

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List in 2010.¹

Executive Summary: IIPA is extremely disappointed by the National Assembly's decision to significantly weaken criminal penalties for copyright violations in its revised Criminal Code, which went into force January 1, 2010. This new law puts Vietnam in immediate violation of its commitments to the United States under the Bilateral Trade Agreement (which required Vietnam to criminalize all "infringement of copyright or neighboring rights on a commercial scale"). Whereas the 2008 Criminal Circular had clarified that criminal liability could be sought for any violation of the IP Code (copyright or related rights), the newly enacted Criminal Code curtails the acts considered criminal in Vietnam. Passage of a Decree on administrative penalties for copyright infringement, also in June 2009, appears to be an attempt to fill gaps left by the Criminal Code, but is a worrisome indication that the government intends to rely on administrative remedies as a substitute for deterrent criminal enforcement against piracy. Like other markets which have gone down a similar road, IIPA members fear these tactics will leave the market in Vietnam inhospitable to legitimate creative activity, solidifying a vicious cycle of infringement in the country and stunting the development of the creative industries in the Vietnamese economy.

While these legislative developments took place, piracy remained an open and often brazen commercial act in Vietnam, providing high profitability and little risk to pirates. Piracy levels in Vietnam remain among the highest in the world, and losses continued to mount to the industries.² Piracy in the retail markets is unchecked and the Internet in Vietnam remains replete with online piracy. In terms of enforcement, there were few positive developments in 2009. No criminal case has ever been brought in Vietnam for copyright infringement. The Copyright Office of Vietnam (COV) has admitted that they are unable to handle the piracy problem.³ The COV indicated that in 2008, the Ministry of Culture, Sports & Tourism (MOCST) "examined and settled" 20 cases involving copyright piracy, meting out administrative fines of a total of VND 225 million (US\$12,050), by no means a deterrent.⁴ Vietnam also maintains some of the most restrictive market access barriers in the world, keeping legitimate products and services out of the market, while creating a fertile ground for piracy. One positive note was the passage of the Cinematography Law in June 2009 which opened the Vietnamese market for the first time to film production for foreign companies.

In 2007, the United States signed a Trade and Investment Framework Agreement with Vietnam, and in May 2008, Vietnam formally applied to the United States Trade Representative for eligibility to receive benefits under the Generalized System of Preferences trade program. Vietnam has also joined the Trans-Pacific Partnership (TPP)

¹ For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² For example, the Business Software Alliance (BSA) reported losses of US\$171 million and a piracy rate of 84% in 2009, due to piracy of business software in Vietnam. These numbers are up from US\$123 million and 83% in 2008. The recording industry reported a 95% piracy rate in 2009. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Vietnam. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ The Copyright Office of Vietnam, in its 2008 report, indicated that the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST) "has made every efforts [sic] but is unable to meet the requirements to establish order in the field of copyright and handle strictly the organizations and individuals who violate copyright, related rights." In Vietnam, the Inspectorate of the Ministry of Culture, Sports & Tourism is the leading enforcement agency for copyright, with the Division of High-Tech Crime (economic police of the Ministry of Public Security), the Customs General Department (under the Ministry of Finance) (which may suspend goods suspected of infringing copyright from entering the channels of commerce), the Market Management Bureau (under the Ministry of Industry & Commerce) (which deals principally with illegal imports being sold in Vietnam), the Inspectorate of the Ministry of Information & Communication (MIC), and the courts at various levels (under the Supreme Court) all having their own competence in certain areas to enforce copyright. The MOCST Inspectors have the right to administer administrative punishments, while MIC Inspectors may also administer punishments or remedies when the Internet is involved, and have been involved in dealing with infringing sites upon request of an MOCST inspector.

⁴ Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.



negotiations which were announced by President Obama in November 2009. Vietnam will need to undertake significant legislative and enforcement reforms if it is to be able to meet U.S. free trade agreement IPR negotiating objectives.

Priority Actions Requested in 2010: IIPA requests that the government of Vietnam take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Legislation and Market Access

- Amend the dramatically weakened Criminal Code to meet Vietnam's BTA obligation, by reinstating a criminal remedy identical to that provided under the 2008 Criminal Circular; and until that can be accomplished, (i) clarify that acts subject to criminal liability under the amended Criminal Code include online distributions and offers to distribute online (making available), and (ii) provide detailed interpretations of "commercial scale" infringements that include infringements which harm the market, regardless of the commercial purpose of the infringer.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Cease government-endorsed open source preference policy which is limiting technology choice in Vietnam.
- Take immediate steps to afford U.S. right holders with greater access to the market in Vietnam, by eliminating foreign investment restrictions and other barriers to entry with respect to production, importation and distribution of physical product, and importation and distribution of product online and through mobile networks.
- Pass optical disc licensing regulation.
- Extend the term of protection for sound recordings to the BTA-compatible term (75 years) and otherwise extend term in line with international trends (e.g., life of the author plus 70 years for works).

