

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List.¹

Executive Summary: IIPA hopes the issuance and entry into force in 2012 of the Ministry of Information and Communications (MIC) and Ministry of Culture, Sports, and Tourism (MCST) Joint Circular on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks will lead to significant reductions in online and mobile piracy in the country, including closures of notorious websites and services built on copyright infringement. The IP Code, Criminal Code, administrative enforcement Ordinances and Decrees, and judicial reform, must all be brought to bear to significantly reduce all forms of piracy, including online and mobile piracy, enterprise end-user piracy of software, physical piracy, and book piracy which remain largely unchecked in Vietnam. The Vietnamese have long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”² The Vietnamese government has taken very few enforcement actions over the years, and to our knowledge, no criminal case has ever been brought to address copyright piracy. The software industry reports greater support in terms of numbers of raids from MCST and the Department of Anti-High Tech Crimes of the Ministry of Public Security (MPS) in 2012, but even then, administrative fines meted out are the statutory minimum and fail to deter piracy. The Vietnamese government has largely ignored concerns over onerous market access restrictions.

PRIORITY ACTIONS REQUESTED IN 2013

Enforcement

- Enforce new Joint Circular, taking effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report (e.g., *nghenhac.info*, *vui.vn*, *Zing.vn*, *Socbay.com*, *Tamtay.cn*, *xemphimonlines.com*, *phimvang.org*, *xuongphim.com*, *viettorrent.vn*, *ephim24g.net*, and *phim.soha.vn*).
- Devote greater resources and MCST Inspectorate, Economic Police, and High Tech Police manpower to running raids and bringing administrative raids and launching cases under the Criminal Code, e.g., against online piracy, end-user piracy of software, retail and source piracy, CD-R burning labs, reprinting/photocopying facilities, etc., imposing maximum administrative fines.
- Reduce piratical imports from China.
- Develop and finalize IP Manual for Vietnamese Judges, conduct training and outline implementing guidance for the Criminal Code, then conduct software piracy raids and bring such cases to the Criminal Court in 2013.

Legislation

- Issue implementing guidance for the revised Criminal Code so that prosecutions can commence, in line with Vietnam’s Bilateral Trade Agreement (BTA) obligation, including by i) confirming that the Code applies to online distributions and all other violations of the IP Code, and ii) providing detailed interpretations of “commercial scale” infringements that include those undertaken without a profit motive.
- Make necessary changes to IP Code and implementing decrees to ensure Vietnam is in full compliance with its BTA and other international obligations, and otherwise facilitate the free exercise of rights by copyright owners.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

¹For more details on Vietnam’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>.

Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009 (on file with IIPA).



- Clarify Decree No. 85 measures that appear to impose onerous restrictions on collective management, namely, by ensuring those provisions do not apply to foreign collective management organizations (CMOs) or the administration of foreign rights.
- Extend the term of protection for sound recordings to the BTA-compatible term (75 years or more) and otherwise extend copyright term in line with the international trend (life of the author plus 70 years).
- Pass optical disc licensing regulation.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.

Market Access

- Afford U.S. right holders greater access to the Vietnamese market, by eliminating foreign investment restrictions and other entry barriers with respect to production, importation and distribution of copyright materials whether in the physical or online/mobile marketplaces. For example, the Vietnamese government should further suspend or repeal regulations imposed in the pay-TV sector requiring the appointment of local agents, mandatory translations, and advertising restrictions.

PIRACY UPDATES IN VIETNAM

Internet and Mobile Piracy Causing Severe Damage to Copyright Owners: Increased Internet and mobile penetration and more widely available broadband capacity have led to a severe increase in the trade of illegal copyright files online. Internet penetration continued on an upward path, with reportedly 31.1 million Internet users according to the Ministry of Information and Communications (MIC) of Vietnam, with 3G mobile Internet users reaching 16 million (18% of the country's population).³ Vietnam ranks 18th in the world, 8th in Asia, and 3rd in Southeast Asia in the total number of Internet users. Broadband usage expanded rapidly in 2010, up to 3.8 million fixed broadband subscriptions or 4.3% of the population.⁴ According to MIC, there are 19 Internet service providers, some 1,064 licensed websites, and 335 social networks operating in Vietnam.⁵ Unfortunately, the vast majority of websites dealing in copyright content remain unlicensed,⁶ although there are now a few operators of online services providing licensed music (representing, however, only 1% of online music services). The rest are streaming and download sites (50%), forums (21%), video websites (17%), search engines (8%), deeplinking, cyberlocker, and social network sites all being employed to deliver unlicensed copyright content, including music, movies, entertainment and software, and published materials.⁷ Some are Vietnam-based/hosted sites, and since both international and other Asian repertoire such as Chinese, Japanese and Korean music can be found on these sites, it appears the online music and film piracy problem in Vietnam is now impacting overseas markets. Notorious websites include *Zing.vn*, *Tamtay.cn* and *Socbay.com*; forum sites like *kenh14.vn*, *yeuamnhac.com*, *hihihehe.com*;⁸ streaming sites (offering unauthorized video and audio content) like *phimiphone.com*, *phim.livevn.com*, *phim.soha.vn*, *phimhit.com*, *funring.vn*, *nghenhac.info*, *nhac.vietgiaitri.com*, *Nhac.vui.vn*, and *Yeucahat.com*; direct download sites like *viettorrent.vn*, *forumphim.com*, and *phimfullhd.com*; and cyberlockers used for piracy like *fshare.vn* and *up.4share.vn*. University networks are increasingly being used for dissemination of infringing content.

³Vietnam Ranks World's 18th for Most Internet Users, Global Times, December 4, 2012, at <http://www.globaltimes.cn/content/748146.shtml>.

⁴ International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

⁵It is important to note that, for example, more than half of the unlicensed online music services are operated by companies. In addition, for licensed Internet content providers, the government has business registration, certificates of domain name registrations and details of legal representatives.

⁶There is clearly a strong demand in Vietnam for copyright content with little regard to its legality, as recent survey results show. According to the author of a 2011 Internet usage survey conducted by Cimigo, "Vietnamese people especially like to listen to music and watch movies online. We measured a constant increase in such entertainment activities over the past few years. At the same time, there is an increasing number of websites offering such services." According to the study, about 80% of internet users listen to music online, and two-thirds download music from the internet. Half of internet users watch movies online. *2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam, April 2011* (on file with IIPA).

