

# IIPA 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT



SUBMITTED JANUARY 28, 2021  
TO THE  
UNITED STATES TRADE REPRESENTATIVE  
BY THE  
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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January 28, 2021

***Submitted via regulations.gov Docket No. USTR-2020-0041***

Mr. Daniel Lee  
Acting Assistant United States Trade Representative  
for Innovation and Intellectual Property  
Office of the United States Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

**Re: IIPA Written Submission in Response to USTR's Request for Comments and Notice of a Public Hearing Regarding the 2021 Special 301 Review, 85 Fed. Reg. 81263 (Dec. 15, 2020)**

Dear Mr. Lee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the above-captioned Federal Register Notice as a part of the "Special 301" review. The filing focuses on three copyright industry concerns in U.S. trading-partner countries: (i) the adequacy of copyright laws, and in particular the ability of rights holders to fully exercise their rights; (ii) effective and efficient enforcement of those rights; and (iii) market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings.

IIPA members represent thousands of creators, producers and worldwide distributors of copyrighted works and sound recordings, including literary works, recorded music, movies and television programming, and video games. On behalf of these rights holders, IIPA has filed comments every year since the 1988 Trade Act established the Special 301 review proceeding. This year, as in the past few years, the particular focus of the IIPA filing is on the improvements necessary to the legal frameworks of trading partners to further enhance digital trade in copyrighted works and recordings. For two decades, the copyright industries have been at the forefront of digital technological advances, creating and disseminating copyrighted materials using a wide variety of media and ever-more sophisticated systems (including new services and applications (apps)) and new digital business models. The end-result of these digital technological advances is that more copyrighted material is now legally available, in more diversified ways, and with more varied pricing options than at any other time in history, for the enrichment and enjoyment of consumers.<sup>1</sup>

As the copyright sector has moved dynamically to electronically produce and deliver its products and services to meet global consumer demand, laws and enforcement regimes in many foreign markets have failed to keep pace. The success of the creative community in digital trade depends on strong copyright laws and enforcement practices that foster a legitimate online economy. Open markets and modern copyright laws, when combined with effective and efficient enforcement of those laws, have resulted in creators and producers investing in the creation and dissemination of new high-quality materials, ultimately meeting worldwide consumer demand. To maximize market potential, rights holders must stay current with (or be ahead of) technological developments in order to expand markets and creative activity and launch new business models. The global health crisis unleashed by the

<sup>1</sup>For example, there are now over 60 million licensed tracks on some of the major music streaming services. See e.g., <https://www.apple.com/au/apple-music/> and <https://www.amazon.com/music/unlimited> and hundreds of digital music services. The number of subscriptions to online audiovisual services worldwide increased to 863.9 million in 2019, a 28% increase from 2018. See, <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>. For more information generally on the proliferation of services, see, <https://www.motionpictures.org/watch-it-legally/> (movies and television content); <http://www.whymusicmatters.com> and <http://www.pro-music.org/> (music), as well as the IFPI Global Music Report 2020.

COVID-19 pandemic has taken a toll on many industry sectors, including the copyright sector. While the creative industries have adapted and responded to the crisis by making available more online resources for both distance learning and entertainment through flexible licensing mechanisms, these businesses are themselves contending with economic stresses. Thus, especially in the age of COVID-19, the need for strong copyright protection remains critical to incentivize the investment in the creation and dissemination of entertaining, informative and educational content.

The Special 301 review requires the U.S. government to identify “foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”<sup>2</sup> To address these statutory requirements, the IIPA filing details acts, practices and policies of our key trading partners focusing on market-related shortcomings. These legal regime deficiencies and market access obstacles prevent or hinder rights holders from asserting their affirmative rights to control the distribution of their copyrighted works and recordings, or to license those works and recordings to whatever businesses and at prices they choose.

IIPA members appreciate USTR’s efforts to maintain Special 301’s focus on improving and strengthening copyright protection and enforcement in the reported countries—as the statute requires and as Congress intended—to enable rights holders to properly assert their rights. Countries with strong IP laws and that effectively enforce those laws help not only American creators and producers, but also help their own cultural and creative sectors to develop, nurture, and enjoy the benefits of their own cultural and creative output, ultimately for the benefit of local consumers. Dynamic digital market conditions, including fair and equitable market access, create enormous opportunities to further expand economic growth, which results in more well-paying jobs and foreign sales. The goal of the Special 301 review—and the IIPA comments—is ultimately to open markets for American copyrighted materials in digital and hard copy formats, not to catalog trade barriers, or to admonish foreign governments for deficient laws or enforcement regimes.<sup>3</sup>

In sum, IIPA members very much appreciate that USTR has made the Special 301 process a positive catalyst for change to effectively address the challenges faced by the U.S. creative industries in key markets around the world. In our view, the process has yielded results, including productive legal reforms, enforcement actions and the removal of market access barriers. In addition to the recommended improvements noted in the filing, the IIPA also highlights some of the recent successes and positive outcomes in a number of countries.

## **I. IIPA RECOMMENDATIONS ON DESIGNATIONS AND A SUMMARY OF COUNTRY REPORTS**

IIPA’s submission focuses on the markets where IIPA members believe active engagement by the U.S. government can reap positive results for creators and the industries that support and invest in them. The 20 Country Reports contained in the filing include a summary of developments from 2020 along with key issues to focus on in 2021. Most of the Country Reports identify key priorities and, wherever possible, detail the legal, enforcement, and market access concerns specific to each market. Some Country Reports also contain details of specific trade obligations to the United States in bilateral or multilateral trade agreements, or identify unfulfilled obligations that, if addressed, could improve the local market. In a few instances, the Country Reports focus only on a few key issues or one or two industries.

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<sup>2</sup>19 U.S.C. Section 2242(a)(1).

<sup>3</sup>The most recently identified market access and other trade barriers around the world, including those pertaining to intellectual property rights, as well as key barriers to digital trade, are detailed in the U.S. Trade Representative’s 2020 National Trade Estimate Report on Foreign Trade Barriers (March 31, 2020). That report is available at [https://ustr.gov/sites/default/files/2020\\_National\\_Trade\\_Estimate\\_Report.pdf](https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf).

IIPA's 2021 Submission includes this Cover Letter plus two appendices—Appendix A and Appendix B.

**Appendix A** includes 20 Country Reports with recommendations for designation in USTR's Special 301 Report this year.<sup>4</sup> These 20 Country Reports cover: **Argentina; Brazil; Canada; Chile; China; Colombia; Ecuador; India; Indonesia; Kenya; Mexico; Russian Federation; South Africa; Switzerland; Taiwan; Thailand; Turkey; Ukraine; United Arab Emirates; and Vietnam.**

For these 20 countries, the IIPA recommends:

| <b>IIPA 2021 Special 301 Recommendations—Country Reports</b> |                          |
|--|--------------------------|
| <b>Priority Watch List</b>                                   | <b>Watch List</b>        |
| Argentina  | Brazil                   |
| Chile  | Canada                   |
| China  | Colombia                 |
| India  | Ecuador                  |
| Indonesia  | Kenya                    |
| Mexico   | Switzerland              |
| Russian Federation   | Thailand                 |
| South Africa   | Turkey                   |
| Taiwan   | United Arab Emirates     |
| Ukraine  |                          |
| Vietnam  |                          |
| <b>11 Countries Total</b>                                    | <b>9 Countries Total</b> |

In addition, IIPA recommends an Out-of-Cycle Review (OCR) for four countries with pending legal reforms that, if adopted, would result in significant set-backs for the copyright industries. The four countries IIPA recommends for OCR countries are: **Malaysia, Namibia, Nigeria and South Korea.**

None of these four countries—**Malaysia, Namibia, Nigeria or South Korea**—were identified in the U.S. government's April 2020 Special 301 Report for the Priority Watch List or Watch List. **Malaysia** was identified for an OCR in 2020 for IP enforcement issues pertaining to patents. An OCR in 2021 for each of these four countries, to engage with the governments and carefully review the pending copyright legal reforms for their sufficiency, would help to ensure these countries enact laws consistent with treaty obligations and international norms. If each country enacts laws that comply with international norms, this would avoid the need to add them to the 2021 or future Special 301 lists. These countries' legal regime shortcomings are detailed below in Section III.A.

**Appendix B** provides a Historical Chart of countries' placement on Special 301 lists by USTR since 1989 and IIPA's 2021 Special 301 recommendations.<sup>5</sup>

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<sup>4</sup>The Country Reports were prepared by the following counsel to the IIPA: Kevin Rosenbaum, Sofia Castillo, Dima Budron, and the undersigned. The reports are based on information furnished by IIPA's member associations. We thank Pamela Burchette for her tireless contributions in the preparation, production and distribution of this submission, as well as Julia Davis for reviewing and editing the entire filing. The information contained in this submission should not be construed as providing legal advice.

<sup>5</sup>A number of countries/territories have appeared on a Special 301 list every year since 1989, or for a considerable number of years. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that USTR must take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country." *Uruguay Round Agreements Act Statement of Administrative Action*, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

## II. ABOUT IIPA AND IIPA'S INTEREST IN SPECIAL 301

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of IIPA include: Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.thesa.com](http://www.thesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association ([www.motionpictures.org](http://www.motionpictures.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)).

Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and/or distributed by IIPA-member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services, as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

In December 2020, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2020 Report*, prepared by Economists Inc. (2020 Report). Based on 2019 data, the report generally does not reflect the impact of the pandemic on the creative industries, but it shows that the copyright industries continued to be a significant contributor to the United States economy, and will likely remain so when the impact of the virus has been mitigated. According to the 2020 Report, in 2019, the "core" copyright industries in the United States: (i) generated over \$1.5 trillion of economic output; (ii) accounted for 7.41% of the entire economy; and (iii) employed approximately 5.7 million workers which is 3.79% of the entire U.S. workforce and 4.46% of total private employment in the U.S.<sup>6</sup> The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 43% higher wages than other U.S. workers. Further, according to the 2020 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.87% between 2016 and 2019, while the U.S. economy grew by 2.48%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2020 Report calls the "total" copyright industries), the numbers are even more compelling. The 2020 Report also highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. Given the importance of digital delivery to the copyright-based industries, this sector has the potential to multiply its export revenues if our trading partners provide strong

<sup>6</sup>See Economists Incorporated, *Copyright Industries in the U.S. Economy: The 2020 Report* (December 7, 2020) available at <https://iipa.org/reports/copyright-industries-us-economy/>. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth has been well documented by the World Intellectual Property Organization (WIPO). See, e.g., *WIPO Studies on the Economic Contribution of the Copyright Industries: Overview* (2014), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2014.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf). The WIPO website provides links to 49 country studies employing virtually the same agreed-upon methodology as the Economists Inc. methodology. See <http://www.wipo.int/copyright/en/performance/>. These studies provide the economic underpinnings for efforts to reform copyright laws, improve enforcement, and lower market access barriers. For the video game industry, see a December 2020 report by ESA *Video Games in the 21<sup>st</sup> Century: The 2020 Economic Impact Report*, available at <https://www.thesa.com/wp-content/uploads/2019/02/Video-Games-in-the-21st-Century-2020-Economic-Impact-Report-Final.pdf>. This report highlights how video games not only provide rich interactive entertainment experiences, but also power an innovative industry that has a significant impact on U.S. economic growth and jobs. For the music industry (RIAA), see the 2018 *Jobs & Benefits Report* (currently being updated): <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwek-Economists-Inc-April-2018-1-2.pdf> and, the 50 States of Music website – <https://50statesofmusic.com/> – that provides (qualitative and quantitative) state-by-state contributions. There are also music industry reports on employment and economic contributions in specific regions, e.g., Europe, available at [https://www.ifpi.org/wp-content/uploads/2020/11/IFPI\\_music\\_in\\_Europe\\_WEB\\_spreads.pdf](https://www.ifpi.org/wp-content/uploads/2020/11/IFPI_music_in_Europe_WEB_spreads.pdf), as well as in specific countries, e.g., India, available at [https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/IMI%20report\\_singlePage.pdf](https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/IMI%20report_singlePage.pdf). For the motion picture industry (MPA), see the 2019 U.S. economic contribution infographic, available at [https://www.motionpictures.org/wp-content/uploads/2020/02/MPA\\_Economic\\_contribution\\_US\\_infographic\\_2019\\_Final.pdf](https://www.motionpictures.org/wp-content/uploads/2020/02/MPA_Economic_contribution_US_infographic_2019_Final.pdf). See also individual (country) MPA economic contribution reports for Australia (<https://www.mpa-apac.org/wp-content/uploads/2020/02/MPA-ANZSA-Study-Final.pdf>), India ([https://www.mpa-apac.org/wp-content/uploads/2020/07/20200708\\_India-ECR-2019\\_Finalized.pdf](https://www.mpa-apac.org/wp-content/uploads/2020/07/20200708_India-ECR-2019_Finalized.pdf)), and the United Kingdom (<https://www.mpa-emea.org/wp-content/uploads/2018/09/OO-UK-AV-sector-economic-contribution-report-FINAL-2018.09.21.pdf>). These reports illustrate the economic value of the production and distribution of motion picture and television programs, and include analyses of direct and indirect economic impacts (i.e., employment and tax analyses).

copyright-protective environments. In 2019, these sectors contributed \$218.76 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, pharmaceutical and medicines, electronic equipment, appliances and components, agricultural products, and aerospace products and parts. The 2020 Report and statistics amply demonstrate the economic importance of the copyright industries to the U.S. economy, and the value of improving protection, enforcement and market access abroad. IIPA looks forward to working with the U.S. government to further improve the collection and measurement of data to accurately capture the creative sector's contribution to the digital economy, including in critical areas of employment, GDP, and cross-border trade in goods and services.

### **III. KEY CHALLENGES FOR THE COPYRIGHT INDUSTRIES—PROTECTION, ENFORCEMENT AND MARKET ACCESS ISSUES**

The U.S. copyright industries face complex challenges in overseas markets that fall into three distinct, but overlapping, categories:

**Legal Reforms:** Inadequate copyright and related laws (e.g., civil, criminal and procedural codes) that fail to meet current global standards and evolving best practices. In some instances, national laws do not meet existing treaty or trade agreement commitments necessary to adequately and effectively address all forms of unauthorized uses. Addressing these inadequacies would allow copyright markets to grow in a fast-changing technological environment.

**Enforcement:** Inadequate enforcement of existing copyright and related laws. As a minimum standard, the World Trade Organization (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement requires "effective action" and "remedies that constitute a deterrent" to infringement, through civil, administrative, and criminal channels, and effective adjudication in the courts.<sup>7</sup> To be effective, enforcement tools must address the modern infringement challenges of all rights holders, including all variety of online uses and those outside a territorial jurisdiction (frequently running anonymously), and often across a number of countries. Moreover, enforcement authorities need the proper resources and capacity to do their jobs effectively.

**Market Access:** Barriers, investment restrictions, and discriminatory measures that make it difficult for U.S. producers and distributors to participate fully in foreign markets. These barriers also include interference with rights holders' contractual freedoms or with their licensing practices.

Below is a summary of the major challenges across the global markets in each of these categories:

#### **A. LEGAL REFORMS**

Although the Country Reports highlight specific concerns and deficiencies in the copyright legal regimes in each of the identified countries, some concerns are common to many countries. First, many countries have yet to accede to the World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties), or, have acceded to the WIPO Internet Treaties but have not yet fully (or properly) implemented the obligations of the treaties into their national laws. Second, several countries undertaking major overhauls of their copyright and related laws, are considering or adopting proposals that would weaken rather than strengthen copyright protections or enforcement. Often related to this concern, are countries that already have, or are considering adopting, broad exceptions and limitations, which undermine markets for the digital creation or dissemination of rights holders' materials. Third, in several countries, collective management organizations (CMOs) are not operating fairly or properly, resulting in the denial of monies to rights holders.

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<sup>7</sup>See WTO TRIPS Articles 41 and 61. There are many obligations for civil, administrative and criminal remedies in Articles 41 through 61, including for provisional relief and judicial procedures (e.g., injunctive relief), which are particularly critical for online enforcement.

U.S. trading partners have many unmet legal reform obligations from the numerous bilateral, regional, and multilateral trade agreements with the U.S., as detailed in the Country Reports. These agreements include: (a) the WTO TRIPS Agreement, to which 164 countries have now acceded (and over 20 additional countries are in the process of acceding); and (b) Free Trade Agreements (FTAs) or Trade Promotion Agreements (TPAs) with over 20 countries, including the 2020 U.S.–Mexico–Canada Agreement (USMCA), as well as bilateral agreements that entered into force in 2012 with **South Korea, Colombia and Panama**. These agreements are intended to open foreign markets to U.S. goods and services dependent on copyright protection, chiefly (although by no means exclusively) by mandating improved and modernized copyright laws, and, in most cases, higher standards for on-the-ground enforcement of these laws. The United States also has a series of Bilateral Investment Treaties (BITs) that are increasingly relied upon to resist efforts by foreign governments to impose heavy-handed regulations, for example, mandated local-content quotas, purchase requirements, or restrictions on audiovisual over-the-top (OTT) businesses.

On July 1, 2020, the USMCA entered into force. Although **Mexico** and **Canada** enjoyed free-trade status with the U.S. for more than 20 years under the North American Free Trade Agreement (NAFTA), that agreement, contemporaneous in time with the WTO TRIPS Agreement, included only basic IP protections, and did not include provisions addressing digital trade.

There are numerous obligations in the USMCA that, if properly implemented, will address the deficiencies in **Mexico** and **Canada's** legal and enforcement frameworks, for the benefit of American and local creators and producers. For example, the USMCA includes strong rules on presumptions of ownership, contractual transfers, national treatment, criminal remedies for cable and satellite signal theft, as well as for criminal, civil, and border enforcement. Additionally, the USMCA defines “commercial scale” to clarify that infringing acts without a profit motive or commercial purpose are actionable. This should address a long-standing enforcement challenge in **Mexico**, although amendments to its national laws are still needed to properly implement its USMCA obligations, including, for example, those related to the decryption of satellite and cable signals. The USMCA also provides for criminal procedures and remedies for aiding and abetting infringement, and requires the full application of enforcement procedures and obligations to the online environment, all of which must also be incorporated into national laws. The USMCA obligates **Mexico** in particular, to address the problem of camcording by adopting criminal sanctions for the copying of audiovisual works in theaters. The USMCA also provides rigorous and important protections relating to technological protection measures (TPMs) and rights management information (RMI), which are critical for enabling online business models and products. **Canada** presently provides adequate protections for TPMs, but **Mexico**, prior to implementing its USMCA obligation, did not provide comprehensive TPMs protections.

One positive development was the enactment in 2020 of many of these key copyright reforms in Mexico. The Mexican Congress adopted protections for TPMs and RMI and carefully defined “safe harbor” (including notice and takedown) provisions, along with other USMCA-obligated changes, into the Copyright Law. While remaining in force, the provisions on the protection of TPMs and the notice and takedown procedures are currently the subject of constitutional challenges, which if successful would seriously undermine **Mexico's** USMCA obligations. IIPA members hope the Mexican government will actively defend against these challenges so that Mexico can finally and properly implement the WIPO Internet Treaties. The national treatment obligations in the USMCA, required **Canada** to amend its laws to pay American sound recording producers and performers for certain broadcast and public performances for which it was previously denying payments; these payments are set to commence after tariffs are agreed to or set by **Canada's** Copyright Board. Certain USMCA provisions, most notably **Canada's** sweeping cultural carve-out and the broad limitations on liability for online service providers, could potentially undermine many of the benefits of this agreement for the copyright industries in these countries.

In January 2020, the U.S. government completed a Phase One Agreement with **China**, which includes enforcement obligations pertaining to copyright protection, including obligations for **China** to improve presumptions of copyright ownership and the notice and takedown system. The agreement also obligates **China** to prevent piracy and

counterfeiting on e-commerce platforms by taking action against platforms that repeatedly fail to take measures necessary to prevent infringements. The agreement requires **China's** administrative authorities to transfer a case for criminal enforcement, if there is “reasonable suspicion” based on articulable facts that a criminal violation of an intellectual property right has occurred. The agreement also includes important purchasing obligations for audiovisual works.

The U.S. government is currently negotiating trade agreements with the **United Kingdom** and **Kenya**, and it may commence negotiations with the **European Union**. In written submissions prior to the commencement of negotiations, the copyright industries addressed specific concerns and hoped-for outcomes for any resulting agreements.<sup>8</sup>

The U.S. government has entered other wide-ranging bilateral agreements, including binding trade agreements, in which our trading partners have committed to taking steps to modernize and strengthen their copyright laws and/or enforcement regimes.<sup>9</sup> Some of the agreements were negotiated bilaterally in the context of accession of U.S. trading partners to international entities such as the WTO, or in the settlement of WTO disputes, while others constitute “action plans” or similar pledges resulting from negotiations to resolve bilateral issues—including for example, online enforcement obligation agreements with **Ukraine** and **Russia** that have never been fully implemented.

Some signatories to existing FTAs have not met their agreement obligations, yet these countries continue to enjoy unfettered access to our valuable national markets for goods and services. These concerns are detailed in the Country Reports in Appendix A, notably in **Chile** and **Colombia**, where the legal frameworks for online enforcement remain deficient.

It is also the case that some of the provisions in certain bilateral or multilateral agreements are outmoded and no longer fit the original intended purpose. For example, some provisions meant to address digital technologies were negotiated more than a quarter century ago, before the dawn of digital markets and interactive uses that have so dramatically changed the landscape of the marketplace for goods and services protected by copyright. In such instances, the U.S. government should seek higher standard remedies that support the current business models of the creative industries—including remedies that effectively respond to current challenges and reflect international best practices—to ensure the proper delivery of digital works and services.

Many U.S. trading partners have extended copyright duration in line with evolving global trends. Setting the term of copyright protection at life of the author plus 70 years (or at least 70 years from fixation or first distribution for works or sound recordings not measured by the life of the author) has become a *de facto* global norm. More than 80 countries, including almost all of the U.S.’ major trading partners in Europe and in the Americas, and all but a handful of Organization for Economic Cooperation and Development (OECD) countries already meet or exceed this norm for some or all categories of creative works and recordings. Several U.S. trading partners including **China**, **India**, **Indonesia**, **Kenya**, **Malaysia**, **New Zealand**, **Nigeria**, **Philippines**, **Russia**, **Saudi Arabia**, **South Africa**, **Taiwan**, **Thailand**, **United Arab Emirates** and **Vietnam** have not yet adopted longer terms for works or sound recordings, or both. A proposal to extend term for sound recordings (to 70 years) is pending in **Ukraine**. **Canada** has committed to extend its term for all works and sound recordings as part of the USMCA. Article 20.63 of the USMCA requires **Canada** to extend the protection for sound recordings an extra five years, and the duration for other works by 20 years. Once fully implemented, this will generate additional licensing and sales revenues for U.S. and local rights holders for works and recordings that would otherwise stop producing revenue for creators and producers. It is hoped

<sup>8</sup>See [https://ipa.org/files/uploads/2019/01/2019\\_Jan15\\_IIPA\\_Comments\\_US\\_UK\\_Trade\\_Agreement\\_Negotiating\\_Objectives.pdf](https://ipa.org/files/uploads/2019/01/2019_Jan15_IIPA_Comments_US_UK_Trade_Agreement_Negotiating_Objectives.pdf); <https://www.ipa.org/files/uploads/2020/04/IIPA-Comments-on-US-Kenya-Trade-Agreement.pdf>; and [https://ipa.org/files/uploads/2019/01/2018\\_Dec10\\_IIPA\\_Comments\\_US\\_EU\\_Trade\\_Agreement\\_Negotiating\\_Objectives.pdf](https://ipa.org/files/uploads/2019/01/2018_Dec10_IIPA_Comments_US_EU_Trade_Agreement_Negotiating_Objectives.pdf).

<sup>9</sup>See, for example, the intellectual property rights agreements compiled by the Commerce Department’s Trade Compliance Center, available at: [http://tcc.export.gov/Trade\\_Agreements/Intellectual\\_Property\\_Rights/Index.asp](http://tcc.export.gov/Trade_Agreements/Intellectual_Property_Rights/Index.asp).

that other countries, particularly in Asia and Africa, will follow recent examples (many in Latin America) and extend copyright term.

Here are more details on some of the more common legal reform concerns:

### **1. WIPO Internet Treaties**

The WIPO Internet Treaties—adopted in 1996—set the global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. The treaties also include an overarching commitment for countries to enable effective exercise of these rights in practice and to provide deterrent levels of enforcement of these rights online (and offline). The WIPO Internet Treaties were the culmination of a global consensus on the need to provide legal protection for TPMs that copyright owners (or their licensees) use to control access to and the copying of their works and recordings. These controls, particularly access controls, are key enabling technologies for a full range of online digital services, such as subscription streaming services, that deliver creative works to consumers in a time and place convenient to them, and in a manner that protects the rights of and payments to creators and producers. IIPA urges the U.S. government to remain vigilant on this issue, especially in reviewing legislation in any country purporting to implement the WIPO Internet Treaties. This should also include copyright reforms undertaken in countries that are parties to an agreement (including a FTA) with the U.S. In particular, anti-circumvention prohibitions (e.g., protections for TPMs) should protect access controls regardless of the method or technology, and should apply independent of whether there is an accompanying copyright infringement. Only in this way can TPMs legislation establish effective, practical, and enforceable anti-circumvention prohibitions that protect and support digital content services.

In the 25 years since their adoption, 107 countries have acceded to the WCT, and 106 to the WPPT. In 2020, four countries acceded to the WCT: **Nauru** (August 11, 2020), **San Marino** (September 2, 2020), **Sao Tome and Principe** (April 27, 2020), and **Vanuatu** (August 6, 2020). All of these countries except **Nauru** acceded to the WPPT as well in 2020 (on the same dates as their WCT accessions).

There are still several large trading partner countries that have not acceded to the treaties including: **Brazil**, **Egypt**, **Israel**, **Norway**, **Pakistan**, **Saudi Arabia**, **South Africa**, **Thailand** and **Vietnam**, as well as smaller markets, such as **Bolivia**, **Brunei**, **Kenya**, **Kuwait**, **Lebanon**, **Namibia**, **Tanzania** and **Uganda**. In 2018, **Saudi Arabia** updated its Copyright Law, and in 2019, the Implementing Regulations were also revised, as part of possible future accession to the WIPO Internet Treaties (**Saudi Arabia** acceded to the Marrakesh VIP Treaty in 2019). If it does accede to the WIPO Internet Treaties, further revisions to the Copyright law in **Saudi Arabia** would be required to fully and properly implement those treaties. In 2019, **Brazil** began proceedings to update its 1998 Copyright Law, and signaled that this was part of a process for eventual accession to the WIPO Internet Treaties. One other country undergoing legal reforms for WCT accession (but no public mention of WPPT accession) is **Ethiopia**. To fully implement both the WCT and the WPPT, Ethiopia needs to substantially revise its current Copyright Law (last amended in 2014) to provide full protection for sound recordings, including enumerating the scope of rights for sound recording producers and performers (and adding a definition of a “sound recording producer”), along with other improvements.

Many countries have joined the treaties, but have not yet fully implemented the obligations of the treaties into their national laws. Examples include: **Barbados** (2019), **Ecuador** (2002), **India** (2018), **Mexico** (2002), **Nigeria** (2018), **Turkey** (2008), and the **United Arab Emirates** (2004). The U.S. government should make it a priority in 2021 to encourage all U.S. trading partners to both accede to and fully implement the WIPO Internet Treaties.

**2. Four IIPA OCR Country Recommendations for Troubling Copyright Reforms. Additional Legal Reform Concerns in Other Countries Including: (i) Weakening Protections for Creators and Producers; and/or (ii) Threatening Norms with Broad Exceptions and Limitations.**

**Four OCR Country Recommendations:** There are four countries that are undertaking significant legal reforms that if adopted in their current draft form, would significantly weaken, not strengthen, protection: **Malaysia, Namibia, Nigeria and South Korea**. As a result, IIPA recommends OCRs for each of these four countries in 2021.

**Malaysia** is in the process of drafting major Copyright Act reforms. In February 2019, the Intellectual Property Corporation of **Malaysia** (MyIPO) held a stakeholders' consultation meeting on proposed changes to the Copyright Act to address the digital creation and dissemination of copyrighted materials and online piracy. **Malaysia** acceded to the WCT and WPPT in December 2012 but has not fully implemented the treaties. Instead, it has instituted some problematic regulatory measures in recent years to limit rights holders' abilities to properly and freely exercise their rights.

IIPA encourages **Malaysia** to enact amendments to the Copyright Act to fully implement the treaties, including: (i) improving its protections against the circumvention of TPMs; (ii) addressing online piracy of film and television content with criminal provisions aimed at piracy devices (including, for example, infringing streaming devices (ISDs)); (iii) providing a clear ISP liability framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities; (iv) maintaining the broadcasting and public performance rights for sound recordings as exclusive rights; (v) extending the term of protection for sound recordings to 70 years; (vi) amending the Criminal Code to sanction unauthorized communications to the public; (vii) narrowing overly broad exceptions – that exceed the “three-step test” of Berne and the WTO TRIPS Agreement<sup>10</sup> – including so-called “flexible exceptions” regarding “quotations” and “transient and incidental” copies; and (viii) avoiding a mandatory registration system (which would run afoul of the Berne Convention). In November 2019, there were additional consultations between MyIPO and some rights holder groups, but the legal reform process has, to date, not been transparent, which is concerning to some rights holders. The development and guarantees of a voluntary and fair collective management system are encouraged; a positive step in 2020 was the dissolution of Music Rights Malaysia Ltd. (MRM).

**Namibia** is proceeding to revise the Copyright Act and Neighboring Rights Act of 1994. Although it was a 1996 signatory to the WCT and WPPT, Namibia has neither acceded to those treaties, nor revised its laws to implement the WCT and WPPT. At present, the Business and Intellectual Property Authority (BIPA) is preparing a draft Copyright Law for **Namibia**. There are several concerns with the existing law (and draft law).

First, **Namibia's** draft law should limit exceptions and limitations—explicitly—to the Berne three-step test. Several of the proposed exceptions would not comply with the three-step test—including the private use and private copying, quotation, and the hyperlinking exceptions—and these provisions should either be amended or deleted from the draft law. In addition to enumerated exceptions, many of which are broadly-written and ill-defined, the draft law includes a sweeping “fair use” provision. The adoption of a hybrid system with both “fair use” (to be determined by a regulatory body in lieu of a case-by-case judicial determination, as in the U.S.), and broad enumerated exceptions, would undermine the protections for rights holders and result in uncertainty for the production and dissemination of materials.

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<sup>10</sup>Article 13 of the WTO TRIPS Agreement obligates WTO members to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” See also Berne Convention Article 9(2) (same, as to reproduction right); WIPO Copyright Treaty (WCT) Article 10 (same, as to all Berne exclusive rights and all exclusive rights granted under the WCT itself); WIPO Performances and Phonograms Treaty (WPPT) Article 16(2) (same, as to all rights provided for under WPPT).

Second, in the **Namibian** draft law, the provisions on TPMs should be revised to ensure compliance with the WIPO Internet Treaties. Treaty compliant provisions on TPMs should cover both the acts of circumvention, as well as the trafficking in any technology, device, product or service that will circumvent, or that are designed to circumvent, a TPM. A clear definition of a “technological protection measure” is an important component of any new law, as well as strong civil and criminal remedies for TPM violations.

Third, the “safe harbor” provisions—which limit third party monetary liability for platforms and certain services—should only apply to passive and neutral activities of intermediaries that do not contribute to infringing activities.

Fourth, the draft law should clarify the scope of protection for sound recordings, including the reproduction right, right of broadcasting, and communication to the public and making available right.

Last, the term of protection for works should be a life plus 70 year term. For sound recordings (or works created by juridical entities), the term should be at least 70 years calculated from first fixation or publication (and not, as the draft proposes, based on a “life plus” term). Most sound recording producers, for example, are juridical entities, so such a life plus term would not be appropriate.

**Nigeria** ratified the WPPT and WCT in 2018, but it has not fully implemented the treaties, and, as a result, its legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2017, was re-circulated in 2020. It has a number of significant deficiencies that need to be corrected for **Nigeria** to properly implement the WIPO Internet Treaties. The draft legislation does not, but should, clearly define TPMs to refer to technologies that prevent infringement as well as to technologies that are designed to have that effect. At present, the draft law provisions on TPMs are not compliant with the WIPO Internet Treaties. Also, the draft law does not include an exclusive right of distribution as required by the WPPT, and proposes only a remuneration right for broadcasting for sound recordings in lieu of an exclusive right. In addition, the definition of “broadcasting” needs to be limited to “wireless” means, consistent with the WPPT (and the Rome Convention), and the rights of pre-existing sound recordings, incorporated into audiovisual works, need to be protected in accordance with the Agreed Statements to Article 2 of the WPPT. To be compatible with the Berne Convention and international treaties, the draft law should abolish the requirement for a copyright registration; registration can be voluntary but it cannot deny the “enjoyment or exercise” of rights under the Berne Convention (nor should it be subject to fines for non-registrations, as in the current draft law). The draft law also proposes draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This proposal is unprecedented and disproportionate to any intended purpose and should be deleted from the draft law. Any new law also should provide that limitations and exceptions comply with the three-step test. Other fixes needed from the 2017/2020 proposal: amend the provisions that would grant broad immunity to Internet Service Providers (ISPs) from copyright liability. These safe harbors should only apply to passive and neutral intermediaries that do not contribute to infringing activities. The draft law should also include expeditious timetables for takedowns and provisions to address repeat infringers. Private copying exceptions, and with them, provisions for levies, should apply only to content that is lawfully acquired—the exceptions should not be misused as a licence to legalise piracy. The term for sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and to the life of the author(s) plus 70 years for works.

One additional concern in **Nigeria** is the absence of an accredited CMO for music rights holders to manage their public performance and broadcast rights. This is the result of a dispute between the Nigerian Copyright Commission (NCC) and the CMO COSON Limited which was responsible for managing performance rights in musical works and sound recordings, but whose operating license was withdrawn by the NCC. Since then, working with rights holders, steps were taken to improve COSON’s transparency and governance, and as a result, IIPA recommends COSON should be reinstated. Additionally, the draft law should define CMOs and their proper governance, so that CMOs should exist only if they are owned or controlled by their member rights holders and are

non-profit organizations. With these provisions in place, CMOs would be able to license effectively in Nigeria. The draft law includes a proposal to add extended collective licensing (ECL) in **Nigeria**. An ECL system is only appropriate in well-developed collective rights management systems, where organizations represent a substantial number of rights holders for each segment of the collective marketplace. For these reasons, such a system is not appropriate in **Nigeria** and IIPA recommends that these provisions be removed from the draft law. Last, because there are a number of unlicensed online entertainment services in Nigeria, which are harming many markets inside and outside of Nigeria, there needs to be more effective online enforcement.

In **South Korea**, in July 2020, the Ministry of Culture, Sports and Tourism (MCST) announced possible policy proposals for revisions to the Copyright Law. MCST requested stakeholder comments before sending its proposed changes to the National Assembly for likely consideration in 2021. The MCST proposal has one positive provision—to sanction websites that provide links to unauthorized works—but it also includes several problematic proposals, some of which are inconsistent with **South Korea's** international obligations. First, there is a proposal for an extended collective licensing (ECL) regime that would apply to online music services and, in an unprecedented manner, also apply to film and television programs. The proposed ECL system should not be enacted either for online music services or for audiovisual works. For films, it would deprive rights holders of their exclusive distribution rights in **South Korea**, including the right to determine release dates for cinemas. A proposal to extend collective management for educational uses (of music) should be significantly narrowed or abandoned. There are several other provisions that would undermine the freedom and sanctity of contracts in both the film and music industries, in particular. Second, however well-intentioned, there is a proposal to decriminalize minor copyright infringements which could, if not carefully crafted (and explained to the public), result in a dramatic rise in infringements by individual users diluting the deterrent effect of proper sanctions for harmful infringements. Other proposals that would harm the film industry would: (i) change the relationship of ownership between juridical entity owners of films (by employees); and (ii) create, in an unprecedented manner, a “portrait” right in individuals distinct from copyright, but within the Copyright Act. If adopted, this would significantly stifle the production of films about or inspired by real people and events. For sound recording producers, the proposed public performance right needs to be remedied by fully applying the right (as opposed to limiting it to specific uses), and with very limited exceptions. Additionally, any proposed exception for text and data mining should be narrowly drawn and well-defined. Last, **South Korea's** third party liability framework (including safe harbors) is outdated and susceptible to abuse by user uploading services and other online infringers, and it should be modified.

Additionally, one market access concern in **South Korea** for the motion picture industry is a proposed screen quota on the number of screens and percentage of showing on any single film. The proposal would, if adopted, impede the free market and have the unintended effect of creating a vacuum of consumer demand. This would encourage piracy of films otherwise blocked from legitimate distribution or theatrical exhibition, and destroy both the rights holders' value in their films as well as the investments made by **South Korean** distributors licensing American titles.

In addition to the concerns identified above in **Malaysia**, **Namibia**, **Nigeria** and **South Korea** regarding compliance with the three-step test governing exceptions and limitations to protections, there are several other countries where the press for reforms and modernization of national copyright laws have failed to keep pace with market and technological trends and where reform efforts, in particular, have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments, with broad exceptions and limitations.

**South Africa** is an alarming example of this trend. In 2019, the National Assembly of South Africa adopted legislation that included a broad spectrum of vaguely delineated exceptions along with an open-ended “fair use” provision to the Copyright Law (all of which were also included in a companion bill for performers’ rights). The President did not sign the two companion bills, instead referring them back to the National Assembly on constitutional grounds. Both bills are currently under reconsideration. Enactment of the two bills as passed by the National

Assembly would introduce a more expansive version of the U.S. “fair use” rubric in addition to a set of extremely broad new exceptions and limitations to exclusive rights, as well as expand the existing “fair dealing” system. This version of “fair use” would be applied to seven broad and unclear “purposes” of uses, such as “scholarship, teaching and education,” and for “ensuring proper performance of public administration.” The U.S. “fair use” doctrine is buttressed by decades of legal precedents that give meaningful context to the broad principles outlined in the statute, and which allow defendants to raise a defense of fair use for consideration by courts on a case-by-case basis. The “fair use” system proposed in **South Africa**, in contrast, would have no case law precedents and would not approximate U.S. law. If enacted, the combination of fair use, fair dealing and the overlapping exceptions and limitations, would likely result in confusion and uncertainty about which uses of copyright works require licenses, and could hinder investment in and the development of new copyright services in **South Africa**. In particular, the laws would imperil the legitimate markets for educational publishing, locally distributed works, and online works in general.<sup>11</sup>

It is critical that the National Assembly not rush its reconsideration process, for instance, by making only minor revisions. Instead, consistent with the President’s directives and wide-ranging concerns, IIPA recommends that **South Africa’s** National Assembly redraft the bills to address the concerns of all stakeholders (including local creators and producers) to ensure the provisions comply with international agreements, including the permissible scope of exceptions and limitations under the three-step test of Article 13 of the WTO TRIPS Agreement, Article 9 of the Berne Convention, and the corresponding provisions in the WIPO Internet Treaties. More details on these and many other concerns with the 2019 legislation as submitted to the President are provided in the **South Africa** Country Report in Appendix A.

In 2011, as part of major revision of its Copyright Law, **Canada** adopted a sweeping “user-generated content” exception, along with a number of other questionable new or expanded incursions on exclusive rights, notably the addition of “education”—undefined and unrestricted—as a permitted “fair dealing” purpose. As detailed more fully in the **Canada** Country Report in Appendix A, the “education as fair dealing” exception has wreaked havoc on a once thriving licensing regime for educational use of published materials, and has produced instability and slowed investment in educational publishing in **Canada**. It is hoped that, as a part of the ongoing Copyright Law review process, these exceptions will be clearly defined and significantly narrowed in keeping with **Canada’s** international obligations.

In **Ecuador**, legislation was adopted in 2016 that substantially weakened copyright protections. The new law—the Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI)—contains 30 exceptions and limitations on exclusive rights including a five-factor “fair use” clause. It is broader than the fair use provision found in U.S. law and Ecuador being a civil law jurisdiction adds to its unpredictability. In November 2020, Ecuador implemented regulations pertaining to some of the COESCI provisions. However, the regulations do not adequately correct the most egregious COESCI deficiencies and do not bring Ecuador into compliance with its international obligations. IIPA understands that the *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology and Innovation, SENESCYT) is working on a legislative proposal to amend (i.e., correct) some of COESCI’s exceptions. These and other problems in **Ecuador** are detailed in the Country Report in Appendix A.

**Switzerland** adopted Copyright Law amendments in 2019 (detailed in the Country Report in Appendix A), but left in place many troubling provisions, including broad exceptions, such as the private copying exception in Article 19, which permits downloading from unauthorized sites, as well as a free reproduction license for scientific

<sup>11</sup>There are many other deficiencies in the 2019 bills detailed in the **South Africa** Country Report in Appendix A. For example, the 2019 bills include provisions that will intervene in private contractual relations (i.e., ministerial powers to set standard and compulsory contractual terms, including setting royalties), mandating the mode of remuneration for audiovisual performers, and limiting the term of assignments for literary and musical works and performers’ rights in sound recordings to a maximum of 25 years. The bills also provide: (i) inadequate protection against the circumvention of Technological Protection Measures (TPMs); (ii) protection of certain performers’ rights that falls below the levels required by WPPT (which **South Africa** intends to ratify) and the Beijing Treaty (to which **South Africa** intends to accede); and (iii) numerous other unclear provisions which risk major disruption to the creative industries.

research (Article 24d) meant to cover text-and-data mining. The latter provision, if read broadly and in combination with other exceptions (e.g., Article 19(1)(c)), will exceed its intended purpose and the internationally-recognized three-step test. Even after the adoption of these amendments, the Swiss law is significantly weaker than the laws of its European Union neighbors and most OECD countries.

Some countries, including **Israel**, **South Korea** and **Thailand** have adopted a fair use legal regime, but proper application of this defense to infringement has been problematic. For example, in **Thailand**, broad educational exceptions (detailed in prior IIPA filings) have been applied in cases allowing copying for research or study. Guidelines on fair use were issued by the Thai government, but is not clear that they are being adhered to in practice. In the **Philippines**, drafts implementing fair use regulations to the Intellectual Property Code were issued (in 2019) for comment. The U.S. government should engage with the Government of the Philippines to ensure that these regulations, when issued, comply with the three-step test and international treaty obligations.

### **3. Laws and Regulations Governing Collective Management Organizations (CMOs)**

Direct licensing of copyright works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline. However, in certain circumstances where direct licensing is impossible or highly impractical, and only where international treaties permit, rights holders may prefer to exercise some of their rights voluntarily on a collective basis, e.g., through CMOs. For audiovisual works, for example, collective licensing of rights is the exception and not the rule. It applies (with all of the above noted limitations) for simultaneous transmissions of broadcast signals, but mandatory collective rights management is otherwise opposed by the motion picture and television industry.

For musical works and recordings, certain public performance and broadcasting rights are more often licensed collectively because there are often a large number of users (potential licensees) involved, for example, from cafes and restaurants, to hundreds of radio stations, and the value of individual transactions may be relatively small compared to the transactional costs. Royalties for the retransmission of audiovisual works and public performances of musical works and recordings are significant revenue sources, in particular, for all music rights holders. This also represents an important source of monies for the financing of the production and dissemination of new works and recordings. This importance has heightened the need for efficient, transparent, and accountable collective management services. It is therefore essential, in particular for music industry rights holders, on a voluntary basis, to set up and govern their own CMOs. Governmental roles should be limited to establishing regulatory frameworks that enable efficient, fair and non-discriminatory operations of CMOs backed by rights holders, and, where appropriate, providing expert *fora* for the resolution of disputes on certain aspects of collective management, including by ensuring that users cooperate in good faith in the licensing process and that rights are properly valued based on reliable economic evidence (using the willing buyer/willing seller standard).

If specific CMO legislation is enacted, it should focus on setting out principles for the establishment, oversight, and basic operations of CMOs, including:

- Collective management should always be voluntary, transparent, allow rights holders the ability to organize efficiently, and should never limit exclusive rights or direct licensing;
- CMOs should only be established and governed by rights holders who have mandated a CMO to manage their rights;
- CMOs may not discriminate in policy or practice between rights holders on the grounds of nationality or similar criteria (and, rights holders large and small should have a voice in governance, with majority approval);

- Distributions should be based on actual use of works and made in a fair and transparent manner, and administrative fees limited to reasonable, demonstrable costs and expenses; and
- CMO tariffs should reflect the market value of the use of the rights in the given commercial context, i.e., they should be set following a “willing buyer, willing seller” standard (and have a basis in market factors available to the parties to be appropriately measured, and if necessary, challenged).

The individual Country Reports in Appendix A detail serious concerns about these issues in a number of countries, especially including **Ukraine**, but also in **Barbados**, **Bolivia**, **Brazil**, **Guatemala**, **India**, **Indonesia**, **Jamaica**, **Russia**, **Switzerland**, **Taiwan**, **Thailand**, **United Arab Emirates**, and **Vietnam**, as well as in **Argentina** (albeit for different reasons). Other countries that have a variety of different CMO problems include **Kazakhstan**, **Kenya**, **Malaysia**, **Peru**, and **South Korea**. One common CMO concern occurs when governments fail to establish robust criteria for CMOs and/or misapply ECL provisions or allow an uncontrolled proliferation of CMOs, for instance, in **Kazakhstan** and **Thailand**. In **Malaysia**, the government forced different categories of music rights holders’ CMOs to operate through a single government-controlled entity. After three years of sharp declines in revenue, the government allowed that single entity MRM to dissolve, and reverted to a voluntary system. In **United Arab Emirates**, the government has prevented rights holders from exercising their performance rights at all, by failing (for almost 20 years) to grant an operating license to a music CMO. The motion picture industry remains concerned about proposals for mandatory collective licensing in some Latin American countries and is objecting to a proposal to do so in **South Korea**. If imposed on rights holders, these schemes would undermine exclusive rights and encumber distribution; they should not be adopted. The recording industry is also concerned about these developments in **Latin America** and **South Korea** because they would undermine legal certainty and freedom of contract, and impact the proper licensing of music videos (treated as audiovisual works).