Enforcement

- Enforce the Criminal Code through targeted criminal actions, e.g., against source piracy, blatant retail piracy, and end-user piracy of business software.
- Enforce the Decree on administrative remedies to reduce piracy levels and improve deterrence.
- Adopt a more coordinated and better financed 'zero tolerance' policy to reduce online piracy, including a regulatory approach (e.g., notice and takedown) and further cooperation among service providers
- Reduce piracy through devotion of greater resources and manpower to campaign targeting sources of pirate production like CD-R burning facilities, pirate distribution warehouses, businesses engaged in end-user piracy of software, pirate retail shops selling CDs and DVDs, and illegal reprinting or photocopying facilities.
- Reduce pirated imports from China.
- Reduce signal theft by removing illegal content from local cable operators, including VTC, and stopping retransmission of signals from neighboring countries without license.

COPYRIGHT LAW AND RELATED ISSUES

New Criminal Code Violates Vietnam's BTA Obligations, Significantly Weakens Law: On July 2, 2009, President Nguyen Minh Triet promulgated the Law on Revising and Amending Some Articles of the Criminal Code, including a new Article 170a on criminal copyright infringement. This amendment criminalizes only "commercial scale" acts of "[c]opying of works, audio recordings and visual recordings" or "[d]istributing the copies of work, audio or video recording." This is a significant and disappointing weakening from the framework in the February 2008 Criminal Circular, which criminalized all acts of "infringement" in Articles 28 and 35 of the IP Code (which included, among other things, reproduction, distribution, communication to the public, public performance, broadcast, circumvention of technological protection measures and trafficking in circumvention devices, tampering with rights management information, unlawful decoding or disseminating of encrypted satellite signals, etc.). There are two improvements in the statutory framework after the amendments: 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.

IIPA expresses deep disappointment with the decision to scale back criminal liability under the Code. By limiting the kinds of activities covered, Vietnam clearly violates Chapter II, Article 14 of the Bilateral Trade Agreement (2001) (BTA) with the United States,⁵ in which Vietnam agreed to criminalize all “infringement of copyright or neighboring rights on a commercial scale.” The Vietnamese government should make the changes necessary to return to the *status quo ante*, i.e., by ensuring that criminal liability can attach to infringements enumerated under Articles 28 and 35 of the IP Code (consistent with the terms of the 2008 Criminal Circular). That change would ensure that Vietnam meets its BTA obligations. 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 by virtue of the revised Criminal Code, Vietnam also violates 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 BTA recognizing that resolution is imperative to Vietnam’s successful participation in the TPP.⁶

Until the *status quo ante* can be restored, it is critical that the government of Vietnam 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).⁷ It would also be important for the government to provide detailed interpretations of “commercial scale” infringements that include acts which harm the market regardless of the commercial purpose of the infringer. 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 piracy activities are taking place.

Administrative Remedies Decree Must be Implemented in Practice: IIPA is pleased that the Vietnamese government completed issuance of Decree No. 47/2009/NĐ-CP, on “Handling Administrative Infringement in Copyright and Related Rights” (Administrative Decree). This Decree, which went into force June 30, 2009, covers “intentional or unintentional actions of individuals or organizations violating the law on copyright and related rights but not serious enough to hold criminal liability,” which 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 Code.⁸ While the Administrative

⁵ See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

⁶ Chapter 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....

⁷ Specifically, 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 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.

⁸ For such violations, Section 2 of the Administrative Decree provides, “for each administrative violation, the individual or organization shall be subjected to one of two forms of primary penalty: warning and fine,” with the maximum fine being VND500 million (US\$26,600). Remedies also include 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, the law 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 a different fine structure, 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.

Decree should not be understood as a substitute for deterrent criminal enforcement against piracy and violations of the IP Code, IIPA members believe that swift implementation in practice of the administrative remedies in the Administrative Decree can send a strong signal that violations of the IP Code will not be tolerated.

Cinematography Law Amendments Enacted, Allowing U.S.-Vietnam Joint Ventures in Production: On June 18, 2009, Law No. 62 on Cinematography was amended by Law 31-2009-QH12 by the National Assembly, which went into effect on October 1, 2009. The amended Law appears to make some improvements to the original 2006 Law. For example, Article 13(2) now expressly provides that U.S. (and other foreign) entities may enter into joint ventures and cooperation agreements with Vietnamese companies for film production, film distribution, and film projection, which represents a partial opening of that market.

Laws Leave Potential Quotas In Place: While IIPA had heard that the law lifted quotas for importing foreign movies (though still subject to censorship), the Cinematography Law as amended appears to retain the overall structure of the original Law, leaving open the possibility for quantitative restrictions, which should be disfavored. For example, Article 38 provides that the central authorities and city and local authorities can still rely on the number of films produced locally to decide whether to authorize the issuance of “film projection permits for films produced and imported by film production enterprises” (Article 38(1)(b) as amended).⁹ Article 35(2) also remains as a potential way to impose quotas with respect to broadcast of imported (versus Vietnamese) films, since it still 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%.¹⁰ Such quotas are disfavored and should be lifted.