⁷The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. Piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

⁸Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content.

Zing.vn, well documented in last year's IIPA Special 301 report,⁹ was proposed by IIPA as a “notorious market” in its Special 301 out-of-cycle review submission in September 2012, and USTR agreed in its December 2012 announcement.¹⁰ USTR noted in its announcement, “In addition to being a social media site, Vietnam-based *Zing.vn* also includes an infringing deeplinking music portal, which reportedly attracts large numbers of users to the site.” They also indicated, “We understand that VNG, *Zing*’s parent company is currently in talks with rights holders to obtain the necessary licenses to transition *Zing* into an authorized digital music platform.” ComScore recorded 470,000 Internet users from South Korea visiting *mp3.zing.vn* in June 2012, an increase of 270% over the same period in 2011. The Vietnamese government has not come forward with any explanation as to why no enforcement action has been taken. In October 2012, the Coca-Cola Company and Samsung decided to pull advertising from *zing.vn*.¹¹ Then in late November, the U.S. Embassy “suspended” its *zing.vn* account, with the State Department noting, “the suspension is part of a dialogue with *ZingMe*’s parent company, VNG, about intellectual property rights and digital piracy. He said the embassy hopes to be able to reactivate its account after “adequate progress” is made on the property rights issue.”¹²

With rapid increases in mobile phone subscribers in Vietnam, there has also been an increase in mobile piracy over the year. Right holders now face two major challenges in the mobile space: 1) the loading by mobile device vendors of illegal copyright content onto devices at the point of sale; and 2) illegal music channels or “apps” set up to be accessed on mobile platforms, without any intervention from the authorities to cease such activities. As an example of this phenomenon, sites like *Socbay.com* offer illegal downloads of ringtones to mobile phones, but *Socbay* has now developed a mobile “app” called *Socbay iMedia* which provides a variety of unauthorized entertainment content, including, *inter alia*, music files. This second phenomenon will, if allowed unchecked, threaten the entire online/mobile market for music and other copyright materials into the future and must be addressed.

Enterprise End-User Piracy of Software Harms the Software Industry and Stunts the Growth of the IT Sector: The software industry reports a continued high level of software piracy in Vietnam. In 2011, the software piracy rate in Vietnam was 81% (among the highest in the world), representing a commercial value of unlicensed software of US\$395 million.¹³ This includes widespread unlicensed software use by enterprises in Vietnam, retail piracy, and hard disk loading of unlicensed software. Most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots. A 2010 study done by the International Data Corporation (IDC) with BSA | The Software Alliance (BSA) concluded that decreasing Vietnam’s software piracy rate by ten percent over a four-year period would add US\$1.17 billion to Vietnam’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$60 million in tax revenue. The industry also notes the desperate need for legalization of software usage within the Vietnamese government. It has been recognized by some within the Vietnamese government that use of unlicensed commercial software is occurring within government ministries. Some initial discussions on government legalization have commenced between BSA and the Ministry of Information and

⁹*Zing.vn* is an online portal service operated by VNG Corporation in Vietnam. *Zing.vn* provides various online services including an unauthorized online music and video portal, social networking, search engine and instant messaging. The unauthorized music portal site *mp3.zing.vn* draws over 60% of the Internet traffic within all the sub-domains of *Zing.vn* according to Alexa.com. Further, *Zing.vn* claimed that 77.6% of Vietnamese internet users visited *Zing* in which over 80% of them used *mp3.zing.vn*. *Zing.vn* remains an extremely damaging site in Vietnam, ranking as the 6th most visited site in that country, and is often visited in South Korea and Singapore, giving it a strong global ranking.

¹⁰ See IIPA, *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf; United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

¹¹Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/oke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads>.

¹²U.S. *Suspends Embassy Account on Vietnam Website*, Associated Press, November 28, 2012, at http://www.mercurynews.com/top-stories/ci_22085190.

¹³BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Vietnam was 81%, representing a commercial value of unlicensed software of US\$395 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

Communications (MIC), with a focus on legalization procedures and the government avoiding any mandates or preferences for the purchase of specific types of software.

Physical Piracy Remains Rampant, Including Pirate Imports, Pirate Burned Content, Factory Production, and “Media Box” Piracy: Evidence of physical piracy, including virtually 100% piracy of home video entertainment, can still be found everywhere in Vietnam, especially in urban areas. This includes major piracy hubs like Hanoi, Ho Chi Minh City, Đà Nẵng, Hải Phòng, and Vietnamese-Chinese border cities Lang Son and Mong Cai. With Internet piracy growing in larger urban areas, physical piracy is migrating to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên. It remains very easy to buy almost imported discs (from China mainly), burned discs or factory discs of any kind of content, and pirated software is readily available at shops on the so-called “PC streets” or other “CD-DVD” shops. Piracy storefronts are more than happy to supply any content on recordable discs, complete with hacking or cracking instructions for those products embedded with technological protection measures (access controls or copy controls). Vietnamese-sourced pirate products flood the domestic markets and have been found in other markets in recent years in Asia, North America, and even Eastern Europe. For the music industry, with piracy levels still extremely high, financial returns for recorded music sales have dropped so deeply that the companies involved are unable to invest in new albums and artists, choosing to recoup investment through ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing. Online websites such as *minhtan.com*, *rangdong.com*, *vnnmall.com*, and *saigonsuperstore.com* are now being used to market hard goods pirate music CDs and karaoke DVDs. A recent phenomenon is the sale of “media boxes” which support BitTorrent file sharing clients and P2P downloads, as well as allowing the direct loading of copyright content prior to or as an after-service to sale of the hardware.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers continue to suffer from rampant piracy in Vietnam, in the form of illegal reprints and unauthorized photocopies. Bookshops, roadside vendors and copy shops all sell unauthorized copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to harm foreign publishers. Unauthorized translations produced by university lecturers or professors have been detected, in which the lecturers or professors append their name to the translated textbook.¹⁴ The English language teaching market continues to be hard hit, with much of the market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. Concerns about piracy have been raised at many levels (country, district, and provincial), and local provincial authorities will conduct the periodic raid when prompted by a right holder, but the raid will generally result in the confiscation of goods and imposition of a small, non-deterrent fine. Moreover, there are currently no university or government efforts to address the endemic piracy on university campuses. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

