Law raise serious concerns. Others require further clarification in implementing regulations. In several cases, critical changes were omitted.

### Concerning Provisions in the Copyright Law

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

**Internet Exception:** The Law provides a broad exception under Article 43(d) for “making and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating.” Both parts of this provision set a terrible precedent and would act to discourage and severely undermine legitimate business models built on the rights of authors, right holders, and related right owners to control the manner and means in which they authorize the making and disseminating of content through information and 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.

**Termination of Transfers:** Articles 18, 30, and 122 of the Law provide for a possible reversion or “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, the provisions do not state explicitly that an author needs to invoke the termination in order for it to be effective. Nor do they address what happens to existing contracts at the time of termination. It is also unclear when a “true sale” occurs (an undefined phrase). In any event, these provisions should be removed.

**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

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

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 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.

**RMI Violations:** In a somewhat perplexing development, the Law provides that rights management information (RMI) violations occur only when moral rights are affected. 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 that, 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 broad and potentially problematic.

**Registration, Invalidity, and Recordation Requirement:** While registration of copyright remains voluntary under 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 because many invalid copyrights get registered, including by IP infringers. It is hoped that this new provision will enable the authorities to review and invalidate false applications or registrations. IIPA suggests that 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 recordation 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. Implementing regulations should clarify 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, preliminary (provisional) injunctions will take too long to obtain. It also appears that 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.

## Regulations Nos. 14 and 26 of 2015 (Site Blocking)

While the relatively new site blocking regulations are a welcome addition to the enforcement regime, there is currently no way to prevent "domain hopping." The regulations should be amended to provide for a quick and easy process of adding additional domains that resolve to "materially the same website" to a report and recommendation without a separate application. This would bring Indonesia's regulation in line with other countries' site-blocking

provisions. Specifically, new subsection (3) to Article 6 of the Regulations should be amended to provide: "Additional domains, URLs or IP addresses that resolve to materially the same website in the report shall be added to the receipt report register of Copyright infringement and / or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation."

## **Broadcasting Law**

A new Broadcasting Law is under development by the legislature and awaits publication sometime in 2018. It is anticipated that the new law will address convergence issues, such as the intersection between traditional broadcasting/pay TV and OTT. A draft regulation aimed at OTT services is overly broad and raises concerns for unintended implications on other sectors. The draft regulation requires that all OTT platforms (including foreign platforms, and defined very broadly to potentially include all kinds of internet services, not just OTT services), have local bases, use national payment gateways, and localize their data, with the objective of securing tax from foreign platforms. There is no timeline for finalizing or issuing revised regulations. Revised regulations, if any, should narrow the scope to comply with international norms on OTT and should not over regulate, but rather should promote commercial development of this sector, consistent with stated government policy to attract foreign investments.

## **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.<sup>16</sup> The film industry reports that four camcords were traced to different local cinemas in Jakarta in 2016 and 2017. 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. Moreover, regulations should be introduced that would provide a clear legal basis to prohibit live streaming and camcording in cinemas.

**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 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, visual art, and architectural works. However, 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,

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<sup>16</sup>Preferably, 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.

copyright infringement should be included as a predicate crime for remedies under the Indonesian 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 No. 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 are also removed. 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.<sup>17</sup> 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.<sup>18</sup>

**Amended Law for Information & Electronic Transactions:** The Ministry of Communication and IT announced an amended Law for Information & Electronic Transaction (UU ITE) No. 11 Year 2008, effective November 28, 2016.<sup>19</sup> 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 May 2016, the

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<sup>17</sup>If 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.

<sup>18</sup>Such 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.

<sup>19</sup>The 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>.

Government of Indonesia issued Decree No. 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, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.<sup>20</sup>

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. The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors

**Eliminate Problematic Provisions from the Film Law:** Directly counter to the positive step of removing film from the Negative Investment List, the Ministry of Culture and Education has drafted implementing regulations to enforce the 2009 Film Law, which would impose significant new barriers in the film market. These draft regulations have many troubling provisions.

First, the draft regulations include a 60% screen quota for Indonesian films and measures to limit the importation of foreign films. If implemented, such protectionist measures would likely lead to lost revenue in local theaters and to limited choices for Indonesian consumers. Such measures would also limit local industry's exposure to the expertise and skill of foreign producers. Moreover, such quotas often leave a huge opening for the purveyors of pirated content.

Second, IIPA also objects in principle to Article 43 of the 2009 Film Law which, if enforced, would ban dubbing of imported films. This is a discriminatory and protectionist policy, which is contrary to the interests of Indonesia's own citizens. Dubbing of imported films into a local language is a commercial decision that should be based on business considerations and market forces.

Third, the Film Law includes some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration. These could have unintended consequences such as restricting foreign participation in the market and curbing business efficiency. Indonesia should revise the draft regulations and incorporate international best practices, notably recognizing the exclusive right of rights owners 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.

**Collective Management Organizations:** After the introduction of broadcasting and public performance rights into the law in 2014, the government has focused on organizational issues regarding CMO-related organizational issues, tariffs, and other collective management issues. However, concerns remain about the government's rate-setting process and overall excessive governmental intervention in the collective management area, including the government's accreditation of numerous CMOs to manage the same categories of rights, which has caused unnecessary confusion and inefficiencies in collective licensing. 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.

**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. This is a concern for the pay-TV industry. Although regulations issued in 2007 provided a series of exemptions, statements by the

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

Indonesian Broadcasting Commission (KPI) in 2015 calling for its implementation have raised concerns about the possible deleterious effects of such a requirement.

**Customs Valuation:** Indonesia applies a 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. This regulation appears to be defunct, and should be permanently and officially abrogated.

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

In September 2017, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access, and determine 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.”<sup>21</sup> IIPA, recognizing the progress Indonesia has made towards meeting the GSP criteria, recommends that the U.S. Government terminate the investigation once it is satisfied that adequate progress has been made by the Indonesian Government to remedy the deficiencies outlined in this report.

## **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, recordation requirement, and unworkable provisional measures provision appear to be out of compliance with Indonesia’s international obligations.

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<sup>21</sup>19 U.S.C. §§ 2462(c)(4) and (5).

# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2018.

**Executive Summary:**<sup>1</sup> Trade with Peru has almost doubled as a result of the U.S.-Peru Trade Promotion Agreement (TPA), which entered into force on February 1, 2009. Peru initially made promising steps to implement the comprehensive Intellectual Property Rights (IPR) chapter of the TPA, which contains high standards for copyright protection and enforcement in some areas. However, Peru has yet to complete implementation. For example, Peru's law lacks a provision that provides statutory damages for civil copyright infringement. Peru must also ensure that infringing services cannot avoid liability. Most importantly, however, Peru needs to invest more effort into enforcement based on the legal tools already at the authorities' disposal.

While there has been some improvement in enforcement, piracy continues to be a serious problem in Peru, both online and on the streets. There has been a long-standing digital piracy problem in Peru, which has become a safe haven for pirate sites distributing content throughout Latin America. Online piracy has continued to grow strong, undermining the market for legitimate content in Peru and across the region. Individuals based in Peru operate many websites offering vast music catalogs from national and international artists to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile. Pirate businesses, which generate profits by selling advertising and user data, flourish as a result of the lack of coherent action by the government. For example, *SetBeat* has more than 900 million monthly visitors from across the region in the last six months. Urgent action is required from the government to tackle this music piracy problem that is severely damaging Peruvian creative industries and the rights of composers, artists, performers, publishers, and producers. Notably, Peru lacks a specific law dealing with camcording and remains one of the main sources of camcorded materials in the region. To facilitate enforcement against this form of piracy, criminal penalties without a need to prove a profit intent should be enacted. The Internet piracy market managed within Peru is steadily increasing, and its impact is affecting not only Peru, but also other countries in the region. The websites attract hundreds of thousands, and for some countries, millions of visitors.

### PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2018

- Pass legislation to address secondary liability principles for online copyright infringement, implement provisions allowing 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 TPA obligations.
- Devote significantly more resources and political support to combat digital piracy.
- *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), the agency charged with promoting and defending intellectual property rights, should work to consistently build upon the recent positive examples of IPR enforcement against administrators of piracy websites, who continue to find Peru to be a safe haven.
- Pass legislation criminalizing unauthorized camcording of films without the need to prove an intent to profit.
- Improve the efficiency and effectiveness of the judicial system.

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<sup>1</sup>For more details on Peru's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Peru's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.





## **COPYRIGHT PIRACY IN PERU**

**Internet Piracy:** Internet-based piracy is 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 18 million Internet users in Peru, representing about 56% of the population.<sup>2</sup> Mobile broadband penetration is growing rapidly. In 2016 there were 62.0 active mobile broadband subscriptions per 100 inhabitants, up from 55.0 the previous year.<sup>3</sup> Fixed broadband is not nearly as prevalent, with only 6.7 fixed broadband subscriptions per 100 inhabitants (up from 6.4 in 2015).<sup>4</sup>

Streaming of pirated audiovisual content is prevalent in Peru. In 2017, the top 180 Spanish-language, audiovisual piracy websites received 260 million visits from Peru. *Repelis.tv*, a website MPAA identified as a notorious market in its 2017 out-of-cycle review filing, has been active since 2013 and receives a high volume of traffic from Peru. This site is a stream-linking site that offers more than 150,000 links to more than 10,000 illegally reproduced titles including movies and television series. Following the regional trend, Peru has also seen the introduction of Android and Kodi boxes as a means of piracy. Piracy websites, like *Repelis.tv*, and devices that facilitate infringement, like preloaded Kodi boxes, affect the legitimate market in the entire region and must be addressed with urgency. Although Peru has seen an influx in modes of infringement with Illicit Streaming Devices (ISDs) entering the market, the prosecution office is currently expanding the time and effort it dedicates to digital piracy. This helps prevent the piracy situation from worsening, even in light of the increased possibilities and methods for users to infringe.

Peru saw a significant increase in digital sales of recorded music in the last year, with almost all growth coming from streaming platforms. That increase is offsetting the very steep decline in physical sales (physical sales revenue has gone down from \$0.8m to \$0.1m in just two years). However, there is no possibility for the market to reach its potential because of the unfair competition created by pirate websites, who are operating openly in Peru and offering millions of illegal music tracks to consumers, mainly via mobile devices. If the legitimate music market is to develop, urgent action is required to tackle endemic piracy problems. There has been a long-standing digital piracy problem in Peru, which has been a safe haven for pirate sites distributing content all across Latin America. Hundreds of websites offering vast music catalogs from national and international artists have numerous domain names registered abroad, but were created, and are administered by, individuals operating within Peru. Digital piracy businesses have flourished with different functionalities spanning from streaming and stream ripping websites, download websites, and linking websites. These websites allow users to access and/or copy thousands of music tracks without authorization from rights holders and compete with legitimate services in the music market. Peruvian pirate websites profit by selling advertising placements and user data. Because the Peruvian Government does not take any substantive action towards the problem, these illegal business succeed. Beyond Peru, these websites are highly popular in places such as Argentina, Mexico, and Chile. Examples of the websites are *Foxmusica* (now subject to an INDECOPI order, see below), *FullTono*, *Enladisco*, *BuenTema* and *SetBeat*. All of these websites have a strong regional audience. *SetBeat* has more than half a million monthly visitors. The Peruvian Government needs to take the music piracy problem seriously because it damages the intellectual rights of Peruvian and international composers, artists, performers, publishers, and producers. It should also shift the focus and training at INDECOPI to better address the problem of digital piracy.

**Hard Goods Piracy:** Some industries, such as the motion picture and software industries, have found that 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 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, small stores, and stands located in informal

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<sup>2</sup>See [www.Internetworldstats.com](http://www.Internetworldstats.com).

<sup>3</sup>Data from International Telecommunication Union, *Measuring the Information Society Report 2017*, p. 144, [https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017\\_Volume1.pdf](https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf).

<sup>4</sup>Id.

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 websites and online marketplaces is becoming more popular as Peruvians embrace e-commerce. For example, *mercadolibre.com.pe* hosts listings of hacked video game consoles that come installed with infringing video games, as well as listings of circumvention devices bundled with infringing video 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 of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content. These discs are then sold in street markets and over the Internet. 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).

**Camcording:** Camcording piracy has grown exponentially over the last few years in Latin America. With the developments in camcorder technology, the camcordered copies are nearly perfect and make detection extremely difficult. Peru remains one of the leading sources of unauthorized camcords in the region and does not have a specific law regulating this issue. Twenty-five illicit audio and/or video recordings of MPAA member films were sourced from Peruvian theaters between January and November 2017. While this is a slight improvement compared to the same period in 2016, Peru is still the second largest source for camcordered films in South America, after Mexico. 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 makes it virtually impossible to obtain a conviction. Peru needs to enact legislation that would effectively criminalize unauthorized camcording of films.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

The TPA entered into force on February 1, 2009.<sup>5</sup> 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,<sup>6</sup> it has not yet achieved the objectives of the TPA, which were to improve the level of effective enforcement of copyrighted content online, including through confirmation of secondary liability principles and the availability of statutory damages. With no clear secondary liability principles in place, online intermediaries are not incentivized to participate at a level that will create a sustainable and lasting effect on the piracy situation. In addition to supporting the implementation of clear provisions on liability principles, INDECOPI should encourage engagement between rights holders, ISPs, and other key Internet intermediaries. Also, Peru's obligation to provide for pre-established, statutory damages in civil judicial proceedings (TPA Article 16.11.8) remains outstanding. This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement. Total trade between Peru and the U.S. has expanded significantly since entry into force of the TPA, with Peru particularly benefiting from it.<sup>7</sup> As such, Peru should fulfill its obligation to implement all provisions of the TPA.

## **OTHER COPYRIGHT LAW AND RELATED ISSUES**

**Bill on Performer Remuneration Rights:** The motion picture and recording industries are concerned with a mandatory licensing bill, known as either the Cultural Workers Bill or the Art Worker Bill. This bill, if implemented,

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<sup>5</sup>The 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>.

<sup>6</sup>Peru 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.

