

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2021.¹

Executive Summary: Vietnam is an important emerging market in Southeast Asia for the creative industries, but the market for creative works in Vietnam remains severely stunted due to worsening piracy and debilitating market access barriers. Vietnam is now host to some of the world's most popular piracy websites, such as the notorious piracy sites *Phimmoi* and *Chiasenhac*, and while rights holders have implored Vietnam's government to take action, the government has done very little to address this issue. Another growing problem involves piracy streaming devices (PDs) and applications (apps), in addition to circumvention devices and software being used to access illegal content. On a positive note, the Authority of Broadcasting and Electronic Information (ABEI), under the Ministry of Information and Communication (MIC) and the police unit A05, have begun enforcing a decree to disable access to dozens of infringing websites in Vietnam. Still, major enforcement deficiencies and obstacles abound in Vietnam, including: (1) government unwillingness or inability to follow through on criminal referrals, regardless of how much evidence is provided of blatant copyright piracy (i.e., the lack of objective criteria for the Vietnamese government to prosecute a criminal case); (2) prohibition on foreign investigations; and (3) prohibition on civil suits against unknown defendants (i.e., "John Does"). The above results in a lack of effective criminal procedure or punishment to deter online piracy operators and lack of a general deterrent message to operators or consumers in Vietnam against copyright infringement.

The Government of Vietnam has agreed, by joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to adopt criminal provisions that represent best practices, including criminalizing "significant acts, not carried out for commercial advantage or private financial gain, that have a substantial prejudicial impact on the interests of the copyright . . . holder in relation to the marketplace." However, the latest draft amendments to the IP Code do not include this important clarification, although they do include some measures to properly implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together, WIPO Internet Treaties), which should be acceded to once that law is enacted. IIPA hopes the Government of Vietnam will bring its enforcement norms in line with the CPTPP and evolving global norms, including by amending the Criminal Code, Resolutions, Decrees and Circulars to ensure Vietnam is in full compliance of its international obligations, including adopting a resolution that clearly defines and interprets "commercial scale" in accordance with Vietnam's current obligations under the CPTPP. 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's piracy problems would also be reduced if the country removed its restrictive market access barriers. It is 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.

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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2021

Enforcement:

- Ensure enforcement officials, including the 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, like addressing notorious piracy sites like *Phimmoi* or *Chiasenhac*; issue administrative penalties for infringement sufficient to deter piracy; ensure administrative orders are properly enforced; and bring criminal prosecutions applying objective criteria against commercial scale piracy, including flagrant piracy websites.
- Provide relevant copyright enforcement agencies with adequate resources, including additional staff, to develop and implement effective enforcement policies.

Legislation:

- Accede to the Internet Treaties, as is legally required under the CPTPP.
- Swiftly enact the draft amendments to the IP Code, with further changes needed to fully comply with Vietnam's international obligations (as outlined in this report), and make other necessary changes to the Criminal Code and implementing Resolutions, Decrees, and Circulars, including adoption of a Resolution that: (i) clearly defines and interprets "commercial scale" consistent with Vietnam's international obligations; (ii) criminalizes "significant acts not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace;" and (iii) takes into account peer-reviewed studies to ensure that the monetary thresholds can realistically be met by applying an appropriate substitution rate to effectively criminalize the main piracy sites operating in Vietnam.
- Further strengthen the legal framework to take effective action against digital infringement, including by: (i) ensuring sound recording producers are provided a full, unrestricted public performance right and exclusive making available right for the digital uses of their sound recordings, consistent with Vietnam's international obligations; (ii) clarifying ISP liabilities, including specifying consequences for non-compliance with the Joint Circular, and ensuring that safe harbors under the Law on Information Technology only apply to passive and neutral services; (iii) easing the evidentiary requirements that interfere with the ability to take effective action against piracy websites, illegal camcording, live-streaming piracy, PDs and apps and circumvention devices and software that facilitate access to infringing works; (iv) 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 swiftly and flexibly transferring cases for criminal prosecution where warranted; (v) developing an effective procedure to promptly respond to rights holders' requests for administrative enforcement, (vi) properly enumerating all sound recording producers' rights in line with WPPT; and (vii) clarifying that provisions relating to technical protection measures (TPMs) are sufficiently broad to cover access controls.²

Market Access:

- Ensure that amendments to Decree 06 do not impose additional market barriers to e-commerce.
- Eliminate foreign investment restrictions, including in the latest draft cinema law amendments: screen quotas and broadcast quotas; caps on the number of foreign pay-TV channels in pay-TV regulations; requirements for local advertisement production that severely impede the growth of the pay-TV industry; 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. As part of this, elimination of all restrictions and limitations for foreign and joint venture entities and their involvement in collective management organizations is required.