Signal Piracy/Pay TV Piracy: Vietnam's pay-TV sector now is one of the fastest developing markets in the Asia Pacific, and is set to rank fourth in the region in growth over the next four years.¹⁵ Vietnam boasts 4.2 million overall connections as of May 2010, and digital systems are taking hold (including through Vietnamese government infusion of capital).¹⁶ Urban cable systems are prone to “line tapping” and signal theft by individual consumers, including the unauthorized reception and redistribution of foreign satellite channels using illegal decoders. Cable companies continue engaging in “under-declaration” by which they fail to pay for the full number of customers to whom they provide programming, and also use unlicensed content (including unauthorized broadcasts of DVDs directly over their channels). “Overspill” is also a problem in Vietnam as cable operators capture signals from neighboring countries’ satellite systems. These are endemic problems which the government should address. A relatively new and dangerous problem in Vietnam involves the operation of websites which steal pay-TV signals and

¹⁴ *Uni Faculty Members Accused of Plagiarism*, <http://english.vietnamnet.vn/education/201005/Uni-faculty-members-accused-of-plagiarism-910815/>.

¹⁵ Louise Duffy, *Vietnam Pay-TV Market Set to Take Off*, Rapid TV News, December 23, 2011 (indicating Vietnam will be the fourth fastest-growing market for Pay TV services through 2016, according to industry market research) (on file with IIPA).

¹⁶ Cable and Satellite Broadcasters Association of Asia (CASBAA), *CASBAA Release - Vietnam Pay-TV in Bloom*, May 7, 2011, at <http://www.casbaa.com/media-and-resources/news-center/casbaa-news/casbaa-news-archive/55-casbaa-release-vietnam-pay-tv-in-bloom>.

stream them onto the Internet. Several sites have been identified as streaming premium content channels without authorization, mainly focusing on motion pictures or sports content.

ENFORCEMENT UPDATES IN VIETNAM

Failure to Address Internet and Mobile Device Piracy: Despite notifying the Vietnamese government of sites involved in piracy of music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products),¹⁷ the government has been mainly inactive and disinterested. Cooperation from ISPs and content providers found to be involved in copyright infringement is extremely poor, with takedown rates for the music industry of less than 2%. Notorious piracy site *zing.vn* has been brought to the attention of administrative authorities in Vietnam, but there has been no response. The problem is further compounded by existing administrative enforcement remedies being rendered ineffective by: 1) the lack of an effective procedure to deal with online piracy administrative complaints; 2) a heavy burden on right holders for production of evidence and proof of actual damages (as opposed to proof of advertising revenues and other commercial advantage); 3) continued rudimentary issues related to MCST knowledge of and ability to identify and effectively deal with online infringement cases; and 4) lack of compliance with administrative orders, since some infringing websites do not comply with orders issued by MCST, and some websites merely remove infringing “URLs” without ceasing the infringing operation. Both MCST and the High Tech Police need to become more active in the fight against growing online piracy in Vietnam.

Court Reform Efforts Lacking: The inactivity of the courts in dealing with copyright infringement issues is a major disappointment. To IIPA’s knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be great reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. There have to date been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors as they play a very important role in bringing a criminal offense case to the courts. To date, no specialized IP court has been established in Vietnam. Industry and the U.S. government are working with the Supreme Court in drafting an “IP Manual for Vietnamese Judges.”

End-User Piracy Enforcement: One relatively bright spot in enforcement seems to be in the area of addressing software piracy. In 2012, more raids were taken with participation of both MCST and the MPS Anti-High Tech Crime Police. Administrative fines remain relatively low, generally, VND50 million (around US\$2,400), never reaching the maximum applicable rate of VND500 million (US\$24,000). The industry also reports stronger support given to both enforcement and educational campaigns to sensitize the public to the need to use legal software. The presence of the High Tech Police is now seen as essential for the success of raids as they possess technical knowledge which is helpful to achieving effective raids. In addition to end-user raids, the software industry reports a handful of *ex officio* actions undertaken by provincial enforcement authorities, e.g., Son La Provincial Market Management Bureau against distributors of pirated software. The Copyright Office of Vietnam (COV) also partnered with the private sector on IP education and training in 2012. These trainings covered the overview of copyright laws and the value of IP and innovation. There remain no implementing guidelines for the revised Criminal Code, so no software piracy cases have ever been brought to Criminal Court.

Very Little Enforcement Against Hard Goods Piracy: Though MCST has indicated its recognition of the hard goods piracy problem, it has devoted very few resources to deal with physical piracy across Vietnam. Only a ‘zero tolerance’ campaign, including *ex officio* actions against open and blatant piracy activities of all kinds, with deterrent administrative fines meted out to their maximums, license revocations, shop closures, seizures of pirate

¹⁷In addition to the sites listed in this filing, MCST and the Copyright Office of Vietnam (COV) have been informed of the following infringing websites: *7Sac.com*, *bbs.orkoo.com*, *clip.vn*, *galaxy.net*, *Gate.vn*, *giaitri24.vn*, *giaitriamnhac.info*, *karaoke.com.vn*, *kenh14.vn*, *livevn.com*, *nhaccuatui.com*, *noi.vn*, *onlinemtv.net*, *rap.vn*, *timnhanh.com*, *Top1.vn*, *truongton.net*, *vast.net.vn*, *Yeah1.com*, and *Yeumnhac.com*.

imports and pirated product destined for export by Customs, and criminal penalties can result in a significant reduction in piracy in Vietnam.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (2005),¹⁸ and 2009 amendments to that Code,¹⁹ the Criminal Code (1999) and 2009 amendments to that Code,²⁰ and the Administrative Violations Ordinance,²¹ as amended and interpreted by further Decrees (Nos. 47 and 109).²² Various ministries also weigh in on important matters with other ancillary decrees, circulars, instructions, etc. The Civil Code²³ remains as a vestigial parallel law, implemented by Decree No. 100,²⁴ and as amended in late 2011 by Decree No. 85.²⁵ The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, include a basic structure which could be adequate if fully implemented to address online and physical piracy phenomena in the country, although further improvements should be sought. They also include implementation of the "Internet" treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Vietnam should now be encouraged as an immediate next step to join those treaties.