## B. ENFORCEMENT CHALLENGES

As digital technologies have expanded consumer access to licensed materials, they have also been exploited by rogue services to facilitate different forms of piracy that undermine rights holders’ investments in the production and distribution of new and existing materials and services. For example, cloud computing and streaming technologies are used by cyberlockers and various platforms that do not have licenses for the content they make available. In addition, there are various stream-ripping applications that circumvent TPMs and convert licensed streams (i.e., music authorized only for online streaming) into unlicensed downloadable content. Stream-ripping is currently the most prevalent form of infringement online of music. Thus, enforcement systems (and trade commitments to address enforcement) must be adaptable, agile, efficient and effective to deter the myriad forms of unauthorized activities. This Section highlights some of the enforcement challenges faced by IIPA members.

### 1. *Online and Mobile Network Piracy*

Digital delivery, whether through wired online or mobile networks, is the dominant form of delivery for copyrighted works, including music, films and television programs, journal publications, and video games—both by licensed and unauthorized services. The entrenchment of infringing services (including those misconstruing laws to avoid licenses) is a leading barrier to U.S. creators and rights holders in markets worldwide.

According to the International Federation of the Phonographic Industry (IFPI) Global Music Report 2020, revenues from licensed music streaming accounted for more than half of all global recorded music revenue in 2019. While the report found increasing rates of licensed music consumption online, piracy and unlicensed downloads of music are still common. IFPI’s Music Consumer Study 2019 found continued growth in the use and popularity of licensed streaming services, which offer huge libraries—now including over 60 million tracks—of music for consumers on hundreds of services worldwide, typically with both a free tier (ad-based) and a premium (subscription) service. The IFPI Music Consumer Study surveyed 34,000 people across 21 major music markets worldwide to understand global consumption of music online and also found that the use of mobile devices to listen to music was

widespread, and in some countries, the dominant device for consumption. In **Mexico** 95% of Internet users listened to streaming music on their phones; in **China** 96%, in **South Korea** 90%, and in **India** 97%. The study also found that despite the growing success of streaming, downloads of unlicensed music remained a major threat, with, as noted, stream-ripping being the most common form of infringement.

Massive online infringement of entertainment software continues to be an international problem that undermines legitimate markets worldwide, as reflected in industry monitoring of peer-to-peer (P2P) and direct download activity. For 2020, **Russia, Ukraine, Brazil, India** and **Kazakhstan** were identified as the top five countries in terms of the number of connections by peers participating in the unauthorized file-sharing of video games for personal computers on public P2P networks.

The motion picture industry reports that (in 2018) there were an estimated 9.8 billion downloads of pirated wide-release films and primetime television and Video-on-Demand (VOD) shows using P2P protocols. Additionally, in 2019, there were an estimated 50.5 billion visits to streaming piracy sites worldwide on desktop and mobile devices. In 2019, the ten most popular streaming sites globally saw an average of 8.9 million monthly total visitors worldwide. Effective enforcement can have a meaningful impact on the legitimate marketplace. For example, the shutdown of Megaupload and its associated sites caused a 7 to 10% increase in online movie units sold and a 4 to 7% increase in movie rentals. If piracy could be eliminated from the theatrical window in the United States, box office revenues would increase 14 to 15% (\$1.5 billion annually).<sup>12</sup>

There are many countries with adequate legal regimes that can address Internet and mobile network piracy, but which fail to provide effective enforcement, usually due to a lack of coordinated efforts or a lack of resources (or both). The motion picture industry, in particular, reports that two examples of this problem are found in **Bulgaria** and **Romania**.

IIPA continues to recommend four steps to address the problem of digital piracy: (1) identifying and closing down services and actors engaged in these activities, especially criminal syndicates, through the use of criminal enforcement remedies; (2) creating legal frameworks that: (i) prevent the operation of services that promote or otherwise induce infringement; (ii) criminalize online infringement; and (iii) provide strong incentives for neutral network service providers to work with rights holders to curb the use of their proprietary networks and services for infringing purposes; (3) enable rights holders to take civil enforcement measures, especially by providing and applying injunctive relief and administrative measures, especially to address notorious online marketplaces hosted in one country that target consumers in another; and (4) engaging in inter-industry cooperation, wherever possible.

The first step, the identification of large-scale illegal markets, has been effectively undertaken by USTR as part of its “Special 301 Out-of-Cycle Review of Notorious Markets.”<sup>13</sup> As detailed in the Country Reports, there have been many successes in the closure of Internet sites and services identified as Notorious Markets by USTR. IIPA’s long-standing recommendation is that USTR should urge trading partners to either convert sites and services to licensed disseminators of works and recordings, or these notorious markets should be taken down followed by, where appropriate, criminal enforcement actions.

The second step, creating legal frameworks to prevent the operation or emergence of illegal services, is also multi-staged, including: (i) providing the relevant panoply of exclusive copyright and related rights (as well as effective TPMs and RMI protections) starting with the minimum standards mandated by the WIPO Internet Treaties, and adoption of global best practices for copyright protection in the digital environment; (ii) ensuring that any ISP

<sup>12</sup>The data included in this paragraph is based on: an analysis of MarkMonitor and GDPI data; SimilarWeb data, based on streaming sites (with at least 10,000 removal requests) according to Google Transparency Reports; and Danaher, et.al. “The Impact of the Megaupload Shutdown of Movie Sales.”

<sup>13</sup>The most recent report is USTR’s Out-of-Cycle “2020 Review of Notorious Markets for Counterfeiting and Piracy” (January 2021), available at: [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (NM 2020 Report).

liability limitations, if present, do not reduce the scope of substantive copyright protections; (iii) recognizing online piracy as a form of cybercrime (consistent with the Budapest Convention and global best practices); and (iv) fostering cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration.

While systems for notice and takedown of infringing materials are in place in many markets, they are often mistakenly viewed as the only means of online enforcement. The mere takedown obligation is not sufficient or effective and should not be the only *quid pro quo* for limiting liability. Moreover, some services, including some clearly pirate services, attempt to rely on notice and takedown procedures to avoid proper copyright licensing. Clear primary and secondary liability rules are necessary to discourage abuses and to avoid inaction or license evasion. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement can be an effective remedy against commercial platforms.

Proposals granting overbroad immunity to ISPs and other platforms from any civil or criminal liability remain a concern. IIPA members urge foreign governments to include clear language in legislative proposals to ensure that any blanket immunities do not apply to IP violations and that such immunity does not hinder IP enforcement.

Separately any copyright safe harbors should only apply to passive and neutral parties that do not contribute to infringements. Additionally, there are concerns with provisions that immunize parties who induce or facilitate infringement of copyright. There have been troubling proposals in **Argentina, Brazil, Namibia** and **Nigeria**, and problematic provisions that exist in the law of **Canada** and **Chile**. Mitigating and preventing online piracy should be a shared responsibility with balanced obligations between online intermediaries and rights holders, particularly since the online intermediaries are best positioned to assist with the mitigation and prevention of online piracy. Absent legal incentives to foster the cooperation of ISPs and other online intermediaries, there is little interest by such intermediaries to fully cooperate with rights holders.

The third effective step, especially for illegal marketplaces hosted in one country that target consumers in another, is injunctive relief. This is necessary where a country hosting illegal services refuses to take effective action against its own “homegrown” (or otherwise) notorious markets, which harm the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this “offshoring” of enforcement responsibility, by developing means and processes to restrict or disable access to foreign pirate sites from within their borders. Government agencies and courts in over 35 countries—including **Australia, Belgium, Brazil, Denmark, France, Germany, Ireland, Italy, Peru, Portugal, Singapore, South Korea, Spain, Sweden** and the **United Kingdom**—employ injunctive relief or administrative orders to ensure that ISPs disable access to copyright infringing websites. **Japan** is an example of a major market that needs to do more to address effectively “off-shore” infringements (an amendment was adopted in 2020, confirming liability against linking sites, but it is too early to tell if it will be effective against such off-shore piracy). In short, there is a wide spectrum of judicial and administrative means through which to impose restrictions, under defined circumstances, when other domestic remedies are insufficient, and this deserves the close attention of the U.S. government. After over a decade of experience, studies have shown that injunctive relief can reduce usage of infringing sites and increase traffic to legitimate offerings of copyrighted material. These steps are also effective for service operators who cannot be identified or who avoid service of legal process.

The fourth step is the development of inter-industry cooperation since Internet services (including piratical services) are enabled by and interlinked with a wide spectrum of supporting services. Combating systematic online infringement of copyright requires the active cooperation of all participants in the e-commerce ecosystem, including online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services); payment processors; hosting providers (including reverse proxy providers and related optimization services); domain name registrars and registries; and search engines. As entities with a direct stake in a secure and stable Internet, and in the healthy growth of legitimate e-commerce, including e-commerce in products and services

protected by copyright, cooperation against threats to that security, stability and health is part of a sound business strategy for all Internet intermediaries. Governments in many countries can do much more than they are currently doing to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer online marketplace. Additionally, governments should ensure that industry agreements, especially those that provide enforcement rights, properly reflect the needs of industry stakeholders, and that any remedies outside of a legal framework, are available to all copyright owners.

## 2. *Circumvention of Technological Protection Measures (TPMs) – Including Stream-ripping*

The range and variety of legitimate material now digitally available to consumers, in so many formats and on so many platforms, is possible because of the widespread use of TPMs by content producers and licensed services. TPMs have fostered many of the innovative products and services available online by allowing creators and rights holders to control and manage access to copyrighted works, as well as to diversify products and services and their pricing. In short, new business models depend on these technological controls. TPMs also ensure that works made available in hard goods (DVDs and Blu-ray discs), in the online or mobile environment (including e-books and video games), or through on-demand streaming services or conditional access (e.g., pay-TV, pay-per-view) are not easily stolen and that pirated copies of video games are not playable on console platforms.

Unfortunately, there are business models built entirely around providing services, and/or manufacturing and distributing technologies, software, devices, components, or tools, to circumvent TPMs in order to gain unlawful access to the content or to copy it without authorization. One example is stream-ripping, which was highlighted as a problem by USTR in its 2016 Notorious Markets report and in subsequent Notorious Markets reports, for example in 2020, including services such as *Flyto.biz* and *Mp3juices.cc*.<sup>14</sup> Stream-ripping services infringe the making available right and circumvent the TPMs used to prevent download of music streams. These services have proliferated in the last few years, making stream-ripping, as noted above, the dominant method of music piracy globally. Stream-ripping sites, services and apps enable users to make a permanent, free download of music that was licensed only for streaming on a video website such as YouTube, and then allow that consumer to listen to it whenever and wherever they wish, without paying for a licensed download or a premium streaming subscription or accessing the stream on the licensed platform. This harms both legitimate streaming services and channels for authorized downloads. In 2016, organizations representing record companies in the **United States** and the **United Kingdom** took legal action against *YouTube-mp3.org*, the largest site dedicated to offering illegally stream-ripped music, closing the site in September 2017.<sup>15</sup> Stream-ripping sites have proliferated across the world (many benefitting from the 2017 closure of *YouTube-mp3.org* as users sought alternatives). A positive note has been the numerous advances in court cases to address stream-ripping in **Australia**, **Brazil**, **Denmark**, **Germany**, **India**, **Italy**, **Peru**, **Russia** and **Spain**.

While legal protection of TPMs, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are often undermined by countries that have yet to implement any adequate protections. **China** is the locus for the manufacturing of a host of circumvention devices. There are many countries identified in the Country Reports in Appendix A, with weak or no TPMs protections in their legal framework, including **Israel**, a developed country that has failed to adopt any protection whatsoever in this field, and **New Zealand**, which adopted weak TPMs provisions. **Mexico** finally addressed this problem, amending its law in 2020 to implement its USMCA obligation. However, as noted, the TPMs provisions are currently the subject of a constitutional challenge (and it is hoped the Government of Mexico will actively defend the adopted reform and its commitment to the USMCA). A proposal in **Thailand** would weaken the prohibitions against acts of circumvention and trafficking in circumvention devices, and should not be adopted.

<sup>14</sup>See <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>15</sup>See <http://www.ifpi.org/news/Worlds-largest-music-stream-ripping-site-shuts-down-after-successful-international-legal-action>.

### 3. **Piracy of Books and Journals**

Unauthorized photocopying of academic, scientific, technical and medical books, in many markets; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular consumer books remain significant problems for book and journal publishers. Combating book and journal piracy requires consistent action by law enforcement authorities against entities engaged in unauthorized reproduction of textbooks and other professional books. Counterfeit books continue to be produced for sale in the domestic market, but also for export to developed markets. Government agencies, universities and educational institutions (especially those that are state-funded or state-operated) should do more to promote and adopt appropriate use and copyright policies, in particular, the use of legitimate textbooks and journal publications, and to discourage the use of unauthorized copies of all literary, educational and professional works. Such acts of infringement should be fully covered in all bilateral, regional, and multilateral engagements. There are more detailed discussions of these issues in various Country Reports in [Appendix A](#). Publishers note significant problems that remain for book and journal piracy, in particular, in **China**, where there remain many unauthorized entities purporting to be subscription services providing access to journal databases, and also in **India**, **Malaysia**, and the **Philippines**, where widespread unauthorized photocopying of educational materials remains problematic.

### 4. **Piracy of Motion Picture and Television Programs by Piracy Devices (PDs)**

A damaging piracy ecosystem has emerged around piracy devices and apps, i.e., “illicit streaming devices” (ISDs). These piracy devices and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. Motion Picture Association (MPA) members continue to suffer enormously from a growing threat of these devices and apps. Streaming devices that are preloaded with infringing apps and TV/VOD subscription services can be found online and in physical markets. The challenge is particularly acute in countries where the legality of the devices (i.e., boxes) and of activities surrounding their trafficking, remains in doubt. Additionally, illegal apps that can place infringing material on otherwise legitimate streaming devices can be found through a myriad of mainstream and specialty app repositories. This issue was the focus of USTR’s 2017 Notorious Markets Report.<sup>16</sup>

Because these piracy devices and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, enforcement against them presents complex challenges. Under the right fact patterns, the retailer/distributor can be held liable; alternatively, the app developer can be prosecuted (if identified). Governments can also take action against key distribution points for devices that are used illegally, including marketplaces (both online and physical) where such devices are sold. Many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling piracy devices and apps, and/or stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material or piracy-enabling apps onto any device. Vigorous action is needed to lessen the growing harm to the legitimate digital delivery of copyright materials by these devices. **Taiwan**, for example, took positive steps in 2019 to confirm the illegality of piracy devices, and imposed criminal penalties on: (i) software or apps that enable access to unauthorized copies of films and television programs on the Internet; (ii) those who assist others to access such unauthorized copies; and (iii) those who manufacture or import devices preloaded with such software or apps. The sanctions include up to two years imprisonment and maximum fines of NT\$500,000 (US\$17,848). Separately, the **United Kingdom’s** Border Agency (UKBA) has recently stepped-up its efforts to deal with this problem.

<sup>16</sup>In its 2017 Notorious Markets Report, USTR spotlighted the growing problem of Piracy Devices (i.e., PDs), concluding that they “pose a direct threat to content creators, sports leagues, and live performance, as well as legitimate streaming, on-demand, and over-the-top (OTT) media service providers.” USTR 2017 NM Report at 8-9.

## 5. *Illegal Camcording of Theatrical Motion Pictures and Pay-TV Piracy and Signal Theft*

In addition to the problem of piracy devices and apps, another priority for the motion picture industry involves stopping the illegal recordings of movies in theaters. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether the image or sound or both) from the theater screen and/or sound system. One digital (camcorder) copy, uploaded to the Internet and made available around the world, can undermine global markets and the huge investments needed to produce and distribute a feature film. Illicit camcording in theaters decreased significantly in 2020 because many theaters closed due to the COVID-19 pandemic. As a consequence of these closures, many films were not released in theaters in 2020, but MPA anticipates that once theatrical markets recover, massive illicit recording of films in theaters will resume.

A multifaceted approach is needed to tackle camcording. This includes: (i) enacting and enforcing anti-camcording legislation to outlaw the use or attempted use of an audiovisual recording device in a theater to make or transmit a copy of all or part of a motion picture; (ii) educating the public about how unauthorized camcording hurts both businesses and the consumer; and (iii) working with the private sector to identify and prevent unauthorized camcording in cinemas. This strategy has been implemented in many foreign markets (including **Canada**, **Japan** and **South Korea**) with good results. **Mexico** has been a major source of camcorded movies uploaded to the Internet. **Mexico** was required by the USMCA to finally address camcording properly in its legal regime. In July 2020, as part of the USMCA implementation package of reforms, the Mexican Congress adopted the requisite changes to its Criminal Code (Article 424bis), which, if properly implemented, should significantly improve enforcement against camcording in Mexican theaters. The Country Reports in this submission highlight many other markets where an effective strategy against camcording has not yet been implemented and where new criminal laws are clearly needed. Enactment of criminal sanctions is not by itself enough; effective enforcement of these laws remains critical to addressing the problem.

Another long-standing problem for the motion picture and recorded sound industries is the unauthorized broadcast, cablecast or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet. In fact, there are many sophisticated forms of cable and satellite piracy, including: the use of hacked set top boxes; decoding or decrypting signals; and, stealing signals from neighboring countries that are within the satellite's footprint (i.e., "overspill" signals). One type of piracy is via direct-to-home (DTH) boxes, where boxes sold for one market (e.g., the United States) are then sold in foreign markets. These devices are used to access content, including broadcasts from the United States, as well as basic and premium movie and television channels.

A second form of piracy is from illegal Internet Protocol TV (IPTV) services that provide access to stolen telecommunication signals or channels and offer on-demand infringing film and episodic television content to a global audience via dedicated web portals, third-party applications, and piracy devices configured to access these services. In the U.S., these illegal services are valued at over \$1 billion in piracy subscriptions alone (and estimated profit margins range from 56% for retailers to 85% for wholesalers worldwide).<sup>17</sup>

There are now over a thousand illegal IPTV services worldwide, offering hundreds of channels sourced from multiple providers, along with VOD content of unauthorized movies and television programs. Many of these illegal services are subscription-based for-profit services, with monthly or yearly user packages. The technical infrastructure of these services is often vast and complex, making the identification of content sources and service operators extremely challenging. IPTV services have been a driving force in the emergence of a number of related illegal businesses, including ones engaged in the re-sale of IPTV services or the theft, distribution and sale of channel

<sup>17</sup> See, *Money for Nothing: The Billion-Dollar Pirate Subscription IPTV Business*. Digital Citizens Alliance and NAGRA (August 2020) at <https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/DCA-Money-for-Nothing-Report.pdf>.

feeds. The marketing and sale of these IPTV services is often carried out by a network of global IPTV re-sellers who purchase subscriptions at wholesale prices and re-sell them for a profit, further complicating investigations. These services rely on infrastructure and support services, including from hosting providers, media servers, and panel hosts, sometimes without the knowledge or approval of the illegal services or product (but sometimes in cooperation with these services), which is why criminal enforcement against these large-scale operations is the most effective deterrent.

Satellite signals are usually encrypted so infringers must circumvent the encryption to access content. Thus, enforcement actions (and regulations) need to focus on: (i) prohibiting the trafficking in pay-TV or signal theft devices or technologies; (ii) the unlawful decryption of encrypted cable or satellite signals; and (iii) the forwarding of decrypted signals (whether lawfully or not) without the authorization of the rights holders of the content or of the signal. These actions can help foster the licensing of broadcasters and cablecasters, and weed out unlicensed television distributors. These types of piracy can take many forms. Retransmission piracy occurs when a local cable operator accesses and distributes (by retransmission) unauthorized U.S. domestic channels. Alternatively, the cable operators may also be engaged in IPTV piracy when they use their own fiber optic network to establish and distribute an IPTV service that obtains film and television content and then transmits it from the cable system headend (i.e., the main distribution point). This is common for TV (and sports programs) offered by cable or satellite systems that are downlinked and distributed in foreign markets without any consent or payments.

Cable and satellite piracy, in one or many of the forms described above, are prevalent in **India** and **Gabon**, and in many countries in the **Caribbean** and **Central** and **South America**, including **Argentina**, **Barbados**, **Brazil**, **Costa Rica**, **Ecuador**, **Guatemala**, **Honduras**, **Peru**, **Jamaica**, and **Trinidad & Tobago**. As part of its implementation of the USMCA, in July 2020, **Mexico** adopted changes to its Copyright Law (and, for administrative enforcement in the Federal Industrial Property Law) to protect TPMs, although the law does not fully protect against the manufacturing or trafficking in circumvention devices (Article 232bis), which is an obligation of the USMCA. At the same time, the Criminal Code (Article 168bis and Article 426) was amended to impose criminal sanctions on those who receive or distribute encrypted satellite signals, or who modify and distribute devices or systems intended for signal theft.

### C. MARKET ACCESS BARRIERS

In addition to the key challenges pertaining to copyright protection and enforcement, which constitute *de facto* market access barriers, the U.S. copyright industries also suffer from a variety of formal market access barriers in crucial foreign markets. The issues of copyright protection of authorized materials, and enforcement against infringing goods, are moot if legitimate American works and recordings cannot be disseminated in a particular market in a fair and equitable manner to meet consumer demand. Market access barriers take many forms, including:

- Restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;
- High tariffs (such as through inclusion of royalties in the calculation of duties), taxes, or fees on core copyright businesses and their products and services;
- Arbitrary restrictions on the ability of rights holders to decide how to manage their rights, in particular by mandatory collective licensing combined with government interference in the operation of CMOs and rate setting;
- Quotas on audiovisual programming or complete bans on foreign programming, which overall curb the ability of film and television producers to compete fairly, and which limit consumer access to legitimate content;
- Local content investment requirements;

- Restrictions on advertising, including local content requirements;
- Restrictions on ownership and investment in copyright-related businesses;
- Discriminatory, onerous, and/or dilatory content review/censorship systems;
- Periods during which foreign governments prevent U.S. producers from opening their films, or impose onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);
- Mandatory local replication requirements for films (that may also compromise the security of digital materials); and
- Other forms of government interference with the exercise of rights or contractual freedoms by rights holders.

One recent trend has seen governments seeking to regulate the online marketplace in the same manner as the traditional television market, threatening the vitality of fast-growing and dynamic business segments such as VOD and other OTT television and film services. For instance, **Canada, Indonesia, Israel, Ukraine** and **Vietnam** are all currently considering heavy-handed regulations of the OTT market. Today, there are more than 480 legitimate online audiovisual services, responding to all manner of consumer viewing preferences and offering diverse options and price points.

The Country Reports in Appendix A include detailed discussions of these formal market access barriers in the markets in which they occur. Whatever form they take, all market access restrictions that impede the entry of legitimate products increase the appeal of unauthorized production and distribution operations. Often these illegal operations cement strong loyalties with consumers, making them even harder to dislodge. U.S. officials should continue to strive to open markets for American creators and producers, and to eliminate or phase out market access barriers, as identified in this year's IIPA submission. IIPA members are committed to the promotion and protection of cultural diversity and believe that governments can, in lieu, effectively rely on the flexibilities built into Free Trade Agreements, including permissible support programs, to promote their cultural interests.

#### **IV. POSITIVE DEVELOPMENTS**

IIPA notes positive developments in the following markets in the past year:

**Brazil:** In November 2020, the Brazilian Ministry of Justice executed Phase Two of “Operation 404” targeting illegal pirate streaming services, websites and IPTV services. This effort resulted in 25 search and seizure raids executed in ten Brazilian states, as well as the blocking or removal of 252 unauthorized websites or applications from official app stores. The operation raided two popular illegal IPTV providers, one of which had 315,000 active subscribers and an estimated US\$19 million yearly revenue. Additionally, the Sao Paulo Public Prosecutor’s Office (Cyber Gaeco – a special IP unit) shut down 13 major infringing domains (accessed over 19 million times/year) and obtained an important court order to block 15 infringing foreign websites (responsible for 440 million visits/year). In a separate operation, seven infringing sites were removed, including the most popular music linking site (*HitseBeats.eu*), known for leaking pre-releases of songs. In addition, the Brazilian Regulatory Agency for Content (ANCINE), along with Customs officials, took enforcement steps against the importation of illicit streaming devices, and seized more than 300,000 devices in the second half of 2020 alone. These enforcement steps, taken by the Government of Brazil, in collaboration with rights holders, are very positive steps and IIPA members look forward to working together on future enforcement operations. In addition, in 2020, Brazil reduced the industrial product tax (IPI) for video game consoles and accessories. Given that the tax burden on these products remains high, we encourage Brazil to continue efforts to further reduce or eliminate this and other taxes.

**Canada:** For years, Canada denied royalty payments for broadcasting and public performances of American sound recordings by traditional broadcasts or other public performance (e.g., uses in bars and public places), as well as for the use of older American recordings (pre-1972 recordings). Canada would only make payments for sound recordings fixed in Canada or another Rome Convention country (the U.S. is not a Rome Convention member). Once the USMCA entered into force on July 1, 2020, Canada was obligated to provide full national treatment to American (and Mexican) sound recording producers and performers in accordance with Article 20.8 of the USMCA. On April 29, 2020, Canada amended its Ministerial Statement “Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries,” which was the basis for the American exclusion. The change provides full national treatment for terrestrial broadcasts and other categories of performances of American sound recordings, as well as for the uses of pre-1972 American recordings. The final step before payments commence is for the Canadian rate-setting Copyright Board to set fair rates (known in Canada as “tariffs”) for each of the uses of American recordings, which it is hoped will occur expeditiously.

**China:** On November 11, 2020, the National People’s Congress passed amendments to the Copyright Law of China. The changes will enter into force on June 1, 2021. The changes will add full exclusive rights for works. For sound recordings, the changes provide for equitable remuneration rights for recordings used in broadcasts and for communications to the public (covering the rights in Article 15 of the WPPT). Positive changes include: enhanced remedies against infringement; increased damages; the addition of punitive damages; new presumptions of ownership; a partial shift in the burden of proof to the infringer; the addition of a pre-injunction remedy to prevent further harm to rights holders; and requirements for the preservation of evidence.

**Ecuador:** The site blocking framework established by Ecuador’s National Service for Intellectual Rights (Servicio Nacional de Derechos Intelectuales, SENADI) has proven effective in its initial actions against copyright infringing sites. The music industry reports that its enforcement framework should be properly scalable to address piracy in Ecuador, much of which consists of foreign (off-site) infringing sources such as stream-ripping and torrent sites. Additionally, the motion picture industry reports that, in the past two years, SENADI has enacted measures to prevent the transmission of unauthorized television signals that rely on IPTV technology.

**India:** In April 2019, the Bombay High Court (*Tips Industries v. Wynk Ltd. & Anr*) held that the statutory license in Indian Copyright Law (Section 31D) does not apply to Internet music—neither for streaming nor download services. The court rejected a 2016 interpretation from the Department for Promotion of Industry and Internal Trade finding it *ultra vires*, and correctly held that the statute was intended only for terrestrial radio and television broadcasting, not Internet transmissions. The case is on appeal, but the Government of India has not, unfortunately, withdrawn its interpretation of the law and the uncertainty is harming the music market. There have also been a number of favorable court opinions regarding online enforcement. For example, the Delhi High Court permitted a permanent site block to curtail a clearly infringing site in India; and there have been cases where domains used to access infringing sites were blocked. In July 2019, the Delhi High Court also permitted dynamic domain blocking of another infringing site (*Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*), and the motion picture industry reports that in total, the Delhi High Court has ordered over 1,000 domains to be blocked, reducing piracy visitations from India to some of the most notorious websites in the world. Another positive development in 2020 is the drafting of a camcording enforcement law (via amendments to the Cinematograph Act) that, if enacted, would properly address a significant problem in India. The proposal would make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, and whether of the audio or video materials), while it is being performed in a motion picture exhibition facility.

**Italy:** In mid-2018, the first music stream-ripping site was blocked by enforcement authorities. According to the music industry, after that initial step, there was a wave of blocking orders issued by the Communications Regulatory Authority of Italy (AGCOM) directed at ISPs. The music industry reports that over the two year period that followed that initial (2018) action, the downloading of pirated music through stream-ripping sites and activities fell by 58.6% in Italy.

**Mexico:** The July 2020 adoption of the USMCA-mandated changes in the Copyright Law, the Criminal Code and the Federal Industrial Property Law incorporated many important changes into the Mexican legal regime, and was welcomed by the copyright industries. However, the current constitutional challenges, while limited in scope to the TPMs provisions and the notice and takedown provisions, are troubling developments. As noted, IIPA members hope the Mexican government will actively defend against these challenges, so that Mexico can finally and properly implement the WIPO Internet Treaties and further improve its marketplace for copyrighted materials. The positive 2020 legal reforms include: (i) the adoption of TPMs and RMI protections; (ii) the incorporation of an exclusive right of communication to the public; (iii) the adoption of notice and takedown (and sanctioning) provisions; (iv) the adoption of criminal sanctions for camcording and satellite and cable signal theft; and (v) a confirmation of the Institute of Industrial Property's (IMPI) powers in website blocking cases (via amendments to the Industrial Property Law). There are still deficiencies in the legal regime as detailed in the Country Report in Appendix A, including the absence of statutory damages, clear scope of ISP liability and safe harbors, and the requirement to prove activities were "for profit" for criminal sanctions.

**Peru:** Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), along with the courts, took positive steps in 2020 to improve enforcement directed at local sites that contain unauthorized infringing music and film materials. INDECOPI issued a preliminary injunction in September 2020 against a local OTT platform that accesses illegal materials on the Internet. The OTT platform (America TVGO) was providing users with music and music videos in particular. In another instance, in December 2020, the recording industry obtained a web-blocking injunction against a very popular stream-ripping site in Peru.

**Spain:** The publishing industry reports that 99 domains and sub-domains of *Sci-Hub* and *Libgen* sites have been blocked in Spain. The implementation of blocking these sites in February 2020 resulted in an 80% drop in usage of the *Libgen* site, and a 68% drop in the *Sci-Hub* domain. While increased usage has been observed more recently, due to circumvention of the blocking orders, the increase has been insignificant, demonstrating the utility of website blocking for the publishing industry. In addition, the music industry reports that over 40 stream-ripping sites have now been blocked as a result of successful civil website blocking applications filed with the Mercantile Court in Barcelona. They report that blocking has been the most effective against sites when implemented by ISPs. Since the first site blocking action, the music industry further reports that there has been a decrease of over 53% in stream-ripping activity in Spain.

IIPA welcomes these 2020 positive developments and looks forward to continuing to work with governments to foster a healthy ecosystem for the creative industries. Despite these positive developments, serious additional legal reform and/or enforcement issues remain in several of these countries. The details of these and other issues in each of these countries can be found in the respective Country Reports in Appendix A.

## V. CONCLUSION

As detailed in the *Copyright Industries in the U.S. Economy: The 2020 Report*, the U.S. economy depends on a thriving copyright sector to create revenue, jobs, and exports. Likewise, the health and competitiveness of our trading partners' economies also depend on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster jobs in the creative industries, increase cultural diversity, promote international trade and exports, increase tax revenues from legitimate businesses, and attract more foreign direct investment. It is essential to the continued growth and future competitiveness of the U.S. creative industries that our trading partners provide high standards of protection for copyright; more effective policies and tools to enforce that protection; and more free and open markets. IIPA continues to urge the U.S. government to use the Special 301 review and other trade tools to encourage the countries and territories identified in our submission to make the necessary political commitments and take the

necessary actions to bring real commercial gains for the U.S. creative industries, by strengthening copyright protection and enforcement regimes worldwide.

We look forward to our continued work with USTR and all the U.S. agencies engaged in copyright legal reforms and enforcement, to work together to meet the goals identified in this submission.

Respectfully submitted,

/Eric J. Schwartz/

Eric J. Schwartz, Counsel  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina be maintained on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** In 2020, Argentina continued to demonstrate an overall lack of commitment to effective copyright enforcement in the face of a serious piracy problem. The absence of an agenda and strategic enforcement policy and a lack of interagency cooperation remain a major challenge, especially between prosecutors and law enforcement cybercrime experts. Argentina's pandemic lockdown contributed to a spike in demand for creative works, enabling pirate sites to thrive and expand to other Spanish-speaking countries. Satellite and signal piracy also persist in Argentina. Hard goods piracy, linked to organized crime groups, also remains rampant, and market access obstacles persist, including film and television quotas, and high taxes on copyrighted content.

A draft reform to the penal code, presented to the Argentine Congress in March 2019, contained some provisions that, if properly implemented, would improve the enforcement landscape for copyrighted works. However, the bill has stalled in Congress and will lose parliamentary status on February 20, 2021 with little possibility of advancement.

In August 2020, the Fernandez Administration created the Coordination Center to Combat Cybercrime (*Centro de Coordinación de Combate al Ciberdelito*, known as C4) within the Cybercrime Investigations Directorate in the Ministry of Security. The goal of this commission is to monitor the implementation of the National Plan Against Cybercrimes (NPAC), which was initiated in 2019, to coordinate actions among security forces, public-private initiatives and cooperation with international organizations. IIPA urges the Government of Argentina to consider this valuable tool to combat rampant online piracy as well.

To address its significant piracy problems, IIPA urges Argentina to: (1) apply existing Civil and Commercial Code provisions on ISP liability for storing infringing content; (2) host private sector discussions on cross-industry cooperation; (3) create a specialized IP Prosecution Office to promote cross-agency law enforcement cooperation and ensure the diligent investigation and prosecution of copyright infringement cases; (4) undertake routine, *ex officio* inspections and raids of physical markets; (5) actively involve the Argentinean Customs Office (AFIP); and (6) assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Direccion Nacional del Derecho de Autor*). It would also be helpful for Argentina to bring copyright under federal jurisdiction, as it has done with trademark law. IIPA also urges the removal of all market barriers to ensure a level playing field for U.S. creative industries.

### **PRIORITY ACTIONS REQUESTED IN 2021**

- Increase resources and political backing for a coordinated, long-term antipiracy agenda at the federal and local levels to address online piracy.
- Continue to apply the Civil and Commercial Code to ISP liability cases.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and support the development of the local digital economy.
- Create a specialized IP Prosecution Office and establish federal jurisdiction over copyright crimes.

<sup>1</sup>For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop hard goods piracy.
- Monitor discussions regarding ISP liability legislation.
- Remove quotas for motion pictures and television content, and electronic devices, and refrain from extending quotas to over-the-top (OTT) services.
- Engage customs authorities to monitor and perform border operations against counterfeit high value products (such as circumvention devices and modified game consoles) entering the country via airports and land borders.
- Assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office.

## **THE NATURE OF PIRACY IN ARGENTINA**

Argentina has the highest Internet penetration rate in the region with 35.1 million users, but its prospects for a robust legitimate online content market will remain bleak until the government makes concerted efforts to address the country's rampant and increasing digital piracy via torrent sites, downloading, streaming, stream-ripping and linking sites.

Following a regional trend, Argentina continues to see an increase in the usage of Piracy Devices (PDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television content. In recent years, IIPA has also seen an increase in consumption of films and television through piracy mobile apps and add-ons. In 2020, the strict lockdown ordered to contain the spread of the COVID-19 pandemic triggered a significant increase in piracy of motion pictures and video games. According to TorrentFreak, there were over 508,000 daily downloads of pirated content through BitTorrent protocols in Argentina on March 17 (three days before the official lockdown order was issued) and 706,000 daily downloads a week later. During this same period, IP addresses sharing Torrents also increased from 179,000 to 254,000.

The illegal distribution of physical and online video game content continues to grow. According to ESA data, Argentina ranks 7th in the world for peer-to-peer (P2P) piracy for the video game industry, and the country saw a 76% increase in P2P piracy from February to April 2020 in the volume of peers participating in infringing P2P swarms, which coincides with the lockdown period to contain the spread of the COVID-19 pandemic. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina. SimilarWeb also reports that monthly visits to infringing linking sites also grew by 11.5% between January and November 2020 as compared to growth from the previous year. Online marketplaces, such as *Mercado Libre*, remain increasingly popular with providers of unauthorized copies of video games, counterfeit consoles, circumvention devices and modification services. During the lockdown period in Argentina to contain the spread COVID-19 pandemic, the availability of listings on *Mercado Libre* for illegal game titles, unauthorized digital goods (UDGs),<sup>2</sup> or physical video game products, including counterfeit controllers and modified game consoles, increased overall by 10% on the popular marketplace. Social media platforms enable online pirates of all varieties to attract wider audiences.

The International Federation of the Phonographic Industry's Music Consumer Study for 2019 found that Argentina had the highest music piracy rate in the world, except for India and China. 48.3% of Internet users (and 68.6% of 16-24 year-olds) had pirated music at least once in the previous month. 41.5% of Internet users downloaded pirated music through stream-ripping sites or apps, while 16.6% used cyberlockers or BitTorrent to download music. The most prominent forms of music piracy in Argentina are stream-ripping and the use of cyberlockers. According to Similarweb, the stream-ripping sites with the most visits from Argentina in the third quarter of 2020 were *y2mate.com* (16.4 million visits), *flvto.biz* (8.0 million visits), *savefrom.net* (7.5 million visits), and *mp3-youtube.download* (4.7 million

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<sup>2</sup>Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

visits). Y2Mate is one of the top 100 most popular websites of any kind in Argentina. For the same period, the most popular cyberlockers in Argentina were [1fichier.com](http://1fichier.com) (3.8 million visits), [Uptobox.com](http://Uptobox.com) (1.8 million visits) and [Zippyshare.com](http://Zippyshare.com) (1.9 million visits).

From time to time, there are seminars and forums about the necessity for specific regulation to enable effective enforcement action online in balance with freedom of expression and other fundamental rights on the Internet. For instance, a heated debate on piracy and copyright protection took place in late April 2020, spearheaded by authors and publishers after Virtual Library, a Facebook site with 16,000 followers, published PDF versions of a series of books, without author authorization. Writers that complained of IP theft were the object of online bullying, principally from campaigners for free access to “cultural productions” and knowledge, who leveraged the pandemic to support their opposition to online copyright protection. Creative industries have maintained their position that protection for freedom of speech and copyright are not opposing interests, rather, strengthening copyright protection can strengthen freedom of speech. Despite those debates and discussions, the current government has not adopted a public position on the matter.

Physical piracy continues to be a problem. After 217 days of closure due to the lockdown to contain the COVID-19 pandemic, the notorious market *La Salada* reopened in October with strict protocols all of which were blatantly violated when throngs descended on the market for Christmas shopping in December. Its owner, was released from prison under house arrest in December of last year, and now accuses the former Administration of abuse of power for the closure of his market and illegal interference with his operations.

**Camcording.** The COVID-19 pandemic, which caused the widespread closure of cinemas in Argentina for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume and Argentina will continue to be the home to a number of release groups, which source camcorded material from all over the region and resell it online.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

The creative industries report that, as in previous years and despite the significant increases in piracy activity due to the COVID-19 pandemic, there were no significant enforcement actions in 2020.

There are no clear sustainable and coordinated policies or actions to promote online IP protections in Argentina. For example, when an online IP crime is reported, both the Federal Police and the State Prosecutor might independently proceed processing the case without communicating or sharing data, with the federal police seeing it as a federal crime and the state prosecutor seeing it as a crime involving a local Argentinean citizen. There are other procedural challenges, such as defaults in evidence chain of custody for cybercrime cases and the characterization of profit and economic benefits from online advertisements.

In a welcome development, in August 2020, the Fernandez Administration created C4 within the Cybercrime Investigations Directorate in the Ministry of Security. The goal of this commission is to monitor the implementation of the NPAC, which was initiated in 2019, to coordinate actions against cybercrime through the collaboration among security forces, public-private initiatives and cooperation with international organizations. This task force is comprised of representatives from four federal security agencies: the Navy, Federal Police, National Gendarmería, and Customs. At the moment, C4 concentrates on crimes such as large-scale money laundering, fraud and crimes against sexual integrity, trafficking and paedophilia. The creation of C4 could be part of a long-awaited solution for enhanced coordination to tackle online IP crimes. It is crucial that the Ministry of Security view rights owners as strategic allies to this important initiative.

Argentinean law enforcement authorities need to be trained to recognize the importance of online IP protections as an important piece of Argentina's digital economic development and its collateral benefits for public

security policies. Additionally, law enforcement authorities should take further concrete steps to establish an agenda that reflects short and long-term goals for tackling illegal sites and piracy groups operating in the country.

The government's disinterest in enforcement has led rights holders to rely more on cooperation with other actors in the online ecosystem. For instance, the video game industry has increased its cooperation with *Mercado Libre*'s regional office, based in Buenos Aires, as a strong partner through which UDGs and other infringing video game items are removed from listings, and to combat commercial game piracy in the entire region. The sound recording industry requests the removal of pirate site through notices sent to registrars and hosting services. In some cases, these notices result in successful site removal. The sound recording industry also sends daily notifications to Google services and YouTube to request the removal of pirate sites from search results and infringing user generated content.

Law enforcement or administrative authorities are not promoting actions by the private sector, nor taking any initiatives to tackle copyright piracy through securing assistance of domain names and registrars. Based on feedback from the criminal enforcement authorities, it is understood that they view any infringing site which makes money through advertising as not making direct profits from copyright infringement, and so, ineligible to be criminally prosecuted. This narrow interpretation of the law is not compatible with the TRIPS Agreement obligation that its parties ensure that criminal enforcement measures are available, at least, against commercial scale copyright infringement.

Despite the successful blocking of *The Pirate Bay* as a landmark case in 2014 (which remains in effect until today), civil litigation for new website blocking remains impracticable in Argentina due to a combination of factors such as the timeframe and coverage of available injunctions, considering the number of sites that need to be blocked to generate impact over the pirate ecosystem. Administrative and criminal site blocking, which would be much less burdensome for right holders, are not available because there is no legal basis for such procedures.

On September 23, 2019, the sound recording industry filed a judicial review action challenging the constitutionality of the Executive Order No. 600/19, which created a single public performance tariff for all hotels and established a governmental control system over tariff rates. The action claims that the Order is an unconstitutional and confiscatory measure because it deprives rights holders of the freedom to set rates according to the nature and specifics of different uses, and to enter into freely negotiated agreements with users' associations. The case is pending for resolution before an administrative lower court in Buenos Aires.

## **COPYRIGHT AND RELATED LAWS IN ARGENTINA**

The Macri Administration's Penal Code Reform Bill (PE-52/19) was sent to the Senate's Justice and Criminal Matters Commission in March 2019, and debate started by June, but stalled after the Macri Administration lost the 2019 Presidential elections. Due to COVID-19, Congress was forced to session remotely and online for most of 2020. The bill will lose parliamentary status on February 28, 2021. As previously reported, if implemented, the bill would partially improve the enforcement landscape for copyrighted works in Argentina. Some of the copyright issues covered by the legislation include: 1) reproduction of copyrighted material and programs from the Internet without proper authorization; 2) manufacturing, storing or selling copyrighted programs without authorization; and 3) circumvention of technological protection measures (TPMs). In addition, the proposal would make theft of IP equivalent to theft of physical objects and would make the incorrect reporting of pay-TV subscriber numbers a penalty under the law. The proposal also presented provisions that would not facilitate enforcement. For instance, legal actions for IP infringement would be prosecuted only upon a complaint from the victim, rather than *ex officio*, as is currently the case.

On September 4, 2020 the House Committee on Systems, Media and Freedom of Expression held a meeting on "Regulation, Co-Regulation And Platform Responsibilities For A Free And Open Internet." Representatives from academia and civil society organizations claiming to represent Internet users' rights and activists presented their views during the meeting. The meeting occurred in the aftermath of Vice President Cristina Kirchner's lawsuit against Google over search results that show a photograph of Kirchner entitled "Thief of the Argentine Nation." The music industry is

monitoring the potential introduction of a Bill seeking to create controls, sanctions, as well as safe harbors, for online platforms.

President Alberto Fernandez issued an Emergency Decree (DECCNU 690/2020) on August 23, 2020 pledging to guarantee universal access to telecom services (including mobile, Internet services) rendered “essential public interest services” by the pandemic. The decree excluded satellite television services from the definition of public services. As a result of this Decree, fees for these services remained frozen for the rest of 2020 and approval from telecom regulator, ENACOM, will be required for future tariff increases. A 5% tariff increase was authorized as of January 2021, well below 2020’s 36.1% yearly inflation.

Law 27.588, which implements the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, ratified by Argentina in 2014, was enacted on November 11, 2020.

## **MARKET ACCESS IN ARGENTINA**

**Local Content Quotas.** Resolution 4773 E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and accompanying regulation (Decree 1225/10) went into effect on January 1, 2018, but it has never been enforced. The quota regime requires free television licensees to air eight Argentine feature films per calendar year. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.5% of the previous year’s annual turnover to acquire, prior to filming, the broadcast rights to independent Argentine film and TV movies.

Media Law 26.522 (promulgated through Regulatory Decree 1225/2010), established a registry of national films at the National Film and Audiovisual Arts Institute (INCAA) from which pay-TV programmers select productions to comply with the quotas imposed by Article 67 of Media Law 26.522. The list includes both existing and yet-to-be-filmed productions. Both INCAA and ENACOM have yet to establish compliance procedures for pay-TV programmers. The decree presents several problems, such as whether channels with highly specific content will be able to find suitable content in the registry and whether programmers are subject to fines if they do not broadcast productions that ultimately fail to be completed.

Local filmmakers increased pressure on ENACOM and INCAA to enforce existing quotas and modify Media Law 26.522 to also impose quotas on streaming services. IIPA remains wary of proposals for additional quotas because they negatively impact non-Argentinean content industries.

In July 2018, INCAA published a resolution (Resolution 1050/2018) regulating content quotas for movie theatres, which came into force on July 10, 2018. Domestically produced films must represent 30% of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen. While that 30% content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film. Under the new regulation, should the exhibitor share the screen with another movie, it will be considered a partial fulfillment, and the local production must be shown for two weeks (a minimum of one screening per day for at least one additional week) or until the full quota is fulfilled. Also in July 2018, ENACOM announced Resolution 4513 establishing that a 30% local content quota would be enforced on free-to-air TV in urban areas (10-15% for lesser populated markets). IIPA recommends that this quota provision be eliminated, as quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

**Temporary Services Export and Import Tax.** In late 2019, the Fernandez Administration extended the 2019 Temporary Services Export Tax to December 31, 2021, via Decree 99/2019. The decree modifies the Customs Code and includes “services rendered in the country whose use or effective exploitation is carried out abroad” to be included in the concept of “merchandise,” including “copyrights and intellectual property rights.” It also provides that services

can be considered exporters. While the 2019 Decree reduced the tax rate from 12% to 5%, it also eliminated the four-peso-per-dollar cap that had benefited exporters due to the steep depreciation of the peso over the past year. Decree 1034/2020, published on December 20, 2020, reduced the Temporary Services Export Tax to 0% for companies registered to benefit from the Knowledge-Based Economy Law 27.570 (October 26, 2020). The Registry of the Knowledge-Based Economy Promotion Regime Beneficiaries does not exist yet.