Copyright Law and Implementing Regulations to IP Code Remain Incompatible with the BTA and Potentially Vietnam’s Other International Obligations: On June 19, 2009, the “Intellectual Property Code,”¹¹ effective July 1, 2006, was further amended by passage by the National Assembly of Law No. 36/2009/QH12, “Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law,” which went into effect January 1, 2010. The law is also subject to an implementing Decree which has not been amended to our knowledge.¹² The amendments do not appear to have resulted in significant changes, although they do fix one deficiency of Vietnam’s law when compared with its BTA obligations, namely, they amended Article 27 of the IP Code to increase the term of protection for cinematographic works to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). The amendments also granted this longer term to “photographic works, applied art works, [and] anonymous works.” The amendments apparently did not meet the BTA obligation to provide this longer term to producers of sound recordings. Article 34(2) of the IP Code therefore still violates BTA Article 4.4.¹³ While amending the law to fix this BTA deficiency as to the term for sound recordings, the government of Vietnam should follow the

⁹ Article 38(1)(b) reads in full:

The Government shall rely on the number of films produced and imported by cinematographic enterprises administered by provinces and cities under central authority to make a decision on delegation of authority to such provincial people's committee to issue film projection permits for films produced and imported by film production enterprises within its locality, by private cinematographic enterprises within its locality and for films for export produced by television stations and radio-television stations licensed for press activities and with broadcast decisions.

¹⁰ Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

¹¹ Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated December 25, 2001.

¹² Decree No. 100 on Detailed Regulations and Guidelines to the Implementation of Number of Provisions of the Civil Code and the Intellectual Property Law on Copyright and Related Rights, Decree No. 100/2006/ND-CP, September 21, 2006, at <http://www.cov.gov.vn/english/viewNew.asp?newId=79>.

¹³ BTA Article 4.4. provides,

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

trend of dozens of other nations that have extended term of protection for works as well to life of the author plus 70 years.

One issue raised by IIPA in the past is the requirement under BTA Articles 4.2(a) and 4.6(b) to provide an exclusive importation right. The government of Vietnam has indicated that Article 20 provides an exclusive importation right as to works, noting Article 20(d)(1) provides the right “to circulate to the public or import the original or copies of the work,” so the law apparently satisfies Article 4.2(a). The law with regard to related rights remains in violation of Article 4.6(b) of the BTA. With respect to phonograms, Article 30 provides a right to “distribute copies to the public” but this does not expressly include “importation.” The government of Vietnam has referred to Article 35(8) of the IP Code with respect to related rights to satisfy Article 4.6(b) of the BTA. Unfortunately, this deems importation of sound recordings an infringement only when rights management information has been removed or altered without permission. This provision does not afford an importation right to producers of sound recordings as required by the BTA.

IIPA has in previous filings discussed other issues in the law, including improvements (e.g., protection for temporary reproductions, some protection against circumvention of technological protection measures) as well as some deficiencies.¹⁴ It should be noted that Vietnam is largely in compliance with the WCT and WPPT and Vietnam should be encouraged to join those Treaties as soon as possible. Vietnamese officials have indicated that, despite not yet having set an exact timeframe for accession, Vietnam is seriously researching the treaties and plans to accede at the appropriate time. The following is a non-exhaustive list of some of the remaining issues with regard to the IP Code and compliance with Vietnam’s international obligations or international trends.

- **Making Available Right (WCT and WPPT):** Vietnam enacted, in Article 20(d’), an exclusive communication to the public right as to works, namely, the right “[t]o communicate the work to the public by wire or wireless means, through electronic information network or by any other technical means.” This right is implemented through Article 23(4) of Decree No. 100 which implemented the IP Code (2006) (Implementing Decree), and includes the right “to make their works or copies thereof available to the public, in such a way that members of the public may access such works from a place and at a time they themselves select.”¹⁵ Thus, the Code as implemented fully satisfies the WCT. Unfortunately, while related rights receive similar treatment in the IP Code (for example, Article 30(1)(b) provides producers of sound recordings the right to “[d]istribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public”), no such clarifying language is found in the Implementing Decree. 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. Alternatively, it should be confirmed that Article 23(4) of the Decree applies, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of WPPT Articles 10 and 14.
- **Technological Protection Measures:** As noted, one of the advances of the IP Code was that it provides protection against circumvention of technological protection measures (TPMs) used by right holders to protect their works/related rights in the digital environment (Articles 28(12) and 35(7) cover the act of circumvention as to works and related rights, and Article 28(14) covers trafficking in circumvention devices as to works only). 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.”

¹⁴ See, e.g., International Intellectual Property Alliance, *Vietnam*, in 2009 Special 301 Submission, at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

¹⁵ See *supra* note 12.