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>.

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Growing Online Marketplace Presents Challenges: A significant percentage of the Vietnamese population is online and a growing number of licensed legal content providers are trying to take advantage of this market. These legal 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. Online piracy is rampant in Vietnam, and increasingly, Vietnam is host to some of the most egregious piracy sites and services in the world with no clear or effective enforcement path available against these sites or their operators. Illegal content generally can be accessed via online and mobile network piracy such as download sites, peer-to-peer networks, linking sites, streaming sites, search engines, cyberlockers, apps and on social media networks. Infringers often take advantage of free platform resources, including those from Facebook and Google, to store and share pirated contents and stream them via piracy sites and apps. PDs are also gaining popularity in Vietnam, as they are cheap and easy to use, provide a range of unauthorized content through piracy apps, and are available from online retailers, as well as physical stores.

Foreign torrent sharing websites such as *ThePirateBay* and *1337x.to* are well known among Vietnamese audiences. The notorious piracy site *Phimmoi* remains a major piracy sore spot for rights holders, remaining very popular with Vietnamese audiences. *Phimmoi* is a streaming website presented in Vietnamese language, offering thousands of unauthorized feature film and television series from the United States and all over the world. According to SimilarWeb data, for the 12 month period from June 2019 to May 2020, *Phimmoi.net* received a total of 862 million visits (a monthly average of 71.83 million visits), with 98% of this traffic coming from Vietnam. In August 2019, the MPA, in conjunction with local rights holders, filed a criminal complaint with the Vietnamese Ministry of Public Security in relation to *Phimmoi*. In June 2020, the authorities issued a notice of suspension of the investigation for unknown reasons. The *Phimmoi.net* domain was subsequently blocked, however *Phimmoi* has simply moved to alternate domains. According to *Phimmoi*'s Facebook page, it announced it was redirecting to *Phimmoi.net*. The *123movies* case was another 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 raised by senior U.S. government officials, no one was arrested or brought to account. Within months of *123movies* closing down, hundreds of copycat sites emerged.

Chiasenhac.vn 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 receives about 2.11 million monthly visitors according to SimilarWeb. Stream-ripping sites have become a new and rapidly growing piracy trend in Vietnam, with five of the top ten most popular music pirate sites originating from this category. *Y2mate.com*, an internationally-popular stream-ripping site, received more than 35 million visits from Vietnam between October 2019 and September 2020. *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.

Some third party sites (especially open source sites) circumvent licensed sites' 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. Nevertheless, there need to be effective legal remedies against these deeplinking sites, and therefore, Vietnam's IP Code needs to afford 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 insurmountable evidentiary requirements. There is also no guidance with objective criteria for criminal liability, and Vietnam has a ban against investigations by foreigners. Moreover, the difficulty in identifying infringers makes civil actions nearly impossible because actions cannot be initiated against an unknown infringer 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 a very difficult 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. All this results in lack of any effective criminal procedure or punishment to specifically deter online piracy operators, and lack of a general deterrent message to operators or consumers in Vietnam against copyright infringement. No criminal proceedings have been brought in Vietnam in relation to online copyright infringement to date, and there is a lack of coordination and transparency among related ministries and agencies. It is critical for enforcement authorities, including the relevant police units, as well as MPS, A05, and/or ABEI/MIC, to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites. Overall, Vietnam's current criminal enforcement system and legislation framework are unable to deter online piracy unless significant changes are made.

ABEI Mechanism to Disable Access to Piracy: Over the past couple of years, MIC's 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 the rights of Vietnamese television rights holders; there are now more than 70 sites blocked in Vietnam by ABEI and the Ministry of Culture, Sports and Tourism (MOCST). While disablement in Vietnam does not stop these Vietnam-based services from harming overseas markets (or even from ceasing, as brands like notorious piracy site *Phimmoi* just hop to new domains like *Phimmoizz*), it is a step in the right direction. The music industry filed an application with the ABEI petitioning for the blocking of the two sites *saigonocean.com* and *chiasenhac.vn*. The ABEI only agreed to consider the application in respect of *chiasenhac.vn*. It took until March 2020 before notification was received that the ABEI had worked with Yeu Ca Hat Entertainment Joint Stock Company, owner of *chiasenhac.vn*, and that the company had monitored the accounts of those who uploaded copyright infringing works, removed over 6,000 works from the company's system, blocked 41 infringing accounts, and simultaneously provided information relating to the 41 accounts that had been blocked to the MIC. Despite this action by ABEI, *Chiasenhac* is now back to being the principal source of unlicensed music in Vietnam, with both local and international repertoire easily accessible via the site.