Additionally, Argentina assesses customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium. This runs counter to international best practice and is a form of double taxation, as royalties are subject to withholding, income, value-added, and remittance taxes.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which negatively impacts the video game industry as well as consumers who resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law also imposed a 21% Value Added Tax (VAT) on OTT services as well as on a range of services provided by companies in the “collaborative economy.” Then, in December 2019, the Fernandez Administration imposed a 30% Social Solidarity and Productive Reactivation Tax (PAIS Tax) over OTT services, including video game, music and movie services. The PAIS tax is currently in force and will expire on December 31, 2024. Additionally, on September 19, 2020 Argentina’s Central Bank imposed a 35% fee on foreign credit card charges, which has a negative impact on Internet and streaming services operated in the country from abroad. These laws contradict international norms and should be amended or repealed.

**Distribution of Performance Rights.** Argentina’s current law, approved in 1974, establishes that collections on behalf of music performers and phonogram producers shall be distributed 66% to performers, 33% to producers and 1% to the National Arts Fund (FNA). We urge Argentina to consider legislation that establishes a more balanced distribution of 50% to performers and 50% to producers.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** The urgency for legal reform in Chile is as strong as ever. Chile's copyright law contains major gaps, including: absence of clear and comprehensive secondary copyright liability standards; a counterproductive court order requirement for online content removal; failure to protect against circumvention of technological protection measures; lack of deterrent remedies; and broad exceptions to copyright. These issues remain unresolved or were made worse by Chile's 2010 copyright law amendment (Ley No. 20.435). We urge Chile to revamp its legal framework to enable effective copyright enforcement online and, in turn, to foster the development of a healthy digital marketplace.

In the aftermath of widespread social and political turmoil in late 2019, the Chilean government held a referendum on October 25, 2020 where the vast majority of voters favored the rewriting of the country's constitution. IIPA urges the Chilean government to ensure that any reform adequately implements the country's existing international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access. IIPA urges USTR to monitor the impact that any constitutional changes may have on Chile's IPR landscape.

IIPA members are also concerned about legislation imposing national content quota requirements that, if implemented, would discriminate against non-Chilean audiovisual works and would contravene Chile's bilateral Free Trade Agreement (FTA) commitments.

### **PRIORITY ACTIONS REQUESTED IN 2021**

- Amend the copyright law (Ley No. 17.336) and repeal Ley No. 20.435 of 2010 to: (i) distinguish clearly between neutral and passive intermediary service providers, and active services that cannot benefit from limitations on liability; (ii) enable and meaningfully incentivize intermediary service providers to enter into voluntary cooperation with rights holders against online copyright infringement; (iii) eliminate the court order requirement prior to content removal or takedown; (iv) introduce deterrent civil and criminal sanctions for copyright infringement, the establishment of statutory (e.g., pre-established) damages, improved injunctions, including an express legal basis for injunctions against intermediaries to prevent access in Chile to domestic and foreign-based infringing websites, and an effective civil *ex parte* search remedy; (v) provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent; and (vi) adopt and enforce technological protection measures (TPMs) legislation with civil and criminal penalties for acts of circumvention and the trafficking in devices or services.
- Refrain from reducing copyright infringement penalties currently provided in the Intellectual Property Law.
- Ensure that the eventual overhaul of the country's constitution and other laws adequately ratifies the country's international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access.
- Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.

<sup>1</sup>For more details on Chile's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Chile's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Ensure that any amendments to the Telecommunications Law (Law #18.168) do not interfere with the enforcement of intellectual property rights online, including through voluntary initiatives agreed between rights holders and ISPs.

## **THE COPYRIGHT MARKETPLACE IN CHILE**

Piracy in Chile involves various modes of infringement such as Piracy Devices (PDs), stream-ripping, file sharing of infringing content over peer-to-peer (P2P) networks, illegal use of cyberlockers, hyperlinks to infringing materials, online sales of circumvention software, devices and modification services for use with illegal video game files, illegal mobile downloads, and, increasingly, Internet protocol television (IPTV) services. Due to the pandemic, online piracy increased in Chile in 2020.

Chile remains active in the sale of circumvention devices such as video game copier devices and modified or unlocked consoles with free games for pre-street-date titles made available through online auction sites, such as *Mercado Libre*. Businesses sometimes offer console modifying services for sale through their *Mercado Libre* listings and modified consoles include the Nintendo Switch, Nintendo 3DS, Sony PSP and PS3, and Xbox 360. An increasingly popular online marketplace, [www.linio.cl](http://www.linio.cl), has been unresponsive to requests from the video game industry to take down counterfeit products. The commercial area of Providencia in Santiago, *Paseo Las Palmas*, is well-known for the sale of video games and related products. Stores offer handheld consoles for sale at different prices, depending on whether the consoles have been modified or not. Known hackers have identified their “official reseller” in Chile for the sale of Nintendo SX Pro/SX OS as *chile-server.cl*, which, in turn refers to hacking groups as “our partners.” In 2020, Chile placed 20<sup>th</sup> (worsening since last year when it ranked 21<sup>st</sup>) in the world in terms of the number of peers participating in the unauthorized file-sharing of select video game titles through personal computers on public P2P networks. Chile ranked 10<sup>th</sup> in the world in P2P infringement of console-based video games (an improvement since last year when it ranked 9<sup>th</sup>).

The most prominent forms of music piracy in Chile are stream-ripping and use of cyberlockers. The most popular stream-ripping sites in Chile are *y2mate.com* and *flvto.biz*, with each site receiving over 6.7 million and over 3.1 million visits, respectively, during the third quarter of 2020. The most popular cyberlocker in Chile is *1fichier.com*, which received over 2.1 million visits from Chile during the third quarter of 2020. *Zippyshare.com*, another popular cyberlocker, received over 1.4 million visits during this same period. BitTorrent indexing sites are also popular in Chile, most notably *thepiratebay.org*, with over one million visits in the same quarter. An unauthorized streaming site, *elgenero.com*, received over 13 million visits from Chile in the last 12 months and is currently the second most visited pirate site in Chile.

The motion picture industry continues to see an upward trend in audiovisual consumption through streaming, but unfortunately, much of it is on unauthorized platforms, PDs, and piracy mobile apps. PDs, in particular, are extremely problematic because the sale of the devices can be legal if used with legitimate services and programming, but the simple download of software or piracy apps on the device opens the door to infringing material. PDs are freely offered in markets in Santiago without proper response from law enforcement. Similar to PDs, law enforcement against free-to-air boxes is lacking because of the dual legal and illegal uses of the device. The pay-TV industry in Chile also continues to experience problems with signal and content theft.

## **COPYRIGHT ENFORCEMENT IN CHILE**

IIPA members report that there were no changes to Chile’s copyright enforcement in 2020. Part of the enforcement challenge is that Chile lacks a dedicated, centralized authority responsible for copyright matters, including copyright enforcement. Rather, entities from different ministries oversee copyright matters with little coordination, including the *Departamento de Derechos Intelectuales del Ministerio de las Culturas, las Artes y el Patrimonio*; the *DIRECON – Dirección de Economía, Departamento de la Propiedad Industrial*, Ministry of Foreign

Affairs; and, the general IPR prosecutor. The implementation of a unified department would advance the fight against copyright infringement.

Additionally, specialized Internet/online crime police units from *Carabineros* and *Policía de Investigaciones* are not focused on pursuing IP crimes or any disruptive strategy for broader IPR enforcement actions despite a good level of technical investigative skills. The video game industry reports that Chilean Customs conducted several border seizures in 2020. As many of these seizures involved repeat importers, IIPA urges Chile to implement policies and measures that deter repeat importers of infringing products.

## **LEGAL REFORM IN CHILE**

Chile made bilateral commitments to the U.S. to significantly improve its levels of copyright protection and enforcement.<sup>2</sup> Yet, Chile's copyright law regime remains inadequate and lags far behind international best practices and the baseline for member countries of the Organization for Economic Co-operation and Development (OECD). Although Chile adopted amendments to its copyright law in 2010, Ley No. 20.435 is detrimental to effective online copyright enforcement. For years, IIPA has repeatedly voiced concerns regarding Chile's deficiencies regarding copyright protection, and the urgency for reform is as strong as ever.

**Broad ISP safe harbor:** Article 85Ñ establishes a safe harbor for hosting service providers and search engine, linking or reference services that do not have "effective knowledge" of IPR infringement, which – by law – can only be established by a court order (issued as per procedure under Art.85Q). This provision significantly limits the circumstances where a hosting, search or linking service provider can be liable for infringements committed by its users. This article also opens the door to abuse because online services that engage in making copyright-protected transmissions routinely seek to portray themselves as mere 'hosting' services to avoid liability under copyright law.

**Content Removal:** Where ISPs are eligible for the above safe harbor privileges, Article 85Q Ley No. 20.435 requires ISPs to remove or disable access to copyright infringing content only following a court order that rights holders obtain after a lengthy and complicated court process that can take over a year. This legal requirement can be an excuse for ISPs unwilling to take down content and can even be a legal obstacle for ISPs who would otherwise react to rights holders' takedown requests expeditiously. There is no incentive for ISPs to act expeditiously to remove infringing material, and there are no sanctions for non-compliance with takedown notices. Instead, the law provides time consuming and disproportionately burdensome obligations on rights holders such as requiring rights holders to have a legal representative in Chile to send notices of infringement. The law does not provide any fines or other sanctions for an ISP that fails to act after gaining knowledge of infringement through a notification from a rights holder. Instead, Chile has an ineffective notice-and-notice system (Article 85U) where rights holders do not know if an infringer has actually been notified to take down material and there are no provisions to deter repeat infringers. The cost and ineffectiveness of Chile's "notice-and-notice" system has prompted the music industry to discontinue using it altogether. Rights holders' only other option is to initiate a civil case directly against the user, which is untenable given the very high numbers of infringing users. We urge the Chilean government to amend its 2010 law to develop a meaningful legal framework for addressing copyright infringement online. As part of this, to avoid abuse of the "safe harbor" provisions, the law should also clarify that liability privileges are available only to ISPs that are passive and neutral, meaning they do not play any active role in relation to the content on or passing through their services. Finally, so as to be effective, the system should require measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of infringing content that has been identified by the rights holder.

**Website Blocking:** Chile lacks a legal mechanism for website blocking. Article 85R provides that a court can order an ISP to block access to clearly identified infringing content only if the blocking does not involve other non-infringing content. This limitation renders the provision worthless as the posting of a single non-infringing work

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<sup>2</sup>The U.S.-Chile Free Trade Agreement (FTA) is available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-FTA/final-text>.

can be relied on to oppose blocking measures, and significantly limits the power of Chilean judges to order effective remedies to limit and prevent online infringement. This contrasts with the situation in the EU and a number of Latin American countries where courts have ordered ISPs to block access to websites while considering the totality of the circumstances. The music, sports and TV industries have pursued successful test cases in Argentina, Peru, Mexico, Uruguay, Brazil and Ecuador.

**Statutory Damages and Civil Remedies:** Pursuant to the FTA, Chile is required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products. Yet, Chilean copyright law does not establish adequate statutory damages (e.g., pre-established damages), nor does it provide a dedicated procedure for obtaining injunctions or an effective civil *ex parte* search remedy.

**Protection of TPMs and Criminalization of Circumvention Devices:** Even in light of its 2018 legislation criminalizing satellite signal decoders, Chile still falls short of its FTA obligation to provide adequate legal protection for TPMs used to control access or restrict unauthorized acts to a protected work. The sale of video game copier devices and modification services on online marketplaces and through social media is prevalent. Also, music rights holders are left without support to tackle the problem of stream-ripping sites that allow users to download content, without authorization, through circumvention of TPMs. Chile should amend its law to provide adequate legal protection for all forms of TPMs.

**Exceptions to Protection:** The law contains certain exceptions that appear to be incompatible with international norms (as well as the FTA). These include: a reverse engineering exception that is not restricted to achieving interoperability; exceptions that could allow libraries to reproduce entire works in digital form without restriction; and the lack of overarching language consistent with the three-step test set forth in international treaties (and the FTA) to ensure that all exceptions and limitations are properly calibrated.

**Lack of Secondary Copyright Liability Rules:** In the civil liability area, general tort law principles do not help copyright holders in establishing secondary liability in Chile. We urge Chile to incorporate secondary liability principles in its copyright law to incentivize platforms to cooperate in the fight against piracy, among other goals.

**Concerning Proposals for a Reform of the Criminal Code:** In early 2019, the Minister of Justice announced a proposal for comprehensive amendment to the Penal Code, aiming to unify and consolidate all criminal provisions scattered in special laws, such as the Intellectual Property Law. The proposal would downgrade copyright infringement to a misdemeanor, dramatically reduce all penalties for copyright infringement and eliminate specific sanctions for the unauthorized reproduction of phonograms while reducing sanctions for other illegal uses. Such changes would be incompatible with the FTA and the requirements of the TRIPS Agreement. Due to the significant amount of opposing comments received from the private sector, the Minister of Justice delayed the project's submission to Congress pending further analysis. At present, the draft is still under consideration at the Ministry of Justice waiting to be submitted to Congress.

**Camcording:** IIPA continues to urge the Chilean government to enact specific legislation that would criminalize illicit camcording in theaters, including deterrent penalties. Such legislation should not include any requirement of proof of the camcorder's intent to profit.

**Constitutional Reform:** Chile held a public consultation on October 25, 2020 on whether to redraft the country's constitution. With a favorable vote of about 80%, the country decided that a new constitution should be prepared and voted on in 2021. IIPA urges Chile to ensure that any reform adequately implements the country's existing international, multilateral and bilateral commitments to strong copyright protection, enforcement, and equitable market access. IIPA urges USTR to monitor Chile's constitutional reform and its implications for copyright protection and enforcement.

## **CASE LAW DEVELOPMENTS IN CHILE**

In September 2020, the Supreme Court affirmed the 2019 decision of the Competition Court (*Tribunal de Defensa de la Libre Competencia*) which ruled against the Chilean Broadcasters Association (ANATEL) request for an order to the Executive to repeal and substitute the collective management organizations' (CMOs) tariffs setting procedure, established in the Intellectual Property Law. According to ANATEL, the procedure was plagued by technical errors that made the implementation of tariffs by all CMOs unfair and unconstitutional. During the procedure, the CMOs and rights holders organizations demonstrated that none of ANATEL's members are actually paying full tariffs and, instead, enjoy discount programs freely negotiated with CMOs and therefore, there was no requirement for users and CMOs to follow the legal tariffs setting procedure. The Court ruled to dismiss ANATEL's lawsuit.

## **MARKET ACCESS IN CHILE**

**Screen Quota Bill:** In January 2020, the Chamber of Deputies passed a bill adding a chapter on screen quotas to the Audiovisual Promotion Law. The initiative awaits further debate and would require exhibitors to show at least one fifth of nationally produced or co-produced audiovisual works as part of their total showings when ticket sales for a Chilean or co-production film, taken as an average from Thursday to Sunday, constitute at least 10% of overall cinema hall capacity in peak season, and 6% in off-peak season. In free-to-air television prime time, 40% of content would have to be of Chilean origin and at least 15% would have to correspond to Chilean cinematographic works, such as feature films, series, and miniseries, among others. U.S. motion picture exporters remain concerned that the screen quota, if enacted and implemented, would discriminate against non-Chilean works and would contravene Chile's bilateral FTA commitments.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2021 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** Supported by the largest Internet user base in the world, China's online marketplace continues to expand, and China now leads the world in cinemas with over 70,000 movie screens, most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China is now the seventh largest music market, and the fourth largest music streaming market, in the world by revenue, and the largest market for video games, with revenues estimated to reach \$41 billion in 2020. Yet persistent and evolving piracy and growing market access concerns hamper, or block altogether, rights holders' ability to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in China.

Serious problems in China include piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services (e.g., *Baidu Pan*) and social media platforms (e.g., *Baidu Tieba*, *WeChat*, and *Weibo*), unlicensed content available on user-uploaded content (UUC) platforms (e.g., *BiliBili*, *Miaopai*), including short-video streaming websites (e.g., *Douyin*, *xigua*, *Kuaishou*), unauthorized distribution of journal articles, and the proliferation of thousands of "mini Video-On-Demand (VOD)" locations that show unauthorized audiovisual content. While several enforcement actions moved forward in 2020, including a successful criminal case against the piracy app *Daquian Vision*, criminal enforcement efforts generally remain stunted by burdensome evidentiary requirements (particularly application of the "server principle"), and high thresholds that are ill suited to effectively combat piracy in the digital environment. Civil litigation, even when successfully brought against blatant piracy services, is generally non-deterrant and insufficient, given the scale of the piracy problem and the limitations of civil litigation in China (e.g., lack of meaningful injunctive relief, relatively low per-title damage awards, and costly litigation procedures). The National Copyright Administration of China (NCAC), in cooperation with rights holders, continues to helpfully pursue administrative actions against certain online services that facilitate piracy, but these actions alone are not sufficient to meaningfully deter widespread online piracy. Overall, much more is needed to ensure China's online marketplace reaches its full potential for rights holders and licensed businesses, in the face of evolving piracy challenges.

In a positive development, China's recently passed amendments to its Copyright Law include the introduction of rights of broadcasting and public performance for producers of sound recordings, which are critical protections for the music industry; enforcement reforms, including a ten-fold increase in maximum "punitive" damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable digital trade of copyrighted works; and the elevation of certain elements of the three-step test into the law to appropriately confine exceptions and limitations. It is critical that the implementing measures, expected in 2021, meet global best practices and China's international commitments. A number of reforms, however, were not included in the amendments that remain necessary to bring the standard of copyright protection and enforcement in line with global norms and best practices and meet the challenges of the digital age. While China made some notable improvements to its enforcement framework in 2020, China should fully implement its commitments under the *Guidelines on Strengthening the Protection of Intellectual Property Rights* (*Guidelines*), including to regulate websites to remove pirated materials, and under the Phase One agreement, including to make a meaningful increase in purchasing audiovisual products for VOD services, all of which would help address a number of the concerns raised in this report.

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<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

China should eliminate the market access barriers highlighted in this report, including the prohibition against online publishing by foreign entities and foreign investment and ownership restrictions in the cultural and entertainment sectors, which exacerbate the piracy problem by impeding access to sought-after U.S. content. IIPA seeks further reforms and enforcement of China's existing obligations under the 2012 U.S.–China Film Agreement, which mandated review and additional compensation in 2017, to improve access for U.S. film producers to China's well-established theatrical film market, including increasing theatrical revenue share and allowing private Chinese distributors the ability to distribute films to cinemas without interference from state owned enterprises, or the imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content continued to be curtailed during 2020, with licensing opportunities on all distribution platforms significantly hampered, through opaque regulations, obscure content review processes, and a “soft ban” on new or never released U.S. imports. This has effectively prevented access by U.S. producers to one of the largest consumer markets in the world. Building on the Phase One agreement's principles of reciprocity and national treatment, China should remove restrictions that have hindered market access of U.S. content.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Improve effectiveness of administrative enforcement, including by:
  - taking measures demonstrated effective in preventing or restraining infringement, including imposing sanctions that deter infringement;
  - imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content and, where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without requiring rights holders to issue a new complaint;
  - continuing to increase transparency (e.g., notifying rights holders of the results of administrative actions);
  - facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that criminal thresholds are met; and
  - NCAC establishing a mechanism with Ministry of Industry and Information Technology (MIIT) and Internet service providers (ISPs) to shut down infringing sites operating without a business license (consistent with the *Guidelines*).
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
  - piracy websites, whether operating from within or outside China, such as *dsdlove.com*, *dytt8.net*, *dy2018.com*, *dygod.net*, *y gdy8.com*, *gaoqing.la*, *mp4ba.com*, *bttt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *rrys.tv*, *5movies.to*, *btbtdy.net*, *92flac.com*, *sq688.com*, *51ape.com*, *2btbtt.co*, *sudhd.tv*, *panduoduo.net*, *keyandi.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*;
  - piracy facilitated through cloud based services that foster piracy, such as *Baidu Pan*, including by encouraging such services to provide prompt and consistent processing of takedown requests, apply rigorous filtering technology to identify infringing content, and take more effective action to suspend or terminate repeat infringers;
  - unauthorized content available on UUC platforms (e.g. *BiliBili* and *Miaopai*), including short video-sharing platforms (e.g., *Douyin*, *Kuaishou*, and *xigua*); and
  - apps such as *Tian Kian Kan*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, including criminal actions, with transparency, against:
  - the manufacture, distribution, and exportation of Piracy Devices (including against dedicated piracy apps);
  - the manufacture, distribution, and exportation of circumvention devices and software components;
  - unauthorized movie broadcasts in mini VOD locations;
  - unauthorized camcording;

- unauthorized broadcasting of movies and music;
- services trafficking in, or providing access to, unauthorized copies of journal articles; and
- hard goods piracy (including against production and supply of high quality counterfeit books and optical discs, USB flash drives containing high volumes of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games).

**Legislation:**

- Implement the copyright law amendments in line with international best practices and China's international commitments, including regarding broadcast and public performance rights for sound recordings, imposing "punitive" damages in line with the increased maximums, providing adequate and effective protections for TPMs, shifting the burden of proof to the accused infringer, and ensuring exceptions and limitations to copyright protections comply with the three-step test.
- Enact additional reforms to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular:
  - ensuring a remedy against apps facilitating infringement (especially where infringing content is hosted remotely), including by rejecting the "server principle";
  - prohibiting unauthorised Internet retransmission of live broadcasts;
  - clarifying that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors from monetary liability;
  - providing a term of protection in line with the international trend;
  - implementing the *Guidelines*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, streamlining evidence processes, establishing a blacklist of repeat infringers, and regulating websites to "remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information";
  - revising the 2011 Criminal IPR Opinions to enable more effective and more frequent criminal investigations and prosecutions;
  - revising the criminal threshold to ensure deterrent-level criminal penalties are available against all instances of commercial scale piracy (consistent with the *Guidelines*);
  - separately defining criminal violations regarding circumvention of TPMs or trafficking in circumvention products, including devices and software components; and
  - Consistent with the *Guidelines*, providing a legal basis for no-fault injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders' notices of infringement.

**Market Access:**

- Take action on the following long-delayed issues to improve the marketplace for U.S. films and TV programs: 1) immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of "double booking" theatrical releases; 4) eliminate informal restrictions on the number of imported "flat fee" films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S.

- producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system and unofficially-mandated genre-based limit; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and erect no regulation or policy that impedes the collection of license fees by American intellectual property owners.
- Open key elements of the entertainment and cultural sectors to foreign investment, particularly regarding film and TV production and distribution companies, and online video game services; reconsider the Negative Investment List, Online Publishing Rules as well as other measures prohibiting foreign involvement in online publishing activities, and allow distribution of audiovisual content on online video platforms where the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP); implement the Beijing 3 Year Action Plan to liberalize online video game services and expand such pilot programs to the entire country; State Administration of Press and Publication (SAPP) should increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures—including the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas, Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and content approval regulations for mobile video games—that discriminate against foreign content by imposing requirements such as registration, onerous, opaque, and *de facto* discriminatory content review procedures, restrictions on foreign content on broadcast, pay-TV, and online video, and strict quotas on foreign films and television programming, with further limitation by genre-basis; adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious; abandon efforts to extend China's burdensome content review regime to books printed in China but otherwise intended for distribution in other markets; and abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China's National Radio and Television Administration (NRTA) for further regulating the production and distribution of foreign audiovisual content.

## **CHINA'S ONLINE MARKETPLACE AND COPYRIGHT PIRACY UPDATES**

China's expanding online marketplace provides consumers with access to a vast array of legitimate music, video games, movies, TV programming, and other works available through an increasing number of licensed digital services. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. The seventh largest music market in the world, the music industry estimates that in 2019 Chinese consumers spent almost 18 hours listening to music each week, with nearly three-quarters of that engagement through social media sites or apps.<sup>2</sup> Yet serious piracy concerns persist. The music industry reports that 74% of Internet users in China admitted to downloading pirated music in the previous month, with stream-ripping from unauthorized content on UUC sites a particular problem. The COVID-19 pandemic exacerbated China's online piracy challenges in 2020, resulting in substantially increased Internet traffic to both legitimate sites as well as known piracy websites. Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's Special 301 filing serves as a supplement to those, and is not meant to provide an exhaustive review of all issues.<sup>3</sup>

**Evolving Online Piracy Remains Serious:** Online piracy in China—including illegal downloading and streaming of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a significant concern. For example, in 2019, China ranked 25<sup>th</sup> in the world in number of

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<sup>2</sup>See IFPI Music Listening in 2019, P23, available at <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf>.

<sup>3</sup>See, e.g., IIPA's 2020 Special 301 submission on China ("IIPA 2020"), available at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301CHINA.pdf>; IIPA, China's WTO Compliance – "Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments" (85 Fed. Reg. 50864, August 18, 2020), September 16, 2020, available at <https://www.iipa.org/files/uploads/2020/09/2020-09-16-IIPA-Comments-on-Chinas-WTO-Compliance.pdf>; IIPA Written Submission in Response to: 2020 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, 85 Fed. Reg. 62006 (October 1, 2020), November 20, 2020, available at [https://www.iipa.org/files/uploads/2021/01/IIPA\\_2020-Notorious-Markets.pdf](https://www.iipa.org/files/uploads/2021/01/IIPA_2020-Notorious-Markets.pdf).

connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 21<sup>st</sup> in the world for mobile game titles. Contributing to the problem, many online services financially benefit from broad ISP safe harbor rules, allowing such services to avoid seeking licenses to the copyrighted material available on their platforms. As discussed below, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a major concern, including illegal download sites; P2P piracy sites; deep linking sites; “hybrid” sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, circumvention devices, high quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games.. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *rrys.tv*, *5movies.to*, *btbtdy.net*, *92flac.com*, *sq688.com*, *51ape.com*, *2btbtt.co*, *subhd.tv*, *dsdlove.com*, *dytt8.net*,<sup>4</sup> *dy2018.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piaohua.com*, *vodxc.com*, *lbdly.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *panduoduo.net*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *bthaha.bizz*, *ciligou.top*, and *btdoor.cc*. Short video-sharing platforms, such as *Douyin*, *Kuaishou*, and *xigua*, have become a means for piracy of popular movies, television series, and video games. Users break up the content into short videos and distribute them on these platforms.

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage service services, such as *Baidu Pan*, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.<sup>5</sup> Given its market dominance, it is critical that Baidu cooperate fairly and transparently with rights holders and put in place rigorous content protection standards and practices to set the right example for other Internet businesses in China. Instead, rights holders in China have been forced to bring legal actions against *Baidu Pan* for facilitating infringement.<sup>6</sup> Unfortunately, Baidu’s services continue to be used for piracy and their notice and takedown system remains ineffective.<sup>7</sup> China’s government should encourage Baidu to do more, including improving implementation of its takedown tools, applying rigorous filtering technology to identify infringing content, and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

A significant problem for the video game industry is “plagiarism,” or “game cloning.” This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images soundtracks and voices. The video game industry is encouraged by two recent judicial decisions—*Blizzard & NetEase v. 4399* by Shanghai Pudong District Court and *Suzhou Snail Digital Technology Co. Ltd. v. Beijing Aiqiyi Technology*

<sup>4</sup>USTR identified *Dytt8.net* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (“2020 Notorious Markets Report”). *Dytt8.net* receives around 9.5 million visits per month, and is ranked 480 on Alexa and 328 on SimilarWeb. The site, which uses a user-friendly interface to provide direct links to third party storage providers, remains a particular threat to legitimate services both within and outside of China.

<sup>5</sup>USTR identified *Baidu Pan* in its 2020 Notorious Markets Report. Baidu is the most popular search engine in China with over 75% of the market, and the second largest search engine in the world by user base.

<sup>6</sup>In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against *Baidu Pan* for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. The Supreme People’s Court (SPC) accepted Sohu’s application for retrial and is reviewing the case. Sohu has filed two additional cases against Baidu for copyright infringement of additional licensed content. In 2017, Youku sued *Baidu Pan* over the unauthorized availability on the service of a popular local television drama series, prevailing in a first instance case heard by the Beijing Haidian District People’s Court. An appeal is pending at the Beijing Intellectual Property Court, and may depend on SPC’s decision in the Sohu retrial. The Chinese affiliate of a Hong Kong television station, TVB, filed suit against Baidu for copyright infringement, losing a first instance case in the Guangzhou Tianhe District People’s Court, but prevailing on appeal at the Guangzhou Intermediate People’s Court.

<sup>7</sup>Takedown rates on Baidu’s services are inconsistent and removal of infringing links can take too long (from one day for one of its services to as long as 15 days for another). Moreover, rights holders must send up to thousands of infringement notices for a single piece of infringing content proliferating on *Baidu Pan* because of its enormous size.

*Co., Ltd. and Chengdu Tianxiang Interactive Technology Co., Ltd.* by the Jiangsu High Court—finding infringement against entities engaged in plagiarism of video games. As discussed below, China needs to enhance its enforcement framework to effectively address this problem.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions), remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating and there remains legal uncertainty regarding the “server principle.”<sup>8</sup> China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing apps, allowing users to access pirated content (i.e., Piracy Devices).<sup>9</sup> A prominent example is the “Ubox,” which is manufactured and distributed by Unblock Tech ([unblocktech.com](http://unblocktech.com)).<sup>10</sup> Android devices allow third-party app distribution and installation, enabling users to download free apps onto their devices to access infringing content by bypassing the major app stores altogether.<sup>11</sup> Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.<sup>12</sup> An example of such an app is *Tian Kian Kan*, which facilitates infringement of audiovisual content. There are also Chinese-developed or operated apps that target foreign music markets. An infringing Karaoke app that is extremely popular in China and Hong Kong is *Tian Lai K Ge*. China must do more to combat the growing threat of the app piracy ecosystem.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *ymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their locations and have stopped responding to takedown request notices. Other sites, such as *666c.com*, have begun to adopt the same strategy. Infringement of music videos is also a problem for the music industry.

Licensed streaming and digital piracy compete side by side in China, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. In recent years, music piracy has shifted primarily to streaming of pirated content, including short videos, from UUC sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>13</sup> domestic and international P2P sites (such as *ThePirateBay* and *Nyaa*), forums, and streaming sites, remains a problem. As discussed below, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently.<sup>14</sup> There is hope that new regulations issued by the Cyberspace Administration of China (CAC), the Ministry of Culture and Tourism, and the National Radio and Television Administration to strengthen the responsibility of ISPs to review and manage UUC will be helpful in combatting online piracy.<sup>15</sup>

**Book and Journal Piracy:** The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journals

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<sup>8</sup>Certain Chinese IP judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

<sup>9</sup>IIPA has provided extensive information on Piracy Devices in prior reports. See, e.g., IIPA 2019 at 19.

<sup>10</sup>Ubox runs on Android and incorporates P2P technology as well as branded apps to enable access to pirated VOD and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech’s set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

<sup>11</sup>The Google Play Store is not officially available in China.

<sup>12</sup>Piracy apps are sometimes advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or other chat functions through apps.

<sup>13</sup>Three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>14</sup>From January to November 2020, 261 notices with 13555 links were sent to Baidu, and all were removed.

<sup>15</sup>Regulations on the Administration of Online Audio and Video Information Services, which came into effect on January 1, 2020.

to continue to operate.<sup>16</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *syyj.com*, *Keyandi*,<sup>17</sup> *UReader*, and *Baidu Paperhelp*, continue unhindered. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in a number of other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact. For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action.<sup>18</sup> Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.

It remains the case that pirated print publications and compromised log in credentials continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell the illegal products to overseas buyers. In part due to China's inadequate online enforcement framework, sending notifications of infringement to remove these products remains unduly complicated.<sup>19</sup>

**Circumvention Devices:** As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices and software components, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass TPMs in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing games distributed over the Internet to be played on handhelds or consoles. The harm they cause is not limited to console makers because almost all games developed for play on consoles, including those developed and published by third parties, can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in webshops and online marketplaces, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. More targeted and transparent enforcement actions, and deterrent-level criminal sanctions and penalties against the manufacturers, suppliers, and exporters of circumvention devices and software components are necessary to meaningfully stem the downloading of infringing video games.

**Unauthorized Camcording Remains a Problem:** China remains a source of illicit camcording in the region, though in 2020 there was a notable decrease in illicit camcording in China and globally because of theater closures and the delay in releasing many films due to the pandemic. In general, the quality of camcorded films from China has improved over the years, threatening the legitimate theatrical and home entertainment markets.<sup>20</sup> Live-streaming of theatrical broadcasts of films online is a growing concern. In 2020, several Chinese courts handed down criminal sentences for illegal camcording, including to members of a major piracy syndicate, to a cinema manager who made camcords and sold them to mini-VOD cinemas, and to a cinema employee and an accomplice for selling illegal camcords to major piracy websites.<sup>21</sup> A more comprehensive solution requires enactment of a specific criminal law

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<sup>16</sup>Although the *KJ Med* entity has been defunct for some years, a number of similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

<sup>17</sup>*Keyandi* is an online entity that makes illegal profits by providing English e-books for download without publisher authorization and charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandi* site appears to have migrated to a new site, [www.bbs.keyanmi.com](http://www.bbs.keyanmi.com), and the relationship between these two entities is unclear.

<sup>18</sup>In June 2017, following a referral by the publishing industry, the Beijing Copyright Enforcement Department took down the *UReader* platform, finding it was infringing, and imposing a fine of RMB 400,000 (US\$58,000).

<sup>19</sup>An e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site worked with publishers to address the sale of infringing copies of textbooks on the platform.

<sup>20</sup>During 2019, a total of 29 camcords (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcords (11 audio and 13 video) in 2018. The 2020 camcord statistics are anomalous due to the widespread closure of theaters due to the COVID-19 pandemic.

<sup>21</sup>As we reported last year, in 2019, Yangzhou Police of Jiangsu Province broke up a film piracy syndicate, and seized a cloned server dubbed "phantom number one" (No. A15591). In September 2020, the Yangzhou Intermediate People's Court found four principal defendants criminally liable for copyright infringement, and issued custodial sentences ranging from four to six years, as well as fines. Also in 2020, the Court of Huishui County issued a fine and a two-year prison sentence against a cinema manager who made camcords at Haohuahong Cinema, Huishui County, Guizhou Province, and sold them to mini-VOD cinemas. In August 2020, the court of Pingluo County sentenced an employee of the Golden Phoenix Cineplex Pingluo, Shizuishan City, Ningxia Hui Autonomous Region and an accomplice for using a theater surveillance camera to camcord new release films, including "Avengers: Endgame," "Captain Marvel," and "Shazam!," and selling the camcorded copies to pirate websites, including [www.415.net](http://www.415.net), [80ys.net](http://80ys.net), [90sdyy.com](http://90sdyy.com), and [tqys.net.cn](http://tqys.net.cn).

against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility. Further, as discussed below, to address live-streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online. In addition, the Chinese government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

**Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain a Concern:** The copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirate/counterfeit textbooks, consumer books, and trade books remains a concern, with, in particular, unauthorized children's books and academic textbooks marketed and sold through e-commerce sites, including into foreign markets. China remains an export center for pirate music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>22</sup> Online sales of USB flash drives containing high volumes of infringing sound recordings have become a growing concern, particularly since these flash drives are exported to other Asian markets, including Taiwan and Hong Kong.<sup>23</sup> Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world and found in kiosks and shopping malls in many countries.

**Unauthorized Mini-VOD Locations:** Regulations on mini-VOD cinemas and chains entered into force in March 2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses, and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are "entertainment premises" and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law. A related problem is that Chinese entities that contract for the rights to distribute film and television content in various home video formats often ignore the differentiation between rights for home use and those for public use. As a result, U.S. content is frequently used for unauthorized public performances.<sup>24</sup>

## **ENFORCEMENT UPDATES IN CHINA**

As highlighted in past filings, in recent years China has increased its enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors; but these actions, while helpful, are not enough to deter widespread piracy. China's growing Internet user base creates opportunities for rights holders; but China's enforcement deficiencies, including application of the "server principle" and broad interpretation of ISP safe harbor rules, as well as an historic toleration for piracy, have kept the creative marketplace from reaching its potential, and have hampered the development of legitimate services.<sup>25</sup> In 2020, the impact of the COVID-19 pandemic strained China's enforcement resources and hindered the progress of investigations in China. IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress on some of the concerns identified below.

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<sup>22</sup>Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but ongoing changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>23</sup>On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1000 tracks in a single flash drive.

<sup>24</sup>One example is that some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing.

<sup>25</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all "commercial scale" piracy.

**Administrative Actions Helpful, But Insufficient:** China has been operating its annual “Sword Net” anti-piracy campaign for 15 years. While those administrative enforcement campaigns have been important, notably following NCAC’s 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns on their own are not enough to deter widespread piracy.<sup>26</sup> The 2020 campaign, which was delayed from April until June due to the COVID-19 pandemic, included a focus on a number of priorities primarily focused on combatting various forms of online infringement.<sup>27</sup> While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed.

**Identifying Infringers Problematic:** It is often very difficult to identify those responsible for piracy sites because many infringers use fake registration information to register their websites.<sup>28</sup> These rogue services effectively cannot be sued. The NCAC should establish a mechanism with MIIT and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*, take immediate steps to guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information.”

**More Sustained, Holistic Enforcement Approach Needed:** Even when it is possible to identify piracy operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing and/or hindering case development (including rigid formality requirements for evidence originating from outside of China and restrictions on foreign investigations in China); high costs; often high burdens of proof (notwithstanding the recent Copyright Law amendments and ancillary regulations intended to address this problem); and political influences that make it difficult to seek enforcement against highly-connected individuals and risky for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for them (discussed below in the Market Access section). When these challenges can be overcome, civil suits can be helpful.<sup>29</sup> But even when successfully litigated, civil suits are ultimately insufficient to address major piracy problems because damages are awarded on a per-title basis and are relatively low and non-deterring due also to the general difficulty of obtaining injunctive relief, while civil litigation costs are high for rights holders, especially foreign ones.<sup>30</sup> In a positive development, in April 2020, the Higher People’s Court of Guangdong Province released (Interim) *Guidelines for Adjudicating Civil Intellectual Property Rights Dispute Cases Concerning Online Video Games* to bring more predictability and establish criteria for granting preliminary or interim injunctions in such cases.<sup>31</sup>

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<sup>26</sup>For a summary of recent Sword Net campaigns, see prior IIPA China country reports (e.g., IIPA 2020 at 21).

<sup>27</sup>The National Copyright Administration of China (NCAC), the Cyberspace Administration of China (CAC), the Ministry of Public Security (MPS), and the Ministry of Industry and Information Technology (MIIT) launched the official 2020 Sword Net campaign. According to the official announcement, the campaign focuses on the following five priorities: enforcement against piracy of audiovisual works, especially online streaming; piracy on e-commerce platforms, particularly against large-scale e-commerce platforms; enforcement against piracy on social media platforms; enforcement against unauthorized online education content; and enhanced protection and enforcement in focused fields, including online gaming, music licensing, and piracy on large-scale online platforms, including regarding literature, animation, cyberlockers, app stores, and online advertising.

<sup>28</sup>All websites in China must register with [milbeian.gov.cn](http://milbeian.gov.cn), and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or “Whois” data.

<sup>29</sup>A number of notable civil suits are ongoing or were concluded in 2020. For example, Youku sued both Shanghai Zhong Duo Mei Network Technology Co. Ltd. and its wholly controlled company Wuhan Image network Technology Ltd. for copyright infringement of five foreign drama series, including series from Korea and Thailand, licensed to Youku. The case is pending. In addition to the two cases involving plagiarism of video games discussed above, another case involving video games was concluded in 2020: the Guangzhou Internet Court found a video sharing platform streaming game-play videos of Tencent’s video game King of Glory constituted copyright infringement, holding that game-play graphics and videos are within the scope of copyrightable content created by means similar to cinematography.

<sup>30</sup>As previously reported, the motion picture studios prevailed in a lawsuit (originally filed in January 2015) against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles. Xunlei withdrew its appeals and paid the civil damages awards plus costs of nearly US\$250,000. As indicated above, Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

<sup>31</sup>While these guidelines only apply to courts in Guangdong province, over 10,000 video game companies, accounting for about 75% of national revenue for the whole industry, are located there, and the guidelines will apply when any of these companies file or defend IP cases involving video games. In addition, courts in Guangdong province, which heard about 28% of all IP cases involving video games in 2019, have more experience than other Chinese courts with IP cases involving video games; as a result, the guidelines will likely also be considered authoritative by courts located outside Guangdong.

Criminal enforcement is inadequate mainly because criminal thresholds are too high.<sup>32</sup> Nevertheless, several criminal enforcement actions are currently pending or were successfully concluded in 2020.<sup>33</sup> In one notable example, a case against the piracy app *Daquian Vision* resulted in criminal fines and imprisonment against the operators.<sup>34</sup> Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

To improve enforcement against Internet piracy, IIPA urges the Chinese government to undertake the following measures:

- Adopt further reforms to the Copyright Law (as detailed below) and follow through on implementation of the *Guidelines* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, including to guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information.”<sup>35</sup>
- Adopt reforms that address shortcomings in China’s Criminal Law that IIPA has identified in previous reports.<sup>36</sup> In particular, China should meet its obligations in the WTO TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a “commercial scale” (which is addressed in the *Guidelines*),<sup>37</sup> and separately defining criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies.
- Ensure prompt transfer for criminal investigation and prosecution.
- Issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions.
- NCAC should establish a mechanism with MIIT and ISPs to shut down infringing websites operating without a business license.

<sup>32</sup>Currently, in cases of Internet piracy, the criminal threshold of “500 copies” is interpreted as 500 *titles*. As a result, a single television episode is not considered a “title”, rather an entire season or even all seasons of a television program are calculated as a single title. However, for local rights holders, authorities have recently been more flexible with this threshold or have used a 50,000-click threshold (or a combination of thresholds under the Criminal Law and judicial interpretations) to bring criminal enforcement actions against piracy websites that clearly have high visitations or piracy apps that clearly have huge numbers of downloads.

<sup>33</sup>For example, since late 2018, the Tianjin Cultural Task Force and Tianjin Police have investigated a case in Zhuhai City, Guangzhou Province involving the illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia. The police have arrested 24 suspects and seized one master production line, 11 optical disc replication lines, 7 printing machines, and 500,000 pirate DVDs (including 130,000 DVDs infringing the copyrights of major motion picture studios). In July 2020, the police of Shanghai Jing'an District raided Shanghai Sigan Network Technology Co., Ltd., the operator of pirated app *Diyidan*, which, according to the police, has disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million and advertisement fees of RMB 24.26 million, for total illegal gains of RMB 32.18 million (US\$4.94 million). Of the 35 people detained in the raid, 22 criminal suspects have been arrested: 16 for criminal copyright infringement and 6 for criminal copyright infringement and facilitating criminal activities on an information network. The case has been transferred to the Jing'an District People's Procuratorate. On July 10, the police of Shanghai Minhang District arrested four operators of a piracy website, www.dilidili.com, which has provided pirated Japanese animation since 2015. Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins.

<sup>34</sup>In 2019, the motion picture industry referred *Daquian Vision*, a mobile piracy app for pirating movies, to the NCAC, which referred the case to the Shenzhen Market and Supervision Administration (MSA) and local police for criminal investigation of the operator. Police executed a raid at the operators’ premises in January 2020, and the case was then transferred to the local procuratorate. In November 2020, the case was heard in the Shenzhen Nanshan District Court, which imposed a criminal fine on the company operating the app (Shenzhen Daquian Vision Cultural Media Co., Ltd) and meted out custodial sentences against four of its executives.

<sup>35</sup>See IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China’s Central Committee (CPCCC) and the State Council. The *Guidelines* would, among other things, direct the government to revise the criminal law, including “lowering the threshold for criminal prosecution of IPR offenses” and “enhance punishment[s]” (Clause 2.1); standardize criteria of evidence, lighten rights holders’ burden in giving evidence, establish efficiencies in the notarization process, including bringing costs down, and establish “e-notarization” (Clauses 2.2, 2.4); issue a “judicial interpretation on evidence rules for IPR infringement in the civil justice system” (Clause 2.2); establish a “blacklist” of repeat infringers (Clause 2.3); and guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information” (Clause 4.10).

<sup>36</sup>See, e.g., IIPA 2017 at 15. China’s Ninth Amendment to its Criminal Law (“Ninth Amendment”) in 2015 failed to address the intellectual property provisions, but added a potentially helpful offense of “assisting criminal activities over information networks.” Implementation of this provision should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. In late 2019, the Supreme People’s Court and the Supreme People’s Procuratorate issued an Interpretation, which entered into force in November 2019, defining the conditions for “knowing others are using information networks to perpetrate crimes.” It is unclear what practical impact this Interpretation will have.

<sup>37</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers (i.e., reject the “server principle”).
- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions should be available against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content that has been subject to administrative law enforcement action, but remains available.
- Consistent with measures by the Supreme People’s Court (SPC) implementing the Phase One Agreement, streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of monetary damages.
- Revise the 2011 IPR Opinions<sup>38</sup> to enable more effective and more frequent investigation and criminal prosecution of online copyright infringement cases, including ensuring MPS prioritizes criminal investigations.
- Enhance expertise among police throughout the country to bring effective criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.

## **COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE**

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>39</sup> These reform processes, including the ongoing implementation of the Phase One agreement, provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Copyright Law Amendments Welcome, but Implementation is Critical and Further Reforms Needed:** After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the National People’s Congress (NPC) passed amendments that will enter into force in June 2021.