<sup>7</sup>See <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

would grant an unwaivable, nonassignable remuneration right for audiovisual and music performers on top of the existing contractual payments they receive, and even when such rights have been transferred or assigned through contract. The bill also creates an unwaivable remuneration right for made for hire authors of musical works and a mandatory remuneration payable when a recorded performance is copied to a new format. The remuneration claims will be subject to mandatory collective management. This would benefit the collecting societies involved at the expense of restraining trade for U.S. works because performer compensations are collectively bargained for and subject to worldwide exploitation. Peru has already implemented the rights of performers and other rights holders as provided in the international treaties. The proposed bill would only complicate the launch and operation of legal audiovisual and music services. Furthermore, it would frustrate the freedom of contract in the industries.

**Copyright Levies:** Peru is one of the few markets in the region that has implemented a private copy levy (along with Paraguay, Dominican Republic, and Ecuador), to compensate rights holders for the private use exception applicable to blank media. Unfortunately, the effort was abandoned mainly due to the lack of coordination with customs authorities. INDECOPI needs to urgently update the list of media to which the levy applies in order to keep up with and accurately reflect the current consumption habits. Also, new regulations need to include provisions that empower customs to enforce the levy.

**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 intent. The lack of anti-camcord laws to criminalize unauthorized movie recordings makes it difficult to obtain cooperation from law enforcement and prosecutors.

## **COPYRIGHT ENFORCEMENT IN PERU**

Criminal, civil, or administrative enforcement against piracy is hampered by a distinct lack of resources devoted to combatting piracy, and, in particular, online piracy. There has been some improvement in this area and industry sectors generally report good cooperation with the criminal enforcement authorities (prosecutors, police, and tax authorities) handling hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that would result in effective sanctions to 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.”<sup>8</sup> This commission should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental priority. 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 region. However, more needs to be done to ensure effective and proper copyright enforcement.

### **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. For example, the jurisdiction of the specialized IP prosecution offices in Lima are based on territory. Cases outside of Lima need to be

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<sup>8</sup>The 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).

prosecuted by local prosecutors, many of whom are not specialized in this matter. Specialized prosecution offices should have jurisdiction over the entire country. There is also a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations, support the National Police, and provide troops when large raids are conducted. Moreover, the National Police lacks sufficient resources to develop intelligence plans that would support investigating and discovering large warehouses of pirated goods.

The four IPR prosecutors in Lima's special prosecution division work with INDECOPI when they are requested to do so. Unfortunately, filing 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 time of the raid before getting to court. Amidst all of these challenges, Peru has made some positive strides in enforcement. On September 13th, 2017, the High-Technology Police Unit in Lima, Peru, (DIVINDAT) and the 2nd IP Prosecution Office executed raids on four premises belonging to the operators of the websites *Pelis24.tv*, *Series24.tv*, and *Pelis24.com*. These sites were constantly amongst the five largest Spanish-language websites in the LATAM region. These raids were executed following a court order obtained on September 8th, 2017, which authorized raids on professional and home premises in order to seize electronic equipment, documents, and any evidence related to the three mentioned websites; temporary arrest of the three operators of the websites for 48 hours, extendible for up to 6 months, depending on the evidence collected and cooperation of the subjects; and suspension of the three websites. The result of the court order was very positive and produced the first-ever precedent on a digital copyright infringement criminal case in the country. It was the first of its kind, in Peru, to recognize an injunction as an adequate means to interrupt the continuous, criminal, intellectual property violations. Additionally, the court order solidified that this type of activity may constitute an act of infringement by distributing copyrighted works to the public and that the monetization through advertisement suffices as indicating a profit intent. While these victories are well-received, more resources need to be invested in enforcement to ensure sustainable change.

**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 non-deterrent. Criminal sentences take between 3-5 years to be issued, and cases often languish even longer. For example, a criminal case involving circumvention devices that was filed in 2011 was repeatedly delayed due to excessive bureaucracy and appeals, but was finally concluded in 2017 when the Supreme Court of Peru rejected an appeal by the defendants. The defendant was found guilty of Article 220-B of the Peruvian Criminal Code: Products made to circumvent a technological protection measure. Despite this positive outcome, many cases remain “pending” and languish in the courts. Some cases for some of our members have been pending for nine years or more as a result of multiple appeals and administrative delays. Such delays cause brand owners to incur prolonged legal fees, which become even more burdensome when courts do not impose deterrent sentences. 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: (1) the 2004 amendments, which provided an increase of minimum sentencing to four or more years for copyright infringements, and (2) amendments made in November 2006 to penalize repeat 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 imposed by its administrative bodies. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPI's enforcement efforts.

**Need for consistent administrative enforcement:** Despite some legislative deficiencies, INDECOPI must work within the current legal regime to take action against pirate sites, suspend their domain names, and fine the

operators. INDECOPI needs to maintain consistent enforcement and strengthen its commitment towards the digital piracy problem. Unfortunately, due to its wide range of activities and competences, INDECOPI tends to get pulled in different directions, resulting in a lack of consistent action or lasting effort on individual issues.

**Increasing deterrent sanctions:** Through Legislative Decree No. 807, INDECOPI has the authority to issue 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 support greater enforcement against piracy, IIPA suggests that regulations be issued increasing and establishing fines, which would also help fund INDECOPI's actions.

**Developing a digital anti-piracy campaign:** Record producers have filed a number of cases with INDECOPI to address digital piracy. These collaborative efforts should remain consistent and develop into a long-lasting, anti-piracy campaign. On October 10, 2017, INDECOPI issued a suspension order to a significant pirate service operating under the domain name *Foxmusica.me*. IIPA expects that this action will be followed by more orders. At this point, 19 additional cases have already been filed. While this is a positive step, rights holders have identified more pirate domains that should be the subject of future orders. INDECOPI's continued interest in, and attention to, digital piracy will be crucial for tackling these pirate sites.

# SOUTH AFRICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR return South Africa to the Watch List in 2018.<sup>1</sup>

**Executive Summary:** As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. It is now more important than ever to maintain and expand proper incentives for investment in the creation of original material—of motion pictures, music, video games, and books and journals in all formats. New technologies for distribution of cultural materials provide exciting opportunities for growth of the copyright industries and all creators. To capture this opportunity, it is essential that right holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their goods and develop new legitimate services. South Africa's government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments. Indeed, in 2018 South Africa will host the second WIPO "Respect for IP" international conference. However, since 2015 South Africa has embarked on a project to update and amend its Copyright Act which resulted in three fundamentally problematic bills—the first a Copyright Amendment Bill in 2015, followed by a "Performer's Protection Amendment Bill," and in May 2017 a revised version of the 2015 Copyright Amendment Bill. The 2017 Bill raises many concerns for the content industries, and moves South Africa further away from international norms, rather than into compliance with the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) which South Africa signed in 1997 but has yet to ratify or implement. Moreover, it will undermine the potential of the modern marketplace because it fails to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in the distribution of revenue from licensing, rather than on ensuring the vibrancy of a free market in creative materials. Considerable work remains to make this Bill acceptable, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act go beyond those raised in this report. The Bill would benefit from revision, not only to reflect concerns from all stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for right holders and users alike. Considering the importance of the task of modernizing South Africa's Copyright Act, and the degree of concern raised by the creative industries with the current bill, IIPA recommends that the U.S. Government send a clear message that any amendments to the Copyright Act must address the concerns of *all* interested stakeholders.

### PRIORITY ACTIONS REQUESTED IN 2018

- Significantly improve the Copyright Amendment Bill and the Performer's Protection Amendment Bill to make them compatible with international treaties and commitments.
- Engage in effective enforcement against online piracy, including by appointing cybercrime investigators and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WCT and WPPT.

<sup>1</sup>For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## **COPYRIGHT LAW IN SOUTH AFRICA**

Amendment of South Africa's Copyright Law is needed to bring the country's laws into compliance with international treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), intended to effect this purpose. However, the 2015 Bill was highly unsatisfactory. Following criticism from many right holders groups, including IIPA, the 2015 Bill was tabled until further review and discussion with stakeholders. In December 2016 and May 2017, two bills, amounting to a revised version of the troubling 2015 Copyright Amendment Bill, were introduced. These revised bills, the 2016 Performers Protection Amendment Bill (Performers Bill) and the 2017 Copyright Amendment Bill (2017 Bill), address only a few of the problems in the 2015 Bill, and many of the most problematic provisions carried over to the new bills.

As drafted, many provisions of the bills lack clarity, create unnecessary burdens, or fall short of needed reforms. Major issues of immediate and primary concern to the copyright industries are the following:

- An ill-considered importation of the U.S. "fair use" rubric is 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.
- Licensing and regulatory mechanisms that are likely to undermine the digital marketplace by regulating the relationship between creative parties rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- Provisions for technological protection measures (TPMs) that fall short of consensus international standards regarding TPMs as set forth in the WCT and the WPPT, and as found in modern copyright statutes of many other countries.
- Unnecessary restrictions on the freedom of right holders to contract on the open market, a key factor for the healthy growth of the entire creative sector. For example, the 2017 Bill has a blanket override of contractual provisions with respect to "any acts which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act," and both bills limit assignment of rights to 25 years.
- New provisions regarding the "making available" right for record producers, which raise significant concerns because they are likely to be read far too narrowly, and would subject the making available right to a *de facto* compulsory licensing regime and a 50/50 split of revenues between producers and performers. As drafted, the provisions are incompatible with the WPPT.

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 and are incompatible with the WPPT. This is inconsistent with South Africa's welcome stated commitment to ratifying the WPPT.

### **2017 Copyright Amendment Bill (2017 Bill)**

Many of the proposals in the 2017 Bill suggest a mistaken assumption that there is a fixed market for works, and that the government's role is to regulate the internal relationships of the creative community rather than to incentivize new creative output. This misguided approach will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, South Africa will be taking a step backward in the effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered rights that would allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats. It is important to note that the 2017 Bill is an extremely broad-reaching document. IIPA's comments do not reflect comprehensive or complete revisions of the 2017 Bill, but instead highlight some of the major concerns for the copyright sectors.

## Fair Use; Exceptions and Limitations

The 2017 Bill drastically expands the exceptions and limitations to copyright in South Africa's law. The results are confusing, will undermine the predictability needed to support a robust marketplace in copyright works, and appear to far exceed the degree of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the WTO TRIPS Agreement. The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa's provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the "public interest" that would serve to constrain copyright protection.<sup>2</sup>

The 2015 Bill declared as "fair use" and non-infringing an indefinite number of activities and a broad range of purposes, thereby misapplying the concept of U.S.-style fair use to an unbounded regime. The 2017 Bill makes some small adjustments, and instead provides a closed list of eight broad categories of "purposes" that may be fair use. However, some of these purposes could be used to undermine the development of legitimate markets, such as the proposed fair use purpose of "expanding access for underserved populations," which, in addition to being unclear, could be used to generate revenue from copyright protected works without the involvement of right holders. Each use under the enumerated purposes is to be evaluated using at least the four statutory factors from the U.S. fair use test. However, this is likely to be difficult to apply, as South Africa lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United States. IIPA's members operate successfully both in the United States, the leading jurisdiction applying the fair use doctrine, and in the many other markets that do not. The relative confidence with which copyright owners and users can function within the fair use environment in the United States is a result of nearly two centuries of case law that has developed and (after codification) elaborated on the main factors to be considered; how they are to be balanced and weighed in particular cases; what presumptions ought to apply; and so forth. Without the foundation of a well-developed body of case law, South Africa's importation of the fair use doctrine seriously risks moving it out of compliance with its international obligations. Furthermore, South Africa's legal system lacks the negative consequences, such as statutory and punitive damages, that infringers face in the United States. Instead, infringers in South Africa would risk little more than deferred payment by claiming fair use, so the likelihood of misuse of the doctrine of fair use is great.

At the same time, the draft retains the "fair dealing" system that has, to date, operated in South Africa and also introduces a number of extremely broad new exceptions and limitations to copyright protection—including "scholarship, teaching and education,"—which have the potential to adversely impact the legitimate markets for educational texts, locally-distributed works, and online works in general. Taken together, these three parallel and overlapping exceptions regimes virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which do not. A robust legitimate marketplace for works cannot develop in such an unpredictable environment, and may well jeopardize the existing licensing system in the country. South Africa need only look to the Canadian educational publishing market to see the effects of an ill-advised adoption of a broad and undefined exception for education. A study by PricewaterhouseCoopers (PwC) predicted "significant negative consequences" for the South African publishing industry should the fair use provision and overbroad exceptions be adopted.<sup>3</sup> The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the 2017 Bill, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the 2017 Bill are of particular concern:

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<sup>2</sup>See <http://www.saflii.org/za/za/cases/ZAGPJHC/2016/228.pdf>.

<sup>3</sup>See "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry," available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>.



Section 12A(j) allows individuals to make copies for “personal uses,” while Section 12A(2) could be read to nullify any efforts to prevent the circumvention of TPMs, particularly given that the current draft amendments offer no protections for TPMs that restrict access to copyrighted material. These broad exceptions in effect allow for private copying without any remuneration for right holders, which is out of step with international norms.

Section 12A(1)(f) grants an exception for making translations for the purpose of “giving or receiving instruction.” The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the draft attempts to limit the scope by defining its purpose, it could undermine the author’s translation rights, which is a significant market for authors and their publishers, and one for which just compensation is warranted.

Section 13A provides an exception for temporary reproduction of a work “to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work which have no independent economic significance.” This provision also allows for *reformatting* an integral and essential part of a technical process, if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to put a stop to piracy. If any such exception is to be included, IIPA recommends that the word “lawful” be replaced by “authorized,” so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the “incidental” reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

Section 13B permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 13B(4) on open access of “scientific and other contributions” is overreaching and will likely undermine the rights of authors and publishers, and also deny authors academic freedom. Subsection 13B(5) specifically authorizes the copying of entire textbooks under certain conditions, even those that are available for authorized purchase or licensing, if the price is deemed to be not “reasonably related to that normally charged in the country for comparable works.” The impact of these provisions on normal exploitation of works for educational markets is likely to far exceed what is permitted under international standards.

Section 19D provides an exception for persons with disabilities, as defined earlier in the draft amendments to mean essentially disabilities that relate to the ability to read books. This would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring the provision in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

### **Making Available Right and Obstacles to Private Licensing**

The proposed amendment to Section 9(e) confirms that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive change, as this right underpins the digital music industry. However, the wording of draft Section 9(e) omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,”—communication to the public “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid any misunderstanding that the amended act is removing public performance from the existing Section 9(e) of the Act, we submit that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public.)

