

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2020.¹

Executive Summary: The market for creative works in Vietnam remains severely stunted due to worsening piracy and debilitating market access barriers. Vietnam is an important emerging market in Southeast Asia for the creative industries, which are eager to invest in Vietnam's booming economy. However, Vietnam hosts many of the world's most popular illegal websites, and other problems are growing, including the use of Piracy Devices (PDs) and apps to access unauthorized audiovisual content. Unfortunately, the Government of Vietnam has done very little to address these growing problems.

There are major enforcement deficiencies in Vietnam: (1) the government is either unwilling or unable to follow-through on criminal referrals so cases are not being prosecuted; (2) there is a prohibition on investigations into infringing conduct by foreign rights holders, so sufficient evidence can only come from government prosecutors; and (3) the law does not allow civil suits against unknown defendants (e.g., "John Does"). Overall, the criminal enforcement framework is unable to deter online piracy. As an example, there was not a single criminal case prosecuted in 2019 for online piracy in Vietnam. In addition, investigative authorities, prosecutors, and judges lack fundamental knowledge and experience on copyright law to be able to undertake cases properly.

Vietnam must take more affirmative steps against piracy, including issuing deterrent penalties against infringers, acting against repeat infringement (e.g., the case against *chiasenhac.com*), and undertaking criminal prosecutions aimed at large operations. Vietnam must also properly implement its revised Criminal Code consistent with its international obligations to ensure that criminal procedures are applicable to flagrant piracy sites. Vietnam has committed to ratifying the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together, WIPO Internet Treaties) and should, without delay, fully and properly ratify and implement the treaties. The government should also address deficiencies with the Copyright Office of Vietnam (COV), which is understaffed, and has not taken any action to reform the dysfunctional collective management organization for the music industry. Vietnam must also take steps to eliminate the many unnecessary and onerous market access barriers, including foreign entry barriers and investment quotas.

PRIORITY ACTIONS REQUESTED IN 2020

Enforcement:

- Ensure enforcement officials, including the Ministry of Information and Communication (MIC), the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and the Ministry of Public Security (MPS) IPR/High-Tech Police and related police units, increase the number and effectiveness of operations focused on online infringement.
- Encourage educational institutions to implement appropriate use and copyright policies to ensure that students and faculty use legitimate textbooks other course materials, and software.

¹For 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- Provide the COV with adequate resources, including additional staff, to develop and implement effective enforcement policies.

Legislation:

- Make necessary changes to laws and implementing Resolutions, Decrees and Circulars, including the IP Code and the new Criminal Code, to ensure Vietnam is in full compliance with its international obligations, including adopting a Resolution that clearly defines and interprets “commercial scale.”
- Strengthen the legal framework to take effective action against digital infringement, including by:
 - Ensuring sound recording producers are provided a full, unrestricted public performance right and exclusive rights for the digital uses of their sound recordings, consistent with Vietnam’s international obligations;
 - Eliminating the legal and procedural impediments, and easing the evidentiary requirements that interfere with the ability to take effective action against piracy websites, illegal camcording, live streaming piracy, PDs and apps that facilitate access to infringing works;
 - Closing gaps in substantive copyright protection, especially overbroad exceptions and limitations, and affording adequate levels of protection to enable Vietnam to accede to the WIPO Internet Treaties;
 - Increasing administrative penalties for copyright infringement to achieve deterrence and ensuring enforcement authorities are able to take action to enforce administrative orders, including shutting down or disabling access to infringing sites that do not comply; and
 - Developing an effective procedure to promptly respond to rights holders’ requests for administrative enforcement.
- 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 as required by the Bilateral Trade Agreement (BTA) with the U.S.²

Market Access:

- Ensure that amendments to Decree 06 that will impose additional market barriers to e-commerce are not adopted.
- Eliminate foreign investment restrictions, including: screen and broadcast quotas; pay-TV regulations that cap the number of foreign channels and require local advertisement production; and other entry barriers with respect to the production, importation and distribution of copyrighted materials.
- Deregister the Recording Industry Association of Vietnam (RIAV) and engage with local and foreign music producers to set up a new collecting society to enable all music producers to effectively manage rights that are subject to collective management in Vietnam.

