

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

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

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

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

### PRIORITY ACTIONS REQUESTED IN 2018

#### Enforcement:

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

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



## Legislation:

- Make necessary changes to laws and implementing Decrees and Circulars, including the IP Code and the new Criminal Code, to ensure Vietnam is in full compliance with its BTA, TRIPS, and other international obligations, including, in particular, clarifying and confirming that “commercial scale” IP violations under the Criminal Code (1) apply to online distributions, including the unauthorized streaming of content; and (2) that the thresholds include infringement that is significant in its impact even absent a profit motive.
- Strengthen the legal framework to take effective action against digital infringement, including by:
  - affording adequate levels of protection to enable Vietnam to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT);
  - encouraging meaningful cooperation between rights holders and ISPs by ensuring that only neutral ISPs are eligible for safe harbors; providing clear legal incentives, including clear liability provisions, for ISPs to cooperate; making clear that ISPs must take action against infringing content without governmental intervention; and ensuring ISPs comply with requests to remove infringing materials and take other measures that have been demonstrated effective in preventing or restraining infringement;
  - increasing administrative penalties for copyright infringement to achieve deterrence; and
  - eliminating the legal and procedural impediments that interfere with the ability to take effective action against Illicit Streaming Devices (ISDs) and the apps, services, and platforms that contribute to ISD piracy.
- Extend the term of copyright protection for all copyrighted works, including sound recordings, in line with the international trend of 70 years after the death of the author or, when term is calculated based on publication, at least 75 years (or 100 years from fixation) as provided in the BTA.

## Market Access:

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

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

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

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

**Growing Online Marketplace Presents Challenges:** A significant and growing percentage of the Vietnamese population is online, with most of that access stemming from mobile broadband subscriptions.<sup>5</sup> Vietnam’s large population of young people and rapidly growing online and mobile user-base offer enormous new opportunities for legitimate services for creative content. Indeed, a growing number of licensed Internet content providers are trying to take advantage of these opportunities, including *Zing.vn*, NCT (*nhaccuatui.com*), Viettel Media

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

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

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

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

(*keeng.vn*), iTunes, and Deezer. Mobile applications like *Pops TV* are also pioneering the availability of music and audiovisual content, using iTunes, Amazon MP3, Android, Windows Phone, and Samsung Smart TV as vehicles for the distribution of content, including local Vietnamese content. Two video-on-demand (VOD) services were launched in Vietnam in 2016: Film+ (“film plus”) and Dannet. Netflix and Iflix are also available. These channels for digital distribution offer huge potential for the creative industries; however, as discussed below, Vietnam must significantly improve its legal framework and enforcement efforts, and dramatically reduce market access barriers for this potential to be realized.

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

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

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

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

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

<sup>7</sup>*Chiasenhac.com* (also *chiasenhac.vn*), which has an Alexa ranking of 144 and receives 5 million monthly visits, is owned by Yeu Ca Hat Company and hosted from Vietnam by Viettel IDC. As a result of an administrative complaint filed in 2016 with the Ministry of Information and Communications against *chiasenhac.com*, the site was fined and ordered to remove all infringing contents. Its infringing activities, however, continue.

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

trainings and institutional reforms to ensure MIC's inspector and other relevant departments are fully able to address online infringement. IIPA is hopeful that these developments will result in improved enforcement against online piracy. In June 2016, MIC and MCST took an important step by promulgating a Joint Circular to provide guidance for changing and revoking domain names that infringe intellectual property laws.<sup>9</sup> While the Joint Circular appears to have had some impact regarding other forms of infringement, it remains to be seen whether it will be effective in disrupting online copyright infringers. In addition, the MIC, in response to an administrative complaint, imposed a fine on an infringing website and ordered it to take down infringing content, although the process was slow and needs improvement. More such actions are needed, especially against the top infringing sites.