IIPA is pleased that the amendments include rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. Swift implementation of these new performance rights, including the appointment of an appropriate collecting society in accordance with international best practices and the establishment of tariffs reflecting the economic value of the use of the rights in trade is vital. The amendments also include some positive reforms, including increasing the maximum for “punitive” damages ten-fold<sup>40</sup> and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence,<sup>41</sup> that will improve the enforcement environment in China. In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Article 13) into the law to appropriately confine exceptions and limitations. China should implement all exceptions to and limitations on copyright protection in the Copyright Law to ensure these exceptions and limitations are appropriately narrow in scope and otherwise consistent with the three-step test.

IIPA is also encouraged that the amendments include protections against the circumvention of TPMs, including prohibitions against the act of circumvention as well as trafficking in circumvention devices or components. It is critical that China properly implements these amendments to ensure these protections are adequate and effective. For example, protections should apply to both TPMs that control and manage authorized access to copyright works (“access controls”) and TPMs that protect rights (including against unauthorized copying) in those works (“copy

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<sup>38</sup>Opinions of Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security on Several Issues Concern the Application of Law in Handling Criminal Cases Concerning the Infringement of Intellectual Property Rights (2011).

<sup>39</sup>See, e.g., IIPA 2020.

<sup>40</sup>Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB.

<sup>41</sup>Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the intellectual property without permission under the Copyright Law.

controls"). As China is the world's leading exporter of video game circumvention devices and software components, the law should prohibit the "export" of circumvention devices or components, which drives significant amounts of online video game piracy around the world. Furthermore, certain exceptions—including for educational or scientific research, encryption research, and reverse engineering—appear overbroad (*i.e.*, broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut protections. China should also ensure that circumvention devices or components are effectively removed from the channels of commerce, and that rights holders have standing to bring suit in cases in which the TPM was employed by a licensee platform. Lastly, China should clarify that criminal liability is available for circumvention of TPMs, and for the manufacture, distribution, and exportation of circumvention devices and software components. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

There are other positive aspects of the amendments—including destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling "competent authorities" to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders. However, the amendments did not address a number of deficiencies in China's legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of "communication over information networks" to reject the "server principle";
- provide a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;<sup>42</sup>
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live-streaming);
- update China's outdated term of copyright protection to bring it in line with evolving global norms;<sup>43</sup>
- consistent with the requirements of the *Guidelines* (as noted above), clarify the legal basis for injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to stop providing access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;<sup>44</sup> and
- clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>45</sup>

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<sup>42</sup>While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

<sup>43</sup>China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). This would not only ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This, in turn, would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

<sup>44</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

<sup>45</sup>Safe harbors from monetary liability regarding IP under the current ISP liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the music market and contributed to the proliferation of pirated content, such as music videos, available for streaming on these services. Clarification of the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China, is needed.

**Fully Implement Phase One Agreement:** IIPA welcomed the conclusion of the Phase One economic and trade agreement signed by the United States and China on January 15, 2020. In the Agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding IPR enforcement. While implementation is ongoing, in August 2020 the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One agreement, transfers of administrative intellectual property cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds are likely to have been met in order for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members, and IIPA is hopeful that this new rule will be effectively applied by both transferring administrative authorities and receiving criminal authorities. IIPA is also encouraged by recent measures enacted or proposed by the SPC and the NCAC to implement aspects of the agreement that we hope will improve the enforcement framework in China.<sup>46</sup> IIPA urges China to follow through on its Phase One commitments, and encourages the U.S. government to ensure that China fully implements them.

The Phase One agreement also includes purchasing requirements that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully implemented, this requirement could improve market access for the film and television industry by increasing the licensing of U.S. audiovisual products for VOD services within China’s 30% quota, as well as increasing revenue share.

**Ensure Takedown Procedures Comply with SPC Implementation of Phase One Requirements:** China’s “e-commerce” law, which entered into force on January 2019, applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations.<sup>47</sup> The law requires platform operators to take “necessary measures” against infringing goods or services and, importantly, the standard of knowledge for a platform operator to take action is that the platform “knows or should know” that the good is infringing. Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to rights holders’ notices of infringement. Furthermore, it is critical that implementation of the e-commerce law supports rights holders’ actions to prevent illegal trafficking of infringing goods on e-commerce platforms,<sup>48</sup> and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is already good cooperation.

In May 2020, China enacted a new Civil Code, which took effect in January 2021.<sup>49</sup> The Civil Code includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action “within a reasonable period of time” of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) (“Reply”), which entered into force on

<sup>46</sup>For example, Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9), enacted by the SPC on Aug.24, 2020, entered into force on Sept.14, 2020; Interpretation on Several Issues of Application of Law in Handling Criminal Cases about IP Infringement (III) (Fa Shi [2020] No.10), enacted by the SPC on Aug.31, 2020, entered into force on Sept.14, 2020; Guiding Opinions on Hearing Cases about IP Disputes Involving E-Commerce Platforms (Fa Fa [2020] No.32), enacted by the SPC, entered into force on Sept.10, 2020; Draft Guidelines on Enforcement of IP Judgments was released by the SPC on Mar.15, 2020 for public comments; Provisions on Evidence in Civil Litigation Related to IP (Fa Shi [2020] No. 12), enacted by the SPC on Nov. 9, 2020, entered into force Nov. 18, 2020; Opinions on Strengthening the Protection of the Copyright and Copyright-Related Rights (Fa Fa [2020] No. 42), released by the SPC Nov. 16, 2020; Notice on Evidence Examination and Determination in Copyright Administrative Enforcement (Guoban Fa [2020] No. 2), released by the NCAC on Nov. 15, 2020; and Opinions on Increasing Sanctions against IP Infringements (Fa Fa [2020] No.33), released by SPC, entered into force on Sept.14, 2020.

<sup>47</sup>The interpretation and implementation of this new law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

<sup>48</sup>High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, as discussed above, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>49</sup>While the Civil Code does not have a specific chapter on intellectual property, some articles in the Chapter of Contract, Right of Personality, and Tort Liability may apply to IPR-related disputes. For example, Article 1185 encouragingly enables IP rights holders to claim punitive damages against intentional IPR infringement with severe circumstances. IIPA is hopeful that given the core role of the Civil Code in China’s legal system, the principle of punitive damages will be reflected in subsequent judicial interpretations and laws regarding IPR protection, consistent with the Phase One Agreement.

Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links. The Government of China should implement the takedown procedures in the e-commerce law and in the new Civil Code consistent with these requirements.

#### **Regulations on Optimizing the Business Environment and Opinions on Strengthening IP Protection:**

State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, entered into force in January 2020. According to the Regulations, China will enhance IP protection by establishing a punitive damages system for IP infringement, promoting the establishment of a rapid protection mechanism for IPR and improving the settlement mechanism for IP disputes. While the Government of China in 2020 took certain positive steps, including increasing “punitive” damages ten-fold as part of the Copyright Law amendments, more can be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.

### **MARKET ACCESS UPDATES AND RELATED ISSUES**

The piracy and enforcement concerns outlined above are exacerbated by China's pursuit of policies that have the effect of impeding foreign creators' access to the Chinese marketplace, thereby restricting the supply of legitimate product to Chinese consumers. China is still not in compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. regarding many market access barriers in music, audiovisual products, and publications.<sup>50</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>51</sup> but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the “publication and editing of books, newspapers, journals, audiovisual products and electronic publications,” and foreign investment in audiovisual production studios, movie distribution, and online video services. While it had been hoped that China would address longstanding market access barriers, the Chinese government continues to move in the opposite direction.

**Increasing Online Market Access Barriers:** As we have noted in prior reports, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>52</sup> Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and “network publication services” remained on the “Prohibited” list. MIIT's 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed, domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, SAPP has tightened the approval process for the publication of video

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<sup>50</sup>China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.

<sup>51</sup>China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of “music videos” is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

<sup>52</sup>Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

games, reducing the number of low-quality copycat games, but also burdening U.S. video game developers.<sup>53</sup> SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games.

In a potential positive development, in August 2019, China's Ministry of Commerce (MOFCOM) issued the Beijing 3-year Action Plan ("Plan") to liberalize by the end of 2021 certain service sectors where foreign investment was previously prohibited or restricted. The Plan will only be implemented in Beijing. While online video game services are not specifically included in the Plan, reports indicate the Plan could open the online video game industry to foreign investment because a pilot program under the Plan includes the "internet information services" sector, which could potentially encompass online video game services. China should implement the Plan, including liberalization of online video game services, and expand such pilot programs to the entire country.

In addition to existing online barriers, China has introduced a number of alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, in May 2016, the former State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>54</sup> Also in June 2016, China published new content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

This flurry of discriminatory measures follows other measures that China has implemented to restrict the online distribution of foreign audiovisual content and software. For example, in 2014, the government imposed rules capping the online distribution of foreign films and TV dramas at 30% (and this cap was made more restrictive by applying it on a genre-specific basis), and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, there are only two opportunities to submit content for registration and review per year, which, for example, because of the nature of television production, does not allow for submission of a full season of a television series when that season is current. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and resulted in delays, effectively curtailing "day-and-date" releases,<sup>55</sup> and in practice, further reducing the foreign content caps to less than 30%.

Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers' ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system. China should also shorten the time for content review to provide certainty of release, increase frequency of content review windows, remove the burden of resubmitting film and television programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process will attract investment and boost China's potential as a regional film and television production hub.

**Extension of Content Review to Books Printed for Export:** In a recent development, China is reportedly extending the reach of its content review regime to content intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets are now also being subject to China's burdensome content review regime. This appears to be the case even for books that were previously being printed in and exported

<sup>53</sup>The number of video games approved by the State Administration of Press and Publication (SAPP) has been reduced from more than 9,000 game titles in 2015, to less than 1,500 titles in 2019. A foreign video game company must work with a domestic video game publisher to commercialize a video game in China. In order to receive SAPP approval, the foreign video game submitted for approval must have a certificate from NCAC, and the domestic video game publisher should have a Telecommunication and Information Services Business License (ICP Certificate). The domestic video game publisher must also ensure that changes have been made to the game so that it complies with all content regulations and other regulations governing loot box systems and game spending by minors.

<sup>54</sup>The proposal was for leading online video platforms to sell up to a 10% "special management stake" and cede at least one board seat to a selected state-owned media company. While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge.

<sup>55</sup>"Day and date" release refers to releasing a film in theaters and making it available on a Video-on-Demand service the same day.

from China without issue. Extending the reach of its burdensome content review regime to books printed in China but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who for decades have used printing partners in China, and is arguably a disguised restriction on international trade.

**Additional Audiovisual Market Access Concerns:** China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry's ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In September 2018, the NRTA proposed two draft regulations regulating the production and distribution of foreign audiovisual content, including proposing a broad 30% cap on foreign content (expanding on the cap for online distribution discussed above) applied on a genre-basis to film, TV, animations, documentaries, and "other" programs.<sup>56</sup> While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies. In addition, 2016 Rules clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.<sup>57</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.<sup>58</sup> Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These types of documentation requests (unique to China's marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China. China also maintains a number of longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry such as, for example, prohibiting foreign-owned investment in online video services, and audiovisual production studios and distribution (and, as noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions).<sup>59</sup> U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

In addition to all of these barriers (and the theatrical market access barriers discussed below), beginning mid-2019, without any official announcement, Chinese government agencies and distribution platforms significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms. This so-called "soft

<sup>56</sup>The "Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs" would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs" seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

<sup>57</sup>The June 2016 Statement and Rules on Importing TV Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a "major guiding role" in production if the Chinese party does not "fully obtain intellectual property rights" in the program. Only two of these "foreign" programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

<sup>58</sup>According to the Notice, if 66% of a cinema's total annual gross box office comes from Chinese films, that cinema will receive a refund of half of the money generated from Chinese films within the 5% of box office that the cinema contributed to the Film Development Fund.

<sup>59</sup>Other examples include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners' contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders' ability to control the print quality or trace the source of camcording piracy.

ban” dramatically decreases available U.S. content online in China. U.S. content has also been blocked from online distribution by a combination of Chinese government delays and censorship failures. Without a prior censorship certificate from theatrical release—which most independent and many other U.S. titles fail to receive—there is no avenue to reach online distribution in China. Finally, Chinese private distributors are inhibited from risking any investment in new U.S. content due to uncertainty about their government’s measures and intent. As a result, U.S. producers—shut out of the second largest market in the world and the number one market in terms of theatrical screens—are also increasingly unable to make significant investments in U.S.-origin content.

China needs to change course from its current protectionist path and open its marketplace to U.S. producers. It is critical to send a strong message that these policies are unacceptable, particularly at a time when China’s creative marketplace holds the potential for explosive growth, and should be reversed. China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

**U.S.–China Film Agreement Implementation:** China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Xi and the Vice President Biden. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>60</sup> Unfortunately, more than eight years after its signing, China has failed to meet its obligations under the Agreement.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.<sup>61</sup> In the case of “flat fee films,” which are imported by private distributors outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the number of these films that can be imported. Furthermore, China has retained governmental control of key elements of distribution, severely limiting the ability of private Chinese distributors to import and distribute any foreign content. These barriers virtually eliminated U.S. independent films from its theatrical marketplace with only 13 films theatrically released in China, for 2.6% of the theatrical release slots, the lowest percentage of slots allocated for independent films recorded by IFTA.<sup>62</sup> U.S. producers who rely on private distributors and the payment of minimum guaranteed license fees to raise production financing and secure distribution have seen their licensing revenues plummet.

China further committed in the Agreement (and reconfirmed in commitments at the June 2015 U.S.–China Strategic and Economic Dialogue (S&ED)) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State Owned Enterprise, including China Film Group (CFG) and Huaxia Film Distribution Company Ltd. This requirement has also not been implemented. The newly formed CFA, which replaced SAPPRFT in 2018, still permits only one film importer (CFG) and two distributors of foreign films: CFG and Huaxia. While China affirmed in the Agreement that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private Chinese distributors. CFG also still dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to market and obtain the full value of the film.

IIPA recommends that China immediately take action on the following issues, which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to

<sup>60</sup>According to a 2012 White House Press Release: “This agreement with China will make it easier than ever before for U.S. studios and independent filmmakers to reach the fast-growing Chinese audience, supporting thousands of American jobs in and around the film industry,” said Vice President Biden, who spent the day in the Los Angeles area with Vice President Xi Jinping of China. “At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world. See <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/united-states-achieves-breakthrough-movies-dispute-china>.

<sup>61</sup>IFTA Research and Analysis, “China Theatrical Market 2010–2019”.

<sup>62</sup>Id.

enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of "double booking" theatrical releases; 4) eliminate informal restrictions on the number of imported "flat fee" films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system and unofficially-mandated genre-based limit; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and erect no regulation or policy that impedes the collection of license fees by American intellectual property owners.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

As noted above, China is still not in full compliance with the WTO's market access case (DS 363) and many of the market access barriers discussed above raise concerns under China's international obligations, including under the General Agreement on Trade in Services (GATS), TRIPS Agreement, as well as Article 1.2 of the Phase One agreement to ensure fair and equitable market access to persons that rely upon intellectual property protection.<sup>63</sup>

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. thresholds that are too high or unclear, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. In addition, China's civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in other bilateral engagements, including the recent Phase One agreement discussed above, the Comprehensive Economic Dialogue (CED), JCCT, and S&ED, addressing a number of the issues discussed above, including full implementation of the U.S.–China Film Agreement, enhanced enforcement against Piracy Devices, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

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<sup>63</sup>For example, in the 2019 Report to Congress on China's WTO Compliance, USTR acknowledged that the Network Publishing Service Management Regulations raise concern "relative to China's GATS commitment." See A106, report available at [https://ustr.gov/sites/default/files/2019\\_Report\\_on\\_China%20WTO\\_Compliance.pdf](https://ustr.gov/sites/default/files/2019_Report_on_China%20WTO_Compliance.pdf).

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** India plays an important role in the ongoing and future growth of the content creation and dissemination sectors, with its large population of consumers and its status as the second largest market worldwide for Internet services and smartphones. For both Indian and foreign based creative industries, however, the promise of continued growth is threatened by piracy, market access barriers, censorship of video game content, overbroad interpretations of statutory licenses for broadcasting musical works and sound recordings, criminal enforcement difficulties, inadequate term of protection, undue regulation of transfers of rights, overly broad exceptions as well as unclear exceptions which could undermine digital markets, and legal requirements that are out-of-step with technological developments. Strong copyright protection that is fully compliant with international standards and best practices is key to addressing many of these challenges and would transform India into a more engaging business environment for the creation and dissemination of content.

At this time, India's copyright legal framework is missing key provisions to comply with international treaties to which India has acceded, including, the Berne Convention, the Geneva Phonograms Convention, the World Trade Organization TRIPS Agreement, and the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties). IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties, including amendment of its existing provisions and remedies on technological protection measures which fall short of treaty requirements. IIPA also urges the Government of India to withdraw a problematic 2016 Department for the Promotion of Industry and Internal Trade (DPIIT) Office Memorandum concerning the scope of the existing statutory license for broadcasting literary or musical works and sound recordings in Section 31D of the Copyright Act.

In October 2020, the Indian government announced a review changes to potentially amend the Copyright Act of 1957, in part to take into account the COVID-19 pandemic. IIPA and its members submitted comments to the Registrar of Copyrights with specific recommendations based on India's international commitments to copyright protection and best practices. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that weaken copyright protection, purportedly, to respond to the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations on copyright protection. IIPA respectfully requests that USTR monitor this process closely and encourage India to pursue changes to its Copyright Act that comply with the country's international commitments and align the law with international good practices.

The Government of India, in combination with industry, continued to take significant steps in 2020 to improve judicial enforcement, notwithstanding ongoing piracy problems and remaining shortcomings in the criminal enforcement apparatus. In 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India in *UTV Software Communication Ltd. v. 1337x.TO et ors.* In a slate of follow-on cases in 2019 to present, including *Warner Bros. Entertainment Inc. v. Tamilrockers*, the courts have significantly improved upon this initial positive precedent. The Court's decision to issue "dynamic" orders that allow for the inclusion of additional domains accessing the site already blocked, and then to issue "doubly dynamic" orders to block additional domains even while the case is still being adjudicated, are examples of judicial measures that effectively address rapidly evolving

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<sup>1</sup>For more details on India's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of India's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



forms of piracy. The excellent results in the courts in 2019 and 2020 have resulted in disabling access to 155 sites and over 1,300 domains in India.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Strengthen and standardize the national IP enforcement regime through a central authority/ombudsman to coordinate with state-level enforcement units. Establish uniform, state-level cybercrime law and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.

### **Legislation**

- Ensure the recently announced open-ended review of copyright laws is used as an opportunity to shore up stronger protections for the online environment and does not result in the weakening of existing protections.
- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining technological protection measures (TPMs), ensuring sanctions apply to both acts of circumvention and trafficking in devices, software, components, and services that circumvent, and providing civil and criminal penalties; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Reject DPIIT's draft amendments to the Copyright Rules which would appear to broaden the Section 31D statutory license to all Internet transmissions of sound recordings and musical works in breach of India's obligations under WCT, WPPT and WTO TRIPS Agreement (TRIPS).
- Amend Section 52(1)(c) of the Copyright Act to clarify that: (i) service providers will attract secondary liability for copyright infringement if they have actual or constructive knowledge that they were facilitating copyright infringement and/or if they fail to remove the copyright infringing content expeditiously; (ii) only neutral and passive service providers are eligible for safe harbor protection; and (iii) Internet service providers (ISPs) are required to employ measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
- Ensure the private use exception is compatible with the three-step test.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, amend the definition of "broadcast" in the Copyright Act to align it with the WPPT definition and, at a minimum, withdraw the September 2016 administrative Office Memorandum from the DPIIT, which interprets the statutory license as extending to Internet transmissions.
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Repeal the exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers' and other rights holders' right of public performance in respect of "social festivities associated with a marriage".
- Enact the proposed Cinematograph Bill amendments that make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Ensure that copyright infringement offences in the Copyrights Act 1957 are not decriminalized as recommended in a June 2020 proposal.

### **Market Access**

- Simplify the rules and procedures for cinema construction.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national Good and Services Tax (GST), and simplify compliance rules.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.

- Eliminate the Telecom Regulatory Authority (TRAI) mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle, and therefore properly exercise their exclusive rights.
- Eliminate the proposed mandate on non-personal data sharing with government and business competitors that undermines content owners' ability to maintain high standards of data security and intellectual property rights, and severely disadvantages competition in the Indian market.
- Eliminate "must provide" requirements, which further hinder rights holders' ability to exercise their exclusive rights.
- Ease the prohibition on direct-to-home (DTH) operators from entering into exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.

## **THE DIGITAL MARKETPLACE IN INDIA**

By the end of October 2020, India reached 734.82 million broadband Internet subscribers.<sup>2</sup> After China, India is the second largest Internet market by number of users in the world. For instance, the use of licensed music streaming services grew by 25% in 2019 and encompassed over 70% of the overall revenues of the Indian recorded music market.<sup>3</sup> On the audiovisual front, it is estimated by KPMG that India will reach more than 500 million users of online video by 2023, positioning the country as the second largest market for Video-on-Demand (VOD) after China. It is also estimated that video will account for more than 77% of all Internet traffic in India by 2022.<sup>4</sup>

**Online piracy:** Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, video streaming and stream-ripping sites, many of which feature and profit from advertisements of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come pre-loaded with apps that allow users to circumvent subscription services to access infringing content. Through its different forms, online piracy is the greatest threat to the film, television and music industries in India, which rose 62% in March 2020 during the pandemic.<sup>5</sup>

The *Telegram* app, which has over 200 million users globally, has gained a huge following in India and has become a major conduit for pirated audiovisual content because it creates anonymous channels for members of unlimited size, and enables the sharing of files larger than 1GB. While the operators of *Telegram*, who are believed to be located in the United Arab Emirates, are somewhat responsive to rights holders' requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage operators to responsibly cooperate or face greater accountability. IIPA requests an explicit, stand-alone obligation to impose civil and criminal liability and penalties on app stores that sell or provide free-of-charge dedicated piracy apps that provide streaming and/or direct download access to titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable state-level enforcement units to take down infringing apps.

Recorded music piracy is a major issue in India. Despite considerable growth in use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Spotify*), music piracy rates are higher in India than in any other country worldwide except for China, according to IFPI's 2019 Music Consumer Survey. Two-thirds (67%) of Indian Internet users reported that they pirated music in the previous month. This percentage rises to 75% among 16-35 year olds. 63% of Internet users had downloaded pirated music through stream-ripping sites or apps in the previous month. Between June and August 2020, based on Muso data, there were 365 million visits to music piracy sites by Indian consumers. In the third quarter of 2020, the most popular traditional music pirate site, *pagalworld.mobi*, received more than 37 million visits from India; based on SimilarWeb data, the Tamil music piracy site *masstamilan.in* received more than 24 million visits from India; the most popular stream-ripping site,

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<sup>2</sup>Telecommunications Regulatory Authority of India, Press Release 101/2020 (Dec. 23, 2020), [https://www.trai.gov.in/sites/default/files/PR\\_No.101of2020\\_0.pdf](https://www.trai.gov.in/sites/default/files/PR_No.101of2020_0.pdf).

<sup>3</sup>IFPI, 2020 Global Music Report 96.

<sup>4</sup>India's Digital Future, KPMG, August 2019, at <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>.

<sup>5</sup><https://www.livemint.com/news/india/india-sees-big-spike-in-film-piracy-post-covid-19-11589183182123.html>.

*Savefrom.net*, received over 58.4 million visits from India, which means that more people visit *Savefrom.net* from India than from any other country in the world. Other popular stream-ripping services include *y2mate.com* and *yttmp3.cc*, which received over 28 million and 18 million visits, respectively, during the same period.

For 2020, the video game industry reports that India remained fourth in the world (where it ranked during 2019) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks, as well as in infringement of games for the PC platform. India rose from fourth place in 2019 to second place in 2020 in infringement of games on mobile devices.

**Unauthorized Camcording** is an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were traced to Indian theaters. During 2020, the COVID-19 pandemic led to the wide scale closure of theaters in India. However, India is likely to remain a major provider of camcorded films once movie theaters re-open.

**Unauthorized Book Copying:** The publishing industry continues to be concerned with the unauthorized commercial scale photocopying<sup>6</sup> and unauthorized reprint of academic textbooks and professional books (for both the domestic and export markets). While India-only, lower priced editions of textbooks continue to be made available in the domestic market to meet domestic needs, these editions continue to be found in several developed markets around the world. Customs officials should be empowered to take *ex officio* actions with respect to illegal exports of lower priced textbooks (similar to how imports are addressed).

**Other Physical and Retail Piracy:** Although the growing focus of the copyright industries is on online piracy, physical and retail piracy continue in India in many forms, including: (i) optical discs, mobile devices, and flash or pen drives (the “side loading” issue for the recording industry); (ii) the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles; and (iii) unauthorized reproduction of textbooks (as noted above).

## **COPYRIGHT ENFORCEMENT IN INDIA**

Enforcement has improved over the past year in the area of judicial site blocking. Due to the COVID-19 pandemic, the courts have shifted to electronic filings and virtual hearings, which has greatly eased burdens previously imposed on rights holders (such as the old requirement to sign every page of pleadings, which could number in multiple 1,000s). In addition, the courts have expanded their reach incrementally, now blocking “proxy portal” sites used principally to circumvent site blocking orders. The data indicates these actions are having a positive impact in reducing traffic to piracy sites.

However, other enforcement against online piracy operators remains inadequate given the current scale of the problem, officers’ general lack of familiarity investigating and handling digital forensic evidence, and the sophisticated nature of the pirate criminal enterprises operating notorious piracy sites and services. Such piracy operations can evade enforcement with ease with the help of anonymizing software. Additionally, the prospect of seeking criminal enforcement for intellectual property violations is very daunting due to the absence of a centralized IP enforcement authority and the lack of effective inter-agency cooperation at the national level and across the country’s 28 states and nine Union Territories. For example, while criminal copyright infringement falls under a national criminal code, cybercrime enforcement and related proceedings fall upon the individual states. India needs to improve the coordination of its enforcement framework against criminal piracy syndicates.

IIPA recommends the following steps: (i) a focus on inter-state operations of organized crime units engaged in piracy and establishment of state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) the establishment of a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate

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<sup>6</sup>Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

and CBI, that is overseen by DPIIT and directed at copyright infringement occurring online and on mobile devices; (iii) the establishment of a centralized IP crime unit within the Central Bureau of Investigation's Cyber Crime Detective Unit; and (iv) a focus on training prosecutors and police officers on the seriousness of IP offences and their links to organized crime.

**Civil Enforcement and Case Developments:** Significant positive developments occurred in 2019 for copyright protection through the courts in Delhi. In particular, in April 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. V. 1337x.TO*, the court issued "dynamic" orders that allowed for the inclusion of additional domains accessing the site already blocked. In July 2019, the same court decided *Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*, where it created a "doubly dynamic" system where domains can be added to a blocking order while a case is still being adjudicated. As a result of these decisions, and many new cases and "impleadments" (whereby additional domains resolving to the same rogue piracy sites are added to the orders), the audiovisual industry has blocked a total of 150 websites comprising 1,386 domains, which has caused a significant decrease in traffic to the blocked sites and overall piracy in India. In addition, on October 19, 2020, the operators of notorious pirate site *Tamilrockers* announced they would be shutting down the service, after many site blocking actions and a significant number of notices targeting this notorious piracy site.

**Domain Registry Outreach:** A few pirate sites in India, and many piracy sites around the world, employ the .in country code in their domains. Since 2017, the music and film industries had good cooperation with NIXI, the agency in charge of the .in domain registrations, and state-based enforcement units such as Maharashtra Cyber Digital Crime Unit (MCDCU), to suspend the .in domains, and registrars like GoDaddy were cooperative in cancelling their registrations based on false or fraudulent Whois data. Unfortunately, in 2020, NIXI determined it would cease domain suspensions. The current unavailability of timely and accurate Whois data, which has resulted from the Internet Corporation for Assigned Names and Numbers' (ICANN's) overbroad interpretation of the European General Data Protection Regulation (GDPR) led to NIXI's decision to cease domain suspensions, so these global and regional developments are now taking their toll on enforcement efforts in India.

**Collective Management of Producers' "Performance" Rights:** Following Phonographic Performance Limited India's (PPL) reorganization and application for an operating license, DPIIT should re-register PPL as a collecting society to license public performance and broadcasting rights without further delay.

## **COPYRIGHT LEGISLATION AND REGULATION IN INDIA**

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and, as of September 25, 2018, the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, IIPA members believe the current law falls short of full compliance in some respects.

In October 2020, the Indian government announced an open-ended process to review whether changes should be made to the Copyright Act, 1957, in light of the COVID-19 pandemic. IIPA submitted comments to the Registrar of Copyrights with specific recommendations. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that would weaken copyright protection, purportedly, to respond to exigencies of the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations and best practices on copyright protection. IIPA urges USTR to monitor this process closely and encourage India to ensure that any changes to its Copyright Act comply with the country's international commitments.

To fully implement the WIPO Internet Treaties and to align with international best practices, key changes to the Copyright Act of 1957, last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013) are needed, including:

- Section 52(1)(c)
  - Clarify that service providers will attract secondary liability for copyright infringement if they had actual or constructive knowledge that they were facilitating copyright infringement and/or if they fail to remove the copyright infringing content expeditiously;
  - Require ISPs to employ measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content;
  - Clarify that the term “person” in this Section includes ISPs;
  - Eliminate the requirement that rights holders obtain an injunctive court order to prevent infringing content from being reinstated within 21 days of submitting a notice of infringement; and
  - Amend Rule 75 sub-rule (3), (Chapter XIV) giving intermediaries 36 hours to take down content in line with recommendations to more effectively address the speed of distribution of illegitimate content online.
- Section 65A—WCT Article 11 and companion language in WPPT Article 18, require Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.” These articles establish a right against unauthorized access that is independent from acts of traditional copyright infringement. To fully comply with these requirements, the following amendments are necessary:
  - Define the phrase “effective technological measure” to expressly cover common TPMs, such as access and copy controls;
  - Expressly prohibit the manufacturing, importing, trafficking and dealing in circumvention devices and software, as well as the provision of circumvention services;
  - Establish civil *and* criminal sanctions for acts of circumvention, trafficking in circumvention devices and software, and offering circumvention services;
  - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
  - Narrow the scope of exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act”; and
  - Adopt definitions and sanctions for the unauthorized removal of RMI.
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission is not an infringement of copyright. Similar or equivalent provisions in other jurisdictions are narrower and IIPA urges the Government of India to emulate similar limitations. For instance, the exception should require the stored copy to be only temporary, that the copying does not have independent economic significance, and that the sole purpose of the reproduction is to enable transmission in a network between third parties. These safeguards would prevent benefitting infringing services or those seeking to avoid fair licensing terms.
- Section 31D—In 2012, this section created a statutory license for the use of literary and musical works and sound recordings for *radio* and *television* broadcasting. Following the 2012 revision to the Copyright Act, the Government of India published a DIPP Office Memorandum in 2016 (now DPIIT), which interprets the Section 31D statutory license as extending to Internet transmissions. The 2016 Office Memorandum is, however, inconsistent with the Copyright Act, the 2012 revision of the Act, relevant international copyright agreements (notably WCT and WPPT), as well as U.S. law. The text of the law and legislative history are clear that Section 31D is limited to radio and television broadcasting and was not intended to extend to Internet transmissions. Indeed, this was confirmed by the Mumbai High Court in 2019 in its judgment in *Tips Industries v. Wynk Ltd. & Anr.*<sup>7</sup> Despite this ruling, the DPIIT persisted in its interpretation, subsequently publishing draft amendments to the Copyright Rules, which sought to enshrine the DPIIT’s interpretation of Section 31D in secondary legislation, despite its incompatibility with the

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<sup>7</sup>There are several ongoing cases on the applicability of the Section 31D statutory broadcast license to Internet music download and streaming services. In addition to *Tips Industries v. Wynk Ltd. & Anr.*, which is currently on appeal, *Warner Chappell v. Spotify* is pending before the Mumbai High Court, and *Radio Next Webcastion Pvt. Ltd. v. Union of India and Anr.* is pending before the Intellectual Property Appellate Board.

WPPT definition of “broadcasting”,<sup>8</sup> the three-step test,<sup>9</sup> India’s own Copyright Act, and the Government of India’s position before WIPO that broadcasts do not encompass internet transmissions.<sup>10</sup> IIPA recommends the following measures:

- Withdraw the section 31D statutory license altogether to allow rights holders freely to license their rights;
- At a minimum, withdraw the September 2016 administrative Office Memorandum from the DPIIT, that interprets this statutory license as extending to Internet transmissions; and
- Reject DPIIT’s draft amendments to the Copyright Rules, and attempts to amend the Copyright Act, which would appear to broaden the Section 31D statutory license to Internet transmissions.
- Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings from 60 to 70 years accordingly.
- Section 39A—Eliminate the over-regulation of private contracts involving sound recordings. This Section appears to impose contractual limitations for authors established in Sections 18 and 19 on the ability of performers to decide the terms on which to license or transfer their exclusive rights in sound recording agreements. These limitations result in unreasonable changes to established practices in the recording industry. Section 39A does make clear that Sections 18 and 19 shall be applied to performers’ rights “with necessary adaptations and modifications.” Such “adaptations and modifications” should remove any restrictions on the transfer of performers’ rights in sound recording agreements.
- Section 52(1)(a)—Ensure the private use exception is compatible with the aforementioned three-step test codified in the Berne and TRIPS agreements and the WIPO Internet Treaties.
- Repeal the unjustifiable exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers’ and other right holders’ right of public performance in respect of “social festivities associated with a marriage”. Although it is not uncommon for national laws to include limited exceptions for the use of certain copyright works in religious ceremonies, this exception extends to purely social functions, which are customarily subject to the public performance right.
- Enact proposed Cinematograph Bill amendments that would make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility. This would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

Additionally, IIPA urges India to clarify the scope and interplay of the exceptions in sections 52(1)(b) and (c) in the Copyright Act and the IT Act, to prevent legal uncertainty and loopholes in copyright enforcement. Section 79 of the IT Act exempts from liability an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. To ensure a stronger framework, IIPA recommends the following amendments: (i) clarify that safe harbors apply only to ISPs whose activities are of a neutral and passive nature; (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown; (iii) expressly include infringement of intellectual property rights as one of the grounds for intermediaries to remove or disable access to certain contents; (iv) make clear that the obligation to deploy automated tools to identify and remove unlawful content under proposed Rule 3(9) extends to copyright infringing content; (v) require service providers to adopt and effectively implement a repeat infringer policy; and (vi) introduce a penalty provision to give teeth to Rule 3 of the pending draft *Information Technology [Intermediaries Guidelines (Amendment) Rules] 2019*.

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<sup>8</sup>WPPT, Article 2 (“broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;...”) (emphasis added).

<sup>9</sup>All limitations to the exclusive rights of a copyright owner, including the exclusive making available right applying to all interactive online transmissions, must comply with the three-step-test as established in various treaties. See, e.g., WCT Art. 10 (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”). Section 31D, as interpreted by the Department for the Promotion of Industry and Internal Trade (DPIIT) does not comply with the three- step test because it would not be limited to certain special cases and it would conflict with the normal exploitation of sound recordings.

<sup>10</sup>WIPO Report SCCR/23/10, paragraph 639 (2011).

**Draft National e-Commerce Policy:** In July 2020, DPIIT released a Draft National e-Commerce Policy for stakeholder comment. It is unclear whether any legislative proposals will materialize based on this draft Policy. Nevertheless, IIPA suggests this should be an opportunity to meaningfully improve online copyright enforcement. While the objectives of the policy are laudable, and the draft Policy document mentions certain anti-piracy measures to address online distribution of pirated content, piracy in the online environment should be addressed more effectively. In particular, the proposed draft Policy should: (i) limit safe harbor protection to ISPs that are passive and neutral; (ii) require ISPs to implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content; and (iii) enable consultation among industry stakeholders, including creative industries, to make determinations on “Trusted Entities” (whose complaints are resolved on a priority basis by ISPs) rather than leaving such decisions to the sole discretion of ISPs as provided under the existing draft.

**Proposed Decriminalization of Copyright Infringement Offenses:** In June 2020, the DPIIT proposed decriminalization of copyright infringement offences in the Copyright Act 1957. This proposal should be rejected because it would weaken copyright protection, remove an important deterrent for copyright infringers, disincentivize investment in the creative industries and run counter to India’s TRIPS obligations. IIPA urges India to abandon this proposal.

## **MARKET ACCESS ISSUES IN INDIA**

The negative economic effects of market access barriers in India cannot be underestimated. Some of the more egregious market access barriers for IIPA members in 2020 include:

**Foreign Direct Investment Caps:** Although India, in recent years, has raised the foreign direct investment (FDI) cap for Indian television news channels from 26% to 49%, FDI above 49% for news channels requires government approval. Further, FDI in digital news sites is still restricted to the earlier limit of 26%. However, 100% of FDI is allowed in non-news channels with government approval.

**Local Body Entertainment Tax:** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. However, LBET collected by state governments have been left out of the GST, prompting state governments (Madhya Pradesh, Tamil Nadu, and Kerala) to attempt to tax entertainment products over and above GST. Local body taxes significantly increase the tax cost for exhibitors and work against the principle of “One Nation, One Tax” and the intent of the GST model, i.e., to remove a multiplicity of high taxes. IIPA urges India to subsume all local taxes into the national GST system.

**Tariffs:** High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement to reduce tariffs on goods that enhance digital trade in India.

**Bill on the Registration of Press and Periodicals:** Introduced in November 2019, this bill may have detrimental implications for U.S. journal and book publishers operating in India or seeking to enter the Indian market. The bill would require printing press owners, as well as periodical publishers, to register and obtain a Certification of Registration from the Press Registrar General before engaging in any kind of publication, subject to a penalty of INR 50,000 (around US\$700). The bill is unnecessarily broad in scope and could potentially apply to all print and digital publications—regardless of whether they were published in India. The bill is replete with undefined requirements that would make it difficult for press and periodical publishers to navigate. For instance, the bill does not clearly identify the criteria on which decisions on registration will be made, or the factors that would adjudge an applicant press or publication eligible for registration.

**Mandatory Sharing of Non-Personal Data:** In July 2020, the Expert Committee on Non-Personal Data under the Ministry of Electronics and IT released a report proposing to require the sharing of “non-personal data” with the

Government of India and business competitors in India. Such proposal raises serious concerns regarding content owners' ability to maintain high standards of data security in India, severely disadvantages competition in the Indian market, and has the potential to undermine intellectual property rights if copyrighted materials are not expressly exempted.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2021 mainly due to ongoing serious market access challenges. If, at the conclusion of the Generalized System of Preferences (GSP) investigation, the Government of Indonesia has not made adequate progress remedying the deficiencies identified below, IIPA requests suspension or withdrawal of Indonesia's GSP benefits, in whole or in part.<sup>1</sup>

**Executive Summary:** As the fourth most populous country in the world, Indonesia is an important and growing market for the creative industries. Several years ago, the government instituted some positive changes to its copyright law and enforcement system, which have helped rights holders protect their rights in the online environment, and made progress in liberalizing Indonesia's investment framework. Unfortunately, the government has recently taken some troubling steps backward on market access—shifting back to a less business and investment friendly regulatory environment—and on copyright reform—contemplating changes that would weaken existing protections and upend rights holders' longstanding commercial arrangements.

Under the revised Copyright Act and Regulations Nos. 14 and 26 of 2015, rights holders have successfully petitioned the Indonesian government to disable access to over 3,200 domains associated with piracy websites. These regulations have led to significant disruptions of piracy in the country, but the Government of Indonesia should improve them by addressing “domain hopping”—a common tactic pirates use to evade government-ordered site blocking. The Government of Indonesia should also do more to improve the efficiency and capacity of law enforcement in handling digital piracy cases. Highlighting the enforcement shortcomings in Indonesia, criminal groups behind sites like *Indoxxi*, *lk21*, and *Nonton*, which are notorious for piracy, continue to operate these sites by routinely “hopping” domains or through hundreds of copycat domains.

IIPA recommends that in 2021 the Government of Indonesia build on past progress and increase efforts to combat online piracy by updating aspects of its legal framework to add effective remedies and to close existing gaps in protection. The Directorate General of Intellectual Property (DGIPR) is considering a partial revision of the Copyright Law focused on exceptions and limitations, film ownership, and collective management issues, and it is unclear whether this revision will enhance or weaken copyright protection. It is critical that new exceptions or limitations are confined to the three-step test, consistent with Indonesia's international obligations, and that copyright ownership in films resides with the producer unless there is an agreement to the contrary, in accordance with international norms and best practices. Furthermore, any revision of the Copyright Law should revisit a number of problematic provisions that create legal and commercial uncertainty for the copyright industries, including by removing the 25-year reversion of rights provision, removing an overbroad exception to the making available right, clarifying rights of making available and communication to the public, setting forth clear principles of secondary copyright liability, and improving protections for technological protection measures (TPMs) and rights management information (RMI). The government should also extend the copyright term of protection for all categories of works to the life of the author plus 70 years, and to at least 70 years for sound recordings and all works for which term is calculated from publication, in line with evolving global norms. In addition, Indonesia should provide clear guidelines that camcording and live-streaming are illegal and implement measures to reduce instances of these activities.

While the government in 2016 took the very positive step of easing its negative investment list and allowing 100% direct foreign investment in film and sound recording production, and film distribution and exhibition, Indonesia has unfortunately regressed towards a protectionist path. Indonesia should reverse course and address the many

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<sup>1</sup>For more details on Indonesia's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Indonesia's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



market access and investment barriers, and the discriminatory treatment against U.S. copyright materials that make it difficult for the U.S. copyright industries to do business and compete in the country. The broadcasting and radio sectors remain closed and the government in late 2020 enacted Implementing Regulation for Government Regulation No. 71 of 2019 on the Implementation of Electronic Systems and Transactions (GR-71) regulating the over-the-top (OTT) sector. While GR-71 included some improvements over the earlier draft, there remain onerous localization and registration requirements, a content review mechanism with mandatory takedown requirements, and disproportionate penalties for non-compliance. Indonesia's government doubled down on the harmful 2009 Film Law, which continues to cause significant uncertainty for all rights holders and local exhibitors, issuing regulations in 2019 that affirmed many of the most harmful aspects of that law. Moreover, IIPA remains concerned that the Government of Indonesia may not agree to further extensions of the WTO e-commerce moratorium and may seek to charge duties on electronic transmissions, because such duties could significantly harm the country's market for creative digital content and related services. For the music industry, the mandatory multi-layered collective licensing system remains a problem, especially when the government-appointed national collective management organization (CMO) (LMKN) determines tariffs and distribution matters without adequate rights holders' representation and may take as much as 10% of the collections from rights holders as "operational costs." Finally, Indonesia should join the WTO Information Technology Agreement (ITA) Expansion Agreement.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Continue enforcement of the Copyright Law and Regulations Nos. 14 and 26 of 2015 to disable access to piracy sites/domains, including establishing and implementing dynamic, site-specific blocking to cover variants, new primary domains, redirects, mirrors, and proxy domains/sites; and develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders.
- Combat illegal camcording and streaming piracy, including live-streaming, by enacting regulations or guidelines confirming these activities' illegality, followed by implementation of a government program to strictly enforce the laws to reduce instances of these activities.
- Monitor the marketplace and take enforcement actions to combat the proliferation of Piracy Devices (including set-top boxes) and piracy apps.

### **Legislation:**

- Amend or clarify Regulations Nos. 14 and 26 of 2015 on site blocking to prevent "domain hopping" by providing that variants, new primary domains, redirects, mirrors, and proxy sites can be added to the blocking list quickly and easily.
- Revision of the Copyright Law should include the following amendments and/or implementing regulations:
  - Repeal Articles 18 and 30 of the Copyright Law, which provide that the rights in literary and musical works and performers' rights revert back to the author or performer 25 years after their assignment.
  - Repeal the broad copyright exception related to Internet uses (Copyright Law Article 43(d)).
  - Clarify the rights of making available and communication to the public in line with Indonesia's treaty commitments and international best practices.
  - Narrow the scope of the broad exception under Article 44 exempting a number of different uses for a wide array of purposes, ranging from education to criticism to "security and maintenance of government," because that exception appears to be broader than the three-step test under the WTO TRIPS Agreement (TRIPS) Article 13, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
  - Maintain copyright ownership of audiovisual works in the producer who arranged for the work to be made and is best positioned to exploit the work commercially, consistent with international best practices.

- Provide clear guidelines explaining that live-streaming and camcording in cinemas is illegal and violates exclusive rights.
- Extend the copyright protection term to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated from publication, in line with international best practices and to avoid discrimination against local creators and artists.
- Strengthen the protection of RMI and TPMs consistent with Indonesia's international treaty obligations and international best practices, including by ensuring the protection of access controls.
- Amend the definition of "piracy" to encompass acts of online copyright infringement and to remove the requirement of financial gain.
- Implement GR-71, but with additional provisions to increase the transparency and accountability of those online service providers to combat online copyright infringement.

**Market Access:**

- Eliminate provisions from the Film Law that serve as barriers to market access and may damage local exhibitors, such as local screen quotas and the prohibition on dubbing imported films.
- Ensure that OTT regulations comport with Indonesia's international obligations and international best practices that protect copyright and related rights, do not interfere with the exercise of these rights, and promote competition through light-touch regulation on commercial and content review matters, including by not imposing content review or classification requirements on Subscription-based Video-on-Demand (SVOD) providers and avoiding localization requirements.
- Improve the collecting society regulations by ensuring that the management of the LMKN is well represented by music rights holders, and eventually eliminate the LMKN, which is an unnecessary extra layer to the CMO system.
- Join the expanded WTO Information Technology Agreement (ITA), and eliminate the tariff on physical imported films.
- Support an extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Remove the requirement in the Broadcasting Law that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced.