The 2017 Bill makes several changes to the law regarding the communication to the public and broadcast of works that could excessively interfere with private licensing, to the detriment of the operation of the digital marketplace. The provisions of the proposed new Section 9A of the 2017 Bill are extremely concerning, and are inconsistent with WPPT and international practices. The effect of Section 9A would be to downgrade the existing full exclusive rights, in existing Section 9(c) and (d), and the amended communication to the public and making available right in proposed Section 9(e), to mere remuneration rights, render contractual negotiations unworkable, undermine

the economics of the digital music economy, and introduce a sweeping statutory licensing regime that will negatively impact investment in new production.

For example, proposed amended Section 9A(1)(aA)-(aE) has the effect of downgrading the right of communication to the public from an exclusive right to a mere right of remuneration, by removing the ability of right holders to choose whether or not to license. It merely allows them to negotiate the royalty for a license, and if this fails, the newly constituted Tribunal may adjudicate the amount (a *de facto* compulsory license). It also establishes a requirement for advance notice and approval for the broadcast of sound recordings, introducing unnecessary complications to the right holders/broadcaster relationship, and confusingly seems to permit users to use works without first entering into a license (Section 9A(aB)). This is particularly troublesome because existing South African law (Section 9e) represents a global best practice in transposition of the WPPT standards, providing that the communication to the public right is an exclusive right. Limiting this exclusive right is counter to the modernizing aims of the bill. Exclusive rights enable record companies or their collective management organizations (CMOs) to negotiate fair commercial terms for the public performance and broadcast of sound recordings.

Most troubling, though, is the effect that these provisions would have on the exclusive making available right, which would fall within the sweeping statutory licensing scheme in Section 9A by reason of Section 9(e)'s grouping together the distinct rights of communication to the public and making available to the public.

The making available to the public right underpins the licensing of digital services that offer any "interactive" uses of music, i.e. any making available of music other than purely "linear" communications to the public where the user has no control over the music that is communicated by the service. (Linear transmissions are covered by the communication to the public right.) WPPT Article 14 provides that the making available right is exclusive, and does not provide any option for contracting parties to provide lesser protection, such as by making the right a remuneration right as proposed by Section 9A(1)(a)(iii).

In practice, the exclusive right enables right holders to enter into bespoke licensing agreements with a wide range of services of terms negotiated between the right holders and the service. This right has enabled the recording industry to licence some 350 digital services globally, and 14 in South Africa alone.

Downgrading the making available right to a mere remuneration right would be seriously detrimental to the music market in South Africa, likely reducing revenues for artists and producers alike, and possibly rendering the economics of a digital music market in South Africa wholly unworkable. At a minimum, it should be made clear that the provisions of Section 9A do not apply to the making available right, to be consistent with the international treaties and international practice.

Confusingly, Section 9A(2)(a) provides that royalties from communications to the public (and seemingly also from making available to the public, as a result of the two rights being grouped together in Section 9(e)) "shall be divided equally between the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust on the one hand and the performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust." This provision is incomprehensible, as it appears to be stating that a user would share in royalties it pays for use of the work, and brings in parties not normally relevant to the licensing of sound recordings. It is already established industry practice globally (and in South Africa) that the revenues from the public performance and broadcasting of sound recordings are shared equally between the sound recording owner (record companies) and performers. This draft provision should be revised to reflect and clarify this arrangement for public performance and broadcasting. Moreover, insofar as the section applies to revenues from the "making available" right, IIPA opposes a mandatory 50/50 split because it is contrary to international industry practice and would render the South African digital music market unviable. Both to adhere to international law and practice, and to sustain investment in the creation of new original recordings, it is essential that performers and labels be allowed to negotiate the relevant terms of their economic relationships.

To require that revenues from the making available right be shared equally between record producers and the performers would be economically unfeasible, considering that record companies cover all the costs and carry the risk of bringing new artists to market. Compulsory equal sharing of all revenues from making available to the public would remove all profit from record companies, making it economically unviable to continue to produce new recordings, and breaking the cycle of investment in artists and repertoire and therefore harming all participants in the creation of recorded music, from performers to record producers.

In addition, throughout Section 9A, the possibility of referring matters to the Intellectual Property Tribunal, which is granted the power to set the terms of license agreements between a right holder and a user, creates further government interference with the normal operation of private negotiations. While IIPA would support the role of the Tribunal with respect to licensing by collecting societies, it should have no role in private contracts between individual right holders and users.

### **Limitations on Contractual Relations**

Several new provisions in the 2017 Bill place direct limitations on contractual relations regarding copyrights, and as a result would restrict the ways that protected works could be offered for use and enjoyment in the market. These provisions place restrictions on the possible ways in which private parties can collaborate to facilitate the public's access to copyrighted works, and ultimately harm the market value of the books, films, sound recordings, video games, and other works created by South African authors. Section 22(b)(3) limits the term of an assignment to 25 years from the date of agreement. This is unnecessary and will ultimately hurt authors and artists, as, for example, it undermines record companies' ability to invest in new talent. An artist's catalogue or historic repertoire is an important part of the revenues a record company factors into its artist agreements. Proposed Section 22(a)(1) provides that rights belonging to the State may not be assigned. Finally, proposed Section 39B renders unenforceable any contractual term either restricting acts that would not infringe copyright or renouncing rights provided in the Copyright Act. While this revision to the 2015 Bill seeks to clarify that dedication of works to the public domain is allowed, it remains confusing and limits parties' ability to contract with each other.

### **Technological Protection Measures**

Technological protection measures are vital tools for the book publishing, film, music, and video game industries in the digital era, enabling creators and right holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering right holders to explore new markets opened up by current and emerging technologies. The 2017 Bill introduces protections for certain TPMs, but these fall short of the scope of protection that would meet the standard set forth by the WIPO Internet Treaties and the global consensus reflected in the laws of many other countries. The draft definition of "technological protection measure" in Section 1 covers only those measures that are "designed to prevent or restrict infringement of copyright work"; but the consensus global standards also cover TPMs that control access to copies of works, as reflected in the WIPO Treaties' language calling for such safeguards. The protection against unauthorized access, and not solely against infringement, is at the heart of global TPM standards. A well defined TPMs standard provides right holders with the tools necessary to combat, not just the use of illegally-obtained works, performances, or phonograms, but also the traffic in and provision of circumvention devices and services.

Section 28P of the 2017 Bill requires considerable further review and refinement. As drafted, it would allow circumvention of TPMs in order to carry out any "act permitted in terms of any exception" under the Copyright Act, which exceptions, as discussed above, are exceptionally broad. The provision further allows third parties to provide circumvention services with respect to permitted acts using circumvention devices. By taking this blanket approach, the legislation omits the careful tailoring needed to ensure that statutory exceptions to the TPMs provisions are confined to situations in which there is no alternative means for carrying out the non-infringing use, and therefore avoid undermining the basic integrity and effectiveness of the prohibition on circumvention, or on trafficking in circumvention devices or services.

## **Intellectual Property Tribunal**

Proposed amended Sections 29 through 29S would establish an Intellectual Property Tribunal, to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things are required by the 2017 Bill. Nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the 2017 Bill adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including broadcasts or to reproduce and publish out of print additions for "instructional activities," with few limitations.

To the extent that a revitalized Tribunal is to be considered, it would best serve the South Africa market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect market forces based on a willing buyer and a willing seller, and not by reference to a perceived and vague "public good." If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

## **Collective Management of Rights**

IIPA is concerned by the draft provision requiring one CMO for each right (proposed Section 22B(4)(b)(6)). It appears this could prohibit the existing collaboration between performers and producers in the SAMPRO CMO, which administers needle time rights on behalf of both recording artists and record labels. If that interpretation of the drafting is correct, this proposal goes against the interests of those right holders, the users (licensees), the public at large, and industry standards. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers' and producers' rights.

Also troubling is draft Section 22D(1) which proposes that users (as well as right holders) should have control over collecting societies. There can be no possible justification for allowing users to control an entity from which they seek licenses.

As a general point, it is also vital that any rates set by the Tribunal for public performance or "needle time" should reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice, which seeks to ensure that right holders are remunerated adequately for the high value of recorded music.

## **State Intervention in Private Investments and the Public Domain**

The 2017 Bill contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works "funded by" or made under the direction or control of the state. This broad provision could be interpreted to involve works developed with the most remote of government interaction and could reverse incentives for public-private cooperation in creative development.

## Term of Protection

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published. The 2017 Bill should be revised to include a proposal to extend the term of protection for sound recordings to 70 years. This will provide greater incentives for the production of sound recordings, and 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.

## 2016 Performers' Protection Amendments Bill (Performers Bill)

A portion of the original 2015 Copyright Amendment Bill, now dubbed the Performers' Protection Amendments Bill, was published separately in December 2016, apparently to implement provisions of the Beijing Treaty. It is reportedly on hold until consideration of the 2017 Bill is concluded. Like the 2017 Bill, areas of the Performers' Bill cause substantial concern, for the same reasons.

In particular, Section 3A seeks to limit the term of assignment to 25 years. As discussed above, this will have a negative impact on both industry and individual authors. Section 5 would introduce a sweeping statutory licensing scheme equivalent to that proposed in Section 9A of the 2017 Bill. Section 3B introduces producers' rights in a way that is inconsistent with the existing and proposed Section 9 of the Copyright Act.

## Cybercrimes and Cybersecurity Bill

This bill aims to put in place a coherent and integrated cybersecurity legislative framework. However, the bill overreaches and grants a concerning level of discretion to the government's security cluster. For instance, the bill grants the South African Police Service and the State Security Agency far-reaching powers to investigate, search, and seize literally any electronic device, with verbally granted search warrants deemed sufficient to take action. Such a provision could invite abuse. IIPA recommends that this bill be revised to place limits on such powers, and also to add a site-blocking provision similar to successful provisions across the European Union.

The bill defines an Electronic Communication and Service Provider (ESCP) very broadly. An ESCP includes a person who provides an electronic communications service with an electronic communications service license; a financial institution; or anyone (including an entity) who processes or stores data for someone else—an ESCP is, thus, essentially "everyone." ESCPs, pursuant to the bill, would be required to keep their customers updated about cybercrime trends, but the bill does not specify the frequency of these updates nor the mode of communication that should be employed. This section also requires that companies preserve any information that may be of assistance to law enforcement agencies, including origin, destination, route, time, date, size, duration and type of service. IIPA urges policymakers to revise the bill to offer more clarity, more specificity, and less onerous requirements for online stakeholders.

## MARKET ACCESS ISSUES IN SOUTH AFRICA

**Broadcast Quota:** In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio. While the regulations have yet to be finalized, IIPA recommends that that market forces, rather than discriminatory quota regimes, should be used to determine programming allocation.

**Online Value-Added Tax:** In May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 14%, the tax includes online selling of content such as films, TV series, games, and e-books.

## **COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA**

Creative sectors in South Africa are growing, but face the challenge of illegal competition. One group of South African artists lamented that they “came together as youths to try and make a living out of music, but these street vendors are killing our business by illegally selling pirated CDs and DVDs that we would have released.”<sup>4</sup>

**Internet Piracy:** Online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. Easy access to pre-released film and television content through international torrent, linking and cyberlocker sites, also fuels online piracy in the country. As South Africa lacks injunctive relief for right holders, consumer access to these infringing sites continues unabated.

**Piracy Devices and Apps:** Set-top boxes and sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series or sporting events. These devices are most commonly sold to South African consumers online, on services such as *gumtree*. There are some companies that develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns.

**Parallel Imports:** The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. Industry stakeholders are in the process of developing a MOU with the Film and Publication Board, which will focus on joint cooperation on enforcement against parallel imports.

**Enforcement:** The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the legislation that right holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this legislation. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

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<sup>4</sup>Savious Kwinika, “South Africa: Piracy Frustrates Budding Artists,” *allafrica.com* (June 9, 2014), available at <http://allafrica.com/stories/201406100742.html>.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland remain on the Watch List in 2018.<sup>1</sup>

**Executive Summary:** Right holders continue to face serious difficulties in enforcing their rights online as a result of inadequacies in Switzerland's legal framework and enforcement regime. In 2013, the multi-stakeholder *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright (AGUR12) issued a "compromise" recommendation, partly steered by the government. In November 2017 the Federal Council adopted a "dispatch" (i.e., an explanatory report) and a legislative draft, which will now be debated by the National Council and the Council of States. The proposed amendments to the Swiss Copyright Act fall short of AGUR12's unanimous 2013 recommendations. While certain aspects of the draft amendments provide positive and welcome changes, such as an increased term of protection to match that offered elsewhere, they contain a number of troubling provisions. Moreover, the draft amendments omit important and much-needed protections. In particular, the government persists in its position that individual downloads from illegal sources are not themselves actionable.<sup>2</sup> And while the draft offers one isolated enforcement instrument (a stay-down duty for certain hosting providers), it leaves large parts of Switzerland's enforcement deficit unresolved (including by not providing for access blocking or providing for a legal basis for obtaining injunctions against intermediaries). It also introduces a troubling collective management remuneration right for Video on Demand (VoD) that will interfere with industry practice, including in the music industry. The government's dispatch and public comments on the draft demonstrate an unwillingness to address either of these two key issues, siding with Internet Service Provider (ISP) preferences against enforcement needs. Moreover, until the Copyright Act amendments are enacted, which will be no earlier than 2019, unprecedented restrictions remain in place, arising out of the *de-facto* ban on the use of IP address evidence in civil and criminal copyright actions as a result of the 2010 *Logistep* case, which effectively eliminates the ability of right holders to enforce their rights online.

The overall timeframe for reform remains frustrating for right holders: the AGUR12 working group was established in 2012, but legislative amendments are not expected to be adopted before 2019. Moreover, the absence of a meaningful reform bill 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 proposed amendments are unsatisfactory and insufficient. The enforcement deficit 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 improve ISP cooperation as part of the work needed to address the piracy enforcement situation, the dire state of which raises serious questions about Switzerland's commitment to comply with its obligation under the WTO TRIPS Agreement to provide a remedy for any form of infringement, including on a cross-border basis. The Government of Switzerland should address online piracy now and revise the draft amendments to the Copyright Act to bring it in line with the TRIPS requirements, including by providing a site-blocking mechanism.