Unfortunately, however, rights holders note the process of addressing infringements is cumbersome and is done on a case-by-case basis. It is not helpful that Vietnam's domain registrar, Vietnam Internet Network Information Center (VNNIC), is not required under national law to provide contact and registration information of website owners in any WHOIS-style lookup database, making tracing the owners of infringing websites extremely difficult and hampering enforcement. Many offending rogue sites remain in operation and are growing in popularity. Vietnamese authorities, including the MIC Inspectorate, MCST, and MPS, are currently being asked to take more effective measures against notorious infringing sites whose business models are based on providing access to infringing content, employing the remedies set out in the MIC/MCST Joint Circular 07 (JC), including bringing criminal prosecutions.<sup>10</sup> The Inspector of MIC should use the authority granted under the JC and Decree No. 17 to sanction violations more effectively, particularly against those websites that are under MIC licenses. IIPA also hopes for increased criminal investigations into online piracy cases by the many police units with responsibility for investigating copyright and online crimes, including the MCST Inspectorate, MPS IPR/High-Tech Police and related police units (such as the Hanoi local High Tech Crime Police (PC50), the High Tech Crime Police (National) (C50), and the Security Police (P83)); and increased prosecutions by the Supreme People's Procuracy.

The level of cooperation with ISPs has improved as some of these companies have started their own licensed services. The responsiveness of some licensed ISPs, such as *zing.vn*, to takedown notices has greatly improved, but other local hosting providers, including FPT, claim that under the JC they are unable to take action against piracy websites without government intervention. Thus, while high piracy levels continue to distort the marketplace, ISPs will only take down infringing content when instructed by government authorities. Because, under Vietnam's legal framework, the government is the indispensable authority for taking action against illegal online content, it is incumbent on the government to take action. One way to better share this responsibility would be for Vietnam to amend the JC to enable greater cooperation between rights holders and ISPs.

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

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

<sup>10</sup>Joint Circular 07 (JC) imposes high standards of performance requiring "providers of intermediary services" to: 1) take affirmative steps to "[e]stablish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights"; 2) "[u]nilaterally refuse to provide a service that runs counter to the laws on copyright and related rights"; and 3) "[r]emove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other Government authorities in accordance with the law." Additional requirements are imposed upon social network operators to "send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights." The JC requires providers of intermediary services to be "[s]ubject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related rights." Finally, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for "[h]aving operations like a secondary distributor of the digital content generated from violations of the copyright and related rights."

that this procedure will become available to other rights holders as well. In addition, the local audiovisual industry, with U.S. rights holders, has established a pilot program to work with online advertisers and brand owners to ensure they do not inadvertently place ads or sell products on piracy websites in Vietnam. IIPA would welcome support of this initiative from the Government of Vietnam as well as from Vietnamese industry to begin to choke the advertising revenue streams of piracy sites.

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

With the rapid increase in the number of mobile phone subscribers in Vietnam, mobile network piracy has significantly increased in over the past several years. Rights holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto devices at the point of sale; and 2) the proliferation of “apps” designed to access infringing sites from mobile networks. For example, Socbay developed a mobile app called *Socbay iMedia*, which provides users with a variety of unauthorized entertainment content, including music files.

**Illicit Streaming Devices (ISDs) and Apps:** ISDs are media boxes, set-top boxes, or other devices that allow users, through the use of piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes around the world. China is a hub for the manufacture of these devices. The devices, gaining popularity in Vietnam, may be promoted and/or advertised to enable infringement of copyright or other illegal activities. Chief among these activities is enabling users through apps, to access remote online sources of unauthorized motion pictures or television programming. Often camcording in cinemas is the source of the pirated material. The apps may be pre-loaded prior to shipment, loaded by vendors upon import and prior to sale, as an “after sale” service, or by the users themselves, often utilizing easy to follow instructions provided by the vendor. ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. Research indicates that e-commerce websites such as *Lazada.vn* are the most common pathway to market for the promotion and sale of ISDs in Vietnam. The Vietnamese Government, including MCST and MIC, must increase enforcement efforts, including cracking down on piracy apps and on vendors who preload the devices with apps that facilitate infringement. Moreover, Vietnam should take action against key distribution points for devices that are being used illegally.