Important New Joint Circular Can Promote Effective Internet Enforcement: On June 19, 2012, the MIC and MCST issued the 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, which entered into effect August 6, 2012. This JC, if fully implemented, could result in significant reductions in online piracy in Vietnam and greater service provider cooperation and responsibility. The JC imposes high standards of performance on "providers of intermediary services"²⁶ defined as "a) Internet service providers; b) Telecommunications providers; c) Providers of service for storage of digital information, including the rental service for storage of electronic information websites; d) Providers of online social media networks; and e) Providers of digital information search service." Namely, "providers of intermediary services" must take affirmative steps to "Establish 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," and "Unilaterally refuse to provide a service that runs counter to the laws on copyright and related rights."

Importantly, the JC also requires the providers of intermediary services to "Remove 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 "Subject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related

¹⁸Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated December 25, 2005, entry into force July 1, 2006.

¹⁹National Assembly of Law No. 36/2009/QH12, "Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law," entry into force January 1, 2010.

²⁰Law No. 37/2009/QH12 Amending and Supplementing a Number of Articles of the Penal Code, Law Amending and Supplementing a Number of Articles of the Penal Code, entry into force June 19, 2009.

²¹Ordinance No. 04/2008/PL-UBTVQH12 on Handling of Administrative Violations, entry into force August 1, 2008.

²²Decree No. 47/2009/ND-CP of May 13, 2009, on Sanctioning Administrative Violations of Copyright And Related Rights, entry into force June 30, 2009; Decree No. 109/2011/ND-CP of December 2, 2011 on Amending and supplementing Some Articles of the Decree No. 47/2009/ND-CP Dated May 13, 2009 of the Government on Sanctioning of Administrative Violations of Copyright and Related Rights, entry into force January 20, 2012.

²³Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

²⁴Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights, September 21, 2006, entry into force October 17, 2006.

²⁵Decree No. 85/2011/ND-CP Dated September 20, 2011 of the Government Amending and Supplementing a Number of Articles of the Government's Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding a Number of Articles of the Civil Code and the Intellectual Property Law Regarding Copyright and Related Rights, entry into force November 10, 2011.

²⁶Intermediary services are defined as "telecommunications service, internet service, online social media network service, digital information search service, rental services for storage of digital information, including the rental service for storage of electronic information websites."

rights.” Finally, but not least, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for “Having operations like a secondary distributor of the digital content generated from violations of the copyright and related rights.”

Industry hopes that Vietnam can maintain momentum and make adjustments such as: 1) providing clear basis regarding the joint or secondary liability of the ISP for copyright infringement committed by a user; 2) introducing appropriately limited safe harbor provisions including an expeditious and effective notice and takedown regime; and 3) taking other necessary measures to create greater accountability in the Internet environment and to create incentives for all actors in the distribution chain to take reasonable and appropriate action to address infringement, including fair and effective means to stop non-hosted infringements and deal with repeat infringers.

Criminal Code Should Cover All IP Code Violations, Remains Incompatible With BTA; New Inter-Ministerial Circular Should Be Issued Forthwith, Confirming Criminal Liability for All IP Code Violations: The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” Article 170a improved Vietnam’s statutory framework in two respects: 1) the phrase “and for commercial purposes” was removed from the Criminal Code, so the standard for criminal liability is now “on a commercial scale”; and 2) fines are increased to a range from US\$3,000 minimum to US\$30,000 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$22,000 minimum to US\$57,000 maximum. Unfortunately, Article 170a is weaker than the provision in force up until its adoption, the February 2008 Criminal Circular. That 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of TPMs, decryption of encrypted satellite signals, and other acts. Implementing legislation should once again confirm coverage of acts of infringement or other violations enumerated in the IP Code, which would confirm that Vietnam meets its commitments under the BTA with the United States.²⁷

In the BTA, Vietnam agreed, in Chapter II, Article 14, to criminalize all “infringement of copyright or neighboring rights on a commercial scale.” The BTA also expressly calls for criminalization of the trafficking in a device or system used for “the unauthorized decoding of an encrypted program-carrying satellite signal” or “the willful receipt or further distribution of an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal,” so it must also be confirmed in implementing regulations that the revised Criminal Code covers this act as well, or the Vietnamese government must separately demonstrate that such acts are criminalized elsewhere in the Code. Otherwise, this lack of coverage would place Vietnam in violation of Chapter II, Article 5 of the BTA. The U.S. should commence immediate consultations in conjunction with Chapter VII, Article 5 of the BTA, to resolve these express violations of the terms of the BTA, recognizing that resolution is also connected to Vietnam’s successful participation in the Trans Pacific Partnership (TPP).²⁸

Over a year ago, IIPA understood that an Inter-Ministerial Circular to implement the revised Criminal Code was to be issued. IIPA understands the drafting team was headed by the Inspectorate of the Ministry of Science and Technology. In such a Circular, the Vietnamese government should clarify the types of acts subject to criminal liability under the amended Criminal Code to include online distributions and offers to distribute online (making available) as well as other violations of the IP Code.²⁹ It would also be important for the Vietnamese government to provide

²⁷See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

²⁸Chapter VII, Article 5(3) of the BTA provides in relevant part,

The Parties agree to establish a Joint Committee (“Committee”) on Development of Economic and Trade Relations between Vietnam and the United States of America. The Committee’s responsibilities shall include the following:

A. monitoring and securing the implementation of this Agreement and making recommendations to achieve the objectives of this Agreement;

...

C. serving as the appropriate channel through which the Parties shall consult at the request of either Party to discuss and resolve matters arising from interpretation or implementation of this Agreement....

²⁹Specifically, to ensure proper coverage of commercial scale Internet-based copyright infringements, which cause enormous commercial damage to copyright owners, those drafting interpretations should ensure that Internet transmissions are included within the term “distributing,” so that communicating works to the

detailed interpretations of “commercial scale” infringements that include acts which harm the market regardless of the motive of the infringer to make profits. Guidance should be provided to set out that “commercial scale” includes infringements that are undertaken without a commercial purpose but which nevertheless have a clear commercial impact (such as the unauthorized making available on the Internet of copies of protected works, knowingly providing access to such infringing materials, or other acts such as the unauthorized use of software in a business). Such guidance will give administrative authorities in Vietnam the confidence to recommend cases for criminal action when harmful Internet piracy activities are taking place.