<sup>1</sup>For more details on Switzerland's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Press release, "Federal Council adapts copyright law to the digital age," November 22, 2017, available at <https://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2017/2017-11-221.html> ("the principle that consumers who take advantage of such illegal offers will not be criminalised.").



## **PRIORITY ACTIONS REQUESTED IN 2018**

- Improve the draft Copyright Act amendments to provide efficient tools against all types of piracy, regardless of technical details and including cross-border piracy. This should include a mechanism to block access to copyright infringing websites and effective remedies with regard to intermediaries or ISPs.
- Accelerate implementation of positive developments in the draft Copyright Act amendments, for example, the extension of term of protection for producers and performers to 70 years.
- Eliminate from the draft Copyright Act amendments proposed new provisions that impede VoD exploitation and the development of on-demand/non-linear services in Switzerland, notably the proposed collective VoD remuneration. If elimination is not possible, at minimum, concert films and music videos should be excluded from the scope of the remuneration for VoD provisions, as recommended by the AGUR12 working group.
- Require datacenters and ISPs to implement better "know-your-customer" policies and enforce that requirement.
- Publicly affirm that Switzerland's exceptions to copyright permit single copies for private use only if they derive from a legal (authorized) source. Also, end the Federal Arbitration Committee's levy on "Catch-Up TV," which is based on the presumption that the recording and making available of entire TV channels is covered by the private use exception.
- 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 ensure that this extends to civil enforcement actions.
- Clarify those areas of the so called "unique distributor clause" in the Swiss Film Act that currently negatively affect the distribution of audio-visual works in Switzerland, including, most notably, VoD and limit the accompanying reporting obligations to apply only to distributors or platforms located in Switzerland.
- End the discrimination against neighboring rights under collective rights management by deleting the 3% cap in Article 60(2) of the Swiss Copyright Act.

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

Overall, enforcement marginally improved in 2017, but levels of Internet-based piracy in Switzerland remain unacceptably high due to weak enforcement and weak laws. As discussed throughout this submission, the government has refused to sanction the private consumption of works from clearly illegal sources, and the options open to right holders for tackling illegal sources are very limited as there is no website blocking remedy. Thus, Switzerland suffers from high domestic piracy rates for music, film, video games, and entertainment software. It also serves as a base of operations for some ISPs dedicated to piracy on a global scale. In particular, there is a serious problem with host and data centers based in Switzerland that provide hosting services to other ISPs, including pirate services, often without checking into the identities or businesses of their customers.

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. There are 29 legitimate digital services available for recorded music in Switzerland.<sup>3</sup> Digital recorded music revenue in 2016 was \$117.8 million, up from \$115.4 million the previous year.<sup>4</sup> But legitimate music services face stiff and unfair competition from illegal offerings. Piracy undermines and disrupts the growth of the legitimate digital content market. Although the Swiss music market has been growing for the last three years, it still accounts for less than one-third of the revenues it generated 20 years ago. Thus, it is as important as ever that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of the legitimate market.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland, and carry copyrighted material that undermines the legitimate market, such as films early in their exploitation cycle. This is facilitated by a general understanding (supported by the government) that private use of

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<sup>3</sup>See <http://www.pro-music.org/legal-music-services-europe.php>.

<sup>4</sup>IFPI, *Global Music Report* (April 2017), at p. 117, available at <http://www.ifpi.org/recording-industry-in-numbers.php> ("GMR 2017").



such platforms is legally permitted. 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 widely used. Downloading and streaming of unauthorized content for private use are likewise viewed by many 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. For example, the popular cyberlocker site *oboom.com* is hosted via SwissBrothers AG. Industry reports a number of host and data centers based in Switzerland that provide hosting services to other ISPs, often without any review to ensure their customers do not include pirate services. For example, before it was removed by RIPE, which controls the allocation of IP addresses in Europe, Panama Connection, a Switzerland-based “bulletproof” ISP, offered “no questions asked” hosting services and was also involved in other criminality. Likewise, some ISPs that purport to be based in the Seychelles in fact have data centers in Switzerland. Another example is Private Layer, which provides hosting services for numerous BitTorrent sites including *bitorent.am*, *bitsnoop.com*, and *1337x.to*, which benefit from access to P.O. box services and possibly server capacity. Private Layer, apparently a Panama based organization with no or unknown operation in Switzerland, seems to use server capacity at an ISP in the Zurich area. It also appears to use Swiss telephone numbers, and as of early 2017, used a Swiss P.O. box. These distributors of pirated content rely on and refer to Switzerland’s legislation that sets high value on privacy protection. Further revisions to the draft Copyright Act amendments should require host and data centers to implement a “know-your-customer” policy to avoid providing hosting to pirate services.

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 have migrated to websites using other domains. Other problematic sites, such as *Torrentflow.com* and *torrentproject.org*, 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 its jurisdiction is not necessarily limited to sites with a *.ch* domain.

Finally, 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 made efforts to resume criminal and civil actions against online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—although now beginning to voice their own frustration with the situation—have interpreted the *Logistep* precedent broadly as a *de-facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases.<sup>5</sup> With some exceptions, prosecutors tend to consider copyright enforcement cases as non-priority. 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). The proposed Copyright Act amendments would clarify that IP address data may be used for criminal copyright cases — however, as explained later in this submission, it does not change the status of IP address collection for civil cases. Until the draft amendments are enacted, right holders remain proscribed from collecting and analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

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<sup>5</sup>While 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.

A test case on website blocking is pending in the Swiss courts. This litigation seeks an access-blocking order against the market leader ISP in Switzerland, and has been pending since 2015. Prior to this promising litigation, courts declined to order the blocking of access to illegal sites due to a lack of clear legal grounds for doing so. The claim was brought in absence of any provision of law specifically dealing with access providers' responsibilities. The first instance judgment was expected in late 2017, but as of January 2018 had not yet been issued. Depending on its outcome, this case could be appealed to the Federal (Supreme) Court.

A Kodi Box (ISD) distributor operating in the French part of Switzerland continues to be in business, despite an ongoing criminal investigation. IIPA is informed that prosecuting authorities now seem to be taking the case seriously, after a two-years' delay. However, the future of that prosecution remains uncertain given the unclear legal status of linking as infringement, and the stated position of the government that private use of works from illegal sources is not actionable.

The current uncertainty around ISP liability, and Switzerland's strong privacy laws, have operated in favor of ISPs and tend to protect even repeat infringers from prosecution. The website hosting industry's trade association has established a code of conduct, which it administers autonomously and defends against interference by government or right holders. Hosting providers affiliated with the trade association purport to be taking down notified content, while "sharehosters," such as *Uploaded.net*, practice takedown but do not prevent from (and even support) quick re-upload, thus avoiding effective stay-down. These provisional measures, in principle, could work well; however they 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 and to agree on measures that have been demonstrated to effectively prevent or restrain infringement, and should also move as swiftly as possible to implement legislation establishing such a process and imposing liability for ISPs that host infringing content. Moreover, ISP host "know your customer" policies are needed in order to stop at the outset the provision of hosting services to ISPs that support pirate sites or directly to pirate sites. The government should revise the draft Copyright Act amendments to require or encourage host and data centers to adopt and enforce such policies.

## **COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND**

While the Swiss Government made progress this year toward the goal of Copyright Act reform, one glaring position threatens to undermine the entire project: downloading by individuals from illegal sources is still considered legal if it is a "private copy, and there are no effective options for tackling this problem.

### **Copyright Reform**

On November 22, 2017, the Federal Council adopted a bill with draft Copyright Act amendments and an explanatory memo providing an article by article commentary (a "dispatch"). The dispatch and the draft amendments will now be up for parliamentary deliberation, which is expected to start in early 2018 and to last for several months. The project grows out of the AGUR12 working group,<sup>6</sup> but falls short of implementing the full AGUR12 compromise recommendations.<sup>7</sup> Substantial revisions to the draft amendments are needed to adequately address right holder concerns. Notably, in the press release regarding the draft amendments, the government steadfastly announced that it did not intend to criminalize or otherwise sanction so-called "private use" of materials obtained from illegal sources. This is a blow to right holders and does not comply with Switzerland's international obligations.

The draft Copyright Act amendments include a few positive changes to the Act. In particular, the draft amendments extend the term of protection for sound and audiovisual recordings and recorded performances from 50

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<sup>6</sup>For a full description of the AGUR12 process, see prior years' IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

<sup>7</sup>See [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/d/Schlussbericht\\_der\\_AGUR12\\_vom\\_28\\_11\\_2013.pdf](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](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/e/Medienmitteilung_zum_Schlussbericht_AGUR12_EN.pdf) for an English summary of the recommendations.

years to 70 years, in line with the term for other works. (Article 39, paragraph 1). This will provide greater incentives for the production of sound recordings, and 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. This brings Switzerland in line with the EU term of protection. Broadcasts, on the other hand, receive only a 50 year term of protection; this should be increased to 70 years as well.

However, certain changes and late additions to the amendments raise serious concerns or fail to meet the promises of the AGUR12 compromise.

Revisions to Article 77i are meant to address the de-facto ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, while the proposed amendment allows right holders to use personal information (including IP addresses) for the purposes of filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims. The proposed amendment and explanatory comments do state that the information may be used to assert civil claims in the context of a criminal proceeding or after criminal proceedings have concluded. However, this needlessly limits right holders' ability to pursue their rights. To properly address the privacy concerns raised surrounding the *Logistep* decision, the proposed amendment should be modified to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (this would mirror the standing opinion of the FDPIC,<sup>8</sup> as well as the recommendation of the AGUR12).

The amendment offers one promising enforcement instrument, a "stay-down" obligation for certain hosting providers that creates a "particular danger" of copyright infringement. (Article 39d.) However, it is left to the courts to determine whether the hosting provider in fact has a such a business model, which will create legal uncertainty.

One unexpected negative change appeared for the first time in this draft amendment. Under the original AGUR12 recommendations, a compulsory collective right to remuneration for authors and performers of audiovisual productions for exploitation of these works on online platforms (VOD) had expressly exempted concert films and music videos, because music interpreters already have, as a rule, a contractual share in the online revenues. This clear carve-out, unfortunately, was removed from the draft amendment without notice. (This collective right of remuneration only applies to audiovisual works produced in Switzerland or other nations with a similar collectively enforced right of remuneration.) This approach disregards the AGUR12 consensus and could pose major problems and market uncertainties for Swiss record producers and producers of music videos. If enacted, artists may earn substantially less money from the online exploitation of music videos under this provision than they do presently as a result of agreements negotiated by their record company with online platforms. Moreover, prior to introducing any new or novel rights, the Swiss Government should concentrate on addressing the existing problem of discrimination in the collectively managed rights area. The compulsory collective right of remuneration provisions are in Articles 13a and 35a and should be deleted.

Other notable provisions in the draft amendments include:

- (i) **"Extended collective licensing" ("ECL"), i.e. collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the proposal is purportedly motivated by the desire to make content accessible that otherwise is barred due to licensing difficulties, such as large archive stock, its scope is not so limited. This creates a risk that extended collective licenses could be applied in areas where they undermine individual licensing, such as online services, where individual licensing is the norm. An opt-out provision, as proposed, does not render an extended collective license voluntary, and the language of the provision suggests that opting

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<sup>8</sup>A standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision—even as it stood by the Federal Court's opinion—underscores, 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."

out must be declared for each individual license, and right holders would have to monitor ECL announcements. 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.

- (ii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered “orphan” after “research performed with appropriate thoroughness.” The dispatch on this article troublingly notes that “this responsibility is considered fulfilled if [the users] have consulted the relevant databanks for the corresponding work category.” A better standard would be the requirement for “diligent search” set out in the Orphan Works Directive.<sup>9</sup> The draft provision should be amended to make clear there is no recordation requirement for right holders to protect their works, or this could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. Also, the provision does not specify that the institution (such as a public or publicly accessible library, school, museum, collection, archive or broadcaster) possessing the orphan work copy must be domiciled in Switzerland; it merely requires that the copy have been created, copied or made available in Switzerland, including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.
- (iii) **A free reproduction license for scientific research (Article 24d), meant to cover “text-and-data mining.”** There is a potential for this license to exceed its intended purpose. For example, if combined with other exceptions such as the existing, unusually broad permission of use inside companies and organizations, (Article 19 (1) c).
- (iv) **Protection of photographs regardless of their “individual character” or level of creativity (Article 2, paragraph 3bis).**

As expected, the draft amendments do not include a legal basis for website access-blocking. According to the Swiss Government, this element “would not find a majority” in the parliament. However, IIPA notes that in spring 2017, parliament adopted a website blocking provision regarding illegal foreign gambling sites. Illegal copyright piracy sites should receive similar treatment.

### **Additional Concerns Under the Copyright Act and Related Laws**

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 by the proposed Copyright Act amendments.

**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. The Swiss Government has confirmed in numerous statements that downloading from an illegal source is to be permitted, and the current draft amendments do not make any changes to Article 19. This broad private copying exception, together with serious concerns regarding the protection of technological protection measures (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. Cable and over-the-top (OTT) providers, including major telecom corporations, offer seven-day catch-up services on integral recordings of hundreds of TV programs, relying

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<sup>9</sup>Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, Article 3 and Recital 14 (“A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.”).

on this government-approved collective remuneration tariff. 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 TPMs “for the purposes of a use permitted by law” (Article 39(a)(4)). This exception is far too broad, particularly given the inappropriately wide scope of the private copy exception. Taken together, these exceptions 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. Furthermore, the country's Monitoring Office for Technological Measures (OTM) is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.<sup>10</sup> This appears to be in service of assessing the possibility of legislating the portability of audiovisual content similar to and inspired by the European Union's Portability Regulation.<sup>11</sup> This consultation is particularly troubling in light of the broader “Digital Switzerland” Strategy, also currently underway.<sup>12</sup>

**Discrimination Against Neighboring Rights:** Article 60(2) of the Copyright Act caps the remuneration payable to right holders (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 owners 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 remuneration 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 showed the path for reform—yet it did not make its way into the draft Copyright Act amendments. Rather, those amendments create an “extended collective licenses” provision that, when combined with the existing remuneration caps, fall short of the country's international obligations. This unusual and unjustified discrimination against the neighboring rights owners should be ended, and replaced with a fair and equitable remuneration for both performing artists and producers.<sup>13</sup>

**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:** Amendments to Switzerland's Federal Act on Film Production and Film Culture (Film Act), known as “extended unique distributor clause”, have been in effect since 2016.<sup>14</sup> They require that any form of exploitation in the Swiss film market, including theatrical, DVD/physical home entertainment, and all forms of video-on-demand/online distribution (with the exception only of linear television) may be undertaken

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<sup>10</sup>See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office.html>.