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

The Government of Vietnam has long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.” The situation did not improve in 2019. Vietnam should take more affirmative enforcement actions against piracy, such as allowing and issuing deterrent penalties against infringing operations, and undertaking criminal prosecutions directed at large-scale operations.

Growing Online Marketplace Presents Challenges: A significant and growing percentage of the Vietnamese population is online, with mobile broadband subscriptions being the largest reason. A growing number of licensed Internet music content providers are trying to take advantage of this increase, including NCT (*nhaccuatui.com*), Viettel Media (*keeng.vn*), Vega Corporation (*nhac.vn*), Spotify, iTunes, and Deezer. The same is true in the audiovisual space. Mobile applications like *Pops TV* are 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

²For a more detailed analysis of recommended legal reforms, see IIPA, *Vietnam*, 2019 Special 301 Report, (February 7, 2019), available at <https://iipa.org/files/uploads/2019/02/2019SPEC301VIETNAM.pdf>.

local Vietnamese content. Several Video-on-Demand (VOD) services have been available for the last two to three years, including Film+ (“film plus”), Darnet, Netflix, and Iflix. These channels for digital distribution offer huge potential for the creative industries; however, market access barriers and weak enforcement are preventing this potential from being realized.

Vietnam faces the rising challenges 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. Vietnam is now host to some of the worst piracy sites in the world. These are sites with a global reach and extremely high popularity such as *phimmoi.net* which is ranked 17th in Vietnam and 853rd globally and receives over 57 million monthly visits (SimilarWeb), as well as *xemphimso.tv* and *vtv16.info*. Further, top Vietnamese piracy sites with Vietnamese operations include, *bilutv.org*, *dongphim.net*, *motphim.net* and *vuviphim.com*. There is no clear or effective enforcement path available against these sites or their operators. The *123movies* case was an excellent example of difficulties in the enforcement apparatus in Vietnam. Rights holders provided extensive evidence to various departments of the MPS of infringing activity of the site. The government’s response was opaque, and while the site shut its doors after the case was politicized at the highest levels (including a U.S. Ambassadorial letter to the Minister for Information and Communications), no one was arrested or brought to account, and within months of *123movies* shutting its doors, hundreds of copycat sites emerged. Piracy apps and PDs, allowing easy access to film and television materials.

Chiasenhac.com is the most popular pirate music site in Vietnam. It allows users to stream unlicensed Vietnamese and international music, attracting 84% of its traffic locally and the remainder from territories including the U.S., Mexico, and India. It had 2.95 million monthly visitors in 2019. *Y2mate.com* is one of the most popular stream-ripping sites in the world, and the site owner is located in Vietnam. These and other sites are making it nearly impossible for legitimate online platforms to develop sustainable and properly-monetized content distribution services.

Even licensed music websites may inadvertently contribute to global piracy because most music sites do not have effective geo-blocking systems and, therefore, the content becomes available elsewhere.³ 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 the coordinated efforts of rights holders and the licensed sites. However, many problematic sites remain operational, such as *trangtainhac.com*, which deeplinks to other services, such as *chiasenhac.vn*. It is important that Vietnamese sites build their capacity to employ TPMs to prevent such unlicensed deeplinking, and there should be effective legal remedies against these deeplinking sites. Unfortunately, Vietnam’s copyright law does not provide adequate protections against circumventing TPMs.

The Government of Vietnam has been willing to take some steps in its enforcement against online piracy of audiovisual broadcasts over the past few years, demonstrating at least a willingness to cooperate with rights holders in enforcement actions, as well as with training and capacity building. Unfortunately, rights holders note that the administrative and criminal processes in Vietnam are cumbersome and slow, as they are subject to seemingly impossible evidentiary requirements. There is also no guidance with objective criteria for criminal liability and a ban against investigations by foreigners. Moreover, the difficulty in identifying infringers makes civil actions nearly impossible, because such actions cannot be initiated against an unknown infringer (i.e., “John Doe” actions are not permitted in Vietnam), even where the domain name, IP address, and related email addresses are known. The police and prosecutors insist that extensive evidence must be produced before any action is taken, creating an impossible task because the investigation is necessary to uncover the required evidence. Even where the infringement is clear, identification of the infringing website is not enough. Vietnam’s ban on investigations by foreign entities should be eased, but in the meantime, the onus is on the Vietnamese Government to investigate and take appropriate and effective administrative or criminal action.