**Ex Officio Enforcement Needed Against Hard Goods:** Hard goods piracy has decreased in Vietnam, largely due to the shift to online and mobile network piracy, and, therefore, is not as commercially devastating as online piracy; nevertheless, traditional CD/DVD piracy (e.g., high-quality counterfeits from China, including of audiovisual “box sets,” as well as home-made pirated optical discs) remains a real problem, mainly due to transshipments to Western markets. MCST has indicated its recognition of the hard goods piracy problem, but the Vietnamese Government has yet to take *ex officio* actions. If the Criminal Procedure Code does not permit *ex officio* actions, it should be amended.<sup>11</sup> In addition, because high-quality counterfeits are being imported into Vietnam (mostly from China), Vietnamese Customs authorities need to undertake *ex officio* actions to intercept such infringing imports.

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

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers report continuing problems in Vietnam with unauthorized photocopying and illegal print piracy, mostly of English language teaching (ELT) materials. The proliferation of small ELT schools makes enforcement against widespread use of unauthorized reproductions of ELT materials at such institutions extremely difficult. Bookshops, roadside vendors and copy shops routinely sell unauthorized copies of bestselling trade books, travel books, and academic textbooks, including ELT materials. In 2015, in the course of its cease-and-desist campaign against multiple copy shops and bookstores in Ho Chi Minh City and Hanoi, the Association of American Publishers (AAP) uncovered a domestic book printer that appeared to be engaged in unauthorized reproduction and distribution of the copyrighted works of AAP member publishers. The book printer produced large quantities of unauthorized ELT materials and text books, which were distributed to several bookstores. Last year, the Ministry of Information Communication (MoIC) conducted an investigation against a number of bookstores, and industry is awaiting the outcome. Notwithstanding some apparent progress, the enforcement environment in Vietnam remains challenging for publishers. The agency tasked with administrative IPR enforcement has little experience or expertise, and there is presently no accredited authority to issue expert opinions on copyright infringement. Local publishers have an interest in making sure their licenses are not misused. Yet efforts by universities and the government to address the endemic piracy at university campuses have not been commensurate with the magnitude of the problem. Implementation of appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students would be helpful to discourage infringing behavior.

**Court Reform and IPR Training Needed:** As reported, the civil and criminal courts are not a realistic avenue for copyright owners. First, to IIPA's knowledge, police and prosecutors have never brought a criminal copyright infringement case to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. To date, there have been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be part of the overall judicial reform effort. Training should be provided to police and prosecutors, as they play a very important role in bringing a criminal case to the courts. Industry and the U.S. Government were working with the Supreme People's Court in drafting an "IP Manual for Vietnamese Judges," but that effort stalled. The manual should be completed as soon as possible, and should include sentencing guidelines to create a level of deterrence in copyright cases. IIPA also recommends frequent outreach with judges (and prosecutors and police) as part of judicial reform efforts, to inform these officials about the commercial and economic harm that results from piracy, and to impress upon these officials the need for meaningful remedies in infringement cases. Finally, IIPA recommends that Vietnam's Government provide the understaffed COV with adequate resources, including additional staff, to develop effective enforcement strategies and policies to tackle online piracy.

**Increase Efforts Against Camcording:** A vast number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during its exhibition in a movie theatre—usually very early in its theatrical release or even before the film's release (e.g., at a promotional screening). These illicit copies are then distributed to pirate "dealers" throughout the world and over the Internet. Illegal camcording destroys entire windows for distribution of audiovisual works, and damages not only the U.S. film industry, but also local cinema businesses. A camcording of a major motion picture was recently found on Youtube with Vietnamese subtitles. In addition, the rise of live streaming content over the Internet has contributed to the growing camcording problem. In 2015, Vietnam's Ho Chi Minh City Police initiated its first enforcement action against camcording, issuing administrative sanctions against a professional camcorder for camcording in a CGV cinema. The perpetrator also admitted that he had recorded and uploaded additional films.<sup>12</sup> More needs to be done to address this insidious problem, including adopting a measure providing for criminal procedures to deter unauthorized camcording in movie theaters.