<sup>11</sup>Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

<sup>12</sup>See <https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/strategie-digitale-schweiz.html>.

<sup>13</sup>Moreover, the government should not be attempting to create additional collectively managed rights (in the proposed Copyright Act amendments) without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring right holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be resolved prior to entertaining proposals regarding collective management.

<sup>14</sup>See <https://www.admin.ch/opc/en/classified-compilation/20001389/index.html#a19>.

only by an organization that controls the rights for all available language versions and regions exploited in Switzerland.

This law has interfered with the internationally established practice of cross-border licensing to multi-territory online platforms for specific language versions or language regions. If construed so as to require exclusive licensing and/or package licensing of various forms of online distribution, the law interferes with practices of non-exclusive licensing and of separate licensing for transactional video on demand (TVoD), SVoD and advertising video on demand (AVoD). While the markets are adapting to licensing practices, adverse effects of this regulation on the market remain probable. No sanctions have been imposed yet. The amended law also imposes registration and detailed reporting of exploitation data upon entities (including foreign) for films exploited in Switzerland in all sectors, effective 2018 (for figures collected in 2017). This will likely result in 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 Article 14(2) and WPPT Article 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, and the draft Copyright Act amendments do not do enough to bring Switzerland in line with its existing obligations.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2018.<sup>1</sup>

**Executive Summary:** Thailand was recently lowered to the Watch List partly in recognition of recent reforms undertaken by the Royal Thai Government intended to help Thailand meet the challenges of the digital age, including amendments to the Computer Crime Act (CCA) that include an administrative, no-fault remedy to disable access to infringing content. While the practical implementation of the procedure has so far been disappointing, IIPA is in principle encouraged by this development as well as other recent 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. Thailand, however, must still update its legislative framework to bring it in line with international norms.

Thailand should not rest on its laurels, but instead build on recent reforms to address a host of serious problems that are damaging the creative industries. Worsening online and mobile piracy threatens the sustainability of legitimate digital platforms in Thailand. The movie industry estimates that there are ten 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 the government has not taken any action to address the continued operation of rogue collective management organizations (CMOs), which undermine the market for music, negatively impacting both users and music rights holders, and contribute to crime, corruption, and the erosion of public order.

More needs to be done to address these mounting concerns. Thailand should ensure the CCA remedy is effectively implemented and use all available tools 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, as it proceeds with its current copyright law revision process, to provide adequate incentives for online intermediaries to cooperate with rights holders to address online infringement; and implement best practices to combat infringement, such as requiring Internet Service Providers (ISPs) to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. 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 2018

### Enforcement

- Ensure proper implementation and application of the CCA regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures.

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<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Encourage Thailand's Department of Intellectual Property (DIP) to continue to promote and coordinate voluntary arrangements between rights holders and intermediaries, including ISPs, payment processors, domain registers, 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 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 the proposed provisions on intermediary liability provide adequate incentives for online intermediaries to cooperate with rights holders to address online infringement, and implements international best practices to combat infringement, such as requiring ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
  - 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 an exhibition facility with the intent to make or transmit an audiovisual work, in whole or in part, and that exhibition facilities are given standing to bring complaints.
  - 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.
- 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 registered content to ensure accuracy and protect consumers from rogue CMOs.

## 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.<sup>2</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2017. 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.<sup>3</sup>

**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.<sup>4</sup> Almost 44 million people use fixed Internet in Thailand.<sup>5</sup> Access to the Internet, including through both fixed and mobile Internet access, continues to increase.<sup>6</sup> Smartphone use in Thailand is very high, and Thailand's Internet users spend among the highest number of hours online compared to users around the world.<sup>7</sup>

Notwithstanding the expanding availability of legitimate services for music and audiovisual materials, the increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, television content, video games, published materials, and broadcasts. As noted above, the movie industry estimates that there are ten 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.<sup>8</sup> 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* (later rebranded as *Doo4k*), and related sites,<sup>9</sup> 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 2017, are portals that allow users to download apps that provide access to pirated content, including the latest run motion pictures, television content, sporting events, and live streamed PPV events and concerts.<sup>10</sup> Free programs that allow users to download infringing content from YouTube (i.e., stream ripping) are an increasing source of piracy. These include *YouTube Downloader YYTD*, *Keepvid*, *Flvto.biz*, *Flyv2mp3.org*, and *Convert2mp3.net*, 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.<sup>11</sup>

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

<sup>2</sup>See, e.g., IIPA, *Thailand*, 2017 Special 301 Report, February 9, 2017, at <https://iipa.org/files/uploads/2017/12/2017SPEC301THAILAND.pdf>.

<sup>3</sup>For example, the motion picture industry participated in several events and trainings, most relating to the challenges of combatting digital piracy.

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

<sup>5</sup>The number of Internet users in Thailand in 2016 is available at [http://ttid.nbt.go.th/internet\\_db.html](http://ttid.nbt.go.th/internet_db.html).

<sup>6</sup>The percentage of individuals using the Internet in Thailand increased from 39.3% in 2015 to 47.5% in 2016, and active mobile broadband subscriptions are now almost 95 per 100 inhabitants, according to *Measuring the Information Society Report 2017*, International Telecommunications Union, at p. 145, available at [https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017\\_Volume1.pdf](https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2017/MISR2017_Volume1.pdf).

<sup>7</sup>As of March 2016, smartphone use was over 50% of all mobile phone users in Thailand according to emarketer. See <http://www.emarketer.com/Chart/Smartphone-vs-Total-Mobile-Phone-User-Penetration-Thailand-by-Region-March-2016-of-population/203960>. For an overview of digital trends in Thailand, see <http://my-thai.org/digital-southeast-asia-thailand-2017-overview/>.

<sup>8</sup>Studies have shown that such websites containing copyright piracy materials also peddle in high-risk advertising, including malware or click-fraud schemes.

<sup>9</sup>Related sites that can be accessed with a subscription to *Doo4k* include: *HDPlayBox.com*, *IPSportClub.com*, *4KPlaybox.com*, and *ConnexIPTV.com*.

<sup>10</sup>The site, which is extremely popular, requires users to pay a monthly subscription fee and is estimated to have 300,000 active subscribers and draw revenues of US\$2.3 million a month.

<sup>11</sup>IP 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 or openload.co, which are very difficult for enforcement authorities to trace.

well as foreign motion picture and television content. These include *Movie2Free.com*, *037HD*, *Mastermovie-HD.com*, *MovieHD-Free.com*, *Siambit*, *ThailandTorrent*, *NungMovies-HD*, *Nanamovies*, and *BitDed*. For the music industry, the infringing site *olozmp3.net*, which attracts more traffic than any licensed music service, is a significant problem. Illegal apps on smartphones, readily available from Apple iTunes and the Google Play Store, are increasingly popular among Thai users to access vast amount of 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.<sup>12</sup> 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. For the motion picture industry, cooperation with ISPs, especially with global social media platforms, has been good (the takedown rate is 93%), but, once taken down, infringing links pop up immediately. From the music industry's perspective, cooperation with ISPs has been lacking, with a takedown rate of only around 50% from January to September 2017, and, again, once content is taken down, links to the same infringing content reappear immediately. Stronger action is needed against non-hosted infringement and piracy sites hosted outside of Thailand.

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments such that it is able to support legitimate business models. In particular, recent amendments to the CCA, which entered into force in May 2017, permit disabling of access to infringing websites. Test cases are currently in process, and early indications are that the procedures are very slow, lack transparency, and are overly burdensome. Enforcement authorities need to establish procedures and issue practical guidelines as soon as possible to ensure cases are processed promptly and effectively.<sup>13</sup> In June 2017, the Royal Thai Police Economic Crimes Suppression Division conducted a raid of the suspected operator of *newmovie-hd.com*, a pirate video streaming site popular in Thailand and around the world, and took down the site.<sup>14</sup> Additional criminal cases against operators of sites that infringe the copyrights of music rights holders are still pending. Notwithstanding some meetings organized by the Internal Security Operations Command, rights holders do not yet have an agreement in place with intermediaries to address infringement on their services. DIP is urged to not only make further efforts to facilitate discussions between rights holders and intermediaries, including ISPs, payment processors, domain registers, advertising services (e.g., DAAT), and search engines, but also to take more proactive steps and apply more pressure on intermediaries to address infringement on their services.

DIP has introduced an intellectual property roadmap, including a call to intensify efforts to combat piracy. To further this goal, the Internal Security Operations Command should proactively spearhead more digital piracy investigations, with an emphasis on upstream criminal organizations.<sup>15</sup> 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 delayed pending 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, is also needed. Coordination with other jurisdictions must also be improved because Internet piracy crosses borders.

**Retail and Hard Goods Piracy Still Prevalent:** Physical piracy is decreasing mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy remains a significant concern, harming local and foreign

<sup>12</sup>For example, the music market total revenues in Thailand decreased by nearly 21% in 2016, including a 15% decline in digital sales, continuing an alarming trend of year-on-year decreases in Thailand's music market.

<sup>13</sup>In 2017 TECA filed three test cases with the Technology Crime Suppression Division (TCSD) and the Economic Crime Suppression Division (ECSD). The cases are still pending as the TCSD and ECSD are revising and refining the forms and procedures. The process has been burdensome, lacks transparency, is very slow and has been hampered by a lack of coordination with different divisions in the government.

<sup>14</sup>*Newmovie-hd.com* has a global Alexa rank of 2,494 and a ranking in Thailand of 17. There were an estimated 1,127 on the site, which, according to SimilarWeb, attracted 21.5 million visitors in the month of January 2017 (an increase of 16% from December 2016). The website enables streaming of embedded videos from Google Drive in either HD or SD quality. The site was also using a U.S.-based Content Delivery Network service to hide its hosting location. A mirror website (*moviehd-master.com*) was also taken down. An arrest warrant has been issued against the operator of the site, and the police should follow through with the arrest while the public prosecutor moves forward with the prosecution.

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

creators alike. Such piracy still finds its place in the malls and on the streets in Thailand, particularly in tourist areas. Areas notorious for piracy include, in Bangkok: Panthip Plaza; Klong Thom; Saphan Lek; Baan Mor Shopping Area; Patpong; Kao-Sarn Road (where reports showed Bruno Mars finding his pirated records on sale blatantly and openly while on tour in March 2014); Silom; Mah Boon Krong (MBK) Center; Sukhumvit Road; and Bobae Market (a wholesale market that sells to street vendors). Also noted for piracy are Rong Klua Market, Sakaew, Samui Island, Hua Hin, Phuket, Pattaya, and Chiangmai. 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. Further, there are indications that infringers have moved to newly emerged Sunday and night markets.

To address hard goods piracy, industry reports that Royal Thai Government authorities have conducted raids. 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:** ISDs 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, 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 on e-commerce websites such as *Lazada.co.th*, but are also made available through traditional retailers found in popular malls across Bangkok, and are often 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. Thailand should also amend its legal framework to specifically address this problem.

**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 movie industry in 2017. 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 2017, nine illicit recordings of MPAA member films were traced to Thai theaters, down from 23 in 2016. While this trend is encouraging, continued vigilance is needed to make these gains sustainable. 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 provision that deems camcording an infringement of copyright

could help.<sup>16</sup> While the movie industry conducted four training sessions for 221 cinema managers and staff in 2017, enforcement remains weak. Only one perpetrator was arrested in 2017.

**Book Piracy Problems Remain:** The growth of the book and journal publishing industry is hampered by unauthorized commercial photocopying in and around university campuses and book piracy. Pirated materials include academic journals, chapters of reference books, language dictionaries, travel guides, and history books, and typically occur on a print or copy “to order” basis. Pursuing litigation against producers of counterfeit/pirated books remains problematic, as the process is typically plagued by 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.<sup>17</sup> Pay-TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>18</sup> Public performance piracy also continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. Bars and restaurants have added “private” rooms to screen motion pictures illegally.

**Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts:** While the establishment of the Thai IP&IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies 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.<sup>19</sup> Also, because upstream investigations are rare, most infringers appearing before the court are pirate vendors at the lower end of an organized criminal enterprise. In criminal cases, convictions almost always lead to suspended sentences. Sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement. The 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.

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<sup>16</sup>Unfortunately, as set forth below, the provision is not as helpful as it could be because it requires a link between the camcording act and a copyright infringement instead of establishing a “time-and-place” violation as all other countries adopting laws in this area have done.

<sup>17</sup>These unauthorized channels are well known to the government and also harm the local pay television industry; thus, there should be sufficient incentive to act against these illegal operators.

<sup>18</sup>The 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.

<sup>19</sup>Section 65 of the Thai Copyright Law states, “In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer’s rights, the owner of copyright or performer’s rights may seek the injunction from the court to order the person to stop or refrain from such act.” Unfortunately, the measure is not effective and has created burdensome and costly hurdles to copyright owners applying for provisional measures.

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 could be a useful tool, but due to the high evidentiary burden, this law has not been used to effectively combat copyright infringement. IIPA hopes that prosecutors and judges are able to find ways to more effectively use this tool in the future 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. Such actions should include promulgating and implementing regulations to increase the transparency of CMOs, such as requiring an entry check and verification of the rights that the CMOs claim to manage, and publishing a list of repertoire and members that the CMOs represent.

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

**CCA Amendment:** In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) added 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 entered into force on May 25, 2017, and as indicated above, test cases for this provision are underway. IIPA looks forward to working with the Royal Thai Government to ensure this provision is implemented in a prompt and transparent manner to provide an effective remedy against foreign piracy sites.