PDs and Apps: PDs 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. 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.

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. These illicit copies are then distributed to pirate "dealers" throughout the world and over the Internet. Illegal camcording can damage the 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 best practices.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (IP 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. Following the signing of the Regional Comprehensive Economic Partnership (RCEP) Agreement on November 15, 2020, the Vietnamese government released draft amendments to the IP Code for public consultation in early December 2020. The amendments make a number of changes to the IP Code, some of which improve the law. For example, the revised IP Code would appear to close gaps in substantive copyright protection to enable Vietnam to accede to the WIPO Internet Treaties, including protections against unlawful circumvention of TPMs and affording rights holders with a communication to the public/making available right. All this comes after Vietnam's formal ratification of the CPTPP in October 2018 and a Free Trade Agreement with the EU in August 2020. Passage of the draft IP Code amendments would set the stage for Vietnam to accede to the WIPO Internet Treaties, as is required by both trade agreements (i.e., by the entry into force of the CPTPP/within three years of the entry into force of the EU agreement). IIPA encourages Vietnam to take the necessary steps to accede and fully implement these treaties.

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 that seemed hopeful a year ago appear to have stalled.³ A Supreme People's Court Resolution should be issued without delay. In addition, further modernization of the Criminal Code would be helpful to ensure that there is congruity between acts considered copyright infringements (under Article 28 and 35 of the IP Code as proposed to be amended) and the Criminal Code (in other words, acts considered infringements, when carried out on a commercial scale, should be criminalized under the Criminal Code).⁴

IP Code Draft Amendments Leave Some Issues Unresolved: Notwithstanding that the draft IP Code amendments would result in some improvements to the law, they leave some issues and questions unresolved, including with regard to Vietnam's compliance with the BTA, TRIPS, and other international obligations. Indeed, Vietnam is yet to accede to WPPT and WCT, which it is legally obligated to do under the CPTPP and EU-Vietnam FTAs, both of which have entered into force. The issues that should be resolved in the current IP Code (or the draft Code) include the following:

- **Temporary Copy Protection:** The draft IP Code expressly recognizes protection of temporary reproductions for the first time, which is positive. However, it is concerning that, notwithstanding changes to technology allowing for piratical uses (with major commercial impact) that are simultaneous or near-simultaneous and do not result in a permanent or cached copy being made, the draft IP Code adopts an outdated concept of certain temporary reproductions that can be exempted from the right.⁵

³A Resolution should: (i) clearly define and interpret "commercial scale" consistent with Vietnam's international obligations; (ii) criminalize "significant acts not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace;" and (iii) take into account peer-reviewed studies to ensure that the monetary thresholds can realistically be met by applying an appropriate substitution rate to effectively criminalize the main piracy sites operating in Vietnam. It should also take notice of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) language that "the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace."

⁴This would include, for example, criminalizing commercial scale infringements involving unauthorized making available or communication to the public of works or objects of related rights, as well as the act of circumvention of TPMs or trafficking in circumvention devices/services.

⁵IIPA proposes that this language be added to the current draft provisions (as to works, phonograms, and performances): "In cases where temporary reproduction is an essential and integral part of a technological process which takes place during the normal operations of the equipment used therein and the copy is automatically deleted without the ability to be restored, and such temporary reproduction has no independent economic significance or does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holders, such rights are not applied." This will ensure that live event transmissions (including, e.g., live-streaming of an unlawful camcord of a major motion picture right off the screen) would be covered as an infringement.