³SimilarWeb estimates that visitors from the United States and Mexico are the second and third top foreign visitors to Vietnam’s music sites.

IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, and then the acceptance of those cases by the Supreme People's Procuracy so that serious criminal cases can be adjudicated in the People's Courts. Furthermore, IIPA recommends that the Government of Vietnam provide the understaffed COV with adequate resources, including additional staff, to develop effective enforcement strategies and policies to tackle online piracy.

ABEI Mechanism to Disable Access to Piracy: Over the past couple of years, MIC's Authority of Broadcasting and Electronic Information (ABEI) worked with a number of rights holders to help combat online piracy, resulting in sanctions against infringing websites, and most recently, in the first-ever site blocks in Vietnam against egregious websites infringing Vietnamese television rights holders. In late October 2019, the first administrative site blocking case was concluded. It had been brought at the request of the Vietnamese broadcaster and licensee VTV. 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 cut-off 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 those with business practices based on the distribution of infringing music—has continued to negatively impact the local music market and contributed to Vietnam remaining a major source of trans-border online piracy. The situation for the motion picture industry is also difficult. While most Internet service providers (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.

Mobile Network Piracy: With the rapid increase in the number of mobile phone subscribers in Vietnam, mobile network piracy has significantly increased 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. Another problem is that some licensed music services have created mobile apps that do not sufficiently support geo-blocking, allowing their contents to be played in other territories that are not licensed. For example, *Thegioinhac* (owned by Mobifone) and *Xmusic Station* (owned by NCT) both lack effective geo-blocking mechanisms.

Piracy Devices and Apps: PDs (also referred to as Illicit Streaming Devices, 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 around the world, and are gaining popularity in Vietnam. Camcording in cinemas is often the source of the pirated material accessed through PDs. The Government of Vietnam must increase enforcement efforts, including cracking down on PDs and vendors who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for PDs that are being sold and used illegally.

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, private ELT schools makes enforcement against widespread use of unauthorized reproductions of ELT materials extremely difficult. Unfortunately, the enforcement environment in Vietnam remains challenging for publishers and little progress has been achieved to combat infringing uses of ELT materials. A long-standing problem has been that 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. Publishers have identified a number of online sites that provide access to infringing copies of medical, dental, and pharmaceutical text books, and referred them to the MCST for administrative action; but, unfortunately, MCST has not taken action.

Increase Efforts Against Camcording: A great 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. These illicit copies are then distributed to pirate “dealers” throughout the world and over the Internet. Illegal camcording can damage the theatrical or later window for distribution of audiovisual works, harming the U.S. film industry and the local cinema business. More needs to be done in Vietnam to prevent this problem, including stronger cinema procedures for curtailing such activity, and corresponding criminal enforcement mechanisms.

Collective Management: Due to market access barriers, 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. COV should engage with foreign music producers to enable reform of collective management to put in place an 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 in line with international good practices

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative Violations Decree (No. 131) (as amended in 2017). The Civil Code of 2015 remains as a vestigial parallel law. Vietnam is not a member of the WIPO Internet Treaties and should accede (it is obligated to do so through the Comprehensive and Progressive Agreement for Trans-Pacific Partnerships (CPTPP) and the EU-Vietnam Free Trade Agreement). IIPA encourages Vietnam to take the necessary steps to accede and fully implement these treaties.

There are many deficiencies in the legal framework in Vietnam, and international trade and obligations still not met including the WTO TRIPS Agreement and the BTA with the United States. Some recent actions can be seen as steps backwards, not forward to meet these obligations.