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

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

## **COPYRIGHT LAW AND RELATED ISSUES**

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

Vietnam has taken some recent strides, but it still must close the gaps between its current legal framework and its unmet international obligations, including those it committed to in the TRIPS Agreement and the BTA with the United States.<sup>14</sup> Unfortunately, some recent changes noted below may have moved Vietnam further from those standards. We are hopeful that Vietnam will raise its standards for copyright protection and enforcement to, at least, meet its BTA obligations as quickly as possible.

**IP Code as Amended Remains Incompatible with Global Norms and with Vietnam's International Obligations:** The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions regarding Vietnam's compliance with the BTA and other international obligations. Among the issues that should be resolved in the current Code are the following:

- The IP Code does not provide for a term of protection for all copyrighted works, including sound recordings, in line with the international trend to 70 years after the death of the author, or, when the term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.<sup>15</sup>
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of "making available."<sup>16</sup>
- Enactment of the IP Code created an apparent inadvertent gap; namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to "works") was not made applicable to related rights.
- Articles 7(2), 7(3), and 8 of the IP Code appear to give the State power to restrict the ability of rights holders to exercise lawful rights in broadly defined circumstances, and remove copyright protection in ways similar to provisions in China's Copyright Law, which were found by a WTO panel to violate China's WTO obligations.<sup>17</sup>
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners, undermining the rights of the latter, which is inconsistent with Vietnam's obligations to provide certain exclusive rights to

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

<sup>14</sup>*Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), Chapter II on Intellectual Property Rights.

<sup>15</sup>Article 4.4: "Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work."

<sup>16</sup>Article 30(1)(b) should be clarified to ensure it provides a making available right, as well as a distribution right, and that it covers any form of transmissions of sound recordings, including interactive and non-interactive digital transmissions.

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

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

- Certain exceptions and limitations in the IP Code may be overly broad and call into question Vietnam's compliance with its international obligations, including TRIPS Article 13 and Article 4.8 of the BTA.<sup>18</sup>
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for "non-commercial purposes," rather than destroyed. These provisions fall short of Vietnam's BTA (Article 12.4) and TRIPS Agreement obligations.
- Article 203 fails to provide an adequate presumption of copyright ownership, potentially running afoul of Vietnam's commitments in the BTA (Article 3.2), as well as under TRIPS (Article 9(1) incorporating Articles 1-21 of the Berne Convention) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing for a presumption of ownership for an author whose name appears on the work in the usual manner).

**New Criminal Code May Have Moved Vietnam Further From International Commitments:** The National Assembly passed a new Criminal Code in November 2015, which was amended in June 2017, and became effective as of January 2018. Unfortunately, the new Criminal Code eliminated the phrase "on a commercial scale" from the previous law, reverting to a threshold approach to determine criminal liability for certain acts of infringement. This approach, which was nominally rejected by the February 2008 Criminal Circular, may take Vietnam further out of compliance with its international obligations, including TRIPS and the BTA.<sup>19</sup> Article 225 of the Criminal Code provides for criminal liability for "making copies of works" and "distribution to the public" of copyrighted works, subject to the thresholds.<sup>20</sup> The language of the new provision suggests that criminal liability may be available only for a limited range of infringing acts; thus, Vietnam must issue implementing regulations to ensure that criminal remedies are available for all acts of commercial scale piracy. In particular, implementing regulations should make clear that acts of "distribution to the public" include making infringing content available for streaming, and that no profit motive is required for criminal liability. Another concern is that proving the profits or losses required by the thresholds will be overly burdensome for rights holders. The bottom line is that the new Criminal Code on its face does not meet Vietnam's TRIPS obligation under Article 61 or its BTA obligation under Article 14 to ensure all infringement on a commercial scale and signal theft are subject to criminal liability.<sup>21</sup> The Vietnam Government should immediately issue implementing regulations for the Criminal Code to make explicit it applies to online distributions and other violations of the IP code, and that all "commercial scale" infringements are included, and are not limited to those with a profit motive. Otherwise, the U.S. should commence consultations in accordance with Chapter VII, Article 5 of the BTA to resolve these violations.