- **Restrictions on IP Rights:** Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact could create inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties. The second half of Article 7(3) also violates Vietnam's current by permitting the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights.¹⁶ The provision should be deleted. The first clause of Article 8 also runs afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. The World Trade Organization's Dispute Settlement Body has determined, in a case involving a similar provision of the Copyright Law of the People's Republic of China,¹⁷ that such a provision denying copyright protection based on the content cannot be consistent with Article 5(1) of the Berne Convention.¹⁸ That clause should be deleted.¹⁹
- **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 so that in no case could the rights of producers of sound recordings or performers be impaired or otherwise prejudiced by the exercise of rights by the author.
- **Exceptions Overly Broad:** 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.
- **Impermissible Compulsory Licenses:** Article 25 enacts into law in Vietnam a broad broadcasters' compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).²⁰ Notwithstanding the attempt in Article 26(2) of the IP Code to limit the scope of the compulsory license to the three-step test, it is hard to see how the compulsory license in clause 1 would not collide with the three-step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which was a last minute addition to this legislation) for use of sound and video recordings for commercial "broadcasting" is in violation of 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

¹⁶ Article 7(3) of the IP Code provides in relevant part, "the state has the right to prohibit or limit the intellectual property right holders from or to the exercise of their rights."

¹⁷ *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362/R)*.

¹⁸ Article 4(1) of China's Copyright Law provides that "[w]orks the publication and/or dissemination of which are prohibited by law shall not be protected by [the Copyright] Law." Vietnam's Article 8(1) provides that it is State policy "not to protect the intellectual property objects which are contrary to the social morality, public order or harmful to national defense and security."

¹⁹ IIPA also notes that Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

²⁰ The Article reads as follows:

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

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

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

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

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:** Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, enforce and exercise rights or benefits in respect of copyright and related rights.” TRIPS, the Berne Convention and the BTA also require that right holders be afforded with a presumption of ownership. Article 203, 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.” The Vietnamese government position is apparently that nothing in Article 203 requires a registration certificate, so, according to the government, there is no prohibited formality. However, Article 203 of the IP Code fails to expressly provide a Berne- and TRIPS-compatible presumption of copyright ownership. Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) apply the same standard of proof as Article 203. The Vietnamese government should confirm that it affords right holders with a presumption of ownership and preferably also a presumption of subsistence of copyright and that it adheres to the no formality principle of the Berne Convention.
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed if permissible constitutionally. Articles 202(5) and 214(3) of Vietnam’s 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 rights holder. These provisions fall short of the BTA (and TRIPS) requirement, as seized goods could potentially be utilized in the “normal channels of commerce.” The 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.

Internet Rules Need to Encourage Service Provider Cooperation: IIPA expresses disappointment that the government of Vietnam failed to amend the IP Code to adopt additional measures to deal with Internet-based piracy. The current infrastructure is contradictory and ultimately unsatisfactory to deal with growing Internet piracy, especially of music and video content. Laws in Vietnam dealing with Internet issues and service provider responsibility include the Information Technology Law (2007),²¹ and Decree No. 55 on the Management, Provision and Use of Internet Services (2001) (Internet Decree).²² The Information Technology Law apparently provides a broad exemption for information transmitted over or stored on their network.²³ The Internet Decree, by stark contrast, contains helpful language on service provider issues, providing in Article 6(1),

²¹ Law No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007).

²² Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services.

²³ Industry indicates that, under this Law, Internet service providers (ISPs) are exempt from liability for information transmitted over or stored on their network. Accordingly, ISPs are not responsible for any copyright infringing material transmitted over or residing on their networks, despite their knowledge of the infringement, unless (i) they themselves initiated the transmission of the information; (ii) they themselves proactively selected recipients of transmitted information; (iii) they proactively selected and modified the content of the transmitted information. Industry indicates that in practice, this means ISPs have to take down infringing content only where they are so requested by competent State authorities.

Information stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State's Secrets and other law provisions on intellectual property and Internet information management.

Article 6(2) of the Internet Decree provides,

Organizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.

The laws in Vietnam must be tailored to foster greater and more reliable service provider responsibility, specifically by creating mechanisms including statutory notice and takedown (with incentives such as safe harbors for service providers who comply) to promote cooperation in taking down and otherwise dealing with infringement online. With increasing broadband penetration, it will also be important to introduce other measures to deal with peer-to-peer (P2P) file sharing, web bulletin boards, torrent sites, and cyberlockers. The government should engage ISPs, most of which have ties to Vietnamese government agencies, and adopt policies so that they can easily stop repeat infringers from engaging in such illegal activities. Such ISP policies could include implementing a system of graduated sanctions leading to suspension or disconnection of accounts used for repeat infringement. IIPA understands Vietnam may be working on changes to the Internet Decree and would look forward to reviewing a draft when made available.

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 many key aspects that are necessary features 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. This leaves certain rights holders, for example, sound recording producers, with no choice but to license Vietnamese companies, which often refuse to do business due to the prevalence of piracy. Thus, the vicious cycle of high piracy rates and little to no market access continues. To improve market enhancement and commercial development of Vietnam's cultural sector, Vietnam should look to internationally accepted standards and practices, recognizing 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.²⁴ Unfortunately, Vietnam's restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, this part of Vietnam's legal structure operates to prevent meeting this key social objective. The following describes various market access restrictions faced by copyright owners.