**Copyright Act Revisions:** Last year’s submission noted several deficiencies in Thailand’s recently amended Copyright Act, including failure to effectively address online piracy; lack of adequate prohibitions against circumvention of TPMs and protections for RMI, important benchmarks to implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), neither of which Thailand has yet acceded to or ratified; and failure to effectively address unauthorized camcording of an audiovisual work in a movie theater. The Copyright Act also unfortunately contains an overly broad exception for disabled persons, and does not include a needed landlord liability provision. IIPA is aware that the Royal Thai Government is considering revisions to the Copyright Act and encourages the government to adequately address these deficiencies. IIPA understands that Thailand has just recently publicly released certain draft amendments to the Copyright Law, and looks forward to reviewing the amendments as soon as possible.

The following are critical issues with the Copyright Act that should be addressed as part of Thailand’s ongoing Copyright Act amendment process to ensure that Thailand achieves its stated goal of a modernized copyright law<sup>20</sup> 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 Copyright Act, which requires service providers subject to a court order to stop infringing acts or to remove infringing works, functions as little more than a court-ordered notice and takedown (if that).<sup>21</sup> ISPs must remove infringing works or stop infringement upon a rights

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<sup>20</sup>During the previous amendment process, 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.

<sup>21</sup>Unlike most countries in the world and contrary to global best practices, this provision has not allowed for a notice and takedown approach. This approach, however, could permit a remedy against non-hosted infringement if a court were to order an ISP to stop infringing acts, which could be executed through disabling access to infringing content. It provides for liability for Internet Service Providers (ISPs) that directly infringe, but in cases in which the ISP does not

holder obtaining a court order, and the evidentiary burden for rights holders has proven to be substantial.<sup>22</sup> IIPA understands that DIP is currently revising this section, and hopes that new intermediary liability provisions will include adequate incentives for ISPs to cooperate with rights holders to effectively address online infringement, rather than putting the onus entirely on rights holders. The amendment should account for the evolution of infringing behavior due to technological advancements and implement best practices to combat infringement, such as requiring ISPs to implement reasonable measures to prevent infringement in addition to taking down the infringing material. The amendment must also authorize the judiciary to issue injunctive relief orders that direct ISPs to take measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. Furthermore, the safe harbors must not interfere with remedies available to rights holders under the CCA. IIPA urges DIP to enact intermediary liability provisions that will ensure an effective remedy to address the problem of online infringement.<sup>23</sup>

- **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 current Copyright Act unfortunately falls short of providing adequate protection and fails to meet the obligations of the WCT and WPPT in critical ways, and it is hoped that the new amendments will address these deficiencies. IIPA understands that Thailand 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.<sup>24</sup> The trafficking offense should be confirmed in implementing regulations, through adopting a sufficiently broad definition of “avoidance”; otherwise, technical amendments should be passed to ensure trafficking is covered. Coverage of trafficking violations is found in U.S. law and 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

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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. Furthermore, 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.

<sup>22</sup>For example, copyright owners must present the court with evidence like sworn affidavits of copyright ownership, evidence of infringement, and guarantees for any collateral damages; then an *ex parte* preliminary trial ensues until the court is satisfied with the copyright owners’ claim. ISPs in the meantime have no responsibility except to wait for an order from the court. Industry is already finding this evidentiary requirement too burdensome. The movie industry reports difficulties in seeking a court order for ISPs to take down infringing content, with one request granted and two requests denied for insufficient evidence. Unfortunately, some ISPs subject to the granted order have not complied because they claim the infringing content is not hosted on their system. It is critical for Thailand to ensure that the process for obtaining court orders for ISPs to remove infringing content is efficient and effective.

<sup>23</sup>IIPA 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.

<sup>24</sup>Preferably, this Section would outlaw anyone who manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a technological protection measure (TPM).

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.<sup>25</sup> IIPA urges the Royal Thai Government to narrow or, if necessary, eliminate these exceptions to bring them in line with international standards.
- **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, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law and any unlawful copies made, as well as civil and criminal penalties.
- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. Clarification in the law and implementing regulations for clear, fair, market-based, and transparent collection rules are overdue. We strongly suggest that the Copyright Act be revised in this regard. 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. The Royal Thai Government should implement international best practices in this area, such as those embodied in the WIPO Collective Management Organizations Toolkit or the EU Collective Rights Management Directive, 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 registered content to ensure accuracy and protect consumers from rogue CMOs.
- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** The Copyright Law includes an 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 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, should not be implemented in such a way that it would conflict with the Berne Convention and TRIPS “three-step test.”

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<sup>25</sup>Section 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).

- **Absence of Landlord Liability Provision:** In the recent amendment process, 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 the recent copyright law amendments included a landlord liability provision imposing criminal liability on one who “provides physical or digital spaces for infringing activities,” in 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code.” DIP then commissioned a research team to conduct an in-depth study on this issue. The authorities indicated they may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing.<sup>26</sup> A test case under the existing law would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, which is necessary to crack down on piracy in the malls and should be considered in the current revision process.
- **Inadequate Term of Protection:** Thailand should extend its 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.

**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, and to ensure administrative guidance on fair use is kept within the legal bounds of existing exceptions and affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.<sup>27</sup>

## **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 high costs associated with rating or censorship approval, 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

<sup>26</sup>The Royal Thai Government, in its February 2012 Special 301 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.” See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, para. 3.2.2. The report indicated DIP would be working alongside the Royal Thai Police and 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.”

<sup>27</sup>See IIPA 2017 at 139.



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.<sup>28</sup>

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, 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.

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<sup>28</sup>The local motion picture industry participated in a public hearing on this issue in August 2017, but IIPA is not aware of any changes that have been made.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 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 2018.<sup>1</sup>

**Executive Summary:** Despite being one of the top ten countries with the highest GDP per capita, the UAE struggles with critical market access barriers, below-par copyright protection, and diverse methods of piracy. The UAE has seen some positive movements in IPR enforcement and awareness, but has not fully implemented the standards of protection required by the WIPO Internet Treaties and does not protect copyrighted content for a term in line with the modern standards of protection. In addition to legal protection shortfalls, rights holders in the UAE face major difficulties with the exercise of their existing rights. It has been sixteen years since the UAE passed federal legislation providing for the possibility of collective management of certain rights—a facility that rights holders in the music sector would like to make use of, given that their attempts to directly exercise broadcasting and public performance rights were blocked by the government. However, the Federal Council of the UAE has failed to issue an operating license to any such collective management entity, or to rights holders themselves, leaving music rights holders without the legal means to exercise their existing rights under local copyright law and collect compensation for the commercial use of their music. The UAE is a major hub for tourism and retail and is a repeat host for legitimate music services, sold-out concerts, and the upcoming EXPO 2020 in Dubai. This puts the UAE in position to not only follow through with payments that are critical to U.S. rights holders and the rule of law in the country, but also to invest in the development of a robust local industry that can advance local talent and increase jobs in the media sector. The government needs to urgently stop ignoring the problem and immediately issue an operating license to a collecting society that will enable music rights holders to start licensing and collecting royalties. Otherwise, they must confirm in writing that rights holders are free to exercise their broadcasting and public performance rights directly. The government's inaction constitutes a direct market access barrier for international music rights holders. Another potential market access barrier is the Dubai Department of Economic Development's (DED) new requirement for a UAE copyright registration certificate as a prerequisite to initiate a copyright infringement case.

On a positive note, the UAE Cyber Crime Law has been used effectively against virtual private networks (VPNs), DNS “masks” (that hide domain names), and Tor (anonymous) networks—all used to otherwise disguise piratical sites and activities from enforcement officials. Moreover, the enforcement of the Cyber Crime Law has resulted in some severe and deterrent penalties. Enforcement officials have also taken action against social media accounts selling counterfeit and pirated materials. Over the past year, the UAE has implemented many non-legislative reforms dealing with customs practices and held focused workshops to increase awareness of, and respect for, IPRs, which is also helping improve the status of piracy in the country.

### **PRIORITY ACTIONS REQUESTED IN 2018**

- Take immediate action to approve a collecting society application so that rights holders can finally begin collecting royalties under the UAE copyright law.
- Modernize the copyright law to implement the WIPO Internet Treaties; 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.
- Proactively enforce against Internet piracy by encouraging the Telecommunication Regulatory Authority (TRA) to engage domain name registrars and other intermediaries to cooperate with rights holders to block: illegal TV

<sup>1</sup>For more details on UAE's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of UAE's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



services websites; advertisement to pirated TV services throughout online classifieds, auctions, blogs, forums and social networks; illegal credit cards payment gateways and alternative online payment methods; websites that offer gift-cards or redeemable vouchers to buy or refill personal accounts to these services in question; help desk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top-boxes. They also should work to better monitor app-based dissemination of illegal content.

- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit products.
- Encourage Customs authorities to ban the importation of illegal set-top-boxes (STBs) such as servers for Dish TV of India.
- 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.

## **COPYRIGHT PIRACY IN UAE**

As of June 2017, roughly 8.52 million people in the UAE use the Internet, which is about 91% of the UAE population.<sup>2</sup> Mobile penetration is widespread, with well over 200 mobile subscriptions per 100 inhabitants.<sup>3</sup> 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 accessing websites that provide illegal access to music, movies, television content, video games, reference books, online journals, and trade books of top publishers. Similarweb reports that in December 2017, 1 million visits to *Torrentz2* and 1.8 million visits to *Thepiratebay.org* were from the UAE.

**Public Performance and Broadcasting Piracy for Music:** At present, because of the impossibility of licensing public performance and broadcasting by rights holders directly or collectively, all music that is used in such a way is *de jure* pirated in the UAE. This is due to the government's 15-year-plus delay in issuing an operating license to a music collective management organization (CMO). Despite attempts by industry, in cooperation with the Abu Dhabi media authority, to obtain an operating license, there has been no information as to whether the Ministry of Economy (MOE) even considered the application at the Federal level. The last application was submitted in 2016, but no formal reply was issued. The lack of government engagement with the industry, and the bar to the exercise of existing rights resulting from the government's inaction, raises questions about the UAE's compliance with the WTO TRIPS Agreement and the state of the rule of law in the country. Simply put, the UAE's regulatory inaction means that the existing law has no effect and there is no remedy for the ongoing, country-wide infringement of music public performance and broadcast rights. As such, music rights holders have no means to license their works and recordings.

**Online and Mobile Piracy:** Several notorious online piracy sites are heavily accessed in the UAE, including *123movies.is*, a streaming website that embeds popular movie and series content from third-party cyberlockers. The TRA reports that it has blocked approximately 83,900 websites in 2017, which includes 473 websites for IP violations, and the Dubai DED has blocked more than 15,050 accounts on social media in 2017. Popular pirate music sites in the UAE include *Torrentz2.eu*, which indexes links to torrent music files that are hosted on BitTorrent indexing sites such as *The Pirate Bay*. According to Alexa, both these websites currently feature in the top 50 websites accessed in the UAE. Recently, there has been an increase in mobile applications that enable illegal showings of copyrighted TV programs or exclusive TV channels and are extremely difficult to monitor. One example is the *Bear TV app*.

**Hybrid Set-Top-Boxes:** With fast Internet bandwidth becoming more prevalent 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, although they do

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<sup>2</sup>See <http://www.internetworldstats.com/stats5.htm>.

<sup>3</sup>See <http://www.arabianbusiness.com/uae-s-mobile-phone-penetration-rises-228--676115.html>.

not pay music rights royalties (see above). However, using the Internet as a low-cost form of delivery, pirates rip content feeds, upload the feeds on servers, and stream them through STBs that can decrypt the data feeds to be viewed on TV sets. Hybrid STBs are used for this. There are STBs that only work online and can be used either to receive the Free-To-Air channels—which is a legal act—or to receive the pirated TV channels by way of installing certain applications. This type of piracy is increasing specifically in the UAE and hurting the market. These STBs and the channels or content they carry are illegally marketed, promoted, and sold to consumers in high volumes through several sales channels such as door-to-door, small retailers, Internet sales, or over social media accounts. While the equipment and hardware used for these types of services seem legitimate, it is the loaded operating software that allows access to the pirated content. Unless these Hybrid STBs are preloaded with the required piracy software, it is difficult to identify their illegal nature. Examples of these Hybrid STBs are the ones known and used for UKTV Abroad, UKTV Arabia, ip888tv.com and Expat TV. Expat TV is gaining popularity amongst western expats in the UAE, operating under the brands Tiger Z280, MXQ, Mag250, iStar and IP888. Numerous Internet-based TV and Video-On-Demand services legitimately operate throughout the world within defined territorial limits. The UAE has many foreign expats from territories where these services are licensed, and it is easy for them (with the use of their foreign credit cards or with the use of VPNs or other circumventing services that are widely available on the digital market) to subscribe to these services and access the content in the UAE. This poses a direct threat to legitimate UAE platforms offering the same content 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 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 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. By increasing fines and threatening expats with deportation in 2017, the government raised extensive public awareness to issues surrounding the use of VPNs, DNS masks, and Tor Networks for illegal activities.

**Pirate Free-To-Air Channels:** Pirate Free-To-Air (FTA) channels constitute one of the major problems in the media industry. The FTA channels are clear, unencrypted channels that can be received and viewed without requiring a subscription. They are uploaded from many different locations across the region to satellites that have region-wide reach. This is becoming an increasingly prevalent problem because it is difficult to apply consistent regulatory control when entities are not located in a specific territory. There is a high number of FTAs focused on broadcasting content without acquiring the necessary rights. The multiple locations and lack of regulatory control in the UAE make it very difficult to regulate FTAs, enforce copyrights, and apply remedial measures. An added problem is that even when the legitimate rights holders are successful in closing down pirate channels, the lack of regulatory control allows for them to simply change the channel or name and restart operations again under the same model. Examples of Pirate FTA channels are *Majestic Cinema* and *Top Movies*, which historically have been two of the worst offenders for this form of piracy.

**Impact on Legitimate Markets and Other Countries:** Piracy of pay-TV and other media streaming channels not only affects rights holders, but also harms cinemas, publishers, and legitimate content providers that invest significant sums to license content and develop business models in the region. These legitimate efforts contribute to the economic development of the country, fund production of local content, create jobs, and generate revenue for advertising and auxiliary industries. Dubai is a commercial hub for the region and may affect legitimate markets in surrounding countries—such as India, Iraq, Iran, and the Gulf Cooperation Countries—by exporting copycat products and digital piracy equipment, like hybrid STBs.