Implementation of the Criminal Code is Critical and Should Be Consistent with International Commitments: Vietnam’s newly enacted Criminal Code became effective in January 2018. The new Criminal Code criminalizes piracy “on a commercial scale,” although the meaning of “on a commercial scale” is not defined in the Criminal Code. Pursuant to its obligations under the WTO TRIPS Agreement and the BTA, Vietnam is required to criminalize copyright piracy “on a commercial scale.” Vietnam should implement its new Criminal Code consistent with these obligations (there are also detailed obligations on point in the CPTPP).

The Supreme People’s Court has indicated it is working on a draft Resolution to provide guidelines for interpreting “commercial scale” and how to calculate the monetary thresholds, but those efforts which seemed hopeful a year ago appear to have stalled. A Supreme People’s Court Resolution should be issued without delay.

Court Reform Needed: IIPA understands that, in addition to the Supreme People’s Court working on a Resolution related to criminal liability, they were also drafting an “IP Manual for Vietnamese Judges.” Unfortunately, it appears that effort has stalled. Once re-commenced, the U.S. Government should, and IIPA members would hope to, weigh in on that process, which would presumably include procedural and evidentiary guidance as well as sentencing guidelines to create an appropriate level of deterrence in copyright cases. In addition, building IP expertise should be part of the overall judicial reform effort. The U.S. Government has stayed involved in training not only to judges, but also to police and prosecutors who will ultimately play an important role in bringing criminal cases before the courts.

IP Code as Amended Remains Incompatible with Global Norms and with Vietnam’s International Obligations: The IP Code and amendments showed promise for improved protection of copyright in Vietnam. Yet, they have not been properly implemented and leave questions regarding Vietnam’s compliance with the BTA and other international obligations. The issues that should be resolved in the current Code include 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 of 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.
- The right of producers of sound recordings “to distribute to the public the original or copies of the phonograms by sale, rental or distribution or any other technical means accessible by the public” under Article 30(1)(b) of the IP Code is vague and is not in line with the right of “making available” under the WPPT.
- 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 neighboring rights (i.e., sound recordings).
- 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 broad circumstances, and remove copyright protection in ways similar to provisions in China’s Copyright Law that were found by a WTO panel to violate China’s WTO obligations.
- Article 17(4) creates an unacceptable hierarchy of the rights of authors versus neighboring rights owners. This is inconsistent with Vietnam’s obligations to provide certain exclusive rights to neighboring rights holders, including producers, performers, and broadcasters, under international agreements, including the WTO TRIPS Agreement. 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 WTO TRIPS Article 13 and Article 4.8 of the BTA. For instance, exceptions for “public information and education purposes” as well as importation of copies of others’ works for personal use are overbroad. Further, a broad compulsory license as to all works except cinematographic works is not in line with international norms.
- 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 WTO TRIPS (Article 9(1)) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing a presumption of ownership for an author whose name appears on the work in the usual manner).

Decree No. 22/2018 Could Undermine Rights of Sound Recording Producers: Decree No. 22/2018, issued in April 2018, provides guidelines for implementing certain provisions of the IP Code. Article 32(3) of this Decree is problematic because it appears to provide an exhaustive list of the types of venues where sound recordings can be used for public performance pursuant to Article 33 of the IP Code. Thus, this provision could be interpreted to mean that the public performance right applies only to this list of venues, and no others, which would unacceptably limit the scope of the public performance right. Furthermore, the list of venues includes “establishments providing . . . digital environment services.” While this appears to refer to venues providing Internet services, such as an Internet cafe, it could be misinterpreted to refer to the use of sound recordings online. As such, the provision is not sufficiently clear and, if misinterpreted, would raise uncertainty regarding the exclusive rights of phonogram producers for the digital uses of their sound recordings.

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 in practice only in very narrow circumstances where online services and websites are directly infringing. No secondary liability provision exists in the JC or elsewhere in Vietnam’s legal framework. The IP or Civil Code should identify the legal liability of ISPs, including that any safe harbors only apply to neutral and passive activities. Overall, these laws should foster cooperation between ISPs and rights holders. The U.S. Government should seek high standard remedies that support today’s business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.