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

BUSINESS SOFTWARE SECTOR

Onerous Restrictions on Technology Choice Through Government Procurement Preference: The Vietnamese government, under the auspices of the Prime Minister's Office, has established a framework for the procurement, use and adoption of open source software within government organizations with one of the key objectives being "enhancing copyrights protection." This regulatory framework was officially established in the Prime Minister's 2004 Master Plan for *Applying and Developing Open Source Software in Vietnam for the 2004 – 2008 Period*, followed by subsequent clarification and implementation through a number of ministerial directives and decisions, most recently in late 2008 by the Ministry of Information and Communications. The 2008 Directive mandated government agencies to install and use Open Source Software (OSS), which it indicated would be "*contributing to reduce software copyright violation.*"

IIPA has no issue with the policy goal stated in the Directive, and fully supports the goal to legalize software usage consistent with APEC economies' agreement that central government agencies should use only legal software and other copyrighted materials. However, the implementation of this goal by creating a clear procurement preference flies in the face of the market, and harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to that education market. As such, it fails to build respect for intellectual property rights and limits the ability of government or public-sector customers to choose the best solutions to meet the needs of their organizations and the Vietnamese people. It also amounts to a significant market access barrier for the software industry.

It should be noted that the "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy"), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Vietnamese government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles. Rather than start down this path away from innovation, and to further promote respect for copyright, the government should abandon the current approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and fosters non-discrimination in business choice, software development, and licensing models. We strongly urge USTR to consider the implications that Vietnam's open source preference policy has on IP protection and access to Vietnam's market for U.S. goods and services.

AUDIOVISUAL SECTOR

Restrictions on Trading Rights for Films and Distribution Services: Importation (trading rights) and distribution services as to foreign films is 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 from the Ministry of Culture and Information (MOCI). The import plan and the contents of foreign films must also be pre-approved by MOCI.

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 10-15 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.

Restrictions on Entity Type for Importation of Foreign Films: Foreign companies are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval and a 51% ownership ceiling. The policy to modernize the cinema industry should be non-discriminatory and encourage investment in construction and renovation of all cinemas.

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

Censorship Process for Films: MOCI 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 a re-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.

MUSIC/SOUND RECORDING 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 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. The lack of a meaningful commercial presence of 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.

Under 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, rights 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 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.

PIRACY AND ENFORCEMENT CHALLENGES IN VIETNAM

End-User Piracy of Business Software Harms the Software Industry and Stunts the Growth of the IT Sector: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the software industry, thereby stunting the growth of the IT sector. Retail piracy and hard disc loading continue to cause losses as well. Most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots. The piracy rate in Vietnam went up to 84%, due to the higher growth of unlicensed use of software by small business and consumers. A January 2008 study done by the International Data Corporation (IDC) with the Business Software Alliance concluded that decreasing Vietnam's software piracy rate by ten percent over a four year period would add US\$600 million to Vietnam's economy, create 1,900 new high-wage high tech jobs and generate an additional \$30 million in tax revenue.

The software industry has experienced some limited success since the IP Code was enacted, for example, the government in 2007 agreed to procure legal software, and took some administrative actions against the unauthorized use of software by businesses and government. The Prime Minister also issued Decision No. 51/2007/QĐ-TTg dated April 12, 2007 with the goal for Vietnam to reduce its software piracy rate to the average level in the region. There were no corporate end-user raids in 2008 on behalf of BSA. However, there were three end-user raids conducted in late 2009 and another raid in early 2010 by the Inspectorate of the MOCST in cooperation with the Economic Police. Administrative fines arising out of previous actions have usually resulted in non-deterrent fines, not even amounting to the cost of having purchased legal software. The authorities have also never taken *ex officio* raids against businesses engaged in software end-user piracy.

A 2008 Memorandum of Agreement has been effective in fostering good working relations between industry and government enforcement authorities though the Partnership in Protection of Software Copyright program.²⁵ In BSA's experience, enforcement officers show a strong interest in learning about copyright, improving their inspection skills, and applying what they have learned in practice. It is hoped that implementation of the Administrative will improve the situation in 2010 and lead to deterrence and a reduction in business software end-user piracy.

Internet Piracy Grew With Increased Broadband Penetration in 2009: In 2009, Vietnam once again ranked near the top in terms of growth in broadband penetration (according to Point-Topic). Total Internet usage continued to climb, with VNNIC (the national registry for Vietnam's Internet domain) estimating total usage at almost 22.8 million users (26.6% penetration, up from 20.2 million users and 23.4% penetration as of June 2008) ranking Vietnam seventh in total number of Internet users in Asia.²⁶

As a result of Vietnam's rapid growth in Internet penetration, but specifically broadband subscribers, it is not surprising that harm to copyright owners due to Internet-based piracy became much more serious in Vietnam in 2009. Industry has consistently and regularly notified the government of Vietnam of many sites that provide illegal content, including music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products).²⁷ Industry sources indicate Internet piracy comes in the form of illegal downloads from hosting websites, deep linking sites (e.g., Socbay and Zing), piracy-oriented search

²⁵ In August 2008, a Memorandum of Agreement was signed establishing the "Partnership in Protection of Software Copyright" between BSA, the Vietnam Software Association, the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST), and the Copyright Office of Vietnam.