## **THE NATURE OF PIRACY IN INDONESIA**

High levels of piracy in Indonesia continue to inflict losses on Indonesian creators, as well as U.S. book, motion picture and television, music, and video game creators. While the Indonesian government has made efforts to fight online piracy, all actions taken by the government are based on applications by or information from the industry. The most significant concern for the audiovisual and music industries continues to be online piracy, which consists of various types of websites, including linking, streaming, torrent sites, and stream-ripping sites, among others. Indonesia is also a major market for cyberlockers operating from outside the territory. Homegrown piracy sites and "brands" such as *Ik21*, *Nonton*, and *Dunia21* are harming the already fragile creative industry ecosystem.<sup>2</sup> Such sites engage in domain hopping, *i.e.*, even after several administrative site blocking actions brought by the industries and implemented by the government, the sites remain available through alternative domains and copycat sites. The government should address this issue of domain hopping by swiftly issuing orders related to the "hopped" domains and copycat sites/domains. Indonesia should also improve its efforts to address other forms of piracy, which continue to negatively impact its marketplace for creative content, including the growing problem of illegal camcording and live-streaming piracy, and Piracy Devices and apps, which have emerged as a significant means through which pirated motion picture and television content is accessed.

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<sup>2</sup>Sites like these employ gambling advertising and sometimes pornography to lure users.

**Internet Piracy and Mobile Network Piracy Require Continuing Implementation of New Law:** Increasing access to the Internet, including through mobile devices, in Indonesia means there is enormous potential for the legitimate commercial market for online dissemination of copyright works: services like iTunes, Spotify, JOOX, Netflix, iFlix, CatchPlay, Vue, Genflix, HOOQ and several other international streaming services now operate in Indonesia. However, infringing cyberlocker, video linking and streaming sites, and direct download sites with pirated content continue to harm the market in Indonesia, inhibiting legal distribution channels from reaching their full potential.

Working with the motion picture and music industries (including local associations APROFI (Indonesia Producers Association) and ASIRI (Indonesian Recording Industry Association)), the government has taken effective action by disabling access to hundreds of piracy websites and over 3,200 pirate domains since the process began in 2016. Many of the domains that have been the subject of these actions are related to notorious pirate sites like "Indo Twenty One" (i.e., *indoxxi*, *indoxx1*), *Nonton*, *Layarkaca* (*lk21*), or *Dunia21*. In late December 2019, the operators of *Indoxxi* announced plans to cease operations voluntarily, but numerous piracy domains believed to be associated with the same syndicate have continued to proliferate.<sup>3</sup> In addition, dozens of copycat piracy sites have sprung up. The self-help actions of industry, with cooperation from the Indonesian government, have resulted in reductions in visits to the blocked audiovisual and music piracy sites, although most well-known piracy sites employ domain hopping to circumvent the results of site-blocking efforts.<sup>4</sup> Infringing music apps have also become a problem. For example, two app developers, *xyzmedia* and *9media*, created hundreds of mobile apps available on the Android market that offer infringing music streaming services to mobile users. The government should streamline the process for rights holders to ensure access to infringing sites is disabled and to deal efficiently with the problem of domain hopping.

**Music Piracy:** Stream-ripping is currently one of the most popular methods to obtain unlicensed music content online in Indonesia. Many extremely popular infringing websites provide stream-ripping function for users to download music files, including *Savefrom.net*, *ytmp3.cc*, *y2mate.com*, and *mp3juices.cc*.<sup>5</sup> Cyberlockers, most notably *Zippyshare.com*, which receives the highest traffic from Indonesia, *Uptobox.com*, *Racaty.net*, and *Solidfiles.com*, also remain very popular.<sup>6</sup>

**Unauthorized Camcording/Live-Streaming of Movies:** Unfortunately, there was an increase in camcording incidents in 2019. 13 video captures and two audio captures of MPA member motion pictures were forensically matched to Indonesia in 2019, up from five in 2018.<sup>7</sup> Illegal camcording and live-streaming piracy remain big concerns. The government should issue clear guidelines and regulations on illegal camcording and live-streaming piracy, including expressly outlawing these activities, and take the initiative to reduce instances of these illegal activities as a priority.

**Piracy Devices and Apps:** Piracy Devices include media boxes, set-top boxes, or other devices that allow users, through piracy apps, to stream, download, or otherwise access unauthorized content from the Internet. Often used on smart TVs in homes, the devices are sometimes advertised as enabling infringement of copyright or other illegal activities. Chief among these activities is enabling users to access unauthorized motion pictures or television programming, often through apps to remote online sources. This content may be pre-loaded prior to shipment, loaded

<sup>3</sup>"Indo 21" and related brands remain popular for piracy in Bahasa language throughout Indonesia and Malaysia. Notwithstanding *Indoxxi*'s announcement that it is shutting down, the *Indoxxi* group has continued to operate via a network of websites, which are constantly being redirected, including to nameless IP addresses, altered, and modified to evade tracking and extensive site blocking efforts. It is estimated that the "indo 21" brand comprises approximately 45-50 domains, and hundreds of other domains use related piracy "brands" to attract traffic, such as "nonton" and "dunia21." For example, the most popular site of 2019, "*indoxx1.center*," has been redirected to "*idtube.me*," and had 360,856 visits in August 2020. These sites use a U.S.-based reverse proxy service to mask the location of the websites' servers. Currently, the most popular of the Indo 21 domains is "*layarkacaxxi.org*," with 1,029,382 visits in August 2020. At last available update, the site was hosted by India-based Host Palace. Many domains associated with this syndicate have been blocked in Indonesia, Malaysia, and Australia.

<sup>4</sup>Notably, traffic to the most popular music piracy websites, *Planetlagu* and *Laguaz*, dropped substantially in 2018. *Laguaz.net*, the second most visited piracy music service in Indonesia, ended its service in November 2018. But *Planetlagu* constantly changes its domain names, although its monthly visits are now only a small fraction (around 2 million monthly visits) as compared to the peak in 2017 (around 36 million monthly visits).

<sup>5</sup>*Savefrom.net* is currently the most popular stream-ripping site in Indonesia with over 15 million visits from the country, around 8% of its total traffic, during the third quarter of 2020, according to SimilarWeb. *Ytmp3.cc* had over 6 million visits, *y2mate.com* had over 4.5 million visits, and *mp3juices.cc* had over 1 million visits based on SimilarWeb data from the third quarter of 2020.

<sup>6</sup>*Zippyshare.com* received over 13 million visits from Indonesia during the third quarter of 2020, according to SimilarWeb. *Uptobox.com* received over 3 million visits, *Racaty.net* received over 1.7 million visits, and *Solidfiles.com* received over 1.4 million visits, based on SimilarWeb data for the third quarter of 2020.

<sup>7</sup>There were also three audio matches of MPA member titles.

by vendors upon import and prior to sale as an “after sale” service, or loaded by the users themselves. Piracy Devices and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. IIPA encourages the Indonesian government to take steps to crack down on piracy apps and on device manufacturers or resellers who pre-load the devices with apps that facilitate infringement, and take action against key distribution points for devices that are being used illegally.

## **ENFORCEMENT UPDATES**

Although the Indonesian government has taken significant strides to combat online infringement, notably through implementation of regulations for disabling access to piracy websites, more should be done to address this significant problem. Indonesia should increase the capacity of its enforcement officials, who generally lack familiarity in investigating and handling digital forensic evidence, and do not understand the ease with which pirates are able to use anonymizing software and infrastructure to evade detection. Online piracy operators rarely receive deterrent level penalties. The government should criminally investigate operators of major online piracy services, such as *Indoxxi*, and issue penalties strong enough to serve as a deterrent to others. In addition, the government should develop a comprehensive roadmap for addressing online piracy in consultation with both domestic and foreign copyright stakeholders, and enhance industry efforts to disable access to infringing sites with additional enforcement actions in 2021, with the goal of encouraging consumers to migrate to legitimate offerings. This should include issuing revised website-blocking regulations to streamline applications to prevent domain hopping.

**Site-blocking (Joint Regulation of the Ministry of Law and Human Rights and the Ministry of Communications and Information Technology (Kominfo)):** As noted above, implementation and enforcement of Joint Regulations Nos. 14 and 26 of 2015 continued to be successful in 2020. Upon stakeholders’ applications, the Indonesian government has issued numerous administrative orders to disable access to over 3,200 piracy domains that resolved to sites that primarily infringed or facilitated infringement of copyright. These actions are the strongest form of self-help available to copyright owners in Indonesia. Emerging issues in 2021 include the ability to disable access to hopped domains, copycat sites, proxy portal sites and host sites (i.e., cyberlockers) where the primary purpose or primary effect of the site is to infringe or facilitate infringement of copyright. IIPA recommends that the government prioritize IP-related cases in issuing site-blocking orders, and improve the regulations to enable “dynamic injunctions” to prevent domain hopping by allowing variants, new primary domains, redirects, mirrors, and proxy sites to be added to the blocking list quickly and easily.

**Comprehensive Enforcement and Judicial Reform:** The National IP Task Force took the first steps towards the kind of multi-faceted enforcement reform process needed to make significant progress against piracy in Indonesia. Under the direction of the Task Force and with the oversight of the Anti-Corruption Commission, Indonesia should undertake comprehensive enforcement reform and implement judicial reforms. IIPA has outlined recommended steps for such comprehensive enforcement reform and judicial reform in prior filings.<sup>8</sup>

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright law in Indonesia is governed by the Law Concerning Copyright (Number 28 of 2014), which entered into force in 2014, replacing the prior 2002 law, and Regulations Nos. 14 and 26 of 2015, which implemented key provisions concerning online and digital forms of infringement, including provisions intended to implement Indonesia’s international obligations under the WTO TRIPS Agreement, the Berne Convention, the WCT, and the WPPT.<sup>9</sup>

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<sup>8</sup>See e.g., IIPA 2019 at 151.

<sup>9</sup>Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

## **Concerning Provisions in the Copyright Law**

DGIPR is currently considering a partial revision of the Copyright Law, focusing on copyright ownership and collective management issues, as well as exceptions and limitations. The first phase focuses on (1) exceptions and limitations for education, libraries, and archives, and (2) clarifying copyright ownership in films. In the next phase, DGIPR intends to establish a CMO for films in cinemas and on VOD. It remains to be seen whether this revision will result in enhanced or weakened copyright protections. Any new exceptions or limitations (including mandatory collective management of rights or statutory licenses) must be confined to the three-step test, consistent with Indonesia's international obligations (e.g., TRIPS Article 13). Imposing collective management and/or statutory licenses regarding uses of exclusive rights currently individually licensed would clearly not be consistent with the three-step test. On copyright ownership in films, in accordance with best international practices, the copyright should reside with the producer who arranged for the film to be made and is best positioned to exploit the film commercially, unless there is an agreement to the contrary. Finally, consistent with international best practices, any CMO must be voluntary, transparent, and governed by rights holders, without interference by Indonesia's government.

Furthermore, any revision of Indonesia's Copyright Law should address certain provisions that raise serious concerns, including, in some cases, clarifying such provisions through implementing regulations. These include the provisions discussed below.

**Internet Exception:** The Law provides a broad exception under Article 43(d) for "making [available] and disseminating copyright content through information and communication technology media that is non-commercial and/or non-profit in its effect on the author or related parties, or in which the author has expressed no objection to such making or disseminating." Both parts of this provision set an undesirable precedent and, if interpreted incorrectly, would severely undermine legitimate business models built on the rights to control the manner and means in which rights holders authorize the making available and disseminating of their content through information and communication technologies. On its face, this provision collides with Indonesia's international obligations under TRIPS, the Berne Convention, WCT, and WPPT. For these reasons, it should be deleted in its entirety.

**Termination of Transfers:** Articles 18 and 30 (and the transitional provision in Article 122) of the Law provide that rights in literary and musical works and performers' rights that are transferred shall revert to authors/performers after 25 years. This reversion rule frustrates the freedom to contract and is an unlawful deprivation of property rights, which are protected by the Indonesian Constitution. It is also unclear how these provisions operate in practice, which has created substantial legal uncertainty. One apparent result of this legal uncertainty is that large catalogues of recordings are not available on digital music services in Indonesia, to the detriment of producers, performers, authors, publishers, and the Indonesian public. These provisions should be removed.

**Clarification of the Making Available/Communication to the Public Right:** Article 27 of the Copyright Law provides equitable remuneration rights to producers and performers for broadcasting and communication to the public of sound recordings. However, the Law defines communication to the public to include making available. This is inconsistent with Articles 23 and 24, which provide exclusive rights for performers and producers to make available their sound recordings in accordance with Article 14 of the WPPT. The definitions in the Copyright Law should be amended to remove this inconsistency and ensure the law does not contravene Indonesia's obligations under the WPPT.

**Criminal Case Structure and Penalties Weakened:** For criminal cases, the Law took steps backward from the 2002 law by making criminal cases complaint-based, rather than prosecuted on an *ex officio* basis; removing minimum mandatory statutory criminal penalties; and providing for non-deterring fines, including for landlord criminal liability. In addition, Article 95 of the Law is highly unusual in that it appears to mandate "mediation" before a piracy case can be prosecuted. The purpose and operation of this provision in practice is unclear.

**Exceptions and Limitations/Compulsory License:** Article 44 of the Law contains a broad exception exempting a number of different uses for a wide array of purposes, ranging from education to criticism to “security and maintenance of government.” On its face, the broad scope of the uses and purposes contained in this exception appears to go well beyond what is permissible under TRIPS, the Berne Convention, WCT, and WPPT, despite a well-intended, but ineffective, attempt to narrow the provision through inclusion of part of the Berne three-step test. The references in Subsections (1)(a) and (d) to the three-step test omit the limitations of “certain special cases” and uses that do “not conflict with a normal exploitation of the work by the copyright owner.” The two other subsections included in this exception do not contain any safeguards required under the three-step test. IIPA recommends that the Indonesian government clarify the application of the full three-step test to each use and purpose contained in this exception through amendment of the provision itself or by implementing regulations. Furthermore, implementing regulations should provide guidance to help prospective users determine whether their use falls within the appropriate bounds of the three-step test.

In addition, Article 84 of the Law includes a compulsory license provision that applies to “works” and is not expressly limited to any subject matter. It should be further clarified and narrowed to ensure it is consistent with obligations under TRIPS, the Berne Convention, WCT, and WPPT.

**RMI Violations and TPMs Provisions:** The Law provides that RMI violations occur only when moral rights are affected. WCT and WPPT clearly require “adequate and effective legal remedies against … acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty [or the Berne Convention]*” (bracketed text in WCT only; emphasis added). The scope of the RMI provisions should be expanded accordingly. Protections for TPMs should be strengthened consistent with Indonesia’s obligations under the WCT and the WPPT, and with international best practices, including by ensuring the protection of TPMs that control access to copyrighted works (i.e., access controls).

**Registration, Invalidity, and Recordation Requirement:** While registration of copyright remains voluntary under the Law, the substantive examination for voluntary registration will apparently address whether a work is “substantially similar” to another previously registered work as a ground for refusal. This substantive examination is intended to enable the authorities to review and invalidate false applications or registrations to address a concern about abuse of the voluntary copyright registration process. IIPA suggests introducing a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application or applies in bad faith. Additionally, the registration and recordation system potentially violates the prohibition of formalities under the Berne Convention. Article 83 appears to impose a requirement to record licenses, with lack of recordation meaning a license “shall have no legal effect on third parties.” This would seem to suggest a Berne-prohibited formality if, for example, lack of recordation was used to deny the exercise of copyright from a particular licensor or licensee. Implementing regulations should clarify that a failure to record transfers and other changes will not deny copyright protection to the registrant. Moreover, recordation is not feasible for industries and rights holders that control a large number of works.

**Provisional Measures:** Under Article 108 of the Law, preliminary (provisional) injunctions take too long to obtain. Under the Indonesian law, there are no legal remedies, such as preliminary injunctions, available to the claimant before submitting the claim. In that respect, Indonesian law does not meet the standards of the TRIPS Agreement (i.e., Articles 41 and 50), which require that countries must make available “fair and equitable” civil remedies and procedures to stop and prevent infringements, including provisional measures granted *in audeita altera parte*.

**Statutory Damages:** There are no statutory damages under Indonesian copyright law. In the case of copyright infringement, the copyright holder can claim a justifiable amount by way of compensation. Compensatory and punitive damages are available under the Civil Procedure Code. Judges, however, may only grant damages based on what the parties request in their claim, and judges are prohibited from granting damages that exceed what the parties previously requested. The successful party must prove losses with sufficient and actual evidence.

**Overly Restrictive Definition of Copyright “Piracy”:** Article 1, Subsection 23 of the Law provides an overly restrictive definition of copyright piracy as “distribution” of unlawfully duplicated “goods” to “obtain economic benefits.” This definition is largely redundant, since all acts of copyright infringement amount to “piracy” (unless permitted under an exception). It is also inconsistent with Article 61 of the TRIPS Agreement because it is limited to goods and requires a showing of financial gain. The definition should be amended to expand the scope to include acts of online copyright infringement, and remove the requirement of financial gain.

### **Regulations Nos. 14 and 26 of 2015 (Site Blocking)**

As noted above, there is currently no efficient way to prevent domain hopping other than to file a separate application to block the “hopped” domains, which is time consuming and cumbersome. The regulations should be amended to prevent domain hopping by allowing variants, new primary domains, redirects, mirrors, proxy sites, and alphanumeric variations to be added to the blocking list quickly and easily.<sup>10</sup> This would bring Indonesia’s regulation in line with other countries’ site-blocking provisions or rulings, which allow for such “dynamic” injunctions (examples include the United Kingdom, Australia, India, and Singapore).

### **Other Needed Legal Reforms**

**Unauthorized Camcording and Live-Streaming of Motion Pictures and Television Content:** The Explanatory Memorandum to the 2014 Copyright Law indicates that the unauthorized use of an audiovisual recording device in a movie theater (camcording) can be addressed under the reproduction right. This important recognition by the Indonesian government of the serious nature of unauthorized camcording should be followed with enforcement, including: (i) fostering greater cooperation with cinema owners to fully uphold and enforce the Law; (ii) taking and supporting targeted enforcement actions; and (iii) where warranted, proceeding with prosecutions against those engaged in this damaging activity.<sup>11</sup> As noted above, camcording incidents increased in 2019. In addition to increased enforcement efforts, regulations should be introduced that would provide a clear legal basis to prohibit camcording (as well as live-streaming) in cinemas and to strengthen enforcement remedies available.

**Term Extension:** The Government of Indonesia should extend copyright term of protection to the life of the author plus 70 years for all categories of works, including cinematographic works and video games, and to at least 70 years from publication for sound recordings and all works for which term is calculated based on publication, in line with international norms. This will provide greater incentives for production and give producers a stronger incentive to invest in local industry, thus spurring economic growth and tax revenues; and enable producers to continue offering content to local consumers in the latest formats. After the 2014 Copyright Law amendment, the term of protection of certain categories of works, including books, music, dramas, visual art, and architectural works, are protected for the life of the author plus 70 years. However, the protection for other categories of works, such as cinematographic works and video games, remains at life of the author plus 50 years, and the term of protection for sound recordings and all works owned by a legal entity is just 50 years from publication.<sup>12</sup> There is no justification for such varied treatment, and protection should be extended accordingly.

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<sup>10</sup>Specifically, new subsection (3) to Article 6 of the Regulations could be amended to provide: “Additional domains, sub-domains, URLs or other IP addresses whose sole or predominant purpose is to enable or facilitate access to the same website in the report shall be added to the receipt report register of copyright infringement and/or related rights, when reported to, and verified by, the Director General of Intellectual Property, from time to time, and subject to the same recommendation.”

<sup>11</sup>Preferably, an express provision would have been added, defining the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a strict liability criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, agreed in 2011 on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken. These include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States, 11 November 2011.

<sup>12</sup>Note that the term of protection has limited practical effect for certain works in view the 25-year reversion of rights regarding literary works, performances, and musical works, as discussed above.

**Strengthening the Organized Crime Statute:** Since many operators of piracy websites are engaged in other criminal activities, copyright infringement should be included as a predicate crime for remedies under the Indonesian organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets and asset seizure, etc.

## **Online Intermediary Regulations**

**Regulation No. 71 on Electronic Systems and Transactions:** In March 2020, the Indonesian government conducted a public consultation on GR-71, which subsequently issued in November 2020. GR-71 regulates certain activities of online services and online intermediaries. This regulation includes provisions addressing the essential role of online intermediaries in combatting unlawful activities online, which is a positive step towards creating a fair online marketplace. However, the regulation should go further to combat online copyright infringement, including requiring additional measures to improve transparency and accountability of online service providers and intermediaries. For example, the regulation should: (i) require certain intermediaries, including payment providers, domain registrars, and hosting services, to implement a “know your business customer” (KYBC) policy and make sure their resellers do the same; (ii) require a public registry for domain registrants that includes accurate data held by domain registrars, registries, or the Ministry of Communication and Information Technology; and (iii) create a legal basis for rights holders to obtain details from the Ministry regarding certain online service providers known as “private scope Electronic System Administrators (ESAs),” which would allow rights holders to take direct action. The regulation should also include a “duty of care” on all intermediaries that requires them to take reasonable steps to limit, stop, and prevent online copyright infringements, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining copyright infringement. Non-compliance should result in liability and fines.

## **MARKET ACCESS AND RELATED ISSUES**

**Issue Clear Guidelines on Implementation of the Decree Removing Film and Recording Sectors from the Negative Investment List and Continue Removing Barriers to Entry for Other Sectors:** In May 2016, the Government of Indonesia issued Decree No. 44, removing film and recording studios from the negative investment list (NIL) and enabling 100% foreign direct investment in film and sound recording production, as well as film distribution and exhibition. The Indonesian government should follow this very positive move by issuing clear guidelines on the implementation process of the decree and removal of market barriers. In addition, many media sectors remain on the NIL, preventing direct foreign investment in other Indonesian media industries.<sup>13</sup>

While the removal of the film industry sectors from the NIL is a positive step, broader investment in the distribution structure for all media sectors would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. The same investment access opened to the film industry should be afforded to the radio and television broadcasting service sectors.

**Eliminate Problematic Provisions from the Film Law:** In 2019, the Indonesian government expressed its intention to amend the 2009 Film Law, but regulations issued in late 2019 affirmed harmful provisions in the existing Film Law, including a 60% screen quota for Indonesian films and a prohibition on dubbing of imported films (with limited exceptions). If implemented, the screen quota would likely lead to lost revenue in local theaters and limited choices for Indonesian consumers, limit local industry's exposure to the expertise and skill of foreign producers, and leave a huge opening for the purveyors of pirated content. The flexibility to dub imported films into a local language on a title-by-title basis is a commercial decision that should be left to content owners based on business considerations and market forces.

Furthermore, the 2009 Film Law and regulations therein include some ambiguous provisions that purportedly aim to limit unfair trade practices or monopolistic conduct, such as restrictions on vertical integration and arbitrary limits

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<sup>13</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree.

on vertical supply between content distributors and theatrical exhibitors. Indonesian authorities should remove these provisions because they could have unintended consequences, such as restricting foreign participation in the market and curbing business efficiency. Indonesia should amend the Film Law and incorporate international best practices, notably recognizing the exclusive rights of copyright owners to determine whether, how, and where their works are made available. Doing so will avoid creating new barriers that could undermine Indonesia's plan to attract foreign direct investment in the film sector.

**Collective Management Organizations:** A December 2018 amendment to the Regulation for Collective Management Institutions (Regulation No. 36/2018) has not improved collective licensing issues faced by the music industry. Certain CMOs for musical works and sound recordings continue to be placed under the single-window LMKN as a "national CMO" that adds an unnecessary extra layer to the collective licensing system. The government-appointed LMKN sets the tariff, collects the remuneration (through agents), and decides how the collections are split among different groups of CMOs; yet, the management of LMKN is not adequately represented by the rights holders whose rights it purports to represent. As a result, those rights holders involved have little control over LMKN's governance and operations, including the setting of tariffs, which are fixed and set extremely low. Even though LMKN delegates the collection function to some of the CMOs, the regulation permits LMKN to deduct 10% from the collections as operation costs at the expense of rights holders' interests. Further, the problem of the existence of numerous CMOs to manage the same categories of rights remains, which has caused unnecessary confusion and inefficiencies in collective licensing.

**Advertising Restrictions:** Indonesia's Broadcasting Law (No. 32 of 2002) includes a requirement that any free-to-air TV and pay-TV advertising aimed at the local market must be locally produced. Although regulations issued in 2007 provided a series of exemptions, the Indonesian Broadcasting Commission's (KPI) 2015 statements regarding implementation raised concerns. If implemented, such a burdensome rule would be harmful to consumers, who would likely absorb the additional associated costs. The timeline for revising the Broadcasting Law remains unclear.

**Customs Valuation:** Indonesia imposes a tariff on imported films that is based on the running time of the film, resulting in high duties for many U.S. feature films. Indonesia should join the expanded ITA to address this issue and to stay consistent with international best practices.

**Customs Duties on Electronic Transmissions:** In creating new tariff lines for digital products that are transmitted electronically, which includes a threat of imposing customs duties on those products, Indonesia has set a troubling precedent that raises serious concerns with respect to the WTO e-commerce moratorium on customs duties for electronic transmissions. Heightening this concern, the Government of Indonesia has recently indicated that it may not agree to further extensions of the moratorium. These actions could significantly harm the country's market for creative digital content and related services, including SVOD services.

**Content Review:** In October 2015, KPI notified platform operators regarding pre-release content review and classification requirements for programs on all TV channels. KPI suggested that non-compliance may violate the Broadcasting Ethics and Broadcast Program Standard, thus subjecting operators to fines and imprisonment. If implemented, these requirements would negatively impact the pay-TV industry by raising costs, creating new barriers to entry, and reducing consumer choice.

**OTT Regulations:** The Ministry of Communication and Informatics in November 2020 promulgated regulations through its implementation of GR-71 that require foreign OTT service providers to complete mandatory local registration, and that include localization requirements to prevent processing and storing data offshore and create content review mechanisms requiring mandatory takedowns, without reasonable practical procedural considerations, for OTT content. Such requirements would stifle business development and add a burdensome barrier to market entry. Furthermore, in August 2019, KPI suggested that it would subject SVOD providers to its strict content monitoring, content review, and classification requirements, which would raise another market access barrier for OTT content.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In January 2020, USTR, pursuant to the 2012 investigation, held a public hearing to review country practices in Indonesia regarding intellectual property rights and market access issues, and to determine whether Indonesia still qualifies for beneficiary status under the GSP. Under the statute, the President of the U.S. must consider, in determining whether a country should continue to be designated as a GSP beneficiary country, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.”<sup>14</sup> While the Indonesian government has made past progress towards meeting the GSP criteria, these efforts have recently stalled and regressed in some respects. IIPA urges the Government of Indonesia to make further progress to remedy the deficiencies outlined in this report, to avoid suspension or withdrawal of Indonesia’s GSP benefits, in whole or in part.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

While passage of the Copyright Law of 2014 made progress toward fulfilling Indonesia’s obligations under TRIPS, the Berne Convention, WCT, and WPPT, several provisions of the Copyright Law raise serious concerns under these agreements. As set forth in more detail above in the “Copyright Law and Related Issues” section, the broad exceptions and compulsory license provision, provisions regarding civil and criminal remedies, limited RMI violations provision, definitions of making available and communication to the public, and recordation requirement appear to be out of compliance with Indonesia’s international obligations. In addition, as set forth in the “Market Access” section, there are areas in which the Government of Indonesia may fail to provide equitable and reasonable market access to foreign rights holders, as set forth in the GSP criteria.

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<sup>14</sup>19 U.S.C. §§ 2462(c)(4) and (5).

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** In 2020, to implement the obligations of the U.S.–Mexico–Canada Agreement (USMCA), which entered into force on July 1, 2020, Mexico made significant improvements in its current IPR regime, revising its Copyright Law, Criminal Code, as well the Federal Protection of Industrial Property Act. These are very positive developments. Mexico ratified the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, but it took until 2020 for Mexico to implement these treaties. Two significant 2020 reforms include the addition of protections against the circumvention of technological protection measures (TPMs) and for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models such as streaming and on-demand services. Without these provisions, the growth of the digital marketplace in Mexico has been hampered by an IPR legal framework decades behind international norms.

There are still remaining obstacles. First, parts of the 2020 legal reforms are being challenged in court on constitutional grounds (although the new laws remain in force in the interim). Second, these new laws will need to be properly enforced and adjudicated, including staffed and resourced. For a long time, criminal enforcement activity in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. These deficiencies were not corrected by the legal reforms of 2020. Success in a criminal case still depends on proving a “direct economic benefit” to the infringer, instead of focusing on the harm caused to a rights holder by infringement (the exception—the result of a 2020 reform—is for criminal prosecutions against camcording). The “direct economic benefit” for criminal cases (unique to Mexico) is a difficult hurdle to overcome for a prosecutor willing to commence a case in a country already short on resources for such cases.

Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake, and are slowed by procedural hurdles. In a positive development in 2020, new laws mandate compliance with notices to remove infringing content, with measures to prevent infringing content from being uploaded again, as well as providing safe harbors for services and platforms that comply with the notices. However, the IPR legal regime is still missing some of the basic tools to address online infringements that can spur cooperation between rights holders and website owners and service providers. For example, there is only general liability in current law and no clear principle of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions.

### **PRIORITY ACTIONS REQUESTED IN 2021**

The copyright industries recommend the following to the Government of Mexico as priority legal reform and enforcement steps for 2021:

#### **Legal Reforms**

- Implement all of the legal reforms mandated by the USMCA and other treaty obligations—in the Copyright Law, and in the Industrial Property, Criminal, and Criminal Procedure Codes by:

<sup>1</sup>For more details on Mexico's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- removing the proof-of-profit (“direct economic benefit”) requirement as a prerequisite to criminal liability (including for satellite and cable decryption); adding aiding and abetting criminal provisions for both physical and online piracy; removing the for-profit limitation on the making available right, and clearly including a violation of making available in the Criminal Code;
- granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the Attorney General’s Office (FGR) and Customs can and will act against so-called “goods in transit”;
- amending the Civil Code to add pre-established remedies, and to recover costs and attorney’s fees; current law does not provide compensatory damages, including lost profits or sufficient monetary damages, nor costs or fees; and
- enacting legislation to provide clear modern rules establishing third party liability for copyright infringement, including for parties contributing, inducing or promoting infringement of copyright and related rights, along with proper injunctive relief and incentives for efficient and effective notice and takedown systems with ISPs, and including repeat infringer measures.

### **Criminal Actions, Raids and Prosecutions**

- Fully implement the USMCA enforcement obligations by:
  - implementing a strategic national *ex officio* anti-piracy campaign with a consistent focus on major targets, emphasizing coordination of the police and prosecutorial resources, and prominently using (and properly resourcing) the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDADI) within the FGR;
  - improving the FGR forensic standards for digital enforcement and eliminating the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases;
  - addressing the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages (and enhancing penalties against repeat importers);
  - ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market; and
  - using *ex officio* authority to enforce the new anti-camcording criminal penalties.

### **Administrative Enforcement**

- Fully implement the USMCA enforcement obligations by:
  - providing the Institute of Industrial Property (IMPI) with: (1) the resources, training and political directives to apply its *ex officio* powers to investigate online infringements and audits of infringing websites; (2) sufficient resources for the takedown of infringing materials; (3) the ability for regional officers to conduct local raids (and improving IMPI coordination with the Federal Police so IMPI can take enforcement actions in difficult or risky areas with police security); (4) coordinated investigative and other support from the Cyber Police (in the National Guard); and (5) resources to help empower the newly-formed Antipiracy Committee; and
  - providing INDAUTOR (the National Author’s Rights Institute) with more resources to increase and strengthen its mediation capabilities.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders.

### **Prosecutions, Judges and Courts**

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy; focusing on online service operators, and seeking deterrent sentences, including jail time and fines;
- Initiate actions against entities failing to provide remuneration for the public performances or broadcasting of sound recordings; there are very serious concerns that rule of law problems render actual royalty collections currently both unsafe and ineffective; and
- Investigate and prosecute IPR infringement cases absent proof of actual lost profits.

## **THE COPYRIGHT MARKETPLACE IN MEXICO**

As online access, as well as mobile phone and smartphone use, have grown exponentially in Mexico in recent years, legitimate online markets have developed, but their growth has been hindered by weak enforcement, as well as by outdated laws. A wide variety of popular pirate services compete with legitimate digital markets in Mexico, including stream-ripping services, sites offering unauthorized downloading and streaming of music, film and video games, MP3 search engine sites that provide links to enable the downloading of film, music and video game content hosted on cyberlocker platforms, BitTorrent index sites, and online markets offering video game-related digital goods, including usernames, passwords and user account information. The COVID-19 crisis significantly increased the consumption of unauthorized materials, as it also drove traffic, to a lesser extent, to legal sites. There are some large local pirate websites, but many of infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Colombia, Argentina, Germany and France, among others), and are routinely accessed by individuals in Mexico.

A major concern to the growth of healthy legal markets is the increased availability of Piracy Devices (PDs, also referred to as illicit streaming devices) and applications (apps), including media boxes, set-top boxes or other devices that allow users, in combination with illegal software apps, to stream, download, or otherwise access unauthorized content from the Internet. The Motion Picture Association (MPA) reports that subscription television piracy and the use of PDs are the two fastest growing problems in Mexico. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican grey markets. This includes the use of web browsers and video apps to allow playback of films and television programming. These devices are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are advertised as facilitating easy access to remote online sources of unauthorized entertainment content. The devices are imported into Mexico either pre-loaded with the apps, as an after-sale service, or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal actions against these vendors and the operators of the infringing apps used on these devices.

The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide. In 2020, Mexico ranked 19th overall in the world (down from 14th in 2019) in the number of connections by peers participating in unauthorized file sharing of video games on public peer-to-peer (P2P) networks. Mexico ranked seventh (down from fourth in 2019) in unauthorized file-sharing of console-based games, 12th for video games on mobile devices (up from 14th in 2019), and 23rd using PCs (down from 20th in 2019).

For some video game companies, Mexico is now among the top countries for P2P sharing of infringing video game files and unauthorized in-game digital goods, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of subscriptions, as well as account usernames and passwords, is rampant for video games. For recorded music, the vast majority of legitimate revenue in Mexico is from digital music services, including subscription services. Although music industry revenue continues to increase, the per capita spending on music in Mexico is only US\$1.41 per year, compared with US\$22.11 per capita in the U.S. per the IFPI Global Music Report (released in September 2020). At the same time that music streaming services are developing, the most widespread source of music piracy is stream-ripping. IFPI's Music Consumer Study (2019) found the rate of piracy in Mexico was 44%, one of the highest in the world, with high rates of stream-ripping and mobile app downloading, as well as high rates of cyberlocker and BitTorrent site use. Popular stream-ripping sites such as [y2mate.com](http://y2mate.com), [mp3-youtube.download](http://mp3-youtube.download), [savefrom.net](http://savefrom.net) and [flvto.biz](http://flvto.biz) (each with millions of visitors per month), and several cyberlockers (e.g., [1fichier.com](http://1fichier.com) and [zippyshare.com](http://zippyshare.com)) are the most problematic, along with "linked" piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links, and these platforms are especially popular distribution channels for pre-release piracy.

The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of online infringement of entertainment software in Mexico. Circumvention is accomplished by installing “modification chips” (“mod chips”) in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated video games, or by modifying the video game platform’s operating system to facilitate the play of pirated video games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces that are then assembled in Mexico. There have been 19 major markets identified that sell circumvention devices, as well as pirated copies of video games (one-third of these markets are in Mexico City). The devices often include memory cards containing up to 400 unauthorized copies of video games as part of the sale. Top sellers on *Mercado Libre* (on the U.S. government’s Notorious Markets list for online piracy sites in 2020) offer dozens of different mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. Cheaper offerings are now available for “virtual chip” installation (an alternative version of soft mods) for 150 to 250 Pesos (US\$8 to US\$13) for installation services and pre-loaded games. Enforcements against distributors of circumvention devices have, until the 2020 amendments, not been available, because Mexican criminal law prohibited only the domestic manufacture of such devices, but not their distribution. The 2020 laws correct this deficiency by shutting off the supply line of devices and systems, not only if domestically manufactured, but also if imported into or distributed in Mexico. IMPI has indicated it will now proactively engage in this type of online enforcement, which is encouraging.

**Camcord Piracy:** Criminal enforcement against camcording has historically been ineffective in Mexico for two reasons: (1) inadequate laws and (2) weak and infrequent enforcement of the existing laws. One of the 2020 amendments, adopted to comply with the USMCA, corrects the legal regime deficiency. The new Article 424bis of the Criminal Code criminalizes camcording, and, in the only exception in the Code, deleted the for-profit motive as a prerequisite for criminal infringement, which had thwarted effective prosecutions of camcording. However, the new provision does require a rights holder to file a claim. Until the 2020 change, the few camcording criminal convictions that had been successful were the result of prosecutions based on an array of crimes other than camcording. As reported in prior IIPA filings, many MPA member films have been sourced from illicit camcords in Mexican theaters in recent years. In 2020, due to the COVID-19 pandemic and the resulting closure of theaters, there are no camcording statistics to report. It is hoped, once theaters re-open, the new laws and better enforcement will properly address this problem.

**Satellite and Cable Issues:** Satellite and signal piracy remain a major concern in Mexico. Another positive development in 2020 was the adoption of two amendments to the Criminal Code (Federal Penal Code) to: (1) impose criminal sanctions for infringers receiving or distributing encrypted programs transmitted via satellite signals without authorization from the legal satellite distributor (Article 168bis); and (2) criminalize the modification and distribution of devices or systems intended for signal theft (Article 426). Until these changes, the Criminal Code covered only encrypted-program-carrying satellite signal theft. The new provisions also include penalties for those aiding or abetting these activities. Also in 2020, Mexico amended the right of public communication in the Copyright Law to include the making available of works through wire or wireless means (as required by the USMCA), so there is clear protection for both cable and satellite dissemination. However, Mexico did not amend the Copyright Law or Civil Code to add proper USMCA-mandated sanctions, i.e., civil remedies, for cable systems, and still needs to do so.

**Hard Goods Piracy:** Although stemming digital piracy is the priority of the copyright industries, hard goods piracy continues on the street and at markets. Three physical markets are on the U.S. government’s Notorious Markets 2020 list (released in January 2021). The first two have been on the list since 2012: (1) El Tepito in Mexico City, an open-air 80 square block market in the middle of Mexico City selling video games, modified consoles and game circumvention devices; and (2) Mercado San Juan de Dios in Guadalajara which is the largest indoor market in Latin America with close to 3,000 vendors selling pirated films, music, video games, and video game circumvention devices (sold by an estimated one-third of all of the market’s vendors). A third market, La Pulga Rio in Monterrey, was added to the list this year; it has 300 stalls selling video games (as well as counterfeit apparel and products).

## **COPYRIGHT ENFORCEMENT IN MEXICO**

Budget cuts in recent years, including in several key IPR enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. There continues to be no coherent or coordinated plan to address online piracy, as hard goods piracy still appears to be the primary focus of enforcement officials. One long-recommended enforcement step is the development and adoption of a high-level national anti-piracy plan to target major online piracy and counterfeiting operations, and to coordinate federal, state and municipal enforcement activities. This would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including in local entities that rarely work on combating piracy at all. Instead of a centralized coordinator for copyright enforcement, there are three federal agencies engaged in copyright enforcement in Mexico. The FGR (formerly, the PGR) is responsible for federal criminal enforcement. IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR is responsible for registering copyrights, and can conduct mediation proceedings for aggrieved rights holders.

In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaría de Gobernación*) have assisted rights holders by providing information on illegal software websites, and have also seized domain names of infringing sites.

### **Criminal Enforcement**

Since Mexico transitioned to an adversarial justice system, criminal copyright cases are no longer prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This has resulted in prosecutorial delays of IP related crimes, including at FGR. Good cooperation continues to exist between rights holders and IMPI, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR. However FGR prosecution continues to suffer from outdated procedures, insufficient resources, long delays (years) for cases to resolve, and the lack of deterrent sentences.

A complicating element in combatting video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by FGR) that each copy of an infringing product must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*). This is done as a general practice even though the law does not explicitly require it. Under the existing system, when the comparison involves multiple copies of the same infringing game, music, or film, rights holders must submit an equal number of legitimate game, music, and film DVD copies to the experts for comparison. The *peritos*' reports take much too long to complete and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Although Article 5 of the Copyright Law refers to copyright registrations as only voluntary ("recognition of copyright and neighboring rights does not require registration"), in practice the FGR and courts require registrations to commence a criminal case. The USMCA (Article 18.72.1) requires Mexico to provide clear presumptions of ownership in civil, criminal and administrative matters, based on the copyright notice appearing on the work, or on a screen, and, without the need for a mandatory and certified registration. Mexico needs to make this change to its Copyright Law for all works (it exists for sound recordings), even after the 2020 amendments. Last, a continuing obstacle to effective criminal enforcement is that file sharing via online networks is generally not considered a serious legal violation by Mexican courts. As a WTO TRIPS obligation, Mexico should have "effective" criminal remedies, including "imprisonment and/or monetary fines," available in cases of "willful ...copyright piracy on a commercial scale." Unfortunately, remedies in Mexico for commercial scale piracy have not been effective, and are hampered by the noted procedural hurdles.

**Structural Reforms and Jurisdictional Issues:** IIPA continues to recommend several detailed "structural" reforms and agency actions to improve criminal enforcement.<sup>2</sup> An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies to identify and target individuals responsible for large-scale distribution and importation of pirated goods, including major organized

<sup>2</sup>See <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf> at pp. 46-47.

crime syndicates. The priority should be criminal enforcement directed against digital piracy with a coordinated plan among FGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO) and the Federal Police. SAT remains engaged with FGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. UEIDDADI needs resources and training focused on technology to properly undertake criminal investigations directed against digital piracy. Until 2016, there was a specialized IP enforcement sub-unit within UEIDDADI; the sub-unit was disbanded. The Government of Mexico needs to properly staff and resource UEIDDADI to address IP cybercrimes, as well as staffing other key IPR enforcement units in FGR and the police. FGR can still take *ex officio* actions, but criminal cases need a complaint to be filed by a rights holder to commence a case. As with other IP enforcement government entities, IMPI, the specialized agency for intellectual property authorized to take administrative actions against infringers, is also severely under-resourced; it is also hampered by outdated procedural rules. One positive 2020 change in the Federal Industrial Property Law adds the ability for rights holders to calculate and collect damages for IMPI-imposed sanctions against infringers.

FGR has a special deputy attorney general department to focus on organized crime syndicates—the Office of Attorney General for Federal Crime Investigation (SEIDF)—which also created UEIDDADI, but this unit is under-resourced. There is also a FGR Organized Crime Investigative Division (FGR-SIEDO) with excellent investigators and attorneys, and resources that the other divisions do not have, including paid informants, wire-tapping authority and witness protection programs. IIPA members recommend better coordination between FGR-SIEDO and FGR-SEIDF, as well as additional resources and training.

A third structural recommendation is to coordinate municipal, state, and federal government criminal enforcement actions (within the 32 states and 2,400 municipal governments). A long-standing IIPA recommendation was for enforcement agencies to adopt clear and consistent policies for the expeditious destruction of seized infringing goods. Another of the positive 2020 amendments (in the Federal Industrial Property Law) gives IMPI the authority to order the destruction of infringing goods 15 days after a final court decision, an accelerated timetable. The copyright industries have also successfully applied the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the FGR enforcement raids continue to find their way back into the black market. A fourth recommendation (i.e., from those industries still confronting hard copy piracy) is for PROFECO to use its *ex officio* powers for consumer protection, and its resources, against street market piracy.

**IPR Expertise in the Judiciary:** A continuing weak spot in Mexican IPR criminal enforcement is the judiciary. There is an ongoing need for training to improve IPR expertise by judges—especially training on technology, digital distribution and piracy, and the use of circumvention technologies. Other weaknesses include the absence of specialized IP judges and courts, and non-deterrent sentencing in most criminal cases where sentences are rare. Mexico should consider mandatory sentencing regulations for criminal copyright cases, or have the Supreme Court issue recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (*reparación del daño*). That court could also issue an advisory to criminal judges nationwide to act expeditiously on search warrant applications. Additionally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

## Civil Enforcement

The 2020 package of amendments adopted notice and takedown procedures, defined ISPs, and provided legal remedies and safe harbors to ISPs providing mere conduit, caching, and storage and information location tools, by limiting monetary damages—but not injunctive relief or administrative sanctions—for ISPs that respond properly and timely to notices (Copyright Act, new Article 114). The changes add specific provisional measures to order the suspension, stay down, blocking or removal of content, and the cessation of acts that are infringing or unauthorized. The new provisions also require ISPs to have repeat infringer policies, and counter notification procedures (requiring rights holders to commence judicial, administrative or criminal actions within 15 days of notification by an ISP). The

new Mexican law compels an ISP receiving a notice of infringement to comply, but it does not require an ISP even with actual knowledge of an infringement or once aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge) to take down material. There are administrative penalties (fines) for non-compliance with notices.

The package, as required by the USMCA, is a welcome step. The Mexican legal system includes general liability principles contained in the Civil and Criminal Codes, however, it does not include secondary liability for copyright infringement for ISPs and similar parties in the Civil Code. The USMCA (Article 20.88) requires Mexico to implement “legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of infringing materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials.” While the notice and takedown and related provisions are a strong first step, ISPs need further encouragement to meaningfully cooperate with all rights holders (large and small) to deter the unauthorized storage, transmission or making available of copyrighted materials that come with secondary liability.

For over a decade, 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the CLAC to promote and defend copyrights and related rights threatened by online (and physical) piracy, including promoting cooperation between rights holders and ISPs. The CLAC initiatives are still a valuable forum for proposed improvements, but unfortunately, some in the ISP community continue to oppose these cooperative efforts. For years, IIPA members have reported sporadic cooperation with hosted content takedowns (as well as with the local domain name registry), but generally little or no cooperation with many local ISPs, and it is hoped the new laws will significantly improve ISP actions and cooperation. Other participants in the ecosystem, such as payment processors and advertising networks, should also be encouraged by effective secondary liability laws to cut off the economic sources of support for piratical websites and services.

In addition, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer’s personal information to rights holders seeking civil recourse against alleged infringers (although Article 189 of the Telecommunications Law, as amended in 2014, does allow an ISP to cooperate with an order from any competent authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations of service contracts if subscribers infringe intellectual property rights. ISP contractual practices thus compound the difficulties of obtaining access to information necessary for seeking civil remedies. For file sharing, the two major ISPs (Telmex Infinitum, which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions.