- **Term of Protection:** The current 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.
- **Right of Producers of Sound Recordings:** The exclusive reproduction right of producers of sound recordings is not comprehensively set out under Article 30(1)(a), and the distribution, rental and making available rights are all set out under Article 30(1)(b) rather than being individually enumerated, which creates confusion. The IP Code should be amended so that it expressly and individually enumerates phonogram producers' exclusive rights in a manner that reflects the WPPT. To ensure consistency and clarity, acts that constitute infringement of phonogram producers' rights under Article 35 should be aligned with the exclusive rights of sound recording producers provided under Article 30.
- **TPMs:** A number of issues relating to TPMs need to be addressed: (i) it is not clear whether the TPM provisions in the IP Code are sufficiently broad to cover access controls, important for effective TPM protection; (ii) Article 28.14 of the IP Code imposes a knowledge (or constructive knowledge) requirement that is too limiting and should be removed; and (iii) 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).
- **Denial of Protection for Certain Works:** Articles 7(2), 7(3), and 8 of the current 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.
- **Hierarchy of Rights:** Article 17(4) of the current IP Code 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.
- **Broad Exceptions and Limitations:** Certain exceptions and limitations in the current 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. Further still, the draft IP Code introduces exceptions in draft Article 25 (as to works) and 32 (as to related rights) which must be examined for the compatibility with the three-step test, TRIPS Article 13, and BTA Article 4.8.
- **Ownership of Copyright:** Ensure that the current IP Code's proviso that organizations and individuals who invest finance and physical and technical facilities in making cinematographic works and dramatic works are the owners of the copyrights thereto remains the law, which is in line with the international best practices in determining ownership of such works. 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).
- **Overbreadth of Draft Private Copy Exception:** Ensure that draft Article 25(1)(a) (private copy exception) expressly does not apply to cinematographic works and is limited to one physical copy to keep it in compliance with international standards.
- **Recirculation of Seized Good/Tools Into Channels of Commerce:** 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.

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. Some of the most typical and heavy commercial users of recorded music (e.g. night clubs, discos, concert halls, exhibition galleries, parks, fitness gyms and hair salons) are not on the list, and the omission of these businesses unfairly and unjustifiably allows them to exploit and free-ride on the backs of rights holders. 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. This provision is not compatible with the three-step test.

ISP Liability Should be Amended to Meet Modern Challenges: Joint Circular 07/2012/TTLT- BTTTT – BVHTTDL on stipulating the duties of enterprises providing intermediary service in protection of copyright and related rights on the Internet and in the telecommunication networks environment (“Circular 07”) 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. The draft IP Code introduces new Article 198b, which appears to incorporate Articles 4, 5 and 6 of Circular 07. As such, despite the insertion of Article 198b, the draft Code maintains the spirit of the prevailing laws in relation to the liability of ISPs in protection of copyrights and related rights in the digital environment. As a result, copyright holders will still face unresolved difficulties in preventing copyright infringements on the Internet.

The draft IP Code does not supplement/introduce a new mechanism that allows copyright holders to cooperate with ISPs directly to take down infringing content. Rather, the draft IP Code only requires ISPs to take down infringing content upon requests by the authorities. To improve protection of copyright and related rights in the digital world and to meet the international best practices, introducing a mechanism to allow an immediate takedown of infringing content upon request of copyright holders is highly recommended. In addition, no secondary liability provision exists in Circular 07 or elsewhere in Vietnam’s legal framework. The IP or Civil Code should identify the criteria for legal liability of ISPs, and these laws should foster cooperation between ISPs and rights holders.

Under Article 5.3 of the Joint Circular, only the MIC or the MCST or other Competent State Authorities may request ISPs to remove infringing content or suspend the access to it. Rights holders should also be allowed to make such requests. Circular 07 further provides under Article 5.5 a few cases in which ISPs will be held directly responsible for damages as a result of copyright violations. They include: making available; transmitting or distributing digital content without permission of the right holder; modifying, mutilating or reproducing content without permission of the right holder; willfully circumventing or bypassing technological protection measures; and operating as a secondary distributing source of infringing content. Article 5.5 should be clarified to provide that an ISP will be liable for copyright infringement committed by its users if the ISP has actual or constructive knowledge of an infringement and fails to act expeditiously to terminate the infringement and to prevent future recurrences of it (including if it does not comply with government’s or right holders’ requests to remove infringing content or block access to it), knowingly facilitates such infringement, or if it enables users to commit infringement. Penalties for non-compliance should be expressly spelt out in Circular 07.

The type of blocking provided in the Joint Circular may only apply to websites that use the “internet services of a Vietnam company,” i.e., if an infringing website uses a host that is provided by a Vietnamese company, registered a domain name with a Vietnamese Company (Vietnamese registrar), or uses an IP address that is managed by a Vietnamese company. If this is correct, the effectiveness of the website blocking provision will be greatly different and even reduced. Given the nature of the Internet, domain names can be registered and websites can be hosted anywhere outside the country of origin, but their target users can be in Vietnam, so implementation should not be limited to infringing websites that are hosted locally.