²⁶ As an example of Vietnam's Internet growth in 2009, according to Point-Topic, Vietnam had the highest growth in DSL connections between the second and third quarters of 2009, at 9.68%, from 2.48 million to 2.72 million (out of a total 2.75 million broadband) connections. Vietnam ranked eighth in the world in total new broadband subscribers added in that same period (adding almost 240,000 new subscribers), and seventh in the world in growth percentage of broadband connections.

²⁷ The following are all suspect websites as to which MOCST and COV have been informed: 1280.com, 7Sac.com, Baamboo.com, bbs.orzko.com, chacha.vn, clip.vn, galaxyz.net, Gate.vn, giai24.vn, giai24.vn, giai24.vn, hiihehe.com, kenh14.vn, loitraitim.com, nghenhac.info, nhac.vui.vn, nhaccuatui.com, noi.vn, Socbay.com, tamtay.vn, timnhanh.com, Top1.vn, trungton.net, vast.net.vn, Vui.vn, tamtay.vn, top1.vn, xalo.vn, Yeuamnhac.com, yeucahat.com, and Zing.vn.

engines, peer-to-peer (P2P) downloading services, and cyberlockers. Pirates do not discriminate between Vietnamese and foreign works, and the Internet pirates involved offer large numbers of infringing files including local, regional and international works. Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content. Illegal streaming of copyrighted contents of international channels remains a major issue. University networks are increasingly being used for dissemination of infringing content.

In one example of Internet piracy and its ill effects on the Vietnamese people and local rights holders, Vietnam's national television station, VTV, was implicated in online piracy involving television broadcasts. In 2008, VTV held the rights to broadcast the "Ms. World Pageant" live. The pageant's organizers discovered that many online sites (including a website named "VietnamITV") directly received signals from VTV and broadcast the shows on their websites. RASS, the right holder in the broadcasts, issued warnings to VTV but the infringement continued. As a result, RASS rescinded the free-of-charge license citing "serious copyright violations."²⁸ Most of the "Ms. World Pageant" was not shown, causing many of the advertisers to pull out of their ad deals, and costing millions of Vietnamese viewers the chance to see the show. This was the second time VTV allowed its license to be rescinded since 2006. Other examples of this form of piracy include the unauthorized broadcast of music videos and unauthorized archived broadcast programs of music videos made available online. Despite sending numerous warning notices to the SCTV cable system about the unauthorized broadcast of music videos by Yeah1TV on Channel SCTV4 and to Yeah1TV's website (yeah1.com/tivi/) about the unauthorized archived broadcast program of music videos, the operators of these services have not taken any measure to remove infringing content. Administrative complaints have been filed with MOCST against both the Yeah1TV and the Yeah1TV's websites. It is hoped that the infringements can be stopped and that deterrent penalties/remedies will be imposed against these infringing channels and website operators.

Right holders have taken an active approach at self-help measures, seeking numerous takedowns of infringing sites and materials. Unfortunately, the takedown rates have not been particularly good, and brazen Internet piracy has increased. With 682 instances of Internet piracy notified to ISPs and directly to the websites allegedly infringing copyright in 2009, there were only 136 takedowns, for a takedown rate of only 20%. This poor takedown rate is due to the lack of a legal obligation or ambiguity as to the same for such services to take down infringing sites or files. The international record industry group, the International Federation of Phonographic Industries (IFPI) has filed several administrative complaints with the MOCST under the new Administrative Decree. MOCST inspectors have issued warnings and asked for the removal of the infringing content stated in the complaints. However, infringing content can still be found on these sites, continuing to cause damage to the music and record industry.

It is clear that overall, the Internet piracy problem is growing more serious, and the government of Vietnam therefore needs to devote additional resources, time, expertise, and equipment, in order to build capacity, train its officers, and ultimately, take needed actions to reduce Internet piracy in 2010. Target cases should be prosecuted at court against egregious examples of Internet piracy, and administrative authority should be exercised to prevent unfair business practices and address activities of commercial entities that actively facilitate infringement. Finally, government-run networks (including university networks) should be monitored closely to minimize infringing activity.