**ISP Liability Should be Amended to Meet Modern Challenges:** Joint Circular 07 (JC) merely requires intermediaries to take down infringing content and terminate services under certain circumstances, but this authority has been used only where online services and websites are directly infringing, and no contributory liability provision exists in the JC or elsewhere in Vietnam's legal framework. Also, the concept of "intermediaries" may be too broad, as it could encompass entities that are not neutral. The law should make it clear that any ISP that engages in any act restricted by copyright cannot rely on the ISP safe harbors to avoid liability. The JC does not include any requirement

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<sup>18</sup>Article 25(1)(g) on "[d]irectly recording and reporting performances for public information and educational purposes"; Article 25(1)(f) on "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns"; and Article 25(1)(j) allowing importation of copies of others' works for personal use remain problematic. Article 25 further codifies a broad broadcasters' compulsory license as to all works except cinematographic works, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audiovisual recordings for commercial "broadcasting" violates international standards at least as to the works involved and cannot be remedied by the addition of three-step test language. Articles 7(2), 7(3), and 8, referenced above, are overbroad exceptions that run afoul of the three-step test.

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

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

<sup>21</sup>In BTA Article 14, Vietnam agreed to provide criminal remedies for all "infringement of copyright or neighboring rights on a commercial scale," as well as for satellite signal (pay-TV) piracy.

for neutral intermediaries to take down infringing content in response to a notice received directly from a rights holder and the requirements of Article 5 of JC appear to apply only where the government has intervened. What is needed are clear legal incentives, including clear liability provisions, to ensure online platforms do not engage in infringing activities, especially regarding the making available right, and, also, that ensure neutral intermediary service providers will cooperate with rights holders to deter unauthorized storage and transmission of copyrighted materials. For example, the “right” for ISPs to take measures to prevent infringement under Article 4 should be an obligation, rather than a right. And the requirements in Article 5 for ISPs to remove and erase digital content that violates copyright and suspend services should be clarified to ensure ISPs are held liable at least for infringements that ISPs control, initiate, or direct, and for infringements that ISPs fail to expeditiously remove or disable access to upon obtaining knowledge, such as (but not limited to) notification from a right holder.

**Administrative Enforcement Decree Must Be Implemented in Practice:** As reported previously, the Administrative Violations Decree (No. 131) reduced the maximum administrative fine for an individual to VND250 million (US\$11,057), and set the maximum fine in the amount of VND500 million (US\$22,115) for an organization. The following fines are also set forth: 1) VND400 to 500 million (\$US17,692 to \$22,115) against an organization that imports an unauthorized copy; 2) VND70 to 100 million (US\$3,096 to \$4,401) against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million (US\$663 to \$1,546) against an individual that reproduces unauthorized copies of phonograms or video recordings. In addition to these fines, infringers may face remedial measures, such as confiscation of infringing goods and any false registration certificates, as well as the forced suspension of business, consultancy, or service activities. Notwithstanding the reduction in the maximum, the government should employ these maximum fines to full and deterrent effect forthwith.

**Decree No. 85 Questions Remain:** Decree No. 85 (2011) amended certain provisions of the Civil Code.<sup>22</sup> While Decree No. 85 contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam’s compliance with international norms and best practices. Most notably, Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management that, if applied to foreign right holders, would be onerous and would conflict with the ability of collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>23</sup> It should also be clarified that the “Principles and methods of payment of royalty, remuneration, and material benefits,” added to a new Article 45a of Implementing Decree No. 100, are not compulsory.

**Decree No. 72 Ignores Piracy:** Decree No. 72 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information unfortunately fails to include copyright infringement on the list of prohibited acts that trigger sanctions and remedies. Vietnam should amend this Decree to ensure piracy is included among the Decree No. 72’s prohibited acts and, thus, eligible for a remedial action, including the remedy of disabling access to infringing websites.