## **COPYRIGHT ENFORCEMENT ISSUES IN UAE**

**Raids and Piracy Prevention:** Industry sectors report that enforcement has 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 Dubai DED is active in fighting counterfeit products and has conducted several raids against entities using software without authorization from the copyright holder and shut down social media accounts selling counterfeit products. The Criminal Investigation Department (CID) has been working closely with rights holders and licensees to stop sales of hybrid STBs. This has somewhat reduced the use of unauthorized direct-to-home TV broadcasting services. Unfortunately, such operations require arrangements between different departments, 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. These are areas the UAE can focus on to strengthen its enforcement regime.

**Judicial and Case Law Developments:** 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 cybercrime-related laws. Also, the punishment under UAE Cyber Crime Law has become more severe. As a result, use of VPNs, DNS masks, and Tor networks for piracy is decreasing. Also, the Abu Dhabi Criminal Court issued a judgment in a case against an administrator of the torrent website called *arabscene.org*. The court decided to block the website, as it showed exclusively licensed TV channels without permission. In addition, the administrator was fined and deported out of the country. The judgment was enforced in 2017. The case is significant as it involved a website that was hosted outside the UAE, setting a strong precedent for other similar offenders.

However, on the downside, administrative authorities such as the DED are requesting copyright registrations in the UAE to proceed with a complaint against copyright infringers, despite the fact that the infringed work is copyrighted outside the UAE. The administrative authorities should proceed with complaints based on foreign copyright registrations if such registrations are recorded in a member country of the Berne Convention, since the UAE is a member of this Convention.

**Enforcement in Free Zone and areas outside city limits:** Enforcement challenges remain in malls outside the main cities and in Free Zone areas. Authorities continue to detect high levels of counterfeit products in Dragon Mart 1, Dragon Mart 2, the Global Village, Karama in Dubai and the China Mall. There is a high volume of goods imported to the UAE, and the territory is used as a regional hub for goods in transit. The UAE should ramp up efforts to enforce against pirate and counterfeit traffickers with deterrent enforcement actions and enhanced customs controls.

**Customs Piracy Prevention:** The Ajman Customs authorities activated their IP department in 2017, and they can now take actions against copyright and trademark infringers. The Dubai Customs recently announced that they will allow recycling of counterfeit products instead of re-exporting such products. Recycling means that the products are sent to a local recycling company that destroys the products and raw material thereafter used in various industries. Dubai Customs used to re-export the counterfeit products to the country of origin instead of destroying or recycling such counterfeit products. Abu Dhabi Customs also extended the protection for recorded trademarks from one year to ten years, in line with other local customs authorities in the UAE.

**Training Programs:** The IPR Department at Dubai Customs is the first of its kind in the Middle East. It is a federal law enforcement agency that works towards securing the twenty-one air and sea entry/exit points of the mainland. Apart from operating in a reactive capacity and intercepting the supply of infringing content/goods, the department has also been working in a preventive capacity by employing educational means to limit the demand for infringing content in the first place. The objective is to raise awareness to avoid the direct, and often physical, harm that counterfeit goods cause, as well as to create an anti-infringement culture and eliminate other issues stemming from IPR infringements. Additionally, Dubai Customs offers customs inspectors training courses to increase their

knowledge and understanding of IPR. The IPR department has, in cooperation with the communication department at Dubai Customs, held theoretical and practical courses on IPR protection in schools. Moreover, seminars have been held in universities, summer camps, and shopping malls, targeting large segments of society. They are also open to representatives from other government ministries and other member states of the Gulf Countries Council. In 2017, Emirates IP Association and INTERPOL co-hosted an IP awareness session with Dubai Customs, Brand Protection Group, Dubai Police, and Ministry of Economy. The session hosted a number of speakers from the private and public sector that shed light on various IP violations.

## **OTHER COPYRIGHT LAW AND RELATED ISSUES**

**Prevention of music rights holders' exercise of legal rights:** Broadcasting and public performance (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.) of music are important uses of recorded music and musical works. 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 the U.S. music being exported to the UAE cannot be monetized, and that various UAE businesses are not required to pay for music despite the protection recognized in the UAE law.

The UAE copyright law provides the relevant rights in Article 18 of the Federal Law No. 7 of the 2002 law concerning Copyrights and Neighboring Rights, which 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 provides that anyone who engages in such exploitation without permission from the rights holder infringes copyright and is subject to criminal penalties and civil remedies. The law also enables the creation of collecting societies and provides for the undertaking of collective rights administration. Additionally, the Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighboring Rights established the basis on which licenses permitting collective management activities would be granted.

Sixteen years later, no license for a collective licensing organization has been granted, and rights holders still find themselves unable to exercise their rights, whether individually or on a collective basis. In 2015, it began to look as if a resolution were in sight. TwoFour54—an Abu Dhabi Media Zone entity supported by a rights holder coalition—submitted an application to the MOE for an operating license as a music rights CMO. However, the MOE issued no response. The most recent application was submitted in 2016, but, again, the authorities neither replied nor engaged with the international music sector. The UAE 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):** ISPs in the UAE, namely Etisalat and Du, cooperate with rights holders to a limited degree and are open to listening to their challenges. Some ISPs have special platforms on their websites for reporting IP violations. They normally ask the rights holders to contact the TRA for enforcement actions, which is the governmental body that monitors the operations of the ISPs in the UAE. The government needs to encourage the ISPs to restrict access to the following: illegal TV services websites; advertisement to pirated TV services throughout online classifieds, auctions, blogs, forums and social networks; illegal credit card payment gateways and alternative online methods of payment; websites that offer gift-cards or redeemable vouchers to buy or refill personal accounts to these services in question; helpdesk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top-boxes.

**Amendments to the UAE Copyright Law:** The current copyright law falls short of the commitments in the WIPO Internet Treaties and the modern standards of protection. It contains only rudimentary protections against the unauthorized act of circumvention of TPMs and against the trafficking in of devices, technologies, components, and services that facilitate the circumvention of TPMs. The following should be prohibited: 1) the act of circumvention of a TPM that effectively controls access to copyright-protected materials<sup>4</sup> or the exercise of exclusive rights; and 2) the trafficking in of devices, technologies, components, and services that facilitate the circumvention of TPMs (independent of the existence of any infringement). It should be made clear that violations involving TPMs are subject to both civil and criminal remedies. Other changes that should be made in any amendments going forward include : 1) removal of unreasonable restrictions on the ability to freely contract;<sup>5</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention Appendix;<sup>6</sup> 3) ensuring WTO TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; 9) raising minimum and maximum fines for copyright infringement (Article 37); and 10) adding provisions specifically related to Internet infringements, including notice and takedown, as well as effective measures to deal with repeat infringers and non-hosted infringements on services with business models based on providing access to copyright infringing material.

**Cyber Crime Law Should Include IP:** The Cyber Crime Law was recently updated to include, among other things, a specific provision on ISP liability. However, it does not expressly classify unauthorized or pirated content as illegal. Moreover, it does not include ISP liability for IP infringement carried out through the ISP. Implementing regulations should be issued clarifying that the Cyber Crime Law applies in cases of IP infringement.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

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. Some of the shortfalls in its copyright law (e.g., with respect to the circumvention of technological protection measures) and the state-sanctioned, non-application of existing legal rights of music rights holders raise issues of compliance with the UAE's obligations under those treaties, as well.

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<sup>4</sup>It should be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM "for preservation of specific standard of quality of the copies," which does not seem to cover all access control TPMs).

<sup>5</sup>For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid "any action" with respect to "more than five" of an author's works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted by statute as they are here.

<sup>6</sup>Article 21 of the Law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See "Berne Convention Members," World Intellectual Property Organization, available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

## **MARKET ACCESS**

**Music Licensing:** Because of UAE's failure to implement a music licensing regime in the country, music producers (and others in the music sector) are effectively prevented from licensing in the market. This selective non-enforcement of legislation acts as a disguised market access barrier for the music sector. This inaction is also protectionist and discriminatory, given that various UAE families, as well as the state, have stakes in most shopping malls, hotels, restaurants, and other such establishments that require licenses to play music. This framework has been the very essence of the problem for years. This situation is untenable, especially in view of the upcoming EXPO 2020 in Dubai, which has worldwide attention. It is imperative that the music licensing problem be solved without any further delays.

**UAE Copyright Registration Requirement:** Dubai DED has started to request UAE copyright registration certificates in order to proceed with any action for copyright infringement. This is a detrimental change from its old policy, in which it allowed a copyright infringement case to be heard if the plaintiff had a copyright registration certificate in any country that is a member of the Berne Convention. Such restrictions limit the power of rights holders to protect themselves from infringement and hinder their ability to thrive in the UAE market.



# **ANNEX**

# ANNEX – SHORT COUNTRY SUMMARIES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The following countries were identified in the U.S. Trade Representative's 2017 Special 301 Report. In prior years, IIPA filed a full country report for each of these countries. In 2018, because IIPA members do not have sufficient new information to prepare comprehensive reports for these countries, we instead provide these overviews identifying key issues in each market. We recommend that the U.S. Government prioritize these issues in 2018.

For 2018, IIPA does not recommend any change to our prior recommendations for each of these seven countries. Our prior placement recommendations are: Watch List – Barbados, Egypt, Guatemala, Jamaica, Turkey; and Priority Watch List – Costa Rica and Venezuela.



# ANNEX: BARBADOS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

A priority in Barbados is to improve the legal regime by ratifying and properly implementing the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). This is a necessary step to protect basic digital copyright and neighboring rights, to create a favorable environment for the digital marketplace in Barbados, and to connect Barbados to the global legal ecosystem for the creative industries.

Legal and enforcement shortcomings for the copyright industries in Barbados are not limited to the online environment. Even the traditional market of broadcasting, including licensing and receiving payments for recorded music is problematic. The recording industry reports that Barbados is one of many Caribbean countries (e.g., Trinidad and Tobago) that continues to permit the unlicensed and uncompensated broadcasting, cablecasting and simulcasting of copyrighted music. Some services currently refuse to pay royalties on the grounds that their use of recorded music services is not clearly protected by law because Barbados has not ratified the WIPO Internet Treaties (WCT and WPPT). This highlights the need for Barbados to accede to the WIPO Internet Treaties.

But even where uses of copyrighted works and recordings are unequivocally protected by the current Copyright Act of Barbados—such as traditional broadcasting and cable transmission—some broadcasters, including the state-owned Barbados Broadcasting Corporation refuse to pay broadcast fees. In addition, concert promoters take advantage of an exception for “charities” to the public performance right and do not pay license fees to sound recording producers or performers for the use of recorded music at concerts and other live performances. This is an exception only available by law to registered charities. The Government of Barbados needs to review the operation of the Charities Act to ensure that it is not abused to avoid licenses. And, if this cannot be corrected by applying current law, then the law must be amended to prohibit the abusive application of what was intended to be a very narrow public performance exception.

In its April 2017 Special 301 Report, the U.S. Government noted that while the legal framework in Barbados largely addresses IPR, the United States continued “to have concerns about the interception and retransmission of U.S. broadcast and cable programming by local cable operators in Barbados” without adequate compensation for, or consent from U.S. rights holders, including music producers and performers. The U.S. Government also noted its ongoing concerns about the refusal of Barbadian TV and radio broadcasters and cable and satellite operators to pay for publicly performed music. A 2007 Supreme Court case granted a local performance rights organization (PRO) the right to receive remuneration, which, ten years later, it has still not received. This was a case against a state-owned broadcaster, but unfortunately, the ruling has never been enforced. In addition, the U.S. Government and IIPA members urge the Government of Barbados to adopt a modern copyright law, one that would protect works in both physical and online environments.

The motion picture industry reported in 2017 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](#).



# ANNEX: COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The Government of Costa Rica has not properly enacted legal reforms or undertaken enforcement actions to respond to the extremely high levels of online piracy in Costa Rica, and has instead moved to weaken the protections available to rights holders. In addition, Costa Rica has fallen far short of meeting its obligations under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). Costa Rica was the last DR-CAFTA country to ratify the agreement, which came into force for Costa Rica on January 1, 2009. The agreement granted Costa Rica a 30-month transition period to upgrade its legislation needed to improve online copyright enforcement; however, that transition period expired in July 2011.

One of the key DR-CAFTA obligations that has not been implemented is introducing clear rules on copyright liability, as well as providing meaningful legal incentives for inter-industry cooperation to deal with online infringements. Instead, Costa Rica's law offers largely unconditional liability exceptions to Internet Service Providers (ISPs) and others, even allowing identified infringing activity to remain on their systems for as long as 45 days (which is the timetable for forwarding infringement notices to ISP subscribers). There are still many instances where the Costa Rican Top Level Domain (ccTLD) registry has provided a safe haven to notorious online enterprises dedicated to copyright infringement. For example, *thepiratebay.cr* domain is still online despite actions against it from ICANN and the U.S. Embassy in Costa Rica. Costa Rica's failure to deal effectively with its obligations regarding online infringement, more than six years after these came into force under DR-CAFTA, is a serious concern.

In 2009, Costa Rica filed a reservation to the WIPO Performances and Phonograms Treaty (WPPT) (and to the Rome Convention). Reservations to Article 15 of the WPPT are permissible, subject to the limitations set out in the WPPT (e.g., pertaining to the scope of the reservation). But, in this instance, Costa Rica violated its bilateral obligation to the United States (and in the DR-CAFTA) to consult before taking this action. Since 2009, consecutive governments in Costa Rica have been advocates, in international fora, to roll back existing protections for sound recordings used in broadcasting, which include, in particular, the obligation on broadcasters to pay license fees for the use of music in broadcastings. As a result, broadcasters in Costa Rica have stopped making payments for the use of music. In addition, online piracy continues to harm the legitimate digital media market, with very high piracy rates for music. USTR's April 2017 Special 301 Report urged Costa Rica to "take effective action against any notorious online markets within its jurisdiction that specialize in unlicensed works."

IIPA last filed a country report on Costa Rica in 2014. At that time, IIPA recommended that Costa Rica be placed on the Priority Watch List. Costa Rica is currently on the Watch List.