In general, Mexico’s three-tiered civil procedure system makes civil litigation very complicated, time consuming and costly for rights holders, even against obvious infringers. The Copyright Law allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued (or becomes final), but the law does not provide statutory damages (e.g., additional or pre-established damages), and the USMCA 2020 amendments did not change this deficiency. Rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. There are other problematic procedural formalities to commencing cases in Mexico, for example, burdensome steps to prove copyright ownership in lieu of presumptions of ownership (which, as noted, is an unfulfilled USMCA obligation). Mexican law grants full validity to electronic documents and discovery, although some judges are unfamiliar with these rules. The Civil Code also provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented.

One recent (2018) legal reform was the adoption of an amendment to the Copyright Law of Mexico (amending Articles 213 and 215) to provide for preliminary injunctions (“precautionary measures”) in civil cases. This remedy is especially useful to address pre-release piracy. The 2018 amendment also permitted *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours’ written notice before the order goes into effect.

## **Administrative Enforcement**

**IMPI:** Once granted the administrative authority (in 2013), IMPI took its first action to take down an infringing website, and issued an order to block access to the site; a monetary fine was imposed against the website administrator, and the website removed the infringing material. A court later upheld IMPI's action and authority. In 2015, IMPI used its authority against the website *mymusic.com*, after a case was brought by the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM). But, that action by IMPI triggered a court case when two ISPs failed to comply with the IMPI order. The court lifted the web-blocking order against *mymusic.com* and the Supreme Court later upheld that ruling, calling IMPI's actions disproportionate to the infringing harm, because the site contained some non-infringing material (a blog), and the copyright ownership of all of the material on the site was not confirmed. A further limiting factor, even if the holding is eventually overturned, is that IMPI can only act against an operator with a physical address in Mexico. With improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines. Rights holders can alternatively initiate an administrative proceeding before IMPI, or bring a court case for civil damages, or request an injunction. The 2020 amendments added new authority and sanctions for IMPI to be more effective. This included an amendment (Federal Industrial Property Law, Article 367) for IMPI to provide notifications to defendants by electronic means (if so requested by rights holders), or if the defendant is abroad (e.g. to issue blocking orders against foreign pirate sites), by public notice. This was a positive development long-supported by the copyright industries.

While the two major telecom (ISP) companies generally do not cooperate, a few smaller ISPs do respond to IMPI orders. IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. But, as noted, IMPI has to date used its authority only against local websites (when their administrators or owners are located in Mexico), limiting its effectiveness against foreign infringing sites. It is hoped the new IMPI authority will be used to address this problem.

**INDAUTOR:** IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy. The recording industry reports that INDAUTOR has been helpful with its mediation procedures (known as *juntas de avenencia*) allowing music producers (via their collecting societies) to meet with users. INDAUTOR also is responsible for supervising the collecting societies in Mexico. INDAUTOR is (since 2015) funded and housed within the Ministry of Culture, which was created to oversee cultural policy and funding (prior to that INDAUTOR was housed in the Ministry of Education).

## **Border Enforcement**

Although the Customs Code was amended in 2018, the changes did not provide the necessary *ex officio* authority for Customs officials to conduct independent seizures of infringing goods and components—a USMCA obligation. Under the current code, Customs' authority is unclear regarding seizures and retention of infringing materials. There are formal and onerous requirements to initiate border actions. For example, absent an official order from IMPI, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, even where the material is clearly infringing. Because IMPI does not issue expedited authorizations to seize products identified by Customs as infringing, suspect merchandise is usually allowed to enter Mexico. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products.

In 2020, the video game industry participated in seven customs enforcement actions (with Customs officials and IMPI), seizing a total of 40,030 infringing items, mostly counterfeit or modified video game consoles. Cooperation with Customs is good, but there are many repeat importers of infringing materials who are not prosecuted (in 2019, there were nine such instances). Without criminal prosecutions or other severe penalties, there are no deterrents for these parties to cease these practices; instead, shipment interdictions are treated as a cost of doing business for infringers. The video game industry reports that importers are reducing the size of their shipments to avoid detection,

making border enforcement even more critical, but more difficult. Even though there has been extensive training and good cooperation in the past, at least one major company reported no seizures of circumvention devices by Customs in 2020. This demonstrates that these devices are entering Mexico through small consignments. The Specialized IP Unit in Customs retains criteria that deters inspections of courier packages even though there is evidence of substantial infringement by these packages and in small consignments. The industry reports that small-quantity seizures are dropped by prosecutors for a lack of tariff classification (which treats the material as never having been imported), requiring an appeal by and additional expenses for rights holders.

Over a decade ago, FGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Unfortunately, in 2011, FGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new “protocol” between FGR and Customs officials.

One challenge for rights holders to pursue recidivists is the false information provided to Customs by importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers, and to work with Customs officials on these cases. Customs chain-of-custody procedures is another hurdle, especially for criminal enforcement. Under existing procedures, Customs must first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors then order the police to inspect the packages. However, police and prosecutors are reluctant to commence criminal cases if packages have been previously opened by Customs officials and not (as the FGR office responsible for the Mexico City International Airport requires) in the presence of police witnessing the opening of (each) package. This interpretation—that the chain of custody is “broken”—has forced rights holders in the video game industry to appeal decisions, incurring additional legal expenses (similar to the tariff classification problems). FGR should develop clear unified rules on chain of custody procedures and shift the burden to prosecutors to prove alteration of evidence.

## **COPYRIGHT AND RELATED LAWS IN MEXICO**

Mexico was a signatory and, in 2002, acceded to the WIPO Internet Treaties (although it did not publish its ratification of those treaties with the Agreed Statements), and only in 2020 adopted implementing laws.

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Law was significantly revised by the 2020 amendments. It was last amended in 2018 with the addition of preliminary injunctive relief, and before that, was amended in 2003. The full list of legal reforms adopted in 2020 has improvements, including the notice and takedown, safe harbor, and related provisions already noted in detail. First, the reforms added (Article 114bis) definitions and protection for TPMs with copy and access controls, and for RMIs. The new provisions make clear that circumvention is actionable independent of copyright infringement, and closed the existing loophole for circumvention devices to cover the making or distribution of such devices. However, Article 232bis limits liability and excludes certain activities relating to the manufacturing or trafficking in circumvention devices or technologies (including so-called “no mandate” language), and additionally, provides many exceptions and limitations that are problematic, including those to-be-determined by INDAUTOR. The TPM sanctions (Article 232bis) regarding manufacturing or trafficking do not include the “promotion, advertising or otherwise marketing” of circumvention devices or services; these activities should be included in future amendments. Further, Article 232qua refers only to RMI infractions that remove RMIs, and not also including the altering or modifying of RMIs; this article should be revised to cover these activities. The Copyright Code (Article 232 etc.) and Criminal Code (Article 427 etc.) include appropriate civil and criminal sanctions, respectively, and neither require proof of “willful” actions to be sanctioned. Second, the reforms explicitly provide a making available right and right of communication to the public for works and recordings (Articles 27 and 131 of the Copyright Law). Third, the Federal Protection of Industrial Property Act amendments broadened IMPI enforcement authority, including allowing provisional measures to suspend the transit of goods (imports or exports), even if by digital means, and added new calculations for the recovery of damages for rights holders (fines up to US\$1 million). Fourth, the new laws added sanctions for camcording, as well as against satellite and cable signal theft. For all the laws that were enacted, INDAUTOR is now preparing draft implementing regulations, but

unfortunately this process is proceeding slowly for these much-needed new changes. This is very troubling considering the constitutional challenges underway, as well as the vocal opposition from many copyright opponents already seeking weakening amendments to laws not yet implemented, all of which are meant to undermine the new reforms.

Some of the other still-needed reforms after the 2020 changes include: (i) establishing third party liability; (ii) raising civil penalties to deterrent levels—and including statutory, pre-established, or “additional” damages and the recovery of costs and attorney’s fees; (iii) amending the Criminal Code to delete the “for profit” provisions (with the exception of the fix adopted for camcording), and replacing them with “acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders”; (iv) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (v) amending the Administrative Code, Tax Code and Criminal Code to (a) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (b) increase administrative sanctions; (vi) creating presumptions of copyright ownership in civil, administrative and criminal cases; and (vii) criminal provisions to enforce against the production or distribution of Piracy Devices. There are provisions in the Copyright Act in Articles 150 (transmissions of works) and 151 (neighboring rights) that provide exceptions to infringement for certain public performances where a retransmission is not “for profit-making purposes” (Article 150) and “no direct economic benefit is sought” (Article 151). These exceptions are too broad, exceeding what treaties permit, and should either be severely restricted or eliminated.

One recent positive Supreme Court ruling (in 2019) found a hotel in violation of the right of public communication where hotel guests accessed copyrighted materials in their rooms via a hotel streaming service. Mexico’s law now provides exclusive rights for the public performances and broadcasting of sound recordings which is a positive step. This provides a sufficient legal basis for producers and performers (and composers) to initiate proceedings against entities that fail to provide remuneration for the public performances or broadcasting of sound recordings. Even though IMPI has adequate authority to impose penalties on entities using sound recordings without remuneration, including the ability to impose fines and to temporarily suspend operating licenses of such entities, there remains a serious concern in Mexico that profound rule of law problems render actual royalty collections both unsafe and ineffective. In addition, the Government of Mexico needs to take administrative and regulatory steps to ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.

## **MARKET ACCESS ISSUES**

There are two market access issues impacting motion picture and television program producers. In 2014, a new law imposed advertising limits on pay-TV channels, and effective in February 2020, the regulations implementing that law got even more severe. The advertising law is meant to promote domestically-made programming and pay-TV channels, many of which are primarily operated by foreign entities at present. The law and regulations impose daily and hourly advertising limits, but only on foreign content, while domestic and free-to-air material is allowed twice the daily quota and no hourly caps. Until 2020, the caps were 12 minutes of advertising per hour, but in 2020 the limit was halved to six minutes, including during primetime. This change will significantly reduce advertising revenue for foreign (e.g., U.S.) film and television program producers. Its discriminatory treatment raises concerns about the non-discriminatory provisions and principles in the USMCA. A second market access concern is the limit (49%) placed on foreign ownership of broadcast networks (by comparison, in the U.S., the Federal Communications Commission permits foreign entities to own 100% of broadcast networks, subject to case-by-case reviews).

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** In 2020, Russia added mobile apps to the list of infringing sources subject to the civil enforcement mechanisms. These civil procedures rely on courts to order takedowns of infringing content and blocking of websites, and now, also mobile apps. This is a positive development since mobile apps are the most popular means of online infringement in Russia. This reform follows a recent trend in Russia to address online piracy with civil, not criminal, enforcement measures and streamlined processes to require websites, and now apps, with infringing content to comply with rights holders' takedown notices. The reforms allow Russian courts (in particular, the Moscow City Court), working with RosKomNadzor (the Federal Service on Communications and Mass Media) to quickly disable access to infringing material. Additionally, the court orders can extend—without reapplication to the court—to clone, proxy and mirror websites containing infringing content. The current laws and procedures also require online search services to exclude infringing websites (identified in the court orders) from search results.

Absent the court-ordered procedures, at present, there are no other legally mandated notice and takedown procedures in Russia. There is a 2018 private agreement, a Memorandum of Understanding (MOU) between key Russian Internet companies and rights holders, requiring search engines to delist links to infringing content from search results. It does not result in the removal of the content. The goal of the MOU was to establish a legal framework for legislation to make enforcement (i.e., responding to rights holders' notices) mandatory, but legislation has been delayed until 2021. The MOU is voluntary, and it only covers certain audiovisual works, including music videos, and only those of the signatories. Proposed legislation would convert the MOU from a voluntary agreement into law for search engines to delist links, as well as to block sites and apps identified by court order or on a registry of infringing sites, and would be broadened to cover all copyrighted works. After two prior extensions, the MOU expires on January 31, 2021.

Overall, the civil and procedural reforms have blocked or slowed access to some major infringing sites and services. Unfortunately, American rights holders continue to report that these procedures are being directed predominantly against infringing activities of users in Russia, and are not used against Russian sites and services catering to users outside the country. The end-result is a substantial and persistent online piracy problem with no borders, as users in major markets outside of Russia access infringing content from Russian sites and services. Even the most effective takedown procedures and processes to disable access to infringing content on these websites can only slow piratical activities. These actions have little lasting deterrent effect without civil, and especially criminal, prosecutions directed at operators and owners of sites engaging in infringing content. One recommended legal reform is for Russia to clarify its Civil Code on the legal liability of Internet Service Providers (ISPs), including that any safe harbors only apply to passive and neutral intermediaries that do not contribute to infringing activities. Two other industry-specific problems persist in Russia. One is the need to address the long-standing problems with collective management of music rights in Russia that have caused revenues to be a fraction of what they should be for a market the size of Russia. The state accredited Russian collecting societies are not currently operating with transparency or good governance rules consistent with international norms. The other enforcement priority is to address the camcording of motion pictures which results in many American feature films being illegally copied in theaters and migrating online worldwide.

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<sup>1</sup>For more details on Russia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country>. For the history of Russia's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2021**

- Increase the number and effectiveness of criminal IPR cases focused against digital piracy, especially on deterrent criminal actions directed against organized criminal syndicates. Criminal actions should target those involved in piracy retail chains that continue to sell pirated entertainment software, music and movies.
- Implement regulations on the operation of collecting societies that confirm that rights holders have the legal and practical ability to determine how to exercise their rights, including whether to choose to entrust licensing to any collective, and if so, to choose that entity and to delineate the rights for such collections.
- Amend the Civil Code, Part IV, to:
  - clarify the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities, to prevent knowing facilitators from enjoying these safe harbor benefits; and
  - enact additional legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks. Article 1253.1 of the Civil Code provides that intermediary services facilitating the widespread dissemination of unauthorized content cannot benefit from the liability privileges if they know or should have known of the infringement.
- Amend the Civil Code (or other relevant law) to convert the MOU into law, applicable to all copyrighted works, with legally mandated obligations for ISPs and appropriate sanctions for non-compliance.
- Amend the Civil Code in Article 1299 to provide civil liability for commercial trafficking in circumvention devices (including circumvention software), as well as for acts of circumvention.
- Amend the Criminal Code to establish criminal liability: (i) for the unauthorized camcording of motion pictures; and (ii) for the importation of and commercial trafficking (by distribution, making available, etc.) in circumvention devices (including circumvention software), as well as for acts of circumvention. Amend the Administrative Code as well to sanction camcording.
- Amend the Administrative Code by eliminating the for-profit requirement in Article 7.12 (Administrative Offences), and raise administrative penalties to deterrent levels by implementing higher fixed fines for violations by legal entities and individuals.
- Increase the number of administrative actions against Internet piracy regardless of whether the servers or users are located in Russia.

## **THE COPYRIGHT MARKETPLACE IN RUSSIA**

**Internet Use and Piracy:** As Internet access, including mobile phone access, has grown exponentially in Russia, and despite the civil law reforms intended to mitigate digital piracy, Russia remains home to many of the most popular illegal services in the world. These include commercial-scale infringing websites, such as web-based (and peer-to-peer (P2P)) downloading and streaming sites, linking sites, and cyberlockers, offering access to unauthorized music, film, video games, books and journal articles. Many of these sites cater to English-speaking and other non-Russian users, resulting in financial harm to markets outside of Russia. Some BitTorrent and other pirate sites have reportedly moved their sites to foreign hosting locations in response to the new enforcement measures (or court-ordered injunctions) directed at sites within Russia. More advanced technologies are used for infringements as well, including pirate cloud systems (e.g., PaaS), which are growing in popularity.

Although the civil law reforms have improved enforcement by the courts, absent these orders, most ISPs and website operators do not comply with takedown notices, instead merely forwarding notices to users without taking down material. Often the Russian websites insist on proof of copyright ownership before even considering compliance with takedown requests. The only alternative is the voluntarily MOU between some ISPs and rights holders regarding delisting of sites from search engines. Converting the MOU into legislation, with sanctions for non-compliance of takedown notices, and applicable to all platforms and search engines, and all copyrighted works, remains a priority of IIPA members to improve overall enforcement. The advertising agencies and payment processors that financially support infringing sites continue to resist cooperation with the copyright industries.

Examples of the types of large-scale online piracy problems that persist are evident in the annual Notorious Markets List, and in the IIPA's past filings with the U.S. government. There are many commercial-scale sites in Russia operating without deterrence, including those on the Notorious Markets List, offering free films, TV programs, music, books and journal articles and/or video games. In January 2021, the U.S. government included six Russian online sites on its 2020 Notorious Markets List (the same online markets as in 2019).<sup>2</sup> USTR retained *rapidgator*, *rutracker*, *Sci-hub* (and its related sites) and *vk.com* (*vKontakte*) on its list of Notorious Markets, as well as the two sites listed for the first time in 2019: *seasonvar.ru*, and *MP3juice*. *Rapidgator* and *rutracker* have been on the list since 2012.

The motion picture and television industry is particularly concerned about *seasonvar.ru*, a St. Petersburg-based streaming website of television programs illicitly offering over 17,000 TV series on the site. It is also concerned about *vk.com*, now owned by *Mail.ru*, which is one of the most popular sites in the world and the most popular social network in Russia, along with *OK* and *Telegram*, which are also infringement hubs. On these social media platforms, users illegally distribute thousands of unlicensed motion picture files (even though *vk.com* negotiated licenses a few years ago with some of the music companies for its use of music). *vk.com* limits access to third party apps, making it more difficult for users to download content directly, and it now blocks infringing sites from accessing videos stored on its site, but, third party pirate sites can still stream illegal content from another service operated by the same parent company. This means that *vk.com* is still a major infringement hub for illegal film materials. The publishing industry (particularly trade book publishing), is similarly affected by e-book piracy on the site. Although the site is responsive to notifications of infringement, piracy remains a concern given the ease with which the site's users can upload and share pirated e-books and audiobooks. The video game industry reported that *vk.com* continues to play a role in the distribution of illegal copies of video games, with a growing number of ready-to-download files on social media pages on the platform. This includes wall posts with advertisement links to external pirate resources or cloud storage sites. The number of groups distributing in-game items on *vk.com*, however, has continued to decrease because of good responsiveness by the websites' administrators to requests to block infringing groups. *Telegram* is also a full-fledged global piracy hub for video games and music. The site is mostly unresponsive to takedown notices, and there is no transparency on what steps, if any, it is taking to address infringement. The website *switch-nintendo.ru* makes unauthorized video games available through indexing torrents for users to upload or download. The video game industry reports overall very weak compliance with takedown notices, and the very quick reposting of materials that are taken down.

The video game industry further reports that Russia is a haven for the production of cloning software and the hacking of entertainment software programs. In 2020, the industry noted *rutracker.org*, *ibit.to* and *rgmechanics-games.com* as particularly problematic with *rutracker.org* hosting an average 47 million visits a month (even though it is blocked in Russia). In 2020, for the eighth consecutive year, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select video game titles on public P2P networks. Russia is also first in the world when it comes to the unauthorized file sharing of video games on PCs with more than twice as many illicit downloads to PCs in Russia compared to the second highest country, Ukraine. In 2020, users with Russian IP addresses accounted for approximately 31% of the global volume of detected video game infringements occurring on public P2P networks. Direct download sites remain a problem, including the uploading of files to rogue cyberlockers. Overall, the pandemic likely caused an initial spike in piracy of video games (far exceeding prior years), with a retreat to normal, albeit, high rates of piracy returning in the second half of 2020.

The market for recorded music should be much stronger than it is for a country the size of Russia. According to a September 2020 industry report, the per capita spending on music in Russia is only US\$1.21 per year, compared with US\$22.11 per capita in the U.S. (IFPI Global Report 2020). The recording industry reports that paid download sites (e.g., *mp3va.com* and *music-bazaar.com*) remain a source of piracy in Russia along with stream-ripping services, P2P services, linking sites and cyberlockers (e.g., *turbobit.net*), with some sites including pre-release music. The recording industry notes that some stream-ripping services are believed to be operating from Russia including *savefrom.net*, the most popular stream-ripping site in Russia, as well as *F1vto.biz*, *2Conv.com* and *F1v2mp3.by* (all

<sup>2</sup>See [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf). The January 2021 report also included three physical markets in Russia, two of which are on the list for the prevalence of counterfeit (but not copyright-pirated) materials.

three offer essentially the same material operating from different domains). The sites provide downloads of converted YouTube videos to users as MP3 audio files (from servers in Germany). Examples of other popular stream-ripping sites include Y2mate.com and Getvideo.org, as well as Newalbumreleases.net, a popular linking site that has a large library of newly-released popular music available, and mp3va.com, which has the look and feel of a legal music site like Amazon or iTunes, but sells downloads of single tracks for less than 15 cents (and albums for US\$1.50 or less). Some of the other unlicensed pay-per-download sites include: mp3panda, mp3fiesta (hosted in Russia) and mp3eagle.com (hosted in Russia with over 45% of its users from the U.S.). In the past few years, access to illegal music via apps in Russia has grown exponentially, and major sources of these apps do not respond quickly (e.g., Apple), or, in some cases, at all, to takedown notices. It is hoped that the 2020 law, applying enforcement against mobile apps, will effectively address this problem.

Book and journal publishers report low compliance rates in response to rights holder notifications for links to infringing content, with many sites ignoring the notices altogether. P2P piracy providing free unauthorized access to e-books likewise continues to be a problem. Most concerning to publishers is the prevalence of online book and journal piracy in Russia, particularly on hosted-content websites that are operated by Russian residents. The most egregious actor is the search engine/locker site *Sci-Hub.io* (formerly *Sci-Hub.org*) which appears to collaborate with a group of sites known as the “Library Genesis Project” (now *libgen.io*). *Sci-Hub* claims that as of October 2019, its servers hold some 79 million copyright-protected journal articles (more than 85% of articles published in toll access journals) and over six million books.<sup>3</sup> To further its infringing activities, *Sci-Hub* gains unauthorized access to university systems and publisher databases through compromised user credentials, sometimes obtaining the credentials through phishing schemes. The compromised credentials are then used to illegally access university infrastructures to obtain copies of copyrighted journal articles, which *Sci-Hub* hosts on its own server network and cross-posts to *Libgen*. Notwithstanding two injunctions against the site, *Sci-Hub* unfortunately remains accessible in the U.S. The *Libgen* site encourages the creation of mirror sites of all of its content, and several such sites remain active.<sup>4</sup> In October 2018, publishers successfully obtained an injunction to block the sites’ primary domain in Russia. In 2019, a permanent block was issued against *Libgen.org*, while a permanent injunction against the primary site’s continued operation in Russia is expected to take effect this year.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for small to medium-sized businesses which cannot engage in lengthy and expensive civil enforcement. Independent producers partner exclusively with authorized local distributors to finance and distribute films and television programming. As a result of the piracy, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

The motion picture, music, and book publishing industries want Russia to take steps to keep infringing content permanently down. Effective enforcement means focusing criminal enforcement actions against the owners and operators of sites engaged in large scale infringing content, which is causing significant economic harm to all rights holders. The Government of Russia has outstanding commitments to take such action against digital piracy. In the 2006 U.S.-Russia IPR Agreement, Russia agreed to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites registered in Russia’s .ru domain name, or whose servers are situated in Russia), and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” When Russia joined the WTO in 2012, as part of its WTO accession, in the Working Party Report (paragraph 1339), Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings),

<sup>3</sup>“Sci-Hub provides access to nearly all scholarly literature.” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832410/>.

<sup>4</sup>The *Libgen.is* site lists *Gen.lib.rus.ec*; *Libgen.IC*; *Libgen.pw*; *Z-library*; and *BookF1.net* as mirror sites.

and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”<sup>5</sup> Also in 2012, in the U.S.–Russia IPR Action Plan, Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, *inter alia*: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content....Take actions against the creators and administrators of websites through which intellectual property crimes are committed....Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.” The Government of Russia should fully and properly implement these obligations.

**Civil Enforcement Against Online Piracy:** As noted, civil judicial remedies have significantly improved in the recent years (with the legal reforms in 2013, 2014, 2017 and 2020), along with administrative remedies. RosKomNadzor, the agency responsible for enforcement of these laws, has been effective and cooperative with rights holders in implementing the new laws, in coordination with the Moscow City Court.

The 2013 legal reforms included two key civil law changes and procedures directed at online piracy. The first change amended the Civil Code, Part IV—in theory, to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors. The changes did not provide clarity regarding the liability of online infringing websites and services, including that safe harbors should only apply to passive and neutral intermediaries that do not contribute to infringing activities. The second 2013 reform included a set of amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) authorizing judicial injunctions after notice and takedown to block access to infringing materials or websites. In 2014, amendments expanded the subject-matter scope of the 2013 changes (Federal Law No. 364, in force May 2015) and expanded the existing procedures for court ordered site-blocking against repeat infringers.

The 2017 reform (Federal Law No. 157, in force October 1, 2017) addressed the problems of clone, proxy and mirror sites by broadening the scope of a court ordered (civil) injunction to cover these sites as well as the infringing site subject to the original order. Under the 2017 law, with an existing court order against an infringing website, a rights holder can submit a request to the Ministry of Digital Development, Communications and Mass Media (Ministry of DDCMM) identifying a mirror (or clone or proxy) site, and, after review by the ministry, RosKomNadzor issues instructions to block the mirror site; an administrative procedure is then used to block the mirror site. No special request to a court is needed from a rights owner; rather, a list of qualified blocked websites is provided by rights holders via an online mechanism to the Ministry of DDCMM, although it is limited to 50 or 60 site blocks per day under regulations adopted in October 2017. The ministry’s decisions—which must be made within 24 hours of receipt of a rights holder’s request—can be appealed to the courts. The 2017 legislation also required that search engines must remove links to infringing content on sites that have been the subject of an order from the courts or the Ministry of DDCMM. RosKomNadzor oversees compliance of both ISPs and search engines with this process. There are fines of up to 700,000 rubles (US\$9,357) for search engines that do not comply with de-indexing orders. An additional change was adopted in April 2019 in a Resolution of the Plenum of the Supreme Court (revising Chapter IV of the Civil Code), which amended existing practices to permit the use of screenshots of websites with unauthorized material on them to be treated as sufficient evidence to obtain a court order. In 2020, the law was further amended (Federal Law No. 177, in force October 1, 2020), to apply the same website blocking procedures to mobile apps, giving RosKomNadzor 72 hours after it receives the Moscow City Court order to act against the app marketplace or a website. The 2020 law allows actions directed at infringing apps as well as against sites (and stores) that distribute the apps, including otherwise legal platforms.

There are other pending proposals (recommended by the Ministry of Culture): one to block anonymous pirate websites without applying to a court; another to accelerate enforcement of site blocking orders (from three days to one day); a third to provide new penalties for failure to comply with the ordered-removal of infringing content. The Federal Tax Service (FTS) has the authority to block the use of anonymizers and to create a list of banned resources to bypass blocked websites, but its jurisdiction is specifically limited to acting against illegal online gambling operations. The FTS

<sup>5</sup>The U.S. government last detailed all the intellectual property WTO commitments of Russia in its “2018 Report on the Implementation and Enforcement of Russia’s WTO Commitments” (December 2018), available at <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf>.

can also request that RosKomNadzor block anonymizers, so there is in place effective authority to take action against online piracy if the Government of Russia chooses to apply it. Separately, a law was introduced in the Duma in 2017 to provide monetary penalties (up to 800,000 rubles or US\$10,694), for attempts to bypass website blocking orders under the law applicable to anonymizers and virtual private network (VPN) services. The VPN law went into force in 2017; the other laws have not yet been adopted. Another proposed law would block websites that display ads of illegal businesses, including online casinos, which are major sponsors of copyright infringing websites.

Overall, the results of the civil laws and procedures have been positive, with increasing numbers of injunctions, including permanent injunctions, issuing against various infringing Russian websites. Some sites have seen dramatic decreases in traffic right after such orders (and some sites have even moved out of the country). While these actions are commendable, without the deterrence of criminal prosecutions against the owners and operators of infringing sites and services, many simply resurface in new guises. The motion picture industry reports that in 2020, more than 8,000 domains of copyright infringing websites were blocked (10% the result of court orders and 90% the result of RosKomNadzor decisions against mirror sites), and that since 2015, the annual numbers of sites taken down or blocked have increased yearly. The recorded music industry reports that, to date, 2,460 music sites have been blocked on a permanent basis as a result of the civil procedures and court-orders.

In 2020, the video game industry did receive several successful decisions under the civil procedures to prohibit game servers from using popular games, and the cases created helpful precedents for future cases. For example, in 2020 there was decision that blocked more than 200 mirror sites from six original blocked websites with pirated games. Also in 2020, a court granted a permanent injunction based on the valid claims of a video game company. There are many examples of injunctions against major infringing sites, including those against *rutracker.org* and *rutor.org*. However, workarounds still exist, and Internet users have obtained access via mirror sites (and alternative DNS services) and VPNs, so sites such as *rutor.org* and *rutracker.org* retain millions of monthly users in spite of the laws.

As noted, the MOU expires on January 31, 2021, and a legislative substitute is under consideration. In late 2020, legislative text was being drafted by the Legal Department of the Administration of the President. Reportedly, the President's office suggested amendments that were not previously considered by rights holders or the other MOU signatories, which may delay the legislation's progress. Only non-commercial organizations could sign the MOU denying its benefits to rights holders who do not have a legal presence in Russia. The codification of the new law, applicable to all search engines and ISPs, and all works, would significantly improve enforcement.

**Criminal Enforcement Including Against Online Piracy:** The copyright industries continue to report high levels of piracy and declining levels of criminal enforcement continuing a trend of the past several years. The criminal enforcement in Russia that is undertaken still is not focused enough on digital piracy. A few industry groups, such as IFTA, report that physical piracy remains a problem for independent producers and distributors (although not as large a problem as digital piracy). High quality pirated DVDs and artwork are routinely sold in street markets or uploaded and offered for free online, destroying the legitimate market for these works. The video game industry also reports persistent problems with physical piracy because of the absence of effective criminal (or administrative) enforcement. One criminal case, commenced in 2020, against an individual (in the Lipetsk region) for selling hacked game consoles, resulted in a guilty plea, and a fine of 20,000 rubles (US\$266).

To be effective, IPR enforcement in Russia needs a clear nationwide governmental directive on enforcement with a particular focus on online piracy. Without coordination and a high-level directive, criminal and administrative enforcement practices have varied considerably from region to region within Russia and have had little deterrent effect. A coordinated nationwide campaign should focus on *ex officio* criminal actions targeting large-scale commercial enterprises, improving investigations and digital tracking, as well as on taking administrative actions and strengthening administrative penalties which have largely been ineffective. This would allow legitimate markets to develop and would also help support smaller independent rights holders who do not have the resources, and therefore must rely on the government for effective enforcement.

The agencies that can commence criminal cases—including the Investigative Committee of Russia, the Investigative Department of the Ministry of Internal Affairs (MVD), the Federal Security Service of the Russian Federation (FSB), and Customs—should coordinate their efforts with the police. Since the General Prosecutor's Office has supervisory authority over investigations and prosecutions, it should work with the Investigative Committee of Russia and the Investigative Department of MVD to develop an updated and detailed methodology for investigations of digital copyright infringements. This would help to increase the quality, effectiveness and consistency of IPR enforcement activities. Work on a draft methodology was suspended years ago.

IIPA continues to recommend that there should be a dedicated digital IPR enforcement unit within the Government of Russia to focus on this problem. For example, combating copyright violations on the Internet, such as the dissemination of music through illegal pay-per-download sites and illegal P2P or streaming services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action in the past (at present, only the Economic Crime Police are doing this). Department K's authority and responsibility to act in all cases of online infringement should be clarified and strengthened. In addition, Department K should be adequately staffed, equipped and resourced, and other such units within the MVD should be formed to deal exclusively with IPR Internet cases and to train officers on how to combat these copyright crimes, including the maintenance of evidence. It also should be clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, even where there is no direct fee charged by the enterprise.

Changes to criminal procedure which placed copyright infringement cases into the category of serious crimes have enabled—at least in theory—Russian law enforcement agencies to conduct thorough and comprehensive investigations against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against operators or owners of commercial Internet operations. In recent years, police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes (and especially have had difficulty proving intent, or in identifying the individuals responsible for criminal activities). As a result, few such cases are ever brought and even fewer tried to a conclusion. The problem has been an inability to adopt a unified formulation by the police and prosecutors on how to apply the thresholds for online crimes. An intensification of criminal investigations and criminal convictions against principals of organized commercial pirate syndicates is sorely needed. The status quo only further corroborates the lack of political will or incentives by government agencies to act against large-scale copyright infringers. In addition to criminal enforcement, the relevant administrative agencies (e.g., the Federal Anti-Monopoly Service (FAS)) should target large illegal distribution enterprises, such as the large-scale unlicensed services responsible for most of the illegal distribution of music and film in Russia.

For the past several years, the quality and quantity of criminal raids and police activity against IPR infringers in general has declined, especially against large-scale online infringers. The decline in police activity in general is the lingering result of the major reorganization of the police force in 2011 and the consequent drop in resources, as well as changes in government priorities and an unwillingness to take action against large-scale online infringers. As in recent years, there were some deterrent sentences applied by the Russian courts, including a handful aimed at serious repeat offenders.

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the Government of Russia continues to rely on its own experts in investigating, examining and prosecuting IPR violations, it should take measures to increase the number of experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. The video game industry continues to report delays in examination reports from government experts, due to a lack of technical expertise. For the video game industry, enforcement efforts are also complicated by other issues including new legislation, changes in jurisdiction or new law enforcement personnel. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases as well as a reluctance to use or rely on rights holder expertise on forensic matters. Worse, some local authorities refuse to share

any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. It is reported that some courts will accept private expert testimony, but a uniform rule would be more effective.

Improvements should also be made with respect to court procedure. The criminal procedures generally permit a rights holder to request the destruction of the seized goods or move for recovery of damages in a separate proceeding before the Arbitration Court (a court of general jurisdiction). However, the criminal courts are reluctant to order this and instead, treat these as civil law matters. The copyright industries recommend that the Supreme Court clarify guidelines on the destruction of goods and the calculation of damages in online cases for the purpose of meeting the minimal criminal damage thresholds established under the (revised and increased) Article 146 of the Criminal Code.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutors, investigators, and police officers at both the federal and regional levels throughout Russia. IIPA recommends that the Investigative Department of MVD and the Investigative Committee of Russia continue to work with IIPA members on future training programs, and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusion. This would also help to improve criminal enforcement nationwide, since expertise and enforcement practices vary widely throughout the country, especially with respect to digital piracy. A similar step to improve this problem would be the establishment of an official uniform methodology for the investigation and prosecution of copyright and related rights infringements, focused on digital enforcement. In 2013, a specialized IP court in Skolkovo (an innovation center) was launched with 30 trained judges. This was a positive step in IP enforcement, but is limited to patent cases. These courts should be created in other cities and regions across Russia and the jurisdiction broadened to handle copyright, as well as patent cases.

Russia's Criminal Code should be amended to allow for corporate entities to be held criminally liable for infringement. At present, only a natural person (usually a corporation director) can be found criminally liable, and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to meet this burden of proof, so many cases are suspended without any penalty.

**Civil Enforcement in General:** While civil measures are not capable of providing the requisite level of deterrence against most digital piracy, they can be a useful tool for some industries or in some instances (including the current procedures used against websites, and now apps). But for independent creators, such as independent film and television producers, civil lawsuits are not viable because they are too time consuming and too costly to pursue. For those creators or producers who are able to pursue civil enforcement, there remain many inadequacies. The list includes: (i) remedies limited to the seizure of specific copies of works that are the object of a lawsuit; (ii) failure to award preliminary injunctions (although 2013 changes made some improvements), or to freeze assets and evidence; (iii) low damages awards, which, like all awards, are also very difficult to enforce; (iv) burdensome evidentiary requirements, including rights ownership information; (v) the absence of personal liability for the directors of infringing companies or enterprises (the only way to bring proceedings in cases where bogus companies operate); (vi) the absence of the notion of clear contributory liability under the Russian civil law system dealing with copyright infringements; and (vii) the absence of judicial guidelines on civil search practices, including provisional measures consistent with the WTO TRIPS requirements.

There is a troubling proposal, long-pending, to lower fines (i.e., statutory damages) from their current levels, below the minimum levels set in the Civil Code (currently US\$170) per infringement. Awards imposed by the courts are already too low; further lowering the permissible levels would not be a deterrent. This proposal (which had a first reading in the Duma in 2017, and a second reading in 2018), remains under consideration for final passage (Amendments to Article 1252 of the Civil Code). It should not be adopted, and instead, damage awards should be increased.

**Administrative Enforcement:** The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles, US\$20 to US\$27), the owners or managers of legal entities (10,000 to 20,000 rubles, US\$133 to US\$266), and on legal entities themselves (30,000 to 40,000 rubles, US\$400 to US\$533), as well as permits the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction for natural persons and juridical entities, and arbitration courts for legal entities. Imposing significant administrative fines on legal entities would have a deterrent effect, especially in instances when criminal cases are terminated for failing to meet the high evidentiary burdens. Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed as well as the inability to reach commercial enterprises that distribute infringing content.

**Camcord Piracy:** A long-standing problem in Russia is the camcording of motion pictures, with many feature films being illegally copied in theaters and migrating online. To correct the camcording problem properly requires changes in the Russian legal framework, as well as dedicating sufficient resources and government willpower to engage in effective enforcement. Russia remains the home to some of the world's most prolific criminal release groups of motion pictures. Pirates obtain their source materials for infringing copies by camcording films at local theaters, and then upload these copies onto the Internet as well as sell illegal hard copies. In the four years before 2020 (and the pandemic's closure of theaters), 245 MPA-company films were camcorded in Russia and an additional 185 audio-only recordings were sourced from Russia. The illicit camcords that are sourced from Russia are of fair quality, but they remain in high demand by international criminal syndicates. Copies of major film titles often appear online within a few days of theatrical release, damaging revenues worldwide and across the economic lifecycle of the film.

To address the camcord problem, the Government of Russia should amend the Administrative Code to add liability for camcording in addition to the general liability provisions (Article 7.12) on copyright infringements, and provide criminal law penalties as well. In 2020, the Government of Russia (Ministry of Culture) prepared changes to a new Administrative Code to address camcording; the Code will reportedly be completely overhauled in 2021. The new rules, if adopted, would explicitly prohibit video or audio recordings of films in theaters, and would allow theater owners to act to stop any such recordings, including removing the offending party from a theater. The proposed new law would also add administrative sanctions for camcording. While this is a step in the right direction, unfortunately, there are no proposals to amend the Criminal Code or add any criminal sanctions for camcording pursuant to Russia's WTO and bilateral obligations.

In addition to the legal reforms, IIPA recommends that the Government of Russia should properly resource enforcement actions and undertake more effective enforcement against illegal camcording of motion pictures.

**Collective Administration:** The long-standing problems concerning the collective administration of music rights in Russia needs to be addressed properly. The ability to exercise one's rights through proper collective administration is a WTO TRIPS obligation, and Russia made specific commitments on these issues as part of its accession to the WTO. In the Working Party Report (paragraph 1218), Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect," to bring the management societies in line with international standards on governance, transparency and accountability. That commitment had a deadline of 2013. There were similar obligations in the 2006 U.S.–Russia IPR Agreement to correct this problem.

Instead of fixing the collective management system in Russia after years of missed deadlines, Russia adopted new legislation in 2017 (in force, May 2018), that did not address key relevant issues, and created even more problems (e.g. with the supervisory boards). The new collective management system denies transparency to rights holders and good governance consistent with international norms (e.g., allowing rights holders to control societies), as well as best practices for collecting societies as required by Russia's WTO accession obligations. The 2017 law amended the Civil Code and the Administrative Code to revise the make-up and activities of collective rights management organizations (RMOs). One obvious failure of the 2017 law regarding transparency is that it neither allows rights holders to see how much money their RMOs collect, nor how much they distribute to their members.

Additionally, the new law creates “supervisory boards” for each of the various authors’ collection societies (the Russian Authors Society, the Russian Union of Right Holders and the All-Russian Intellectual Property Organization) consisting of members of each RMO, but also including government representatives and “user” group representatives. This does not allow rights holders to be involved in the selection and management of the organizations that purport to manage their rights. Proper management would allow for a supervisory board of rights holders to oversee the internal management of the RMO and would include international rights holders with local representatives on the board. Lastly, the so-called “fiscal control improvements” in the new law, including regular audit reports, will not improve accountability, because the audit obligations are for reports only to the government (for taxation purposes), not to those rights holders. Instead, partial control of RMOs by the Government of Russia deprives rights holders of their ability to control the licensing and collection of monies for their works and recordings, and is resulting in less, not more, money flowing to authors and producers (and certainly less money than should be collected for a market the size of Russia).

To develop properly functioning music broadcasting and public performance payment systems via collective management, the Government of Russia should re-visit the 2017 law to ensure that rights holders are able to control and manage their own societies, or can effectively opt out of collective management. This would result in fair representation (direct representation of rights holders on the board in a manner that is proportionate to relevant market share and that reflects commercial realities), and no conflicts of interest in the governance structures. There are many models for proper governance of RMOs, including WIPO best practices, international rights holder group best practices, as well as U.S. and European Union existing practices. Instead, the existing regulations and state accreditations have institutionalized a system that is neither transparent, nor well governed with accountability for authors, record labels and performers, who have no other option except for the state collective management organizations.

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

Russia has made progress on legal reforms but gaps remain, especially with regard to effective Internet enforcement and implementation of the digital treaties.

IIPA and its members continue to note three major overarching concerns in the Civil Code, as amended: (a) a lack of clarity on numerous provisions, especially on exceptions and limitations; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement (and the applicability of safe harbors for such services). Even after the recent amendments, the law does not define ISPs and the various services they provide, nor does it link liability and safe harbors in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy. Lastly, it does not define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement or that directly infringe. Further, it is critical that Russia amend its regime to allow for injunctive relief that is quick and effective and applicable to all works, especially for Internet matters.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises or the principals of such enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.<sup>6</sup>

Article 1299 of the Civil Code prohibits the commercial distribution (i.e., trafficking) in circumvention devices and services that circumvent technological protection measures (TPMs). The law should be expanded so that liability

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<sup>6</sup>For a detailed list of IIPA’s prior comments, specifically on the Civil Code (and some of the related laws), see <https://iipa.org/files/uploads/2017/12/2010SPEC301RUSSIA.pdf> at page 138.

applies to the commercial trafficking in all variety of circumvention devices (including software) and services. In addition, commercial trafficking in circumvention devices—including by importation—should be criminalized. IIPA also recommends improving Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

## **MARKET ACCESS ISSUES**

In addition to the issues noted on copyright law and enforcement, there are significant market access issues in Russia that impact the motion picture and television industries.

Russia imposes customs duties on the royalty value of some imported audiovisual materials (which include video games), rather than solely on the value of the physical carrier medium, contrary to standard international practice. Digital distribution has mitigated its impact, but the duty is a double taxation since royalties are also subject to withholding, income, value-added, and remittance taxes.

The Value Added Tax (VAT), raised to 20% in January 2019, remains very problematic because of its discriminatory treatment: Russian-made films are issued certifications exempting them from the VAT. The exemption for Russian films is imposed in the Customs Code (Article 32), and the Federal Law “On State Support of Cinematography” (Article 4), the latter defining the Russian-film criteria. This is a WTO violation because it denies national treatment for taxes on identical foreign products.

The Mass Media Law prohibits non-Russians (including legal entities with foreign participants) from engaging in certain mass media activities, including broadcasting. The law limits foreign ownership to 20% of the capital of a covered entity, thus denying film producers and distributors access to the Russian market absent a joint venture partner. The law applies to broadcasters, as well as to online film websites, streaming platforms, and “over-the-top” (OTT) services. The law, opposed by Russian and foreign film distributors (as a violation of international treaties), reduces consumer choices, and is part of an overall scheme to control the media.

In 2015, a law went into force banning advertisements on pay cable and encrypted satellite channels. The law does not affect state-owned television channels because they do not rely on advertising revenue, and it exempts terrestrial broadcasters who are heavily dependent on ad revenue. As a result, the law significantly impacts the market for cable and on-demand services, including those services operated by foreign companies, and has hindered the growth of the pay-TV industry in Russia.

A persistent legislative concern have been the numerous proposals over the years (never enacted) to adopt screen quotas to limit the availability of foreign films. Another proposed law would place a 3% tax on theatrical box office revenue, but only on foreign films. If enacted, this too would violate the national treatment obligations of the WTO TRIPS Agreement.

# SOUTH AFRICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place South Africa on the Priority Watch List in 2021.<sup>1</sup> IIPA further recommends that through the Generalized System of Preferences (GSP) review, the U.S. government continue to send a clear message that the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) are fatally flawed, and work with the South African government to remedy the deficiencies in South Africa's legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed below and in IIPA's previous submissions. If, at the conclusion of the review, South Africa has not made requisite improvements, the U.S. government should suspend or withdraw GSP benefits to South Africa, in whole or in part.

**Executive Summary:** South Africa's current copyright protection and enforcement framework is not up to the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately, South Africa's inadequate response to persistent piracy enabled by these same technologies threatens to undermine this progress. As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. At a time when South Africa's economy must rebound from the economic impacts of the global pandemic, it is more important than ever to maintain and expand proper incentives for investment in the creation of original material—motion pictures, music, video games, books and journals in all formats—by ensuring: (i) that rights holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their content and develop new legitimate services; (ii) that these rights are not subjected to unjustifiable exceptions and limitations; and (iii) that rights holders are able to transfer, license, and otherwise exploit their rights freely and without regulatory interference. IIPA is encouraged that South Africa's government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments.

However, IIPA remains seriously concerned about two bills, currently under reconsideration by Parliament, which are not only inconsistent with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), but if enacted, would also violate South Africa's obligations under the TRIPS Agreement, potentially violate South Africa's Constitution, and move South Africa even further away from international norms. For these reasons, after initial passage through Parliament in late 2018, in June 2020 South Africa's President referred the CAB and the PPAB back to the National Assembly for reconsideration. These bills raise many concerns, including that they undermine the potential of the modern marketplace because they fail to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on regulatory restraints on the ability of rights holders to freely transfer, license, and otherwise exploit their rights, rather than on laying a foundation for a vibrant free market in creative content. Moreover, the bills' inadequate protections for copyrighted works and sound recordings in the digital environment would render South Africa's law incompatible with the very standards the government has stated an intention to implement.