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 rights holder has suffered...” As noted above, Vietnam’s remedies for civil and administrative enforcement allow for distribution or use for non-commercial purposes of infringing goods and the materials and means for producing them, falling short of Vietnam’s obligations in BTA Article 12.4 and TRIPS Article 46. Similarly, Vietnam’s remedies for infringement at the border also allows for distribution or use for non-commercial purpose of infringing goods, which does not meet its obligations in the BTA (Article 15.12) or TRIPS (Article 59).

MARKET ACCESS BARRIERS IN VIETNAM

Vietnam continues to generally restrict foreign companies from setting up subsidiaries to produce or distribute “cultural products.” Restrictions via 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 publicly indicated that they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products. 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 products. 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

Decree Regulating OTT Services: In August 2018, MIC issued draft amendments to Decree 06 with the intent to expand it to encompass over-the-top (OTT) services. Several provisions of the draft Decree would create significant barriers to foreign investment, stunt the growth of Vietnam’s e-commerce market, and limit consumer choice and access to information. Of most concern is a licensing scheme that would require a local presence through forced joint ventures. In addition, the proposed revisions include a fixed local content quota and onerous censorship requirements. Over the past year, U.S. industry stakeholders have been intensely engaged in consultations pertaining to the draft Decree 06 amendments, including meeting with various Vietnamese officials to convey rights holders’ significant concerns and highlight international and regional best practices. In late December 2019, Vietnamese officials offered some concessions around consultation processes and substantive issues in Decree 06, but these fall short of industry expectations. A revised draft has not yet been made public.

Laws Leave Potential Quotas In Place: Under Cinema Law/Decree 54, Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. Vietnam is producing more local films, which now command over 25% market share in the country, rendering this quota irrelevant, so the quota should be removed. The latest draft amendments to the Cinema Law, issued in August 2019 and expected to be deliberated in the National Assembly in 2020, contain a troubling policy objective of restricting the screening of imported films. These quotas should be lifted or eased significantly, because they limit exports of audiovisual content to the detriment of U.S. producers.

Foreign Investment Restrictions: Foreign companies may only invest in film production and distribution, as well as cinema construction, through joint ventures with local Vietnamese partners and these undertakings are subject to government approval and a 51% ownership ceiling. Although the Vietnamese Government has recently proposed amendments to its Cinema Law which would facilitate foreign investment in stand-alone film distribution enterprises,

these amendments maintain the 51% ownership ceiling. Such restrictions are an unnecessary market access barrier for U.S. film producers and should be eliminated.

Law on Cybersecurity: In June 2018, the National Assembly passed a new cybersecurity law, which took effect in January 2019. Unfortunately, this law did not include any provisions to improve copyright enforcement, which would have assisted in the law's goal of improving the health and security of Vietnam's online environment. Implementation of this law should be monitored, however, because it is critical that this law does not impose unreasonable compliance obligations on OTT services, particularly regarding data localization requirements. Overly strict data localization requirements could negatively impact U.S. exports of audiovisual content.

Barriers Specific to the Video Game Industry

Decree No. 72 Restricts Video Game Rights 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."

For some games, the Decree establishes the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: censorship of the content of video games in order for them to be approved; outright prohibition of certain content within video games data collection; age of users; and license duration limits. The implementation of this Decree should not create structures that unduly impede the ability of foreign rights holders to access the Vietnamese market or that discriminate against them. IIPA urges 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 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. Under the applicable Decree today, circulation permits for tapes and discs are granted by provincial-level MCST Departments. However, restrictions placed on foreign companies limiting their ability to setup subsidiaries to produce and distribute "cultural products" in Vietnam in turn makes it difficult for foreign companies to obtain circulation permits, as the applications must be submitted by local (Vietnamese) companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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

- All infringements on a commercial scale may not be subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- A number of copyright exceptions may be 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 with prosecutors or to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials all are 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; and
- Presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2.