# ANNEX: EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Egypt needs to modernize its copyright regime, including ratifying and properly implementing the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In addition, its laws are antiquated and in need of significant reforms, including the Intellectual Property (Copyright) Law, the Civil and Commercial Procedural Code (No. 13) of 1968, and the Evidentiary Code (No. 25) of 1968. There were no copyright-related law reforms enacted in 2017.

Some IIPA members report that there was no change in the levels of piracy, or enforcement against piracy, in 2017. In June 2017, the General Directorate for the Censorship of Artistic Works (GDCAW), announced it had initiated over 2,300 IPR cases, and that of these, approximately 1,075 pertained to unauthorized broadcasts and satellite channel infringements. A number of these unlicensed satellite channels include unlicensed broadcasts of U.S. audiovisual 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. Piracy has spread in recent years, in part because of the growth of more sophisticated piracy organizations and increases in the number of mobile devices and other technological advances. Most Internet Service Providers (ISPs) do not respond to takedown notices.

Enforcement generally remains a problem. Cases drag on for years without resolution (two to three years on average for civil cases), and court procedures require experts to identify infringing material even though there are few qualified experts. The industries report continued cooperation with enforcement officials, including the Public Prosecutors Office and with Customs authorities. One positive step, taken many years ago, 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 concurs with the U.S. Government's recommendation (in the April 2017 Special 301 Report) on the need to "provide *ex officio* authority for customs officials to seize counterfeit and pirated goods at the border" and to "provide deterrent-level penalties for IP violations." There have been, as noted, some successes (in 2016) in shutting down a few of the satellite channels showing pirated films.

IIPA members recommend four priorities in 2018: (i) to allow the establishment and operation of collecting societies in Egypt under the Intellectual Property Law (No. 82 of 2002, as amended, to administer music performance rights and to ensure a framework to protect exclusive rights); (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; (iii) to augment enforcement against signal theft; and (iv) to urge the Economic Court, where appropriate, to make use of the full range of penalties available under the IPR laws in order to deter infringements (recent practices have assessed only minimal fines and no imprisonments for commercial-scale infringements).

IIPA last filed a country report on Egypt in 2013. At that time, IIPA recommended that Egypt be placed on the [Watch List](#). Egypt is currently on the [Watch List](#).



# ANNEX: GUATEMALA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The music industry has, in recent years, introduced licensed music services in Guatemala, where there is a clear interest among consumers for such services. At the start of 2017, there were 11 digital streaming services competing for consumers. However, because of piracy and the lack of effective enforcement locally, the digital music market in Guatemala has had a difficult time developing beyond its initial phase. In the face of strong opposition from broadcasters, the local collective management organization of record producers and artists (AGINPRO) continued its efforts in 2017 to collect monies, and filed several legal actions (mostly criminal actions) to try to obtain compensation for public performances from businesses performing sound recordings and from cable operators. In August 2017, AGINPRO won a case against a group of television and radio broadcasters requiring that the broadcasters obtain licenses and make payments for broadcasting recorded music. In ruling in AGINPRO's favor, the Constitutional Court required payments consistent with tariffs published by AGINPRO in November 2010. But even after the August ruling, the broadcasters have continued to use recordings without a license and without making any payments. Some of the broadcast stations are owned by local politicians. This highlights the need for the Government of Guatemala and the U.S. Government to assist music rights holders so they can exercise their rights in Guatemala to license their recordings and to be paid for such licenses. Rights holders cannot do this without government assistance.

In its April 2017 Special 301 Report, the U.S. Government noted increased enforcement activity by the National Police and Attorney General's Office (in 2016), but also urged increased enforcement coordination and criminal prosecution. The U.S. Government also noted that cable signal piracy remains a serious problem. IIPA members agree with this assessment and the need for substantially more criminal enforcement efforts, as well as the need to address the cable signal piracy and to ensure that broadcasters have secured licenses for the use of music that they broadcast.

Guatemala is currently on the [Watch List](#).



# ANNEX: JAMAICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

In April 2015, the Broadcasting Commission of Jamaica publicly identified nearly 100 illegally transmitted channels, and it issued a directive to cable licensees to cease the illegal transmission of 19 of these channels by August 2015. The 2015 enforcement directive was widely complied with, and there were some steps taken in 2016 to continue the enforcement of broadcast rights among the country's top providers of audiovisual content. However, there has not been a widespread subsequent removal of channels, and dozens of additional channels continue to be broadcast illegally by local operators. In addition, 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 in 2015 was the enactment of amendments to the Copyright Act to fulfill Jamaica's obligations under the WIPO Internet Treaties; and, the law was amended to extend the term of copyright protection. In June 2017, the U.S. Government led the "Joint CARICOM-United States Public-Private Sector Stakeholder Seminar and Dialogue on Broadcast Licensing and Enforcement in a Converging World" in Jamaica. This long-awaited dialogue was a positive step allowing content licensors, cable operators, regulators and copyright officers to discuss the direction the region should take regarding pirated content on various cable platforms. IIPA hopes that this initiative will accelerate the pace of reform in Jamaica and in neighboring markets in the months and years to come.

In its April 2017 Special 301 Report, the U.S. Government noted the progress made in the prior years, but also noted the "dozens of local operators" continuing to illegally broadcast content. Although the Government of Jamaica has agreed to legalize its broadcast television ecosystem, rampant signal theft continues. The government needs to enforce the current law and fully implement its promised reforms.

Jamaica is currently on the Watch List.



# ANNEX: TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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” (i.e., high speed servers used covertly to share content)—permeates the marketplace. Some of the copyright industries reported that the nature and levels of piracy remained the same in 2017. However, satellite TV channel infringement has gotten worse in the past year, and the Turkish laws need to be amended to explicitly address satellite piracy. There is a need for numerous improvements in the law, including proper implementation of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as well as improvements in enforcement to help Turkish markets grow for copyrighted content.

The Government of Turkey published a draft Copyright Amendments Bill in May 2017; it is expected to be considered by the Parliament in 2018. The draft bill includes provisions to address: (1) online infringement and Internet Service Provider (ISP) liability (and a “graduated response” mechanism against repeat infringers to slow their Internet connections); (ii) the formation and operation of collective management organizations (CMOs)—but, the legislation would leave the details of CMO operations to future regulations which fails to address long-standing practical problems impacting American and other music producers; (iii) providing the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases; (iv) enforcement against the making, selling or trafficking in anti-circumvention devices or software; and (v) establishment of specialized digital piracy task forces with dedicated and specially-trained prosecutors.

The goal of changes to the liability and responsibility of ISPs, should be to ensure that the law is properly tailored to incentivize all online intermediaries, including technical, automatic and passive intermediaries, whose services are used for infringing activities, to cooperate with copyright owners to stop copyright infringements on their services. The May 2017 draft bill fails to meet this objective. It would instead require “content or hosting providers” to remove infringing content within 24 hours of a takedown notice. First, the bill should be clarified to limit the takedown scheme only to technical, automatic, and passive online intermediaries. Content providers, including user upload content platforms, that go beyond merely providing users with technical facilities, should not benefit from the takedown procedure because they are primarily liable for copyright infringing content on their sites or services. Additionally, IIPA recommends that the obligation be revised to require that content be removed “expeditiously, but no later than 24 hours.” Infringing content under the draft bill can also be removed subject to a court order, but the legislation does not clarify the timeframe for removal; the bill should clarify this provision. The proposed penalties for noncompliance with takedown notices or court orders, include administrative fines and civil law damages.

The governance and management of CMOs has been a long-standing problem in Turkey. Currently, foreign rights holders face discriminatory policies that prevent foreign producers from being fully participating members of Turkish CMOs. As a result, they do not have voting rights or the ability to engage in the management and decision-making of music-related CMOs. Because of this, the monetary distribution rules and practices are discriminatory and are not transparent to non-management rights holders. The draft legislation would be an improvement, but it does not address the fundamental problem of banning non-Turkish producers from participation in or management of the CMOs. There are also concerns about the draft’s lack of clarity regarding extended collective licensing which potentially could result in the collective management for rights in American recordings without authorization from rights holders. Additionally, the draft legislation does not clearly grant rights holders with an ability to opt out of this licensing. If so enacted, this would create serious problems for rights holders, including producers (and performers) of sound recordings. In addition, the draft bill does not clearly prevent the discrimination that is now prevalent in CMOs. The draft bill would also mandate formal registration and a “sticker” (banderole) procedure for CMO representation, both of which should be eliminated since these are relics of physical copy distributions, not digital





ones, which now predominate. Where mandated, these requirements have proven onerous and burdensome, especially for foreign rights holders. Some improvements in CMOs that are foreseen by the new law (if enacted), include improvements in digital tracking of the usage of works and online payment systems.

One loophole in the draft law would allow Turkish collecting societies to screen motion pictures in theaters without an authorized license, and subject them only to a collecting society-determined remuneration. This exception to the public performance right, if enacted, would be a violation of international treaties and norms, and should be corrected before the adoption of the Copyright Amendments Bill.

Another related concern in Turkey is that judicial decisions have incorrectly interpreted the right of communication to the public, specifically, the right of public performance, in violation of the Berne Convention, the WCT, and the WPPT. These interpretations have meant that so-called “indirect” performances—such as the playing of a sound recording on a radio, a television or other indirect manner in a bar, hotel or other public place—do not require a public performance license and are exempted from collections. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed. This fails to distinguish between the use and licensing of a sound recording to broadcasters, and the use and licensing in public performance venues, which are separate and distinct uses and markets for licensing music. IIPA urges the Government of Turkey to correct the misinterpretation of public performances to capture “indirect” performances, as is required by Turkey’s obligations under the international treaties and the Copyright Law of Turkey.

Some courts and prosecutors are reluctant to treat IPR offenses as a priority, and will not order the confiscation of pirated materials or grant injunctive relief. And, the reorganization of the courts, beginning in 2016, has further exacerbated the workload of specialized courts dealing with IP cases. There have, in the past, also been prosecutorial delays (or indifference) especially to takedown notices with ISPs or actions to remove links to pirate sites. It is hoped that the draft law, if enacted, would improve compliance. One additional improvement has been the Access Providers’ Association which has worked as a clearinghouse, in lieu of individual ISPs, to receive notices. 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.

Current law provides a legal basis for direct infringer injunctions to block infringing websites (and many such sites, including *Grooveshark*, have been blocked in Turkey). However, there is no legal basis for injunctions against third parties, such as third party intermediaries. There are no changes in the draft Copyright Amendments Bill to revise these procedures. The Government of Turkey should provide a civil law-based injunction against third parties, such as intermediaries (e.g., access providers), whose services are used by direct infringers or those assisting them. Such a legal basis exists in EU law (Article 8(3) of the EU Copyright Directive, Article 11 of the EU Enforcement Directive) and in many other countries around the world, and is a key tool for rights holders to enforce their rights in the online copyright environment.

In its April 2017 Special 301 Report, the U.S. Government noted that Turkey needed to make significant improvements to the copyright law, including WIPO Internet Treaty implementation, and to address enforcement that suffered from “insufficient penalties and a backlog of cases.” The problems relating to collective management were also identified by the U.S. Government.

IIPA last filed a country report on Turkey in 2014. At that time, IIPA recommended that Turkey be placed on the Watch List. Turkey is currently on the Watch List.

# ANNEX: VENEZUELA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The motion picture industry reports that for several years, Venezuela has remained a source of many infringing camcords. From January 2015 through November 2017, 17 illicit audio or video recordings of MPAA member films were sourced from Venezuelan theaters. These copies then migrate online fueling international piracy. In its April 2017 Special 301 report retaining Venezuela on the Priority Watch List, the U.S. Government noted the widespread unauthorized camcording taking place in Venezuelan theaters, and the migration of those illegally made copies of films to the Internet.

The Venezuelan music market has also been struggling because rampant piracy has overwhelmed the legal marketplace. Even though performance rights collections made by a local producers' and artists' collecting society (AVINPRO) have grown in recent years, the numbers have been deceiving because the rate of inflation has been tripling on an annual basis the past few years.

IIPA last filed a country report on Venezuela in 2007. At that time, IIPA recommended that Venezuela be placed on the Priority Watch List. Venezuela is currently on the Priority Watch List.



# **APPENDIX B**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2017) & IIPA'S 2018 SPECIAL 301 RECOMMENDATIONS**

APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2017)  
AND IIPA 2018 SPECIAL 301 RECOMMENDATIONS

USTR 301 PLACEMENT (as of April/May of each year)																														
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2018	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	PWL	WL																			
ARGENTINA	PWL	PWL	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	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	WL	OO	WL	OO							
BRAZIL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL
BRUNEI							WL	WL	WL	WL																				
BULGARIA		WL	WL	WL	WL	WL							WL	WL	WL						PWL	WL	OO	OO						
CANADA	WL	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	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
CHINA (PRC)	PWL+306	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+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	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								
REPUBLIC		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
ECUADOR	WL	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	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	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
GUATEMALA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	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	PWL+OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL

APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2017)  
AND IIPA 2018 SPECIAL 301 RECOMMENDATIONS

USTR 301 PLACEMENT (as of April/May of each year)																															
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2018	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	
INDONESIA	WL	PWL	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						
ITALY						WL	WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
JAMAICA		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	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+OCR	PWL	PWL	WL+OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	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	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	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	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	PFC	PWL	WL	WL	OO	OO		WL				
PERU	WL	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				
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							

APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2017)  
AND IIPA 2018 SPECIAL 301 RECOMMENDATIONS

USTR 301 PLACEMENT (as of April/May of each year)																														
COUNTRY	IIPA RECOMMENDATION FEBRUARY 2018	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
ROMANIA		WL	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	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
SAN MARINO																						WL								
SAUDI ARABIA										WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL
SERBIA AND MONTENEGRO																												WL	WL	WL
SINGAPORE																			WL	WL	WL	WL	WL	WL	OO					
SLOVAK REPUBLIC														WL	WL	WL	WL	WL												
SLOVENIA																			OCR											
SOUTH AFRICA	WL																			WL	WL		OO	WL						
SOUTH KOREA											WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
SPAIN			OCR	OCR	OCR	OCR		WL	WL	WL	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL
SWEDEN																				WL	WL	WL								
SWITZERLAND	WL	WL	WL																											
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	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	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	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
TURKMENISTAN		WL	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			
UKRAINE	PWL	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	WL											
VENEZUELA		PWL	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	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