Considerable work remains to make the bills acceptable and, frankly, implementable in practice, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act and Performers' Protection Act go beyond those raised in this report. The bills require redrafting, not

<sup>1</sup>For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



only to address their deficiencies as outlined by multiple stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for rights holders and users alike. As currently drafted, the bills would put South African creators and artists at a serious disadvantage relative to their counterparts in other countries. Considering the importance of the task of modernizing South Africa's Copyright Act and Performers' Protection Act, and the degree of concern raised by the creative industries with the current bills, IIPA recommends that the U.S. government continue to send a clear message that the proposed bills are fundamentally flawed and that the National Assembly should not rush its reconsideration and make only minor revisions; instead, consistent with the President's directives, South Africa's Parliament should redraft the bills to address the concerns of *all* stakeholders and ensure the provisions comply with international agreements and standards.

## **PRIORITY ACTIONS REQUESTED IN 2021**

- In consultation with stakeholders, redraft the CAB and the PPAB to ensure compatibility with international agreements, commitments, and other practices, and avoid undermining the existing commercial practices of the creative industries.
- Engage in effective enforcement against online piracy, including by providing effective mechanisms to address domestic and foreign-hosted infringing content, appointing cybercrime investigators, and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WIPO Internet Treaties.
- Monitor implementation of 4G and 5G networks to ensure it does not lead to a higher level of piracy, and improve education and increase enforcement commensurate to the increased threat.

## **COPYRIGHT LAW IN SOUTH AFRICA**

Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act in order to bring the country's laws into compliance with international agreements, including TRIPS, and the WIPO Internet Treaties.<sup>2</sup>

As previously reported, in late 2018, the South African Parliament adopted the first major revision of the copyright and related laws in decades.<sup>3</sup> While the intent of South Africa's copyright reform process was to bring the country's laws into compliance with international agreements, the bills that ultimately passed fell far short of international norms for the protection of copyrighted works in the digital era. Moreover, the copyright reform process, which began in 2015, transpired without adequate consultation with the public and, where opportunity for public consultations was provided, comments submitted by rights holders apparently were disregarded entirely.

In June 2020, South Africa's President referred the CAB and the PPAB back to the National Assembly based on "a number of reservations as to the Constitutionality of the Bills." At the time of this filing, the National Assembly is reconsidering these bills. Enactment of the bills in their current form would place South Africa out of compliance with international norms, its obligations under the TRIPS Agreement, as well as the eligibility criteria of both the GSP and the Africa Growth and Opportunity Act (AGOA) regarding intellectual property.<sup>4</sup> It is critical that the National Assembly does not rush this process and make only cosmetic revisions; instead, consistent with the President's directives, South Africa's Parliament, in full consultation with stakeholders, should redraft the bills to address the concerns of *all* stakeholders and ensure the provisions comply with South Africa's constitution and with international agreements.

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<sup>2</sup>South Africa's Cabinet has approved the country's accession to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the "WIPO Internet Treaties"), and the Beijing Treaty.

<sup>3</sup>See <https://www.iipa.org/files/uploads/2020/02/2020SPEC301SOUTHAFRICA.pdf> at 76.

<sup>4</sup>See IIPA's comments and post-hearing brief on South Africa's Generalized System of Preferences (GSP) eligibility in the 2019 annual GSP review, available at <https://www.iipa.org/files/uploads/2020/01/2020-01-17-IIPA-South-Africa-GSP-Review-Written-Comments-and-Notice-of-Intent-to-Testify.pdf> and <https://www.iipa.org/files/uploads/2020/03/SOUTH-AFRICA-IIPA-GSP-Post-Hearing-Brief.pdf>; and IIPA's comments on the 2020 Africa Growth and Opportunity Act (AGOA) Eligibility Review, available at <https://www.iipa.org/files/uploads/2020/06/IIPA-Written-Comments-on-2020-AGOA-Eligibility-Review.pdf>.

One of the grounds on which the President referred the bills back to Parliament is that the Parliament did not follow the correct process in passing the bills. As a result, the provincial governments, which should have participated in the legislative process, did not. The President's June 2020 letter referring the bills to Parliament also mentioned the lack of proper consultation regarding the extremely broad "fair use" exception, which is discussed in detail below. In addition, as discussed below, the Parliament did not adequately consult on other provisions of the bills, including failing even to publish, for stakeholder consultation, Section 8A of the CAB, which would regulate the remuneration terms of private contractual agreements between performers and copyright owners. According to South Africa's Constitution, because the CAB and PPAB were passed using incorrect parliamentary processes, they are invalid *ab initio* and must be redrafted and properly processed by the National Assembly as well as the governments of the nine provinces. As part of this process, the governments of the provinces and the National Assembly must conduct rounds of stakeholder consultations on all aspects of the bills.

At a time when South Africa's economy must rebound from the economic impacts of the global pandemic, the stakes are extremely high for the Parliament to redraft these bills to avoid destabilizing the creative industries and to support a thriving copyright sector, which contributes so significantly to economic and job growth in the country and which has potential for substantial growth under the proper conditions.<sup>5</sup>

The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, pose significant harm to the creators they purport to protect, and fall far short of needed reforms. Major issues of immediate and primary concern to the copyright industries are the following:

- The bills would severely restrict the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability freely to license and otherwise derive value from their copyrighted works and sound recordings. For example, both the CAB and the PPAB limit certain assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- The bills would create an overbroad amalgamation of copyright exceptions that includes a more expansive version of the U.S. "fair use" rubric appended to a proliferation of extremely open-ended new exceptions and limitations to copyright protection (on top of "fair dealing" provisions), resulting in a vast and unclear thicket of exceptions and limitations.
- The bills would overly regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers, which would undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings, rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- The bills would not provide adequate criminal or civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills' provisions on technological protection measures (TPMs) are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the overbroad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to launch and develop.

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<sup>5</sup>According to a study conducted by the Department of Trade and Industry (the DTI) and the World Intellectual Property Organization (WIPO) in 2010 using data from 2008, the South African copyright-based industries contributed 4.11% to gross domestic product (GDP) and 4.08% to employment. See WIPO, Economic Contributions of Copyright Based Industries in South Africa, available at [https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_za.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf).

These provisions are inconsistent with South Africa's international obligations, for example, by far exceeding the scope of exceptions and limitations permitted under the TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The provisions are also inconsistent with other established international legal norms and commercial practices, posing a significant risk to investments in South Africa.

## **2018 COPYRIGHT AMENDMENT BILL (CAB) AND PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)**

Beyond their individual failings, the two bills suffer from fundamental systemic failings that are not amenable to discrete fixes, nor correctable in implementation.<sup>6</sup> Rather than incentivize new creative output, many of the proposals in the CAB and the PPAB are based on a false premise, i.e., that there is a fixed market for works and that the government's role is to regulate the internal relationships of the creative community and their authorized distributors. This premise is incorrect, and implementation of these proposals will instead result in a stagnation of South Africa's cultural community. Without a fundamental reset of its copyright reform process, South Africa will be taking a step backward in its effort to strengthen copyright incentives and to align its laws with international standards and practices. South Africa would be better served by providing clear and unencumbered rights (subject only to targeted and clearly delineated exceptions and limitations that are justified by a clear evidentiary basis and comply with the three-step test), without restrictions on contractual freedoms, to allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats, at all price points. This is important particularly in the context of South Africa's recovery from the economic impacts of the global pandemic, the President's clear objective to improve levels of foreign direct investment, as well as the imperative to improve the lives and legacies of South Africa's own artists and creators.

It is important to note that the CAB and PPAB are extremely broad-reaching documents. IIPA's comments in this filing are not comprehensive, but instead highlight some of the major concerns for the U.S. copyright industries. It should also be noted that the bills, when read together, are incoherent. For example, Section 3B of the PPAB purports to set out the nature of copyright in sound recordings, which is already enumerated in the Copyright Act, as amended by the CAB. Thus, in addition to the very significant flaws in the bills described below, from a technical perspective, the bills are inadequate and risk introducing widespread uncertainty into South African law.

### **1. Severe Intrusions into Contractual Freedom**

Several provisions in the CAB and the PPAB constitute severe intrusions into private contractual relations. As such, these provisions restrict how private parties can collaborate to facilitate the public's access to copyrighted works, threatening well-established market practices that underpin domestic and foreign investment in artists and creative content, including books, films, sound recordings, musical works, music videos, and video games.

**A. Limitation on term of assignments:** Sections 22(b)(3) of the CAB and 3A(3)(c) of the PPAB limit the term of assignments for literary and musical works and performers' rights in sound recordings, respectively, to a maximum term of 25 years from the date of agreement, and in the case of performers' rights in sound recordings, provide for automatic reversion of rights to the performer after that period. These provisions raise serious concerns, including that Section 3A of the PPAB, by proposing to limit the term of contracts between performers and copyright owners to a maximum term of 25 years, would detrimentally disrupt the well-established practices of the recording industry in South Africa for the creation and use of sound recordings. This would risk serious harm to the recording

<sup>6</sup>Regulations cannot cure fundamental problems with the bills because a basic legal principle adhered to in South Africa is that regulations must be confined to the limits of the law itself, and cannot fundamentally alter primary legislation. See *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (holding by the South Africa Constitutional Court that while "detailed provisions" are necessary to implement laws, "[t]here is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. . ."). Furthermore, the number of provisions in the bills that require future regulation are very limited, and do not relate to the vast majority of the problematic issues raised by IIPA in this and previous submissions.

industry, performers, and other creators in South Africa because a major incentive for investment would be removed through the effective halving of the term of assignment of recordings from 50 years to 25 years.<sup>7</sup>

In effect, these provisions would make it impossible to clear rights in many works after 25 years, rendering these works unusable, with no one able to receive any revenues from them. Sound recordings typically involve performances from a large number of performers. The copyright owner of a sound recording (i.e., the record company) will often have a long-term relationship with the featured artist, but is far less likely to have such a relationship with, for example, a performer who entered into a one-off agreement to provide the backing vocals or other musical performances in the sound recording. Under the PPAB, each such performer would have rights that, according to Section 3A, would be transferred to the copyright owner (the record company in most cases) to enable the copyright owner to license the use of the sound recording by third parties. Yet Section 3A provides that the record company would cease to have those rights after 25 years, meaning that the record company would need to seek out thousands of performers (with whom, in the case of session or “backing” musicians, the company often has no long-term relationship) to obtain their mutual consent to an extension of the 25-year term. The inability to locate just one session musician involved in a sound recording would render the sound recording unusable, ending the revenues that come to record companies, performers, authors, or publishers from the exploitation of that recording. That cannot be the intent of this legislation.

Section 3A would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers require large upfront investment from record companies, with no certainty of when, if ever, the investment will be recouped. Limiting the term of agreements between record companies and artists would increase the economic risk even further and would likely reduce the revenues available to invest in new talent. The provision should be removed to avoid the serious harm that it risks causing to all participants in the South African music industry. While audiovisual works are specifically excluded from the CAB provision limiting assignments to 25 years, they are arguably not excluded from the ambit of Section 3A of the PPAB, which states that any performer whose performance is fixed in a sound recording will benefit from the reversion of performers’ rights. Accordingly, performers who “make an audible sound” in an audiovisual work, or contribute to a voice-over in an animated work may be able to claim that they should also benefit from the reversion of rights under Section 3A of the PPAB. This provision would increase legal uncertainty and introduce a disincentive to the acquisition of literary properties by film companies for adaptation into film and TV. This would ultimately inhibit financing of film projects and would jeopardize film production in South Africa.

**B. Sweeping ministerial powers to set contractual terms:** Section 39 of the CAB and Section 3A(3)(a) of the PPAB create ministerial powers to prescribe “compulsory and standard contractual terms,” including setting royalty rates regarding “uses” of copyrighted works and across any form of agreement covering authors’ and performers’ rights. These provisions are not only unjustified, but are seemingly premised on a lack of understanding of the myriad of contractual relationships that underpin the creation of copyright content, which often comprises many different rights from various parties, and which are licensed for use by third parties in a variety of ways. Empowering ministers to impose contractual terms risks imposing a degree of rigidity into the South African creative economy that will stifle investment and innovation.

These provisions would unfortunately restrict the flexibility in transfer agreements between sound recording performers and producers. That flexibility is needed to address the varying relationships between performers and copyright owners. For example, the relationship and contractual agreement between the featured artist and the

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<sup>7</sup>While there is a provision in U.S. law on termination of transfers, that provision contains key differences that mitigate these harms. First, the South African provision broadly applies to all literary and musical works and sound recordings, and is automatic. Under U.S. law, by contrast, termination rights do not apply to works made for hire; as a result, many works, including most audiovisual works (with potentially dozens or hundreds of contributing “authors”), or similar multiple-contributor works (sound recordings, video games, etc.) cannot be terminated. This gives certainty to the producers of those works of their ability to exploit the works without clearances from the numerous contributors. Second, termination under U.S. law is subject to notice (up to ten years prior to termination) and exceptions, allowing derivative works to continue to be exploited. The South African bill has neither of these provisions. Third, the U.S. termination right applies only where the grant was made by the original author, not by successors or assignees. The South African proposal includes no such limitation; it is broadly applicable to all literary and musical works and sound recordings.

copyright owner will differ substantially from that between a performer appearing as a one-off session musician and the copyright owner. Neither performers nor copyright owners would benefit from prescribed contracts, which would inevitably fail to meet the differing needs of performers depending on their respective roles in a sound recording. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners.

**C. Mandating the mode of remuneration for audiovisual performers:** The CAB includes a proposal (Section 8A) to regulate the remuneration terms of private contractual agreements between performers and copyright owners. Even though it proposes a significant interference into private contractual arrangements, to the particular detriment of certain performers, Section 8A was never published for consultation (except for Section 8A(6)). The result is a proposal that would substantially undermine the economics and commercial practices concerning the production of audiovisual works. While Section 8A may be intended to provide appropriate remuneration to performers, in practice, the proposal would cause substantial harm to a large category of the performers who perform background roles.

Audiovisual works are comprised of performances by lead/featured performers and extra/non-featured performers. Lead or featured artists are remunerated in accordance with the terms they have negotiated with the producer, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Extra/non-featured performers, on the other hand, are remunerated by way of lump-sum payments, typically by way of one-off contracts, rather than by way of longer-term partnerships with producers.

Unfortunately, Section 8A appears to propose removing the possibility of lump-sum payments and replacing them with royalty payments.<sup>8</sup> Rather than benefitting performers, this provision would in fact result in many performers, who otherwise would receive remuneration from performing in an audiovisual work, receiving little or nothing from the exploitations of the work. This is because many creative projects are loss-making for the producer. As a consequence of proposed Section 8A, extra/non-featured performers would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the work in question actually succeeded in generating revenues. The current commercial practices avoid that outcome by paying extra/non-featured performers on a lump sum basis, irrespective of whether the works in which they perform succeed. This provision also risks a direct negative impact on investments in South African productions and a reduction in the number of South African “background” performers engaged to perform in audiovisual works.

**D. Prohibition on contractual override:** The risks posed by the CAB are further compounded by the prohibition on contractual override in Section 39B(1), which prohibits any contractual terms that deviate from the provisions of the bill, thereby removing the possibility for parties to determine their own contractual arrangements in a manner that avoids the harm caused by certain provisions of the bill. The provision also presents a significant risk of compelling contractual parties to follow rigid standardized contractual terms, thereby inhibiting a competitive and innovative marketplace, and requiring terms that may be overly onerous and disadvantageous to the contractual parties in light of the specific circumstances.

## **2. Inadequate Protection of Performers' Rights**

South Africa's intention to ratify the WIPO Internet Treaties is welcome and full implementation would represent a significant step towards establishing an appropriate legal framework. Regrettably, a number of provisions in the bills, including the level of protection afforded to certain performers' rights, are incompatible with the treaties.

Section 5 of the PPAB sets out the rights granted to performers. In the PPAB, performers' rights are also enumerated under Section 3. The amendments to Section 5 are therefore, in part, duplicative of Section 3. More

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<sup>8</sup>Section 8A, on its face, states that performers have a right to royalties.

importantly, though, Section 5(1)(b) downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights, a proposal that would be incompatible with WPPT (and the WIPO Beijing Treaty), which do not permit these rights to be diminished to the level of mere remuneration rights. Furthermore, providing mere remuneration rights with respect to distribution and rental, subject to rate setting by the Tribunal (Section 5(3)(b)), would prejudicially devalue these performers' rights. Experience in South Africa, and internationally, shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works because one set of rights would be subject to private negotiation (the producers' rights), and the performers' rights would ultimately be subject to Tribunal rate-setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

### 3. ***Fair Use***

The CAB drastically expands the exceptions and limitations to copyright in South Africa's law. The broad exceptions, which are duplicated in the PPAB, will create a disproportionate imbalance against creators and producers of copyright-protected works and undermine the predictability needed to support a robust marketplace for copyrighted works. Additionally, they appear to far exceed the scope of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the TRIPS Agreement (and Article 9 of the Berne Convention and the corresponding provisions in the WIPO Internet Treaties). The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa's provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the "public interest" that would serve to constrain copyright protection.<sup>9</sup>

While the proposed "fair use" provision may resemble certain aspects of the fair use statute in U.S. law, it is inaccurate to contend, as some have suggested, that South Africa is proposing to adopt the U.S. fair use doctrine. South Africa's proposed broader fair use provision, along with the other proposed exceptions and limitations to copyright protection, are blatantly inconsistent with the three-step test, which is the internationally-recognized standard that confines the scope of copyright exceptions and limitations,<sup>10</sup> for the following reasons:

- First, South Africa lacks a deep and rich body of case law that, in the United States, helps to mitigate the inherent uncertainty of the scope or applicability of the fair use exception. Without the foundation of a well-developed body of case law, South Africa's untested broad fair use provision would result only in uncertainty for both rights holders and users on the parameters of permissible uses (since U.S. fair use is determined on a fact-intensive case-by-case basis). Compounding this shortcoming is that high legal fees and protracted timeframes for cases in South Africa will deter and undermine efforts by rights holders to access the courts in hopes of more clearly establishing the parameters of this broad exception.<sup>11</sup> The International Center for Law & Economics, analyzing whether the U.S. should require trading partners to adopt U.S.-style fair use, concluded that "the wholesale importation of 'fair use' into other jurisdictions without appropriate restraints may not result in a simple extension of the restrained and clearly elaborated fair use principles

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<sup>9</sup>See *South African Broadcasting Corporation v. Via Vollenhoven & Appollis Independent, et al.*, Case No. 13/23293, The High Court of South Africa, Gauteng Local Division, Johannesburg (Sept. 2, 2016) <http://www.saflii.org/za/za/cases/ZAGPJHC/2016/228.pdf>.

<sup>10</sup>See, e.g., Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention.

<sup>11</sup>While some have suggested that South Africa could look to case law in the United States, or elsewhere, South African judges are not bound by the decisions of U.S. courts, and such decisions carry virtually no legal weight in South Africa. It is very unlikely that South African courts would, or even could, wholesale adopt U.S. precedents, especially considering South Africa's very different and unique legal history. In addition, while a handful of countries have recently enacted fair use provisions, IIPA is not aware of any significant case law that has been developed under the fair use statutes in any of these countries. South Africa's existing jurisprudence on fair dealing will also not be helpful because the fair use proposal is much broader than the fair dealing provisions in the current law and, therefore, whatever case law exists interpreting the existing, narrower fair dealing provisions would have very little relevance.

that exist in the U.S., but, rather, something completely different, possibly even a system untethered from economics and established legal precedents.”<sup>12</sup>

- Second, the South Africa proposal includes language even broader than the U.S. fair use statute, which further heightens the uncertainty discussed above, and the risk that an unacceptably wide range of uses in South Africa will be considered “fair” and non-infringing. For example, the proposal includes a number of additional access and use purposes that are absent from the U.S. fair use statute. These include: “personal use, including the use of a lawful copy of the work at a different time or with a different device;” “illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;” “preservation of and access to the collections of libraries, archives and museums;” and “ensuring proper performance of public administration.” Extending fair use to such undefined access and use purposes that are not included in the U.S. statute adds to the uncertainty of how South Africa’s judges will apply fair use, and the risk that they will apply the fair use doctrine well beyond the scope of its application in the United States.<sup>13</sup> In addition, unlike the U.S. fair use statute, the South Africa proposal states that the “the purpose and character of the use” should include consideration of whether “such use serves a purpose different from that of the work affected.”<sup>14</sup> The South Africa proposal also includes an affirmative requirement to consider “all relevant factors” that is not in the U.S. statute. It is unknown how South African judges would interpret these provisions, which heightens the risk that a broader range of uses in South Africa will be considered “fair” than those permitted under U.S. law. Therefore, rather than proposing to adopt a U.S.-style “fair use,” South Africa has proposed a new copyright exception, borrowing certain statutory language from the United States, while adding new and broader language, and without incorporating the corpus of U.S. jurisprudence that is integral to defining the scope of U.S. fair use and its interpretation.
- Third, in addition to the new expansive “fair use” exception, the legislation also retains South Africa’s existing “fair dealing” system, while expanding the impact of fair dealing exceptions by effectively removing the limiting standard of “fair practice.” It also introduces a number of extremely broad, new exceptions and limitations to copyright protection, all of which have the potential to adversely impact the legitimate market for educational texts, locally distributed works, and online works in general. A 2017 study by PricewaterhouseCoopers looked at the impact of these broad exceptions on the South African publishing industry, and predicted “significant negative consequences” would result from the adoption of the proposed fair use provision and the other broad exceptions.<sup>15</sup> Taken alone, the “fair use” and the “fair dealing” aspects of the proposed bill are each too broad. Taken together, the proposed “hybrid” model creates an unprecedented mash-up of exceptions and limitations that will deny rights holders fundamental protections that enable licensing of their copyrighted works and sound recordings, and, because the provision is drafted so unclearly, will also deny users certainty regarding what works and what uses are permissible without a license.

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<sup>12</sup>See International Center for Law & Economics *Dangerous Exception: The Detrimental Effects of Including ‘Fair Use’ Copyright Exceptions in Free Trade Agreements*, 15 (2015), [http://laweconcenter.org/images/articles/dangerous\\_exception\\_final.pdf](http://laweconcenter.org/images/articles/dangerous_exception_final.pdf).

<sup>13</sup>Many of these additional access and use purposes in the South African proposal are in fact broader than exceptions permitted under U.S. law. For example, regarding the “personal use” language, there is no general “personal use” exception in U.S. law and “format shifting” is not always held to be a fair use. In addition, the “preservation of and access to the collections of libraries, archives and museums” is not a fair use in the U.S. Rather, Section 108 of the Copyright Act establishes specific instances and limits pursuant to which libraries and archives may make copies of works for preservation purposes. It is unclear what “ensuring proper performance of public administration” encompasses, but nothing in the Copyright Act or U.S. case law establishes such use to be a fair use.

<sup>14</sup>Requiring South African judges to consider whether “such use serves a purpose different from that of the work affected” would broaden the U.S. judge-made notion of “transformative use.” The Supreme Court has defined “transformative use” as one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). South Africa’s provision would establish a lower bar for the permissibility of a use than U.S. law because it appears to require that a use merely serve a “different” rather than a “transformative” purpose. See *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (“difference in purpose is not quite the same thing as transformation, and Campbell instructs that transformativeness is the critical inquiry under this factor.”)

<sup>15</sup>See *The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>. The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the CAB, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

- Fourth, the uncertainty that will be caused by the proposed hybrid model is particularly problematic in South Africa because its legal system lacks statutory and punitive damages, which rights holders in the U.S. rely on to deter and remedy infringement, and enforcement in South Africa has been historically inadequate. As a result, bad actors in South Africa would be undeterred from taking advantage of the uncertainty created by these exceptions to infringe copyrights. A copyright system that consists of open-ended and unclear exceptions, weak affirmative rights, and non-deterring enforcement is the archetype for inadequate and ineffective protection of intellectual property rights.
- Fifth, the risks posed by the fair use provision, and the other unclear and very broad exceptions discussed above, are further compounded by the prohibition on contractual override in Section 39B(1) (discussed above), which renders unenforceable any contractual term that prevents or restricts a use of a work or sound recording that would not infringe copyright under the Copyright Act (as amended by the CAB).

For these reasons, if the proposed legislation is enacted, South Africa's legal framework for exceptions and limitations to copyright protection would clearly violate South Africa's international obligations, would be inconsistent with international treaties it has stated an intent to join, and would further erode the already inadequate level of copyright protection in the country.

#### **4. *Exceptions and Limitations***

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the CAB are likewise of concern, and many clearly exceed the bounds of the longstanding international standard confining exceptions and limitations to copyright, the three-step test:<sup>16</sup>

**A.** Section 12B(1)(i) and 12B(2) allow individuals to make copies for "personal uses." These broad exceptions in effect allow for private copying without any remuneration for rights holders, which is out of step with international norms (a similar proposal was challenged successfully in the UK where the High Court quashed a private copying exception that did not compensate rights holders for the harm the exception would cause). Such private copying exceptions are typically accompanied by a remuneration (or "levy") system by which rights holders are compensated for the private copying of their works. The proposed exception also permits copying in an "electronic storage medium," which is highly unusual and which risks undermining existing licensing practices with regard to digital content services. This exception violates the three-step test because it is not limited to "certain special cases" and does not include any requirement to consider whether such copying would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder.

**B.** Section 12B(1)(f) grants an exception for making translations for the purpose of "giving or receiving instruction." The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the bill attempts to limit the scope by defining its purpose, it would undermine the author's translation rights, which warrant just compensation and which South Africa is required to protect under the Berne Convention and the TRIPS Agreement.<sup>17</sup> Enactment of this exception would therefore disrupt the significant market for authors' and publishers' translation rights. As a result, this exception falls outside the bounds of the three-step test because it fails to take into account the need to avoid conflict with a normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rights holder.

**C.** Section 12C provides an exception for temporary reproduction of a work "to enable a transmission of a work in a network between third parties by an intermediary or any other lawful use of work; or . . . to adapt the work to allow use on different technological devices . . . as long as there is no independent, economic significance." This provision also allows copying for *reformatting*, where such copies are an integral and essential part of a

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<sup>16</sup>See, e.g., TRIPS Article 13.

<sup>17</sup>See Berne Convention Article 8, and TRIPS Article 9, incorporating the Berne Convention Article 8.

technical process, if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to stop piracy. If any such exception is to be included, IIPA recommends that the word “lawful” be replaced by “authorized,” so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the “incidental” reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

**D.** Section 12B(1)(a) provides a broad and circular exception for quotation, permitting any quotation provided that “the extent thereof shall not exceed the extent reasonably justified by the purpose,” but without enumerating the permitted purposes such as, for example, criticism and review. The result is an exception that appears to permit quotations for any purpose whatsoever, which risks causing substantial harm to rights holders and renders the proposed exception incompatible with the internationally recognized three-step test for copyright exceptions and limitations. The exception allows quotation in all instances, which fails to meet the three-step test limitation of “certain special cases.” The exception also violates the three-step-test because the absence of clear limits to the extent and purpose of a quotation would also potentially lead to a conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interest of the rights holder.

**E.** Section 12D permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 12D(7)(a) on open access for “scientific or other contributions” is overreaching and will likely undermine the rights of authors and publishers and deny authors academic freedom. Subsection 12D(4)(c) specifically authorizes the copying of entire textbooks under certain conditions, even textbooks that are available for authorized purchase or licensing, if the price is deemed not to be “reasonably related to that normally charged in the Republic for comparable works.” The likely impact of these provisions on normal exploitation of works for educational markets would far exceed what is permitted under international standards. Permitting copying of entire textbooks that are available for authorized purchase or licensing clearly is not confined to certain special cases. Such unauthorized uses would also clearly conflict with publishers’ normal exploitation of the work and unreasonably prejudice their legitimate interest.

**F.** Section 19D provides an exception for persons with disabilities, which is defined as, essentially, disabilities that relate to the ability to read books. This provision would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring provisions designed to facilitate access for visually impaired persons in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

## **5. *Exclusive Rights of ‘Communication to the Public’ and ‘Making Available’***

The CAB would add Section 9(f) to the Copyright Act, confirming that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive clarification, as this right underpins the digital music industry. However, the wording of proposed Section 9(e) regarding sound recording producers’ exclusive right of communication to the public omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,” which explicitly “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid ambiguity in the legal framework, IIPA submits that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public.)

Furthermore, the meaning of proposed Section 9A(aA) (and equivalent provisions in relation to exploitation of other categories of works, and in the PPAB with respect to performers’ rights) is not clear. While it is understood that these provisions are intended to ensure accurate reporting of authorized uses of works, to the extent they could be interpreted as providing a legal license for such uses, they would be wholly incompatible with the WIPO Internet Treaties, while undermining the economic feasibility of South African creative industries. These provisions should therefore be clarified to avoid any such confusion.

## **6. Technological Protection Measures**

TPMs are vital tools for the copyright-based sectors in the digital era, enabling creators and rights holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering rights holders to explore new markets opened up by current and emerging technologies. It is welcome that the CAB introduces provisions (and the PPAB incorporates them by reference) on TPMs. Unfortunately, these provisions are completely inadequate, and therefore fall short of the requirement of Article 18 of WPPT and Article 11 of the WCT that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the creative industries. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on TPMs is therefore essential to protect against piracy and enable the development of new business models. Moreover, many film and television producers are seeking to respond to consumer demand by establishing online platforms to provide content to consumers or licensing film and television programming to online services. TPMs are essential to the functionality of these platforms and to the licensing of this high-value content.

First, the definition of “technological protection measure” in Section 1(i) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. The provision should be clarified to ensure that a protected TPM is one that effectively protects a right of a copyright owner in a work, or effectively controls access to a work. Furthermore, paragraph (b) of the definition should be removed; that a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. This provision is furthermore inconsistent with the proposed exception of Section 28P(2)(a), which is intended to enable the user to seek assistance from the rights holder in gaining access to the work for a permitted use. As it stands, paragraph (b) of the definition would be open to abuse and would provide a charter for hacking TPMs. In this respect, see also IIPA’s comments below with respect to Section 28P(1)(a).

Second, we also recommend that the definition of “technological protection measure circumvention device” be amended to include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition encompasses a broader range of harmful TPM circumvention devices, consistent with best international practices.

Finally, the exceptions in Section 28P regarding prohibited conduct with respect to TPMs (in Section 28O) are inadequately defined, therefore rendering them incompatible with international norms and substantially reducing the effectiveness of the protections afforded by Section 28O. Under Section 28P(1)(a) it would be extremely burdensome, if not impossible, for rights holders to establish that the use of a TPM circumvention device by a user was not to perform an act permitted by an exception.<sup>18</sup> Additionally, a provider of an unlawful circumvention technology could rely on Section 28P(1)(b) to claim it is acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of Section 28P(2)(b), which permits assisting a user to circumvent TPMs after a “reasonable time.”

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<sup>18</sup>In this regard, see the discussion above regarding the proposed “fair use” and other unclear and overly broad exceptions proposed in the bills, which would compound this problem.

## **7. *Penalties for Infringement***

The CAB lacks appropriate remedies for infringement. The criminal fines provided will not assist copyright owners in recovering their losses from infringement, as the money does not go to them. Additionally, the bill does not provide copyright owners any additional civil remedies in cases of online infringement. Online piracy remains a persistent and growing threat to the creative industries. Given the scope and scale of the problem, there is a serious need for more mechanisms to combat infringement and further remedies for rights holders.

IIPA reiterates its recommendations to introduce enforcement provisions that are effective in the digital age and protect the online marketplace, such as: (1) ensuring online platforms do not make or allow unauthorized use of copyrighted works on their platforms; (2) preventing the unauthorized distribution of electronic formats of copyright works; (3) alleviating the burden of proof on claimants with respect to technical allegations in claims that are not in dispute; and (4) providing for appropriate and adequate damages for online infringement.

## **8. *Intellectual Property Tribunal***

Proposed amended Sections 29 through 29H would establish an Intellectual Property Tribunal to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things is required by the bill, nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the CAB adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including a broadcast, or to reproduce and publish out of print editions for "instructional activities," with few limitations. To the extent that a revitalized Tribunal is to be considered, it would best serve the South African market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the economic value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect the price that would be agreed in a free market transaction based on a willing buyer and a willing seller standard. If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

## **9. *Collective Management of Rights***

IIPA is concerned by proposed Section 22B, which may be understood to preclude a Collective Management Organization (CMO) representing, for example, both copyright owners and performers. Such an interpretation could prohibit the existing collaboration between performers and producers in the SAMPRA CMO, which administers needletime rights on behalf of both recording artists and record labels. This would be inconsistent with industry standards and contrary to the interests of those rights holders, the users (licensees), and the public at large. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers' and producers' rights. The provision should be clarified.

As a general point, and as referred to in section 8 above, it is also vital that any rates set by the Tribunal for performance rights (including "needletime") reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice (i.e., the "willing buyer willing seller" standard applied by the U.S.

Copyright Royalty Board), which seeks to ensure that rights holders are remunerated adequately for the high value of recorded music.

#### ***10. State Intervention in Private Investments and the Public Domain***

The CAB contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works “funded by” or made under the direction or control of the state. This provision could be broadly interpreted to include works developed with a modicum of government involvement and may well diminish incentives for public-private cooperation in creative development.

#### ***11. Term of Protection***

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published, and for literary, musical, and artistic works, the term of protection is 50 years from the author’s death or 50 years from publication if first published after the author’s death. The CAB should be revised to extend the term of protection for copyrighted works and sound recordings to 70 years. This will provide greater incentives for the production of copyrighted works and sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues, and enabling producers to continue offering works and recordings to local consumers in updated and restored formats as those formats are developed.

### **MARKET ACCESS ISSUES IN SOUTH AFRICA**

**Broadcast Quota:** In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio and published local program quotas for licensed broadcasters of television content in March 2016. In May 2020, ICASA published a new regulation, fully exempting “television broadcasting service licensees” from compliance with the local television content quotas during the National State of Disaster (NSD) and allowing a three-month grace period from the end of the NSD. Non-domestic media service providers licensing content to local broadcasters are exempt from the program quotas and, in 2018, ICASA clarified that this exemption also applies to non-domestic over-the-top (OTT) services. IIPA recommends that businesses should have the freedom to determine content programming according to their business models and relevant consumer demands.

**Online Value-Added Tax:** In May 2014, South Africa published regulations relating to registration and payment of value-added tax (VAT) on all online transactions conducted in, from, or through South Africa. Currently levied at 15%, this onerous tax includes online selling of content such as films, TV series, games, and e-books. Furthermore, since April 2019, income on business-to-business services provided by foreign providers to South African businesses is also subject to VAT.

### **COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA**

Creative sectors in South Africa are growing, but face the challenge of illegal competition. Improved infrastructure and accessibility to broadband Internet has changed the landscape of copyright piracy in South Africa over the last decade. Physical piracy (e.g., sale of pirated CDs and DVDs) is not as prevalent as it used to be. The dominant concern in South Africa is increasing piracy in the digital environment.

**Internet Piracy:** Although South African consumers have increasing options available to stream legitimate creative content, online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. South Africa has one of the highest rates of music piracy worldwide. According to a 2019 music industry study, 61.6% of Internet users admitted downloading

pirated music at least once in the prior month, a piracy rate below only India and China.<sup>19</sup> Stream-ripping is the major music piracy issue in the country, with 39% of all users and 58% of 16-24 year olds saying they had downloaded illegally via stream-ripping.<sup>20</sup> Bit Torrent and cyberlocker use is also high, with more than one-fifth of users (21%) downloading music through these means.<sup>21</sup>

South Africa's government recently agreed to open the spectrum paving the way for implementation of 4G and 5G networks. While this will boost distribution and consumption of legal content, without efforts to increase education and improve enforcement, it also will likely lead to higher levels of piracy. Easy access to pre-released film and television content through international torrent, linking, and cyberlocker sites also fuels online piracy in the country. As South Africa lacks injunctive relief for rights holders, consumer access to these infringing sites continues unabated.<sup>22</sup> South Africa needs a legal framework that facilitates rights holders in addressing unauthorized use in all ways and supports consumer education and awareness programs.

**Piracy Devices and Apps:** Set-top boxes and memory sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series, or sporting events. These devices are most commonly sold to South African consumers online. There are some companies that develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns. In January 2018, the Durban Commercial Crime Unit executed a search and seizure warrant for Internet Protocol television (IPTV) boxes and Play Station peripherals after it received a filed complaint. Actions like this are helpful, but much more is needed to effectively combat the growing problem. There are a number of examples of enforcement and consumer education programs that are effective in other markets and could be replicated in South Africa. It is critical for South Africa to gain more understanding of these approaches and to work proactively with experts from the applicable creative industry sectors to localize and implement similar programs.

**Parallel Imports:** The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. Industry stakeholders are in the process of developing a MOU with the Film and Publication Board, which will focus on joint cooperation on enforcement against parallel imports.

**Enforcement:** South Africa's enforcement framework is not up to the challenge of its counterfeiting and piracy problems. Border enforcement is inadequate because of a lack of manpower and lack of *ex officio* authority, which places a burden on the rights holder to file a complaint and institute costly proceedings to ensure that goods are seized and ultimately destroyed. Civil enforcement is not a practical option because a High Court application or action currently takes two to three years to be heard, and damages are low because, as noted above, South Africa lacks statutory damages or punitive damages.<sup>23</sup> In addition, criminal enforcement suffers from a lack of specialized

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<sup>19</sup>See IFPI Music Listening in 2019, available at <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf>.

<sup>20</sup>Stream-ripping sites are some of the most popular sites in South Africa. *Tubidy.mobi* was the 12<sup>th</sup> most visited website in South Africa in Q3 2020 according to SimilarWeb with 23.9 million monthly visits, making the piracy site more popular in South Africa than websites such as *microsoft.com*, *yahoo.com*, and *Spotify*. Another stream-ripping site, *MP3juices.cc*, had 23.8 million visits over the same period, and stream-ripping sites *Savefrom*, *Y2Mate*, and *YTMP3.cc* each reportedly had multiple millions of visits from South Africa.

<sup>21</sup>According to SimilarWeb data, BitTorrent site *1337x.to* had over 4.1 million visits from South Africa during Q3 2020, and BitTorrent site *ThePirateBay.org* had more than 2.6 million visits from South Africa during the same time period.

<sup>22</sup>While South Africa's current law allows for an "interdict" (or injunction) under certain circumstances, in practice, this remedy is limited and extremely difficult to obtain. Lower courts have jurisdiction to grant an interdict, but only if the "value of the relief sought in the matter" does not exceed a limit of ZAR400,000 (~US\$30,000) or if the actual economic harm that the injunction is sought to prevent or restrain can be projected under that limit. It is also often difficult in intellectual property cases to establish the required showings of "urgency" and "irreparable harm resulting if the order is not granted." Compounding this problem, judges in South Africa have little to no experience in IP infringement cases, further diminishing the utility of this remedy. As a result, in practice, the interdict remedy is not effective for rights holders in South Africa. Moreover, the proposed copyright reform legislation will further diminish the utility of this remedy because the ambiguous and overbroad exceptions could make it more difficult to establish a *prima facie* case of infringement on which to base an interdict order.

<sup>23</sup>Section 24(3) of South Africa's Copyright Law, which states that courts may "award such additional damages as the court may deem fit," does not provide for statutory or punitive damages. Statutory damages allow plaintiffs to recover damages without showing proof of harm to the rights holder or gain to the infringer. In contrast, the "additional damages" provision of 24(3) permits a judge to take into account the flagrancy of the infringement and the benefit to the infringer, but rights holders must still prove the harm and the gain to the infringer. Regarding punitive damages, IIPA is not aware of a case in which these "additional damages" have been actually quantified and awarded, and there is nothing in South Africa's law or practice to suggest that the purpose of the "additional

prosecutors and judges equipped to handle intellectual property cases. A particular problem for South Africa is infringing services that are hosted outside of the country, which undermine the legitimate online marketplace. South Africa needs a mechanism to provide an appropriate remedy that is narrowly tailored with appropriate processes to halt services that are built on, facilitate, and/or encourage infringement. Around 45 jurisdictions around the world have developed approaches to halt illegal services from being accessed from across their borders. For example, Europe has addressed this problem through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

South Africa recently set up a specialized unit tasked with financial crimes and counterfeiting (known as the “HAWKS” unit), but it does not appear to be adequately resourced or have a suitable remit to take effective action against digital piracy. There is also a need for ongoing training and education for South Africa’s police and customs officials to improve the process for detention and seizure of counterfeit and pirated goods. In particular, law enforcement officials should better understand the arduous procedures and timelines in the Counterfeit Goods Act (which prohibits rights holders from getting involved in many of the required actions), including that non-compliance will result in the release of counterfeit and pirated goods back to the suspected infringer. The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the law that rights holders rely upon for title, site, and link takedowns. The lack of cybercrime inspectors continues to limit the full potential of this law. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

The enactment of the Films and Publications Amendment Act, No. 11 of 2019, which extends application of the Films and Publications Act to online distributors of publications, films, and video games, could be a positive step for enforcement because it establishes an Enforcement Committee for investigating and adjudicating cases of non-compliance with any provision of the Act. South Africa’s government should implement the Act to improve enforcement against online piracy.

IIPA welcomes South Africa’s initiative on cybercrimes: a Cybercrimes Bill was passed by Parliament (both the National Assembly and the National Council of Provinces) and sent to the President for assent on December 2<sup>nd</sup>, 2020. The Bill focuses on cyber-related crimes, including copyright infringement through peer-to-peer networks. While the Bill potentially could provide additional enforcement tools to combat online infringement, certain provisions should be revised for clarity and specificity and to eliminate certain onerous requirements for online stakeholders.

The Interpol Intellectual Property Crime Conference held in 2019 in Cape Town provided local law enforcement with information on best practices and resources for combatting IP theft, including access to the Interpol Intellectual Property Investigators Crime College (IPIC). Law enforcement should take advantage of these initiatives, including the IPIC training courses to assist with local and regional training of new and existing units.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In November 2019, USTR opened an investigation, including holding a public hearing in January 2020, to review country practices in South Africa regarding intellectual property rights and market access issues, and to determine whether South Africa still qualifies for beneficiary status under the GSP. Under the statute, the President of the U.S. must consider, in making GSP beneficiary determinations, “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets … of such country.” IIPA requests that through the GSP review, the U.S. government continue to send a clear message that the proposed CAB and PPAB are fatally flawed, and work with the South African government to remedy the deficiencies in South Africa’s legal and enforcement regimes, including by redrafting the bills to address the serious concerns detailed

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damages” provision is to punish or deter infringement. In addition, criminal damages in South Africa are ineffective for deterring infringement due to limited criminal prosecutions, the high burden of proving and collecting damages, and the higher burden of proof in criminal cases (which would be exacerbated by the new vague and open-ended exceptions in the copyright reform proposal).

above and in IIPA's previous submissions. If, at the conclusion of the review, requisite improvements are not made by the Government of South Africa, IIPA requests that the U.S. government suspend or withdraw GSP benefits to South Africa, in whole or in part.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Special 301 Priority Watch List.<sup>1</sup>

**Executive Summary:** Taiwan has recently taken some positive steps to improve its digital marketplace for legitimate (licensed) audiovisual content, including outlawing Piracy Devices (PDs) and software applications in 2019 and taking enforcement actions in 2020 against certain notorious piracy sites, such as *8maple.ru* (and related domains). However, online piracy, legal framework deficiencies, and other barriers continue to stifle the potential of the Taiwanese market and limit market access for the U.S. creative industries. To further its stated interest in negotiating a bilateral trade agreement with the U.S., Taiwan's government should address the copyright protection, enforcement, and market access concerns discussed in this report.

Piracy websites and software applications (apps), especially those operated or based outside of Taiwan, are increasing and facilitating various forms of piracy, including stream-ripping and the proliferation of PDs. Illegal camcording remains a concern. E-book piracy and the making available of copyrighted teaching materials without authorization on university digital platforms likewise remain problematic.

In 2019, Taiwan amended two articles of its Copyright Act to provide a clear legal basis for taking action against the proliferation of piracy apps and devices. Taiwan's government should further improve the legal framework for copyright protection and enforcement to combat remaining and growing online piracy problems. For example, Taiwan should provide an effective remedy such as no-fault injunctions against foreign-hosted piracy sites. This is essential to address the fact that most forms of piracy affecting the Taiwanese market are operated by or involve services based outside of Taiwan. Data suggests that the public in Taiwan would support more effective protection of creative content online. Unfortunately, two separate sets of draft amendments to the Copyright Act under consideration not only fail to address deficiencies in Taiwan's legal framework, but would further damage local and worldwide investment in the production and legitimate distribution of copyrighted content and raise questions regarding Taiwan's commitment to its existing international obligations.

The Government of Taiwan should move swiftly to remove market access barriers negatively impacting the audiovisual sector, and Taiwan should refrain from imposing any new barriers, including proposed regulations of Over-the-Top (OTT) services. IIPA urges the Government of Taiwan to take the steps necessary to address the persistent threats to the creative industries, which contribute so significantly to Taiwan's economy and culture.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Criminal Investigation Bureau (CIB), Telecommunication Police Brigade (TPB), and Criminal Investigation Brigade (CIBr) should continue to investigate and prosecute more online piracy cases (including those involving PDs and piracy apps under the amended Copyright Act), with the goal of seeking deterrent level punishment against commercial piracy operations.
- Ensure that the CIB, TPB, and CIBr remain focused on combatting online piracy and are provided with sufficient training, funding, manpower, and equipment to investigate online piracy cases.

<sup>1</sup>For more details on Taiwan's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Taiwan's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Increase training for judges and prosecutors on global best practices in the area of online copyright enforcement, and the application of procedural requirements to the online environment.
- Take action against infringement of reading materials at educational institutions, including the making available of on-demand printouts of pirated e-books or teacher resource materials, and against digital infringement occurring on online education platforms.
- Take effective action to deter unauthorized camcording incidents, including issuing deterrent penalties.
- Issue a regulation (or equivalent administrative measure) pursuant to Article 87(7) of the Copyright Act confirming that the provision applies to all websites and apps that facilitate infringement of copyright, including stream-ripping, and bring cases under that provision.