Another piece of legislation relevant to determining ISP liability is the Law on Information Technology (No. 67/2006) (the “IT Law”). Articles 16 and 18 of the IT Law require services that transmit digital information or lease

information storage space to promptly take necessary measures to stop illegal access, to or illegal deletion of, digital information at the request of competent state agencies. Articles 18 and 19 of the IT Law also require services that lease information storage space or provide information search tools to cease leasing storage space for illegal information or supplying tools for searching illegal information sources when they detect or are informed by competent state agencies of the infringement. These articles should be revised so that the services are also required to act upon the requests of right holders. Articles 16 and 17 of the IT Law provide safe harbors to organizations and individuals that transmit or temporarily store digital information of other organizations and individuals on certain conditions. These articles should be amended to clarify that the safe harbors only apply to passive and neutral services, and that the services relying on the safe harbors have the obligations to cease access to or remove infringing content upon request by right holders or upon actual or constructive knowledge of infringement. They should also adopt a repeat infringer policy and ensure that infringing content, once blocked or removed, does not reappear.

Court Reform Needed: IIPA understands that, in addition to the Supreme People's Court working on a Resolution related to criminal liability, it was also drafting an "IP Manual for Vietnamese Judges." Unfortunately, it appears that this 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.

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.

Pay-TV Regulation: In March 2016, Vietnam enacted pay-TV regulations (Decree 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 30% of the total number of channels any such service carries. These regulations also require operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced or otherwise "conducted" in Vietnam. Further, these regulations essentially expand censorship requirements to all channels, while such regulations had previously applied solely to "sensitive" channels. This mandate also appears to impose new "editing fees" on international channels. These measures are unduly restrictive and severely impede the growth and development of Vietnam's pay-TV industry.

Decree Regulating OTT Services: In August 2018, MIC issued draft amendments to Decree 06 with the intent to expand the scope of existing pay-TV regulations 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 and onerous censorship provisions. Over the past two years, U.S. industry stakeholders and the U.S. government have been intensely engaged in consultations pertaining to the draft Decree 06 amendments. In late 2020, the latest draft was submitted for finalization by the Office of Government. While this draft contains some concessions relating to the proposed content quota, the remaining licensing proposal and uncertainty around censorship requirements fall short of industry expectations.

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. Domestic films in recent years have accounted for a growing share of the market and greater investment. Vietnam should remove any quota reference in proposed amendments to the Cinema Law, targeted for 2021 completion. The latest draft amendments to the Cinema Law, issued in December 2020 and expected to be deliberated (and possibly passed) in the National Assembly in 2021, disturbingly expanded the scope to include film dissemination on the Internet, raising serious questions about the policy objective of the Cinema Law in the Video-on-Demand sector. The latest draft includes an impractical requirement to obtain permit for all film dissemination and classification for Internet delivery, local presence for offshore film dissemination services, and establishment of a film fund drawn from a percentage of VAT collected from cinematographic business activities. Although the 20% screen quota was replaced with less prescriptive language, the provision should be eliminated completely to avoid uncertainties. In the television sector, foreign content is limited to 50% of broadcast time and foreign programming is not allowed during prime time. Broadcast stations must also allocate 30% of air time to Vietnamese feature films. These restrictions limit U.S. exports of film and television content. 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 invest in cinema construction and film production and distribution through joint ventures with local Vietnamese partners, but these undertakings are subject to government approval and a 51% ownership ceiling. Unfortunately, Vietnam's December 2020 proposed amendments to its Cinema Law maintained the 51% ownership ceiling in cinematographic sector activities. 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. In September 2020, the MPS released a revised decree that would implement the 2018 Cybersecurity Law. This revised decree, which contains onerous data localization requirements, is intended to be the final version and will be promulgated soon. Overly strict data localization requirements could negatively impact U.S. exports of audiovisual content. Vietnam should remove such a requirement to facilitate a dynamic and market-driven responsiveness to cybersecurity threats.

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.

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, hinders 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, and to establish music publishing houses and websites to publish and distribute legitimate music products in 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 companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

Due to market access barriers, 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. Furthermore, the restrictions and limitations on foreign and joint venture entities and their membership in collective management organizations established as associations needs to be removed (found in Decree No. 45/2010/ND-CP). The 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 rights holders and users alike in line with international best practices.

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, however, Article 198a of the draft IP Code amendments provides for the first time a presumption of ownership in Vietnamese law.