Physical Piracy Dominates the Market, Including Imports, Recordable Disc "Burning," and Local Factory Production: A reported seizure in Ho Chi Minh City on January 6, 2010 of "300,000 discs of all kinds that could be considered pirated," from a plant supposed to be producing blank discs, highlights the continued struggle in Vietnam against piracy.²⁹ Unfortunately, piracy can still be found everywhere, especially in urban areas, including major piracy hubs like Hanoi, Ho Chi Minh City, Danang, Haiphong, and two border cities Lang Son and Mong Cai. It remains, for example, very easy to buy almost any kind of software at shops on the so-called "PC streets" or other

²⁸ Other websites illegally retransmitting the VTV signals included VTC.com.vn, PDA.vn, and Clip.vn. See *VTV Loses Miss World Pageant Broadcasting Rights*, Look at Vietnam, December 15, 2008, at <http://www.lookatvietnam.com/2008/12/vtv-loses-miss-world-pageant-broadcasting-rights.html>.

²⁹ *Vietnam Police Say Pirated Discs Seized*, Agence France Presse, January 7, 2010, at <http://www.france24.com/en/20100107-vietnam-police-say-pirated-discs-seized>.

“CD-DVD” shops. Though MOCST has been supportive in recognizing there is a problem, they have devoted very few resources to deal with piracy across Vietnam. With the development of the Internet, some physical piracy has begun to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed. The author of a recent article on the topic notes, “[t]hese shops are open, just like any legitimate business.”³⁰ In fact, for the music industry, with piracy levels still over 90%, financial returns for recorded music sales have dropped so deeply that the companies involved are unable to invest in new albums and artists. Instead, companies operating in Vietnam have shifted their focus to different revenue streams, such as ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing. Even the Copyright Office of Vietnam understands that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”³¹

Pirate optical discs in the market come in three varieties: imports, mainly from China; locally produced “burning” onto recordable discs; and factory-produced discs. The majority of pirate VCDs and DVDs of movies are now imported from China. Authorities in Vietnam report eight optical disc plants operating in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand. 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 measures to protect the original discs from being illegally accessed or copied.³² Vietnamese-sourced pirate products flood the domestic markets and have in past years been found in other Asian countries, Canada, the Czech Republic, and Poland in recent years. The industries also have prior years’ intelligence that syndicates headquartered outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam).

The government must devote greater resources and greater manpower in order to achieve significant reductions in physical piracy. 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, and criminal penalties, can result in a significant reduction in piracy in Vietnam. A comprehensive regulation to address optical disc pirate production (of the kind discussed above) is needed to curtail pirate factory production, and provisions to license recordable disc production will also help to weed out pirate burn-to-order services.

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, translations, and photocopies. Government-owned bookshops, roadside vendors and copy shops all sell illegal copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers who engage local production. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. 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. Government publishing houses could help reduce piracy by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy. Universities, likewise, should play a role in reducing piracy of academic materials. Online piracy (mostly of reference books) is growing but is not yet a significant threat in the country. Most universities continue to show a lack of interest in promoting use of legitimate published materials on campuses. Universities should be more active in ensuring that campus facilities, photocopying machines and networks, are used for only legitimate purposes.

³⁰ See Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at http://news.cnet.com/8301-17938_105-10122530-1.html. Industry notes that the current cost of pirate movie DVDs in Hanoi is between VND15,000 (for a low quality copies) to VND18,000 (US\$0.81 – US\$0.97), and half that for an audio CD.

³¹ Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.

³² See Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at http://news.cnet.com/8301-17938_105-10122530-1.html. The author is quoted regarding the pirate software found in neighborhood shops in Hanoi, “These software applications, of course, come with “crack”—a hacking application that allows for bypassing the vendors’ antipiracy mechanism. All are guaranteed to work; if not, you’ll get another copy that does or get your money back.”

In 2009, several publishers discovered that their books were being pirated by a particularly egregious domestic publishing company. Repeated requests of the infringer to cease the infringing activity have been ignored, despite the fact that the request issued from COV and MOCST. In July 2009, local representatives in cooperation with a registered book distribution company organized a press conference to call attention to the illegal activities of the infringing publishing house. Following the event, the infringer wrote to the Ministry of Information and Communication accusing the local representatives of slander and of organizing the press conference “illegally” (though on what grounds remains unclear). This act appears to have precipitated the government agencies’ lack of interest in pursuing the matter.

Signal Piracy: Vietnam has seen a dramatic fall in illegal pay TV connections since 2007 and a surge in legal subscribers over 2009. The improvement has been attributed largely to the removal of pirated international channels from local operator Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telematics. It appears, however, that VTC is again broadcasting without license Motion Picture Association members’ content, ignoring cease and desist letters. In addition, industry reports that the unauthorized reception and redistribution of foreign satellite channels using illegal decoders remains a problem throughout the country. The cable and satellite group CASBAA reported that in 2009, industry lost \$15 million due to under-declarations and illegal pay TV connections. Almost 1.1 million pay TV connections in the country are illegal, constituting three out of every four such connections.

Mobile Device Piracy: With mobile penetration skyrocketing in Vietnam, estimated at nearly 120 million mobile subscribers as of November 2009,³³ or well over 100% mobile penetration, it is no surprise that Vietnamese are increasingly obtaining their content from digital sources. The government of Vietnam must remain vigilant and resist any attempt by pirates to established fixed mobile device piracy shops or services.