Administrative Enforcement Decrees Must Be Implemented in Practice: Several ordinances and decrees (most notably, Ordinance Nos. 44 and 04, and Decrees Nos. 47 and 109) govern administrative enforcement of copyright in Vietnam. Ordinance Nos. 44 (2002) and 04 (2008) form the basis for administrative enforcement. Ordinance No. 04 raised the maximum fine up to VND500 million (about US\$24,000), and provides for revocation of business licenses and confiscation of material evidence and means used in administrative violations, for “acts of administrative violation in the domains of intellectual property,” namely “intentionally or unintentionally commit acts of violating law provisions on State management, which, however, do not constitute crimes and, as required by law, must be administratively sanctioned.” Decree No. 47 then further refines (in Article 1) acts to be covered as “administrative violations of copyright and related rights intentionally or unintentionally committed by organizations and individuals under the law on copyright and related rights, which do not constitute criminal offenses but, as prescribed by this Decree, are subject to administrative sanction.” Thus, administrative liability appears to cover any violation of the IP Code including violations as to works in Article 28 of the Code and as to related rights in Article 35 of the IP Code.

Remedies also include (pursuant to Article 3 of Decree No. 47) seizure of all infringing goods and materials (transport, equipment, raw materials, and imported materials) used in the infringement, suspension of the business or service for three to six months, and possible destruction of all infringing goods and materials used to effect the infringement. Importantly, Decree No. 47 expressly refers to removal from the Internet of copies that were transferred illegally by digital networks, and removal of all illegal copies under form of electronic storage. While there is overlap, the Administrative Decree also sets forth separate penalties, with different fine structures, for illegally making derivative works, displaying (or performing) works to the public, reproducing works, distributing or importing works, communicating works to the public by wireless or wired means, electronic information networks or other technical means, and rental of cinematographic works or computer programs.

On December 2, 2011, the Prime Minister approved Decree No. 109 on amending and supplementing some articles of Decree 47. Decree No. 109 deals in large part with valuation of infringed commodities in order to determine the fine structure, but also helpfully restates the further remedies of “Forced destruction of infringed commodities; forced destruction or putting into use of raw materials, materials, means and equipment used for production of the infringed commodities,” and “Forced removal of electronic copies of works from the Internet, informatics and electronics devices and other equipment.” The Decree also adds to the administrative liability structure to provide penalties of a fine between VND10 million (US\$475) and VND90 million (US\$4,200) if the value of infringed commodities cannot be determined. While this newly added provision is welcome to address the difficulties faced by the right holders and/or law enforcement agencies in estimating the value of infringed commodities, it appears that the level of administrative fine remains wholly inadequate to create real deterrence. Unfortunately, administrative remedies in Vietnam as implemented have been mostly non-deterrent, with the maximum fine never imposed. While the Ordinances and Decrees in general should not be viewed as a substitute for a workable and deterrent criminal remedy in Vietnam, IIPA members believe that swift implementation in practice of the remedies in the Ordinances and Decrees can, if implemented with maximum fines in most circumstances, and if applied to the online environment, begin to deter piracy and send a strong signal that violations of the IP Code will not be tolerated.

public by wire or wireless means, through electronic information network or by any other technical means, and such acts as making available works through interactive networks, are covered.

Concerns Arising from Decree No. 85: Decree No. 85, amending certain provisions of the Civil Code related to IP protection, was issued in 2011 without any public consultation period or other form of transparency with the U.S. government or industry. This is highly unfortunate, since both would have had comments. Decree No. 85 contains some helpful clarifications,³⁰ but raises new questions with respect to Vietnam’s compliance with its international obligations. The following are some initial observations regarding the Decree:

- **Coverage of Temporary Reproductions:** Article 5 of Decree No. 85 alters Article 23(2) of Decree No. 100 to provide that the right of reproduction “provided at Point c, Clause 1, Article 20 of the Intellectual Property Law means one of exclusive economic rights under copyright which are performed by copyright holders or their authorized persons to make copies of works by any means or in any form, including electronic ones.” Article 20(1)(c) of the IP Code provides a more detailed definition of reproduction, including “permanent or provisional backup of the work in electronic form.” Since that provision is not altered, we read Decree No. 85 as consistent with, if less detailed than, the IP Code provision. To the extent the intent of the drafters is to alter the IP Code to remove “provisional backup” (i.e., temporary storage) from the law, it would appear to us necessary to make an amendment to the IP Code itself. Such an amendment would be inadvisable, however, since 1) over 100 countries recognize temporary reproductions as part of the reproduction right in their national legislation, or through interpretation, and 2) it would be hoped that through the TPP process protection of temporary copies will be included, as confirming the understanding of Article 9 of the Berne Convention, and carried forward into the WCT and WPPT.
- **Collective Management:** Article 11 of Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management. Some of these changes are useful clarifications, e.g., it requires that collective management organizations have “signed authorizations” (Article 41(1)(b) as amended), and takes away discretionary power for MCST to “guide the division of royalties, remunerations and other material benefit” when right holders have “not yet authorized any organizations to act as collective representatives of copyright or related rights.” Unfortunately, some other changes to Article 41(3) and especially the changes to Article 41(4) are onerous and conflict with the ability for collective management organizations to operate freely, and are especially onerous with regard to right holders’ ability to freely determine on what terms their rights will be administered. As the most egregious 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.