**Certain Enforcement Provisions Inconsistent with the BTA:** A number of Vietnam’s civil, administrative, and border enforcement provisions remain inconsistent with obligations in the BTA. For example, the availability of pre-established damages is limited and the amount is inadequate. BTA Articles 12.2.D and 12.3, require the availability of pre-established damages “adequate to compensate for the injury the right holder has suffered...” As noted above, Vietnam’s remedies for civil and administrative enforcement allow for distribution or use for non-commercial purposes of infringing goods and the materials and means for producing them, falling short of Vietnam’s

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

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

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

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

obligations in BTA Article 12.4 and TRIPS Article 46. Similarly, Vietnam's remedies for infringement at the border also allows for distribution or use for non-commercial purpose of infringing goods, which does not meet its obligations in the BTA (Article 15.12) and TRIPS (Article 59).

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

## **MARKET ACCESS BARRIERS IN VIETNAM**

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

The restrictions also fuel demand for pirated product. Vietnam's virulent piracy problems would be reduced if the country removed its highly restrictive market access barriers. By limiting access to legitimate content, these barriers push Vietnamese consumers' towards illegal alternatives. The restrictions instigate a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam's cultural sector and the development of a potentially very significant digital content market, Vietnam should look to internationally accepted standards and practices, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

### **Barriers Specific to the Audiovisual Sector**

**Laws Leave Potential Quotas In Place:** The amended Cinematography Law created the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Ministerial Decision of Approval of "Development Strategy for Movie Industry to 2020 and Vision to 2030" set an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. Although the Cinematography Law's stated quota and the Decision appear to be hortatory in nature, the Vietnamese Government should remove the quota. IIPA also notes the hortatory preference to show "valuable" foreign films. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese Government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam. Certain articles of the Cinematography Law also endanger the television broadcast market. For example, Article 35(2) provides that broadcast of films shall ensure "the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government." Unfortunately, Article 2.4 of Decree No. 96 implementing certain provisions of the Cinematography Law requires that Vietnamese films must be at least 40% of those broadcast on TV.<sup>25</sup> This quota should be lifted or eased significantly.

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

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

**Regulatory Intervention in the Pay-TV Sector:** A draft Decree on the Management, Provision, and Use of Broadcast Services (No. /2014/ND-CP) would, if implemented, place undue and excessive regulatory control into the hands of MIC, including allowing it to set prices for pay-TV services, extend foreign translation requirements beyond those already in place, and impose a further quota on foreign programming and additional fees on the pay-TV industry. Regulations for the pay-TV industry enacted in 2011 require foreign channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Most foreign programming is required to be edited and translated by an approved licensed press agent. In 2016, MIC indicated it is considering treating pay-TV services as a form of utility, which could affect the current free market pricing and competition. These measures, if fully implemented, would unduly restrict and impede the continued growth and development of the pay-TV industry in Vietnam. Further, these regulations essentially expand censorship requirements to all channels instead of “sensitive” channels as previously provided. This mandate also appears to impose new “editing” fees on international channels.

### Barriers Specific to the Video Game Industry

**Decree No. 72 Restricts Video Game Right Holders:** Decree No. 72 on the management of Internet services and online information creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. However, there remains a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. Article 31(4) provides, “[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam’s law in accordance with this Decree and the laws on foreign investment.”

The Decree establishes four categories of games. In category G1 (multiplayer games in an interactive online environment) the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: restrictions that involve censorship of the content of video games in order for them to be approved; outright prohibition of content within video games (see, e.g., Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; and license duration limits. The implementation of this Decree must not create structures that unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or that discriminate against them. We also urge Vietnam to work towards commitments agreed to in previous trade negotiations to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

### Barriers Specific to the Music Sector

**Onerous Market Access Restrictions on the Music Sector:** Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, hinder anti-piracy efforts. These restrictions effectively mean the Vietnamese Government must enforce intellectual property rights related to U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam,<sup>26</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

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

## COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

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

- all infringement on a commercial scale is not subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- a number of copyright exceptions are overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;
- remedies for civil, administrative, and border enforcement permit "non-commercial" distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- inadequate enforcement framework including no criminal infringement cases proceeding to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials which is inconsistent with Vietnam's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- term of copyright protection falls short of the requirements of BTA Article 4.4;
- presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2; and
- inadequate remedies against signal theft that BTA Article 5.

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