Courts and Judicial Reorganization: Perhaps the greatest disappointment to IIPA members has been the inactivity of the courts in dealing with copyright infringement issues. No criminal copyright infringement cases have been brought to courts. While inter-governmental discussions have ensued on judicial reforms, there still seems to be great reluctance to apply criminal remedies to even the most egregious cases involving copyright infringement. Equally, there have to date been relatively few civil court actions in Vietnam. The main reason for this is ambiguity within the law, complicated procedures, delays, and a lack of certainty as to the expected outcome.

Overall, there have been very few cases involving copyright reaching final court decision in Vietnam, and thus neither the civil nor the criminal courts have been well tested, and both lack clear direction on how to handle copyright cases.³⁴ Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors because they play a very important role in bringing a criminal offense to the court. With regard to the civil courts, we recommend a full training program for specialist judges and other IP professionals, to include training from authorities such as the NOIP as well as training by external organizations who are able to provide knowledge and guidance gained from a wider, more international perspective. Civil judges require training on the determination of compensation for damages together with the calculation of damages.

³³ Ngo Viet Hung (MIC Officer), *Managing Significant Market Power Enterprises In Vietnam's Telecom Market*, presented at ITU Workshop on Policy and Regulations for Newly Established Regulators in the Asia Pacific Region, December 8-9, 2009, at http://www.itu.int/ITU-D/asp/CMS/Events/2009/NewRegs/docs/S4_Mr_Viet_Hung.pdf.

³⁴ In one of the first reported copyright cases to make its way to the Supreme Court in Vietnam, the People's Supreme Court in Hanoi issued a decision on the first major literature copyright lawsuit between two experts of the literature classic Tale of Kieu (the 3,254-verse epic work by Vietnam's most revered poet, Nguyen Du), finding that Dao Thai Ton's reproduction "in a faithful and comprehensive way" and use of the essays of Nguyen Quang Tuan "in their original versions" in his book titled *Tale of Kieu – Research and Discussion* was permissible under Vietnamese law (the case was brought prior to the adoption of the new IP Code) since the purpose was to provide commentary and criticism of Mr. Tuan's interpretation. It appears that the new IP Code would not permit such wholesale copying of the essays without permission or license, would not meet the criteria of any exception under Vietnamese law, and would not meet Vietnam's international commitments.

TRANS-PACIFIC PARTNERSHIP

On November 14, 2009, in Tokyo, Japan, President Obama announced that the United States will engage with the Trans-Pacific Partnership and on December 14, United States Trade Representative Ron Kirk formally notified Congress that President Obama “intends to enter into negotiations of the agreement with the TPP countries with the objective of shaping a high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America's workers, farmers, ranchers, service providers, and small businesses.”³⁵ The initial TPP negotiating partners include Vietnam. IIPA has submitted public comments to the U.S. government's Trade Policy Staff Committee as part of its official docket which describes in greater detail the hoped-for results of a TPP negotiation, in the areas of substantive copyright protection, enforcement standards, ensuring the free flow of electronic commerce products and services, and opening markets to trade in copyright goods and services.³⁶ In particular, opportunities will arise to introduce copyright and enforcement standards consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, that would greatly benefit the creative communities in all the TPP markets. IIPA hopes and expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date. Vietnam must undertake significant reforms to its legal and enforcement regimes if it is to be able to meet the obligations of the US free trade agreement IPR chapters.

GENERALIZED SYSTEM OF PREFERENCES

IIPA Does Not Oppose Vietnam Bid for GSP, But Requests Review: On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States 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 Generalized System of Preference trade program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria, and formally requested that one year after the President designates Vietnam as a beneficiary, a review be scheduled to determine whether Vietnam has made progress in fully meeting its eligibility criteria sufficient to continue to enjoy GSP benefits. The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from 131 designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP statute requires the President to take into account the following, among other things,

- (4) 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 ... ;
 - (5) the extent to which such country is providing adequate and effective protection of intellectual property rights; [and]
 - (6) the extent to which such country has taken action to—
- ...
- (B) reduce or eliminate barriers to trade in services...”

The piracy and market access barriers highlighted in this report are the key reasons Vietnam should be scrutinized closely when it comes to beneficiary status under the GSP program.

³⁵ See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

³⁶ International 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)

TRAINING AND TECHNICAL ASSISTANCE

In 2009, the Business Software Alliance provided training to the Provincial Inspectorates of MOCST in three major regions of Vietnam. They organized Software Asset Management (SAM) training for members of the AmCham in Ho Chi Minh City. They also worked with the U.S. Embassy and U.S. Patent and Trademark Office in organizing IPR workshops for “Young Entrepreneurs and Enforcement Authorities (Courts, Procuracy, Economic Police, Customs, Market Management).” In 2010, BSA plans to conduct trainings with MOCST at the end of June, and it is hoped this can lead to a number of end-user piracy raids following the training. IFPI plans to conduct several technical training events to MOCST and other government authorities about investigative techniques to tackle online piracy. The first training in 2010 is expected to be held in late March.