- **Remuneration “Principles and Methods”:** Article 12 of Decree No. 85 adds Article 45a to Decree No. 100, setting out some “Principles and methods of payment of royalty, remuneration and material benefits.” The first

³⁰For example:

- Article 6 of Decree No. 85 confirms a BTA-compatible term for cinematographic works.
- Article 8 of Decree No. 85 helpfully clarifies that broadcasters’ rights as defined in Article 31 of the IP Code shall include the ability to control the “relay, re-broadcast or transmi[ssion] via telecommunications or electronic communication networks or in any technical media broadcasts of other broadcasting organizations,” as well as “[a]ny modification, mutilation or supplementation of broadcasts of other broadcasting organizations for rebroadcasting or transmission via telecommunications or electric communication networks or in any technical media.” It would be helpful if the law also specified these rights in the authors of cinematographic and other audiovisual works, but since they are already granted broad “communication to the public” right as well as remedy against any form of “dissemination” we see these enumerated rights as covering most, if not all, the acts enumerated in Section 8 of Decree No. 85.

principle of the provisions noted in the IP Code are that the rights enumerated therein are exclusive rights, and thus, the method and manner in which exploitation of those rights will occur is the primary domain of the author, co-authors, or right holders, as the case may be. IIPA is worried that the obligatory nature of the “principals and methods” set forth in Article 45a as amended (“Royalty and remuneration ... *shall be determined* as follows”) suggests they are compulsory. However, in reading the “principals and methods” they do not seem to be inconsistent with the ability for right holders to freely contract and freely determine the terms under which their exclusive rights may be exercised. This should be confirmed, however, by the Vietnamese government. To the extent the Vietnamese government is considering compulsory remuneration, the government should be reminded, for example, that the BTA prohibits Vietnam from availing itself of the very narrow and restrictive provisions of the Berne Convention Appendix.³¹ To the extent the “principals and methods” are meant as compulsory, it should be clarified that these provisions do not apply to administration of foreign rights.

IP Code and 2009 Amendments Remains Incompatible with the BTA and Vietnam’s Other 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 with respect to Vietnam’s compliance with the BTA and other international obligations/standards, and could afford further upgrades in the future.³²

- **Term of Protection (BTA):** The 2009 amendments did not meet the BTA obligation to increase the term of protection for sound recordings to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). Article 34(2) of the IP Code therefore still violates BTA Article 4.4. When the government amends the law to fix this BTA deficiency, it should follow the international trend to extend the term of protection for works as well to life of the author plus 70 years.
- **Making Available Right (WPPT):** The Implementing Decree does not expressly confirm that Article 30(1)(b) provides producers of sound recordings with a WPPT-compatible right of “making available” as required by Article 14. Either a clarification should be made to Article 30 of the IP Code to ensure that this right should cover any form of transmissions of sound recordings under the distribution right, including interactive and non-interactive digital transmissions, or Article 23(4) of the Decree should be made applicable, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of the WPPT.
- **Technological Protection Measures (WPPT):** It appears an inadvertent gap was created in enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to works) was not made applicable to related rights. This can be resolved in one of two ways: Article 28(14) can be made applicable, *mutatis mutandis*, to related rights, or a separate provision of Article 35 can be added to provide that trafficking (as in Article 28(14)) is a “related rights infringement.”
- **Restrictions on IP Rights (TRIPS):** IIPA remains concerned about Article 7(2) (which potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances), Article 7(3) (which permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights), and Article 8 (which establishes impermissible content-based restrictions of protection under copyright, similar to a provision in the Copyright Law of the People’s Republic of China which was found by a WTO panel to violate China’s WTO obligations). The scope of Article 23 also remains ambiguous. These articles must be made compatible with Vietnam’s commitments under bilateral and international copyright agreements and treaties.

³¹See BTA, Article 5, which provides,

Neither Party may grant translation or reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party’s territory for copies or translations of the work could be met by the right holder’s voluntary actions but for obstacles created by the Party’s measures.

³²In addition to the remaining issues discussed in the text below, IIPA urges the government to introduce pre-established (statutory) damages, upon the election of the right holder. Statutory damages can be very important in civil cases in circumstances in which the amount of reproduction or distribution having occurred is difficult to calculate. Such damages systems have been adopted in many countries, including China and Malaysia.

- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the performer or producer must not cease to exist because the author has granted authorization of a particular use, and vice versa. Article 35 of the Implementing Regulations establishes the supremacy of copyright over related rights. This should be remedied.
- **Exceptions Overly Broad, and Impermissible Compulsory Licenses (TRIPS):** Certain exceptions in the IP Code may be overly broad. Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes” and Article 25(1)(e) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” remain potentially problematic. IIPA also remains concerned that Article 25(2) of the Implementing Decree appears to allow the copying of a computer program “for archives in libraries for the purposes of research,” which would create a TRIPS-incompatible exception which must be remedied. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works. Notwithstanding the attempt to limit the scope of the compulsory license to the three-step test, the simple addition of the language of the test will not avoid any compulsory arrangement from colliding with it. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which was a last minute addition to this legislation) for use of sound and video recordings for commercial “broadcasting” violates international standards. Article 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne Convention three-step test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **TRIPS/Berne-Compatible Presumption of Ownership Must Be Afforded and No Formality Principle Honored (BTA, Berne, TRIPS):** Article 203 of the IP Code requires right holders to provide “necessary evidence proving basis [for] the establishment of copyrights, related rights, of which [a] Copyright Registration Certificate and Related Right Registration Certificate are consider[ed] as acceptable evidence.”³³ The Vietnamese government has taken the position that nothing in Article 203 requires a registration certificate as a formality and that it affords a presumption of ownership without production of a certificate. Vietnam must adhere to the “no formalities” principle of Berne and TRIPS, and Article 3.2 of the BTA.³⁴
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Articles 202(5) and 214(3) of the IP Code provide that remedies for copyright infringement may include compelling the distribution or use for non-commercial purpose of the infringing goods, as well as the materials and equipment used in furtherance of the infringement, provided that such distribution does not affect the exploitation of rights by an aggrieved right holder. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS obligations.³⁵

Vietnam Should Adopt an Anti-Camcording Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These 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 camcording pirates do not discriminate between domestic or foreign films, and do not care that they are harming the local cinema businesses. Several

³³Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) of the Code apply the same standard of proof as Article 203.

³⁴Article 3(2) of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, enforce and exercise rights or benefits in respect of copyright and related rights.”

³⁵The government of Vietnam points to “Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008,” which indicates that in case any law of Vietnam or international treaty to which Vietnam is party “provides that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.” This response seems helpful, although it may not fully satisfy the default rule in the IP Code, since that Code does not compel the destruction of infringing goods.

countries in the region, as well as other previous hotspots of camcording piracy, have enacted statutes outlawing the use of (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work (in whole or part). Vietnam should swiftly amend its law to address this problem which is causing increasing harm throughout the region.

Optical Disc Regulations: IIPA understands that draft optical disc regulations have been under consideration by Vietnam for some time to deal with optical disc production over-capacity in Vietnam. This regulation should be enacted and implemented forthwith. IIPA members have provided the government with model legislation on numerous occasions. Such a regulation on the licensing of optical disc manufacture should include the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs, and a way to monitor imports of machinery and raw materials used to make pirate discs. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production" in 2003, which contained key aspects of an effective optical disc regulatory scheme.

MARKET ACCESS BARRIERS IN VIETNAM

Various market access barriers exist in Vietnam today, the most serious of which are limitations and prohibitions on foreign companies setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. These restrictions contribute to the lack of a robust and competitive marketplace for content, and limit investment in the creation of new Vietnamese cultural materials. Thus, the vicious cycle of high piracy rates and little to no market access continues. To facilitate commercial development of Vietnam's cultural sector, Vietnam should look to internationally accepted standards and practices which are premised on the understanding that constraining market access for legitimate products complicates efforts to effectively combat piracy. The Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.³⁶ Unfortunately, Vietnam's restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, undermining this objective.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides a summary and, where applicable, updates.

Concerning Regulatory Intervention in the Pay-TV Sector: Decision No. 20/2011/QĐ-TTg issued in 2011 would, if not reversed, severely impede the continued growth and development of the pay-TV industry in Vietnam. We understand the Decision was further suspended in part for six months as of November 15, 2012. This Decision should be formally and permanently scrapped in its entirety. If fully implemented, the Decision would require foreign pay-TV channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. All foreign programming would be required to be edited and translated by an approved, licensed press agent. New local language subtitling requirements would be imposed for most programming, as well as imprecise content guidelines and new registration requirements. The Decision also provides that all commercial advertisements airing on such channels in Vietnam would have to be produced in Vietnam. Further, these regulations essentially would expand censorship requirements to all channels, while such regulations had previously applied solely to "sensitive" channels. This mandate also would appear to impose new "editing" fees on international channels.

Restrictions on Trading Rights for Films and Distribution Services: Importation (trading rights) and distribution of foreign films are limited to cinemas and business entities that own or have the right to operate a qualified cinema for at least five years and have a license. The import plan and the contents of foreign films must also be pre-approved.

³⁶See 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, at http://www.nhandan.com.vn/english/culture/171208/culture_v.htm.

Quantitative Restrictions on Foreign Films Imported for Theatrical Distribution: Under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced. Also, the number of foreign films projected by each cinema is only allowed to reach two-thirds of the total projected films in a given year. Since the domestic film industry is underdeveloped and the number of domestic films produced has generally ranged between ten to fifteen films or less per year, these restrictions, if enforced, would be a significant barrier to the import and distribution of foreign films in Vietnam. The Cinematography Law amendments appear to leave the possibility for quantitative restrictions on importation of films for distribution.

Laws Leave Potential Quotas In Place: IIPA has in previous submissions noted the concern over potential quotas for foreign film projection in Vietnam in the Cinematography Law as amended. Such quotas should be disfavored. Certain articles 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 the proportion of Vietnamese films broadcast on TV must be at least 40%.³⁷ Such quotas are disfavored and should be lifted.

Foreign Investment Restrictions: Foreign investment in cinema construction and operation in Vietnam is limited to 51% and must be through joint ventures which are state-approved. A foreign investor cannot establish a distribution network for home video if they do not engage in manufacturing, and foreign investors may only engage in videotape, VCD, and DVD production in Vietnam in the form of a joint venture with local interests.

Government Monopoly Over TV Broadcasting/Foreign Broadcast Quotas: The Vietnamese government controls and owns all television stations in the country. It does not allow private- or foreign-owned TV stations, or foreign investment in broadcast stations. Foreign content is reportedly limited to 50% of broadcast time, and foreign programming is not allowed during prime time.

Censorship Process for Filmed Entertainment: MCST has censorship authority and maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. Films that require editing are subject to an additional review, though importers are not assured a right of appeal. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

Onerous Market Access Restrictions on the Music Sector: Onerous Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. Vietnam maintains investment barriers against foreign sound recording companies, many of which are of a discriminatory nature. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under the General Agreement on Trade in Services (GATS) as part of its WTO accession. Vietnamese restrictions on the business of making and selling music stifle the development of the Vietnamese music industry, and deny participation of U.S. companies in the market.³⁸ The lack of a meaningful commercial presence of

³⁷Decree 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.

³⁸Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute “cultural products” is unclear. It appears that foreign sound recording companies must license a Vietnamese company. Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already readily available in the Vietnamese market. Thus, right holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted to establish wholly-owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam’s failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, IIPA believes, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies cannot do business in Vietnam, pirates will fill the void, forming a unique pirate supply chain for consumers. This is

U.S. record companies in Vietnam also inhibits IIPA members' anti-piracy efforts – the effectiveness of which is further hampered by restrictions on the ability of our industry to investigate the activities of pirates in Vietnam. This leaves it incumbent upon the Vietnamese government to enforce intellectual property rights of U.S. content largely on its own. 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,³⁹ and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

Potential Examination Procedure for Digital Music Products: Article 11 of the Decree No. 11/2006/ND-CP dated 18 January 2006 provides that:

“Locally produced or imported music and theatrical tapes and discs must be previewed and granted permits by competent state agencies before they can be widely circulated. Music and theatrical tapes and discs permitted for wide circulation must be stuck with control labels according to regulations of the Ministry of Culture and Information.”

Clarifications are needed as to whether this “preview” procedure is required for digital music products (if no physical products are being circulated). Any cumbersome examination system which delays the normal release schedule of legitimate music would give rise to a huge advantage to pirates over legitimate sales channels in Vietnam. This problem is especially serious for international releases as they usually release earlier in other markets before they make available in Vietnamese market.

Discriminatory Consumption Tax on Imported Game Products: IIPA had previously received information about a draft decree of the MIC targeting games for a discriminatory 30% special consumption tax imposed only on imported online and offline games. The Draft Decree remains up on the MIC website, but we are unaware of developments toward issuance of this Decree.⁴⁰ The Vietnamese government should refrain from imposing such discriminatory taxes which prejudice legitimate right holders and ease the way for pirates who do not have to contend with such costs.

New Draft Decree Would Exacerbate Already Onerous Market Access Restrictions on the Online Game Industry: The Vietnamese government controls the country's online games market through an onerous licensing process. Game operators without a license are foreclosed from the market. In 2010, the Vietnamese government banned issuance of new licenses for online games and banned advertising of online games, with a disproportionate impact on foreign game publishers.⁴¹ Prior to the ban, obtaining a license required the approval of three separate government ministries, and was limited to companies that were at least partially domestically owned. In mid-2012, Vietnam issued a new Draft Decree on the Management, Provision and Use of Internet Services and Information on the Network (3rd Draft). IIPA expresses serious reservations and concerns about this Draft Decree. The Draft Decree would cut off inflows of financial capital, human capital and technology. Included in the problematic draft provisions are discriminatory provisions against so-called “foreign information providers.” Among other problems, the Draft Decree would:

what has happened in other markets – like that in China – which results in harming U.S. rights holders, but also local artists. One way to make headway into the damaging piracy that has resulted from lack of market access for foreign sound recording companies in Vietnam is to permit legitimate companies to participate in the growing mobile and Internet markets for music. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers. Further, foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users.

³⁹The 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 CST Departments. The Decree provides for application procedures. However, limitations on foreign companies' setting up subsidiaries to produce or distribute “cultural products” in Vietnam also thereby limit foreign companies' abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for music content examination.

⁴⁰See *Draft Decree Guiding Some Articles of the Law on Information Technology for Information Technology Services (28/04/2010 9:19 CH)*, Article 14, at <http://mic.gov.vn/layyknd/Trang/duthaonghidinhhuongdanmotsodieucualuatcongngghethongtinvedichvucongngghethongtin.aspx>.

⁴¹The ban is imposed pursuant to MIC Inter-Ministerial Circular No. 60 (2010) and, to IIPA's knowledge, remains in effect. *Unlicensed Games Still Rife in Vietnam*, Gameland International, August 7, 2011, at <http://en.gamelandvn.com/news/596/unlicensed-games-still-rife-in-vietnam.html>.

- impose requirements to ensure that users in Vietnam can remove their personal information in its entirety from the foreign entity's data;
- limit capital participation in Vietnam's game industry to 49% of chartered capital (Article 35(4));
- require approval for the initial script and for any changes which is arbitrary and non-transparent;
- require location in Vietnam of the server for any online game, which is highly suspect under Vietnam's WTO commitments on "computer and related services";
- require an amendment of the license every time that there is a change in the location of a server providing service (Article 37(3)(a));
- require the government's written approval for any change in the game script or content, no matter how small, and without regard to its impact on the game play experience (Article 37(3)(c));
- prevent any network electronic game operator from increasing the value of virtual items from the value determined when the script was registered (Article 38(7)(b));
- require all network electronic game operators to apply technical measures to manage user accounts in order to prevent one physical person from playing more than 180 minutes per day (Article 38(11)); and
- require all games that facilitate exchange of information between players to comply with the Decree requirements for a social network (Articles 26 through 29) (Article 38(10)).

MCST "Master Plan" Could Wreak Havoc on Film Industry: MCST is drafting a rather ambitious 10-20 year master plan, to be finalized by June 2013, which aims to help develop the local film industry. Unfortunately, the plan could create more market access barriers for the U.S. motion picture and television industries in Vietnam. Our preliminary understanding of the Plan is that it contains a number of discriminatory barriers including screen quotas, mandates for showing Vietnamese movies only during prime time (7pm to 10pm) on weekends, State control over the management, distribution, and exhibition of films, and establishing a film fund that might be drawn from U.S. films' box office. Any plan that would create yet further market access hurdles in Vietnam should be scrapped.

TRANS-PACIFIC PARTNERSHIP (TPP)

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, begun in 2009.⁴² IIPA has submitted public comments to the U.S. government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.⁴³ Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile, and Peru, and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and continued economic stabilization in line with the Administration's goals. Vietnam has taken strides in its substantive laws which will make meeting the legal and enforcement obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, as noted, recent changes threaten to move Vietnam further from those standards, and in addition, Vietnam has some of the most restrictive market access barriers in the world. IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein. The TPP E-Commerce chapter, and the TPP's market access provisions for services and investment, should require TPP partners such as Vietnam not only to eliminate discriminatory taxes and policies, but to open Vietnam's market to foreign competition including

⁴² See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/pressreleases/2009/december/trans-pacific-partnership-announcement>. In 2012, Canada and Mexico joined the TPP negotiations, bringing the total number of countries to eleven, including in addition Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam.

⁴³International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009). See also International Intellectual Property Alliance, "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement," 75 Fed. Reg. 64778 (October 20, 2010).

in the creative and cultural sectors. We remain hopeful that Vietnam's participation in TPP negotiations will aid in the elimination of such discriminatory barriers.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program is designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “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.” 19 USC 2462(c)(4) and (5). On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States in response to a Federal Register notice on whether to designate “the Socialist Republic of Vietnam as a GSP Beneficiary Country.” While the IIPA filing did not oppose granting Beneficiary Developing Country status to Vietnam under the GSP program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria. The piracy and market access barriers highlighted in this report are key reasons Vietnam should be scrutinized closely before being granted beneficiary status under the GSP program.

TRAINING AND PUBLIC AWARENESS

IIPA members continue to provide training events and participated in workshops and roundtables sponsored by other organizations, with the aim of sensitizing the public in Vietnam to the importance of providing adequate and effective intellectual property protection, and to train Vietnamese government officials on specific aspects of the IP system and the needs of creators to enjoy their rights in Vietnam. For example, on November 29, 2012, the local Motion Picture Association provided Internet training in Hanoi for local government and industry officials. The event was co-sponsored by MPA, the U.S. Agency for International Development, and MCST and was attended by approximately 115 people. BSA held a press conference in May 2012 in Hanoi to announce its Global Piracy Study (with IDC), with participation of dozens of representatives of IPR-related government agencies such as Copyright Office of Vietnam, National Office of Intellectual Property, Inspectorate of MCST, Inspectorate of the Ministry of Science and Technology, the Supreme Court, and around 30 journalists. IIPA members have also provided assistance to the Supreme Court in drafting the “IP Manual for Vietnamese Judges” beginning in October 2012. In addition, BSA has been providing technical assistance on government software legalization to MIC officials since November 2012. Finally, a “hotline” to report piracy was set up in October 2012 to provide a platform to heighten awareness among companies in order to have them take steps to legalize software usage.