**Legislative:**

- Enact legislation to:
  - provide for a clear legal basis for rights holders to obtain no-fault injunctions to order Internet Service Providers (ISPs) to disable access to infringing websites, including foreign websites (including, as necessary, amending the Civil Procedure Code and the Intellectual Property Adjudication Act to overcome potential civil procedure restrictions);
  - make all criminal copyright infringement, including Internet piracy, “public crimes” to permit *ex officio* action against infringement;
  - clarify ISP liability framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
  - further amend Article 87 of the Copyright Act to: 1) clarify that the list of acts setting out “an infringement of copyright” is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping; and 2) remove the pre-condition for liability that infringers “receive benefit” from the infringement;
  - extend term of protection in line with international best practices (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years);
  - make unauthorized camcording of motion pictures in theaters or of live musical performances a criminal offense;
  - correct Taiwan Intellectual Property Office (TIPO) collective management practices to allow a fair-market based royalty rate and eliminate delays in fixing the rate in dispute settlement cases; and
  - provide exclusive rights for public performance and retransmissions of sound recordings.
- Ensure amendments to the Copyright Act do not reduce criminal liability standards, and do not extend exceptions beyond what is permissible under Taiwan’s WTO TRIPS and Berne obligations (i.e., that exceptions to and limitations on copyright are narrowly tailored to avoid overbroad interpretations), including by explicitly referencing the three-step test in all applicable exceptions.
- Eliminate market access barriers that discriminate against U.S. audiovisual content (including investment restrictions in the Cable Radio and Television law, the rate cap for basic cable TV service, local discriminatory content quotas on television content, and television program classification regulations that require display of Taiwanese ratings and warning messages); and ensure that any new OTT regulations do not disincentivize foreign investment by, for example, requiring foreign OTT service providers to set up local permanent establishments or mandating local content obligations.

## **TAIWAN’S DIGITAL MARKETPLACE AND PIRACY AND ENFORCEMENT UPDATES**

A 2016 Oxford Economics study shows local film and television sectors directly contribute US\$5.9 billion to Taiwan’s GDP, support 104,200 jobs, and generate approximately US\$490 million in tax revenues.<sup>2</sup> Moreover, Taiwan,

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<sup>2</sup>See Oxford Economics, *The Economic Contribution of the Film and TV Industry in Taiwan in 2016*, 5, available at [https://www.mpa-apac.org/wp-content/uploads/2018/03/MPAA\\_Taiwan\\_2016\\_WEB.pdf](https://www.mpa-apac.org/wp-content/uploads/2018/03/MPAA_Taiwan_2016_WEB.pdf).

the 27<sup>th</sup> largest music market in the world in 2019 by revenue, is a hub of music production for the Chinese speaking world and a major exporter of “C-pop.” Unfortunately, Taiwan’s online marketplace permits unhampered access to unlicensed services, which compete with and undermine legitimate digital services. Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those prior reports and is not to be considered an exhaustive review of all issues.<sup>3</sup>

**Piracy Continues to Grow, Especially Online:** Online and mobile device piracy in Taiwan continued in 2020. Foreign websites that provide illegal content remain a significant problem and undermine the ability of legitimate rights holders and services to survive commercially in Taiwan. Examples of such websites include *gimyvod.com* (ranked 36<sup>th</sup> in Taiwan according to SimilarWeb) and *99kubo.tv* (ranked 45<sup>th</sup> in Taiwan), which offer access to thousands of infringing movie and television series titles and make money through advertising. Particularly popular are streaming, forum,<sup>4</sup> blog, deeplinking, peer-to-peer (P2P) (e.g., *Rarbg*, BitTorrent, and cyberlocker sites (e.g., *Mega* and *Katfile*), which are used to infringe or facilitate infringement of copyright in movies and television content, music, video games, and books and journals. There is still no effective means to combat foreign-hosted infringing services. This has left Taiwan unable to stop online video piracy syndicates and their products and services, which have expanded from China into Taiwan. Notorious piracy sites *Dytt8.net*, *Dy2018.com*, *Dygod.net*, and *Ygdy8.com* allegedly have their servers located in Taiwan.<sup>5</sup> While these sites remain under investigation, Taiwan should take effective action by imposing deterrent level punishments against the operators of these sites and services, as discussed below.

In 2020, Taiwan’s enforcement authorities took some notable enforcement actions against key websites that infringed film and television content. For example, the CIB successfully took action against a major streaming website, *8maple.ru*, responsible for 32.5 million piracy visits per month. In March 2020, the CIB seized the primary and related domain names (*8maple.com*, *8drama.com*, *8drama.ru*, *8duck.ru*, *8video.tv*, *eyny.is*, and *eyny.tv*), arrested two suspects, and seized computer equipment, property and approximately US\$1.9 million in illegal funds.<sup>6</sup> In addition, in July 2020, the Intellectual Property Court upheld a lower court’s criminal sentence of the operator of a linking site *ishowfile*, which offered dozens of U.S. motion pictures without permission.<sup>7</sup>

“Stream-ripping,” where users of legitimate online music platforms use tools, such as an app or a website, to illegally “rip” the streamed content, is a growing problem impacting primarily the music industry.<sup>8</sup> The legal framework in Taiwan presents challenges for taking action against persons who facilitate this activity (i.e., the app developer or website operator). In other jurisdictions, courts have found such services to infringe the reproduction and/or making available rights, and/or to unlawfully circumvent technological protection measures (TPMs), but in Taiwan no such cases have been brought, in part because operators are located outside Taiwan. While it appears possible that Article 87(7) of the Copyright Act, which provides for aiding and abetting liability, could be used, this has not been tested yet and would not provide a solution in cases in which the server, the website, and the service operator are based outside of Taiwan. As discussed below, Article 87 should be amended further to clarify that it can be used against foreign-

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<sup>3</sup>See, e.g., IIPA, Taiwan, 2020 Special 301 Report, (February 6, 2020), available at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301TAIWAN.pdf>.

<sup>4</sup>Forums are a serious problem, including, for example, *eyny.com*, one of the most popular infringing websites with 33.45 million monthly visits, and 82.25% of its traffic from Taiwan (according to SimilarWeb data). Users can easily share unlicensed content (including movies, TV dramas, and music) in the forum. In addition, *eyny* has a sub-streaming service, *video.eyny.com*, which receives 9.43 million monthly visits and 73.54% of traffic from Taiwan, where users can share unauthorized content (including movies, TV dramas, and music videos) directly with each other.

<sup>5</sup>USTR identified *Dytt8.net* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (“2020 Notorious Markets Report”). *Dytt8.net* is a consistently high-ranking pirate website in China with local rankings of 480 and 328 on Alexa and SimilarWeb, respectively, and it receives around 9.5 million visits per month. With a very user-friendly interface and the provision of direct links to third party storage providers, this website remains a particular threat to legitimate services in greater China. *Dytt8.net* is part of a group of related sites, including *dy2018.com*, *dygod.net*, and *ygdy8.com*. These sites are under investigation.

<sup>6</sup>The case has been transferred to the Taoyuan District Prosecutor’s office for further investigation. See <https://www.taipeitimes.com/News/taiwan/archives/2020/04/09/2003734279>.

<sup>7</sup>In September 2019, The Taiwan Shilin District Court sentenced the defendant to 22 months imprisonment. While the sentence was encouraging, the length of the proceedings (4 years and 4 months) is far too long to have a significant deterrence in the marketplace. It is expected that the defendant will make a final appeal to the Supreme Court.

<sup>8</sup>Popular websites that enable stream-ripping include *YouTubeTo.com*, which receives over 4.4 million visits per month from Taiwan, and *Y2Mate*, which receives 1.2 million visits per month.

based services and that the list of acts setting out “an infringement of copyright” is non-exhaustive to ensure the provision is applied to other acts of infringement, such as stream-ripping.

A new type of piracy emerged in 2020 involving a mobile app for use with karaoke machines that allows consumers to access and download content from a cloud database located overseas. The app provides access to a vast amount of unauthorized karaoke audiovisual content. In a recent case in Taiwan, the owner of a karaoke audiovisual content cloud database provided an app for download by Taiwanese consumers that permitted them to access and use content on the database licensed only for the China territory. Rights holders of the karaoke audiovisual content in Taiwan suffer significant losses from this form of piracy but are unable to pursue either the machine manufacturer or the Taiwanese distributor under existing law (i.e., Article 87(1-8) of the Copyright Law or the new OTT legislation) because the content is legally licensed in China.

Social media platforms have also become a popular way to share pirated content. Apps for PDs and mobile devices, such as *Mixerbox 3*,<sup>9</sup> have become a significant platform for disseminating illegal content. Illegal camcording continues to be a problem, with ten video matches forensically matched to Taiwan cinema locations (including in Kaohsiung) during 2019 (up from five in 2018), and six audio matches.<sup>10</sup> In addition to improving the legal framework (discussed below), the government should take actions under current law, and work with industry to persuade exhibitors to provide staff with more training and to take proactive security measures.<sup>11</sup>

Unauthorized photocopying and use of infringing materials at universities continues to be problematic. A “Campus Intellectual Property Protection Action” plan was incorporated into the Ministry of Education’s (MOE) Campus Inspection program in 2006, but it is unclear whether the required inspections continue to be conducted. These campus inspections will only be effective if they are conducted on a consistent basis and allow industry participation to foster greater cooperation among MOE, university administrators, and rights holders. Based on recommendations submitted by the publishing industry regarding measures to better address piracy of reading materials, in 2018 MOE issued guidelines: 1) requiring the creation of an online reporting portal (the Portal) for rights holders, and providing the contact information for the university employee charged with administering the Portal; 2) warning universities to adopt cautionary language (or “warnings”) on university platforms advising students and professors to comply with the law in their use of copyrighted materials; and 3) requiring that warnings against “illegal photocopying, downloading, and dissemination” be included in informational materials provided to students.

While unauthorized photocopying remains a concern, the availability of unauthorized copies of textbooks on online sites has overtaken this problem. Online shopping forums, such as [www.shopee.com](http://www.shopee.com) and [www.ruten.com/tw](http://www.ruten.com/tw) host numerous vendor accounts that sell or re-sell unauthorized copies of textbooks, test banks, and solutions manuals in both pdf and print form.<sup>12</sup> Copy shops on and around university campuses may be equipped with computers and multi-function printers to allow students to select the desired textbook to be printed on demand (from pirated digital files stored on in-store computers),<sup>13</sup> while computer labs at universities also appear to be venues for downloading and printing infringing materials by students.

The “Teaching Excellence Program” encouraged teachers to make available teaching materials they created on a university digital platform freely accessible to students. Unfortunately, the universities do not appear to audit their

<sup>9</sup>*Mixerbox.com* is a website that allows users to watch embedded YouTube clips stripped of advertisements, providing a service similar to a streaming service like Spotify or KKBOX, except with unlicensed content. *Mixerbox.com*, which has seriously disrupted the local music streaming market, has 623 thousand monthly visits, with 91.71% of its traffic from Taiwan. The website also disseminates the popular mobile app *Mixerbox 3*, which also provides unauthorized music video content streamed from YouTube, stripped of advertisements.

<sup>10</sup>Two video matches were traced to Taiwan in 2020, but this data is anomalous due to the pandemic impacting cinema openings and the availability of theatrical releases.

<sup>11</sup>It has been reported that actions against camcording as “unauthorized duplication” have been brought and sustained under Article 91 of the current Copyright Law; nevertheless, it is important that Taiwan adopt *sui generis* provisions specifically covering the act of camcording.

<sup>12</sup>Vendors on these online forums purchase DVD-ROMs containing pirated content from vendors on Taobao (China) or download infringing copies from other high traffic piracy sites (such as Libgen or ThePiratebay) and upload the infringing copies to their seller accounts.

<sup>13</sup>Copy shops store unauthorized pdf files of textbooks on in-house computers, which are available for students to search and select files for printing and binding by the shop.

platforms, and in addition to original content generated by the instructors themselves, a significant amount of the materials—textbook content, PowerPoint slides, exercises, or test banks and the like—on these platforms consist of unauthorized copies of copyrighted content created and owned by publishers. The full extent of the infringement remains unknown, as publishers are not permitted access to the university platforms, even for evaluation purposes. Where publishers become aware of infringing content stored on the platforms, they notify MOE, which in turn forwards the notifications to the university. Though university response has been largely inconsistent, there have been instances of university cooperation, resulting in consultations between the university and the domestic publishers' association regarding guidelines for uploading teacher resources.<sup>14</sup>

**Piracy Devices:** Notwithstanding specific legislative reforms, the proliferation of PDs remains a problem in Taiwan, and enforcement against operators of PDs to effectively deter them has been insufficient.<sup>15</sup> Two separate criminal investigations involving the Qbox and the Chuang Yi TV Box, which date back to 2017, are pending prosecution and trial hearings. As discussed below, the 2019 amendments to Articles 87 and 93 of the Copyright Act now provide a clear legal basis for enforcement against the dissemination of certain piracy apps and the manufacture and trafficking of PDs, but authorities have yet to invoke the amended provisions and courts have yet to interpret them. In 2019, the IP Court ruled against a company that operated an app that facilitated access to unauthorized television content. Although the Court issued fines against the company that were relatively low and non-deterring, the Court also issued prison sentences against two officers of the company.<sup>16</sup> These are very positive developments, and IIPA hopes that Taiwan's enforcement authorities strictly enforce these new prohibitions and impose deterrent level penalties to address the proliferation of PDs and infringing apps.

Taiwan's government should clarify that the amended law applies to resellers of devices that do not have piracy software or apps pre-loaded, but who are well equipped (either by the manufacturer or by middleware providers) to install the software or apps or to enable users to do so, or who circumvent TPMs used by rights holders to avoid unauthorized access to their works. Such a clarification would ensure the law accomplishes its goal of deterring the sale of PDs in the marketplace. In light of the amended law, local associations, including the Taiwan Over-the-Top Media Services Association, are asking the government to set up a specialized enforcement unit to handle cases involving unlawful PDs. The local audiovisual industry has recently worked well with enforcement authorities (including CIB, TPB, and CIBr) on PD cases, and IIPA is hopeful enforcement authorities continue to pursue such cases, using the amended law to its maximum extent.

**Pirated USBs:** USB devices loaded with thousands of pirated songs are becoming more popular in Taiwan. Sold online at a very cheap price (NT\$200–NT\$800, or ~US\$7–US\$27), investigations indicate that these USBs are being manufactured in mainland China and delivered by local couriers in Taiwan, with the money going into Taiwanese bank accounts. Taiwan's notice-and-takedown mechanism is inapplicable to this kind of infringement because these are physical products and there is no list of infringing content available to identify in a notice. In 2020, the music industry initiated eight actions against sellers of pirate USBs by filing complaints with the CIBr, which has been working proactively with the music industry on this issue.

**Online Piracy Enforcement Hampered by Inadequate Legal Framework:** While the takedown rate remains extremely high for domestically hosted content, Taiwan's Internet users obtain unauthorized content primarily from websites located overseas. Cooperation with ISPs is generally good for domestically hosted infringement. One

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<sup>14</sup>Two universities located in Taoyuan City have been in consultations regarding guidelines for uploading teacher resources, and one is improving its i-learning platform, including by adopting a monitoring scheme.

<sup>15</sup>Piracy Devices (PDs) refer to media boxes, set-top boxes, or other devices and their corresponding apps and services. Mostly originating from China, PDs are available openly throughout Taiwan, including at so-called "3C" shops, and via online retailers, and facilitate unauthorized streaming of motion pictures and television content through apps that direct users to pirated content. These devices often contain, or can connect to, a hard disk to store the downloaded content, and may have an SD card slot, which helps novices connect to foreign piracy sites. More than 30 different brands of such devices are now available in the marketplaces in Taiwan. Manufacturers of popular PDs in Taiwan include Unblock Tech, EVPAD, and SVI Cloud.

<sup>16</sup>The case was the result of a claim brought by cable television network Sanlih E-Television (SET) against a company that operated the illegal app OH!COOL. The company was fined NT\$200,000 (US\$6,550) and its director and Chief Technology Officer were each sentenced to three months imprisonment and 50 days criminal detention.

problem, however, is that the provision of the Copyright Act penalizing repeat infringers has never been properly implemented so ISPs do not enforce against repeat infringers as is legally required.

Regarding overseas infringing websites, however, Taiwan's legal framework remains inadequate. No-fault injunctive relief against ISPs to stop infringement by piracy websites does not appear available under current law. Taiwanese government officials and stakeholders have had discussions with ISPs about the severe problem of online piracy. While ISPs are generally sympathetic, they require the government to direct them or courts to order them to act. Meanwhile massive online piracy continues to cause significant damage to American creators and businesses, which have invested in production, distribution, and exportation of copyrighted content.

Taiwan has a mechanism to report and ensure permanent removal or blocking of content that facilitates illegal activities such as child pornography, human trafficking, and defamation/cyber-bullying. Government involvement and support is essential to expand this cooperation to content that infringes copyrights. Without such a remedy, Taiwan is becoming an outlier in Asia, as many other countries in the region (and elsewhere in the world) are taking active steps to address the growing online and mobile piracy problem.

Without overall effective remedies, online piracy investigations suffer, and piracy proliferates. The music industry reports that CiBr actions against music piracy have been significantly reduced, in part because domestic takedown notice recipients have become more responsive, but also because most piracy websites are hosted outside Taiwan, where CiBr does not have jurisdiction.

**Provide Adequate Resources for and Prioritize Copyright Cases:** As previously reported, the Government of Taiwan should provide CiBr with adequate human resources, funding, and equipment necessary to investigate digital piracy cases; and CiBr should prioritize copyright cases, with appropriate benchmarks and goals, to ensure it is effectively addressing Taiwan's piracy problems. In addition, as previously reported, it is critical to reinstate an award budget so that CiBr officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. TIPO should also play an important advisory role.<sup>17</sup>

**Improvements Needed in Court Adjudication of IP Matters:** Many reports from copyright and other IP rights holders indicate that civil court procedures in Taiwan remain expensive, inefficient, and time-consuming, and that criminal prosecutions are drawn out and do not result in deterrence. In the criminal context, prosecutors have settled for "suspension of indictment" in digital piracy cases and judges have commuted prison sentences to a fine or suspended punishment altogether. The Judicial Yuan would benefit from and may be receptive to trainings for judges and prosecutors on specific issues related to IP infringements, focusing on the following: 1) technical particularities of Internet and new technology-based copyright infringement cases; 2) aspects of the civil and criminal system that are not operating smoothly for rights holders; and 3) ways the creative industries have evolved over time and rely on effective and expeditious enforcement in the digital environment.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Infringements Emanating from Outside Taiwan:** While many of the online services built on infringing activities and/or facilitating infringement are located outside of Taiwan, a significant amount of infringing activity occurs within Taiwan and should create a nexus for action. ISPs in Taiwan have indicated a willingness to address the problem of flagrantly infringing websites, but the current inadequate legal framework inhibits them from doing so. Around 45 jurisdictions around the world have developed or are required to adopt approaches to halt illegal services from being accessed from across their borders. IIPA believes the Taiwanese government should propose legislation to provide an appropriate remedy that is narrowly tailored with appropriate processes to halt services that are built on, facilitate, and/or encourage infringement. It is unfortunate that no such proposals have been included as part of the copyright reform process.

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<sup>17</sup>For more details on IIPA's concerns with CiBr, see IIPA 2019 at 81-82.

Governments in the region, including Australia, South Korea, Singapore, India, Indonesia, Malaysia, Thailand, and Vietnam have adopted and/or refined approaches that provide a remedy requiring ISPs to disable access to infringing sites, and draft legislation has been introduced in the Philippines.<sup>18</sup>

**Proposed Copyright Amendments Inconsistent with International Norms:** In January 2020, following elections to the Legislative Yuan in December 2019, TIPO proposed another draft bill amending the Copyright Act (Draft Bill). The Draft Bill is largely based on earlier proposals. Unfortunately, the Draft Bill does not address many of the criticisms IIPA raised in comments on the previous drafts that TIPO had released for public comment. Prior IIPA submissions have detailed the flaws in the draft amendments.<sup>19</sup> These include failing to address a number of deficiencies in Taiwan's existing legal regime, including the need to:

- provide a mechanism to address the problem of foreign hosted piracy websites that target users in Taiwan through the availability of no-fault injunctions to disable access to pirated content;<sup>20</sup>
- clarify ISP liability framework to ensure that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities and that all intermediaries are properly incentivized to act against online piracy;
- deem all criminal copyright infringement, including Internet piracy, "public crimes" (as was so successfully done regarding optical disc piracy), which would be an effective deterrent and would benefit all rights holders, including those who cannot afford to pursue civil enforcement actions;
- extend the term of protection for copyrighted works, including sound recordings, in line with the international trend;<sup>21</sup>
- make it a criminal offense to engage in unauthorized camcording of motion pictures in movie theaters or of live musical performances;<sup>22</sup>
- correct problematic TIPO practices regarding collective management;<sup>23</sup> and
- provide producers and performers exclusive (rather than remuneration) rights for public performance and retransmissions of sound recordings.

In addition, like earlier proposals, the Draft Bill contains a number of provisions that are inconsistent with evolving international norms and raise questions regarding Taiwan's compliance with its existing international obligations, including the following:

- numerous broad exceptions and limitations to protection, including education<sup>24</sup> and fair use,<sup>25</sup> which would call into question Taiwan's compliance with its TRIPS obligations;<sup>26</sup>

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<sup>18</sup>IIPA also encourages Taiwan to look at how Europe has addressed this problem, in particular, through Article 8.3 of the European Information Society Directive, which is the basis for injunctive relief against intermediaries to remove access to infringing content.

<sup>19</sup>See, e.g., IIPA 2019 at 83-84.

<sup>20</sup>To the extent necessary, additional legislative changes should be made to overcome potential civil procedure restrictions, such as amending the Civil Procedure Code and Article 22 of the Intellectual Property Case Adjudication Act.

<sup>21</sup>Term should be extended to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years.

<sup>22</sup>The music industry reports that infringement through camcording live concerts is increasing.

<sup>23</sup>Corrections should include allowing the setting of fair-market based rates for collectively managed rights (instead of tariffs determined by the Taiwan Intellectual Property Office (TIPO)); establishing judicial dispute resolution mechanisms in lieu of the requirement to have Collective Management Organizations (CMOs) tariffs reviewed, revised, and approved by TIPO; and eliminating TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection. The 2010 amendments to the Copyright Collective Management Organization Act leave in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings, and allow for delays in fixing the rate, thus interfering with the ability of rights holders to collect royalties. A detailed discussion of the shortcomings of the Act appears in previous IIPA filings.

<sup>24</sup>These include a broad exception for distance learning and compulsory licenses for the benefit of educational institutions and compilers of "pedagogical texts."

<sup>25</sup>Article 65(1) of the draft states that all of the enumerated exceptions (Articles 44-63) are subject to fair use without any requirement that they be confined to the fair use factors outlined in Article 65(2). Article 65(2) instead appears to function as an additional "catch all" fair use exception. As a result, the draft sets out a sweeping exception regime that is largely exempt from the safeguards set out in Article 65(2), which was originally intended to confine the enumerated exceptions to the three-step test. All of these exceptions should be expressly confined to the three-step test (i.e., WTO TRIPS Article 13) to ensure compliance with Taiwan's international obligations.

<sup>26</sup>Other problematic exceptions include an exception for using "common domestic reception appliances" to retransmit works publicly that have been publicly broadcast, and a broad exception for public performance of works for "nonprofit" activities. To ensure compliance, the three-step test should be made explicitly applicable to all relevant exceptions and, where it has been removed from existing law, the "reasonable scope" limitation should be retained.

- a reduction of criminal liability standards (e.g., requiring participation in collective management organizations as a prerequisite for criminal enforcement, exempting a broad range of uses of copyright works from criminal liability, and removing the minimum prison sentence of six months for making and distributing infringing copies);<sup>27</sup> and
- requiring rights holders to file a formal complaint rather than providing *ex officio* authority for law enforcement to take action against criminal acts of infringement.

As previously reported, to further its stated ambition to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which requires compliance with the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), Taiwan is considering a second set of amendments to the Copyright Law that purport to implement the CPTPP standards.<sup>28</sup> There is no timeline for passage at this stage. While the draft includes some positive aspects, such as establishing digital piracy as a public crime,<sup>29</sup> it does not address most of the deficiencies in Taiwan's legal framework outlined above, including the lack of an effective remedy against flagrantly infringing websites and an inadequate term of protection.<sup>30</sup> Furthermore, an early draft would have weakened enforcement against pirated optical discs.<sup>31</sup>

**Amendments to Address Piracy Devices and Apps:** As previously reported, in 2019 Taiwan enacted amendments to Articles 87 and 93 of the Copyright Act.<sup>32</sup> This legislation followed 2018 guidance from TIPO that streaming devices are prohibited under the Copyright Act, and an August 2018 IP Court decision confirming this interpretation.<sup>33</sup> Unfortunately, revised Article 87 maintains the condition that violators must "receive benefit" from their actions. This requirement is unnecessary and should be removed, because proving infringers have received a benefit from their illicit activities is often difficult and onerous for rights holders, thereby limiting the effectiveness of the prohibition. In addition, as noted above, it should be clarified that the list of acts setting out "an infringement of copyright" is non-exhaustive to allow the provision to be applied to other acts of infringement, such as stream-ripping. IIPA hopes that Taiwan's enforcement authorities vigorously use these new tools to better address piracy in the country.

Notwithstanding this recent legislative achievement, other longstanding draft copyright amendments, which unfortunately propose many changes that would weaken rather than strengthen the scope of substantive copyright protection, continue to languish before the Legislative Yuan. As discussed above, Taiwan should prioritize copyright reform to improve its marketplace for rights holders and move forward legislation to address the serious deficiencies in its copyright law and enforcement regimes.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

**Local Content Quotas:** In January 2017, the National Communications Commission (NCC) issued regulations that included significant local content requirements that limit the broadcasting of U.S. audiovisual content

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<sup>27</sup>The draft mandates that rights holders participate in a CMO to benefit from criminal enforcement against some infringing re-broadcasts or public communications, which impinges on the contractual freedom of creators and raises serious questions of TRIPS compliance. Parallel imports should not be decriminalized because the government needs appropriate means to address the fact that many piratical imports are labeled as legitimate goods, which undermines Taiwan's legitimate marketplace. And the exemptions from criminal liability set forth in Article 37 are too broad, covering, for example, exploitation of digitized karaoke machines or jukeboxes, which contain reproductions of musical works for public performance and re-transmission.

<sup>28</sup>See IIPA 2019 at 84-85.

<sup>29</sup>Unfortunately, to qualify as a public crime, the "whole" work must be exploited "for consideration" and the infringement value must exceed NT\$1M (about US\$32,169). These are unnecessary obstacles that should be removed, particularly the high threshold, because calculating the value of infringement is fraught with uncertainty and the high bar does little to deter online infringement and may actually encourage it.

<sup>30</sup>The obligation for term of protection in the Trans-Pacific Partnership (TPP) has been suspended in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

<sup>31</sup>The provision would eliminate minimum penalties regarding pirated optical discs (Article 91bis) and eliminate the legal basis for confiscating pirated optical discs seized (Article 98 and 98bis).

<sup>32</sup>These amendments impose criminal penalties on individuals or entities who: 1) provide software, such as peer-to-peer (P2P) software, or apps that enable members of the public to access unauthorized copies of films and television programs on the internet; 2) assist members of the public to access such unauthorized copies of films and television programs; or 3) manufacture or import devices with such pre-loaded software or apps. The penalties that may be imposed by a court are a sentence of up to two years imprisonment and/or a maximum fine of NT\$500,000 (~US\$16,600).

<sup>33</sup>See *Taiwan Taichung Local Inspectorate Prosecutor v. Zhang Zhiyuan (first accused) and NESO Technology Pte Ltd (second accused)*, Taiwan IP Court, 2018, Case Number 7 (29 August 2018). The case significantly held that Article 87(7) is not restricted to P2P technology, and can be applied to other technologies that enabled access to unlicensed programs and copying of copyrighted works through apps installed on the PD.

on terrestrial and satellite television.<sup>34</sup> These discriminatory conditions limit consumer choice, undermine the growth of the pay-TV sector in Taiwan, and restrict U.S. exports.

**Content Ratings:** In 2016, NCC issued regulations on Television Program Classification that require all terrestrial, cable, and satellite channels to display Taiwanese ratings and warning messages regardless of the content being broadcast. This onerous requirement, which entered into force in 2017, is a significant barrier for non-Taiwanese content. In response to objections from international channels, Taiwan has indicated it will consider requests for waivers; but such requests are discretionary, on a case-by-case basis, and are not always granted.

**Additional Barriers Against Audiovisual Content:** Taiwan maintains a number of other discriminatory barriers against U.S. audiovisual content. The Cable Radio and Television law limits foreign direct investment in a domestic cable television service to 20% of the operator's total issued shares. Foreign investment in satellite television broadcasting services is also restricted to no more than 50%. In 1990 Taiwan set a rate cap for cable TV service of NT600 (US\$20) per month per household, which has never been adjusted to keep up with inflation. Other restrictions on television services include a mandatory carriage requirement of 90-100 channels in the basic cable package, and, for all IPTV offerings above the basic level cable TV services, only *a la carte* pricing is allowed. Such investment restrictions and rigid regulations of retail cable rates by the central and local government have hindered the development of the cable TV industry, satellite operators, and content providers.

**OTT Regulations:** The Ministry of Culture (MOC) and NCC are considering OTT regulations that would require foreign OTT service providers to set up local permanent establishments and potentially mandate local content obligations. In addition, the proposed regulations would require foreign OTT service providers to register with the NCC and disclose sensitive commercial information. Although these agencies state they are primarily concerned with regulating OTT services and streaming content originating from China, such requirements, if applied to all OTT services, would stifle business development and add a burdensome barrier to market entry.

## **TRAINING AND OUTREACH**

The global COVID-19 pandemic unfortunately hampered efforts at physical or in-person training or outreach opportunities. That said, rights holders continue to work with the Government of Taiwan, providing assistance by sharing the results of investigations with law enforcement authorities (this would include rights identification, and investigations into piracy activities sourced from outside Taiwan, e.g., mainland China). Industry also supports raids and anti-piracy operations by providing on-scene examinations of seizures and logistical support to police and prosecutors. Industry provides publicly available data (including the recording industry's website in Taiwan) with important information about anti-piracy actions and copyright protection campaigns. Industry remains available and interested in providing more of the same in 2021, including through the American Institute in Taiwan (AIT), the European Economic and Trade Office (ECTO), the European Chamber of Commerce Taiwan (ECCT), and the AmCham.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

The deficiencies in Taiwan's enforcement framework outlined above—including de-prioritization of copyright piracy cases at CIBr; inadequate civil procedures that do not result in deterrence; and a judicial system that does not take piracy cases seriously resulting in non-deterrent criminal sentences—are inconsistent with Taiwan's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61. Furthermore, as noted above, should Taiwan adopt the proposed draft amendments to the Copyright Act without significant revisions, Taiwan's copyright

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<sup>34</sup>The Administrative Regulation for the Terrestrial TV Stations Broadcasting Local Production Programs and the Administrative Regulation for the Satellite TV Channels Broadcasting Local Production Programs require terrestrial TV stations to broadcast at least 50% of locally produced dramas between 8 pm and 10 pm; local satellite TV channels to broadcast at least 25% of locally produced children's programs between 5 pm and 7 pm; and at least 25% of locally produced drama, documentaries, and variety programs between 8 pm and 10 pm. 40% of these locally produced programs must be new productions. Furthermore, cable TV services must broadcast at least 20% of local programming.

laws will run afoul of a number of its TRIPS obligations including, in particular, those under TRIPS Article 13 on exceptions and limitations.

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** Weak criminal enforcement remains the most significant obstacle to the growth of the copyright industries in the Ukraine marketplace. There are three reasons why enforcement is inadequate: (i) an antiquated legal regime that cannot properly address online piracy; (ii) a lack of resources; and (iii) the absence of coordinated and effective campaigns against large-scale illegal operations. For the recorded music industry, a separate long-standing problem is the failure to have a proper system for the collective management of music rights. Although positive steps have been taken recently to address collective management through the accreditation of some music-industry collective management organizations (CMOs), the process was not finalized in 2020. The Government of Ukraine should be encouraged to continue on its path to normalize the CMO landscape, including upholding 2019 accreditations and finalizing the most recent (December 20, 2020) accreditations.

Two copyright-related laws were enacted in 2020. One (Bill No. 2255) detailed the authority of the National Intellectual Property Office (NIPO), which replaced the State Intellectual Property Service of Ukraine (SIPSU), closed in 2016. The second (Bill No. 3377) made some minor changes to CMO processes. Ultimately, the CMO bill did not change the composition of the accreditation board (as proposed in earlier drafts), but new legislation (Bill No. 4537) would do so, and should be defeated. One disappointment in 2020 was the decision to allow non-accredited CMOs—including UACRR (for musical compositions)—to continue operations. UACRR, for example, has paid no monies to American rights holders. Separately, a major overhaul of the Copyright Law is underway, unfortunately, without meaningful input from copyright industry stakeholders. There were positive enforcement actions in 2020, including the closure of some large infringing websites and services. As in recent years, there were also a few criminal convictions—although none that resulted in deterrent sentencing of those found guilty of IPR crimes.

The enactment of a package of anti-piracy legislation in 2017 included a clear requirement for Internet Service Providers (ISPs) to respond to notice and takedowns, although the procedures and timetables for takedown notices and responses are unduly complex. Despite these changes, the copyright industries report that there are no effective remedies to enforce the required responses to infringement by ISPs, and no incentives to cooperate because there is also no third party liability in the current law. IIPA additionally recommends that the Government of Ukraine appoint more state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions (e.g., monetary fines) for non-compliance.

### **PRIORITY ACTIONS REQUESTED IN 2021**

#### **Criminal enforcement:**

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of illegal streaming, pay-per-download, peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials; and (ii) the principals of CMOs operating without legal authorization from rights holders, including foreign rights holders; and (iii) the principals and participants of camcording operations.

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<sup>1</sup>For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Coordinate key agencies, including the National Police and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized Cyber Police Department within the National Police (and a sub-unit dedicated to IP-related crimes); and establish specialized IPR prosecutors within the General Prosecutors Office.

**Legal reforms:**

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile conflicts to provide clear rules of liability for ISPs and other third party providers of online services that contribute to infringing activities (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law On Collective Management (CMO Law)—to correct 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations (including the treatment of “expenses”); (ii) adopting rules to identify current and future rates; and (iii) limiting the scope of extended collective licensing and the role of collective licensing organizations. In addition, the “cable retransmission” definition in the bill violates international treaty obligations because it excludes local broadcasts. The 2018 law also repealed an effective enforcement tool that provided pre-established (statutory) damages. The 2018 change should be reversed to allow rights holders to choose between actual or statutory damages.
- Amend the Copyright Law to: (i) cover all copyrighted materials under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices (and enforce penalties for non-compliance with such notices); and (iii) add clear third party liability for website owners and ISPs that contribute to copyright infringing activities.
- Repeal the requirement to manufacture film prints in Ukraine; and, ensure that amendments to the Media Law are fully consistent with Ukraine’s Bilateral Investment Treaty (BIT) obligations.

## **THE COPYRIGHT MARKETPLACE IN UKRAINE**

The IPR legal regime in Ukraine has lagged far behind the rapid growth of technological advances as access to mobile devices, and the demand for online services for copyrighted materials, have grown considerably in recent years. Ukraine is now home to many advanced coders, hackers and others engaged in highly technical activities that facilitate cybercrimes. The failure of Ukraine to modernize its law and engage in effective and deterrent enforcement means that legitimate markets cannot develop, and the country remains a major exporter of piracy into both the European Union and regional markets.

**Online Piracy:** The market for licensed materials in Ukraine is being harmed by illegal P2P hosting sites, especially BitTorrent sites, as well as by online streaming sites of music and movies. The video game industry reports that in 2020 (as in 2019), Ukraine ranked second in the world in the number of connections by peers participating in the unauthorized file-sharing of select video game titles on public P2P networks. Ukraine is also ranked second in the world for infringement of video games for the PC platform—in both cases behind only Russia. BitTorrent indexing sites, direct download sites and user-generated content (UGC) sites are the most prevalent in Ukraine (many hosted in Ukraine) with BitTorrent sites (like *monova.org*) being the most popular source of pirated copies of video games in 2020. Direct download sites are the second most popular—from Ukraine or from Russian-based websites, with traffic from Ukraine increasing even as Russian users are blocked from access in Russia. User-generated content sites remain a problem and the notorious *vk.com* remains highly popular in Ukraine. The music industry reports significant economic harm by popular BitTorrent indexing sites such as *rutracker.org*, cyberlockers such as *Turbobit.net*, and stream-ripping sites such as *savefrom.net*. *Fmovies* is a movie and television program piracy website that is very popular in Ukraine. In January 2021 it was included on the U.S. government’s Notorious Markets list (2020), for the second year in a row. From servers in Bulgaria, Ukrainian users regularly stream

unauthorized movies and television programs either directly to computer desktops or through Internet protocol television (IPTV) apps via Piracy Devices.

**Online Enforcement:** In recent years, the Government of Ukraine has taken some positive steps to improve Internet enforcement. Five years ago, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. The Cyber Police have been active in taking down pirate websites. Unfortunately, *ex.ua* (for years on the U.S. government's Notorious Markets list) has resurfaced as a cyberlocker at *fex.net*, and there are reports of infringing material, particularly music being streamed, from that site. According to the copyright industries, some sites have been taken down in Ukraine by a combination of police action and rights holders' actions. Most of the Cyber Police activities have been directed at motion picture and music sites. The motion picture industry reported that police actions have resulted in many illegal sites moving out of Ukraine, but that as of early 2021, at least 41 illegal websites were still being hosted from Ukraine (down from 150 in 2019), with 16 sites under criminal investigation (and another 14 sites deleted their infringing content). In 2020, the Cyber Police also met with copyright industry representatives to discuss ways to cooperate on enforcement actions.

NIPO was formed in 2019 within the Ministry for Economic Development, Trade and Agriculture (MEDTA), but without the proper resources to start operations. In June 2020, Ukraine enacted a new law (Bill No. 2255) to consolidate IPR functions, including registrations, within NIPO, but the law did not vest copyright enforcement authority with the agency. The Government of Ukraine needs to provide MEDTA with strong online enforcement authority. In October 2020, a bill was introduced (Bill No. 4246) to amend the Administrative Offences Code to give clear authority to MEDTA IP inspectors to issue monetary fines against website owners and ISPs (including for non-compliance with the notice and takedown system per Articles 164-17 and 164-18). In 2019, MEDTA appointed seven officials in the Intellectual Property Department to serve as IP inspectors, but many more state IP inspectors are needed, along with the statutory enforcement powers, to be effective. The 2017 anti-piracy package also established a High Court on Intellectual Property Matters for civil cases. It was supposed to start operations in late 2018, but the court is still not in operation. Once operational, it is hoped that the High Court will develop guidelines for judges in other courts to properly handle IP matters and to avoid forum shopping to lenient courts.

In 2010, the Government of Ukraine developed an IPR "Action Plan" in cooperation with the U.S. government to combat and target the digital piracy problem. A decade later, key provisions of the 2010 Action Plan still have not been addressed, including: ISP liability, effective administrative remedies (as well as fixing or eliminating the hologram sticker program). Instead, the 2017 anti-piracy package of laws only partially addressed online piracy by adopting formal notice and takedown provisions; but this alone is not effective enforcement.

Many of the websites offering pirated copyright materials are thriving, in part, because of the support of local ISPs that have no incentive to cooperate with rights holders. This is particularly true in eastern Ukraine where several large piratical operations have started operations, now outside of any enforcement jurisdiction (two music piracy cases have been suspended for this reason). The copyright industries report that, without a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant them total immunity.

One major initiative of the past few years, undertaken in cooperation with Ukraine's four major media groups, the largest television channels, and rights holders, has been to monitor advertising of well-known brands on pirate sites. In 2018, the Ukrainian Anti-Piracy Association (UAPA) started to monitor these sites and to notify major brands that are advertised on these sites to get brands to pull their advertisements; UAPA is also sending similar notices to the advertising agencies. After several multi-stakeholder conferences, a list of pirate websites was created for the brands and advertising agencies to identify easily sites to avoid (*blacklists.org.ua*). Rights holders report that the initiative has yielded positive results. In addition, in October 2020, Ukraine signed up to the WIPO piracy alert database to allow advertisers to easily find, and thus not support, pirate websites. Separately, in February 2020, the National Police carried out an operation against a Ukrainian advertising agency for financing pirate websites, and opened a criminal investigation.

**Criminal Enforcement:** While the Cyber Police have taken down sites, there have been no effective criminal enforcement actions taken against the owners and operators of these websites or hosting services. Criminal enforcement against commercial scale actors is rarely pursued and even more rarely successful. The copyright industries report that the Cyber Police commenced 33 criminal cases in 2020, but only three cases resulted in criminal convictions. Additionally, 65 pirate sites were shut down either by the police or by site owners. The motion picture industry reported two criminal cases against illegal websites, with fines imposed of 20,400 UAH (US\$723) and 34,000 UAH (US\$1,205), respectively. In addition, a camcorder was convicted and fined 3,400 UAH (US\$1,205) in December 2020. There were also four criminal cases for illegal online broadcasts of television channels in 2020, with fines imposed of 3,400 UAH (US\$121) in one case, 34,000 UAH (US\$1,205) in two of the cases, and two years' imprisonment (with a year of probation) in the other case.

The Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs (that refuse to provide information on infringers). Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet criminal investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective criminal enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

Adequate resources for criminal enforcement remain a problem (along with lingering problems from a nationwide police re-organization). It was hoped last year that the number of Cyber Police would rise to 1,600 officers, but instead there are only 804 officers at present. There is also a dedicated sub-unit (a telecommunications crime force) focused on IPR crimes; it has approximately 70 officers and is in need of proper computer equipment.

It has been long-recommended that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained. Once properly resourced, the sub-unit should be tasked with enforcement actions against owners and operators of infringing websites and services without political interference. Another recommendation is for the Government of Ukraine to form a specialized interagency working group of experts to address IPR crimes, with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, MEDTA representatives, the State Fiscal Service, and other relevant agencies.

The lack of deterrent sentencing is a lingering problem for both digital and hard copy piracy. The current (January 1, 2021) threshold for criminal prosecution is 22,700 UAH (US\$804) per Article 176 of the Criminal Code. The main concern with the threshold is that there is no unified approach on how to calculate a valuation of seized copyright material, so the threshold acts as a bar to criminal enforcement. This is particularly true for online piracy matters (where an official methodology is especially needed). Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material of every rights holder does not exceed the threshold, a criminal case cannot proceed (the losses cannot be combined). The requirement of "material composition of a crime" (causing significant material damage) should be repealed from the Criminal Code (Article 176-1). Also, the maximum fines for infringement are low—51,100 UAH (US\$1,796)—and thus, not deterrents.

There are other criminal procedural problems as well, including: (1) denying the use of rights holder experts (Article 242-6 of the Criminal Procedure Code mandates experts to calculate damages, and there is a scarcity of state experts); (2) delays and case dismissals in pre-trial investigations; (3) the lack of presumptions that rights holders are the infringed (harmed) party; (4) the absence of judicial guidelines to improve IPR case proficiency and sentencing; and (5) a procedural hurdle requiring a court's permission before an investigator or prosecutor can offer forensic evidence. One new online enforcement problem is a "requirement" that rights holders provide proof of actual

damages before cases can proceed. Until recently, indirect evidence was accepted by prosecutors. In addition, prosecutors demand disclosure of business confidential licenses (as examples of damages) in enforcement actions which is inconsistent with Article 242-6.

Provisions exist in the Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been underutilized by prosecutors. Other lingering enforcement problems are: (1) burdensome proof of ownership requirements in criminal (and civil) cases, including a complete chain of title; (2) the absence (in the Criminal Code) of clear provisions for the confiscation and destruction of infringing goods, including the materials and equipment used for manufacturing; and (3) the requirement that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

**Collecting Societies:** Collecting societies in the music sector, specifically in connection with broadcasting, public performances, as well as certain other communications to the public (e.g., certain cable retransmissions), can provide cost effective services to both rights holders and users for licensing, collecting, and paying remuneration. A proper collective administration regime allows CMOs to operate with full transparency and accountability, and fair and balanced governance. It also provides for proper accreditation procedures based on the criterion of the largest representation of domestic and foreign repertoire in active use.

The 2018 CMO Law was intended as a starting point for proper accreditation of CMOs. In 2019, MEDTA began to implement the law and accreditations of legal CMOs, despite objections and strong resistance (political and legal) from opponents of reform. After the first accreditation round, the process was halted by the courts, and MEDTA had to re-launch the process. Three industry and artist-supported organizations were eventually accredited in 2019: (1) the Ukrainian League of Copyright and Related Rights (ULASP), accredited to represent performers and producers of sound recordings (and videograms) for public performances; (2) the Ukrainian Music Alliance (UMA) accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting and private copying levies, but not including cable retransmissions; and (3) the Coalition of Audiovisual and Music Rights to license cable retransmissions of copyrighted and neighboring rights works. The All-Ukrainian Agency on Authors Rights was also accredited in 2019 to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. CMOs still need to be accredited for the collection of royalties for public performances, including broadcasting, of musical works (musical compositions). In December 2020, the accreditation commission met to continue CMO accreditations. Accreditations of OKUASAP (public performances) and A&P (broadcasting) were forwarded to but not finalized by the MEDTA. As of January 1, 2020 CMOs can collect for broadcasting and public performances of musical works, so these CMOs need to be finalized without delay to avoid lost revenues.

Although two copyright-related bills were enacted in 2020, neither addressed the shortcomings of the 2018 CMO law (and a draft Copyright Law revision bill contains some troubling CMO provisions). The shortcomings in the 2018 law that should be corrected are: (i) problems regarding royalty rate calculations; (ii) no transitional provisions for the application of tariff rates until new rates are set; (iii) a definition of “cable retransmission” that excludes all local broadcasts; (iv) unclear provisions on so-called “second tier” (additional accredited organizations) where a primary CMO exists; (v) troublesome extended collective licensing provisions (allowing CMO collections without rights holder authorization); and (vi) problems with the calculation of damages in copyright cases. Under the old system, CMOs would grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. These longstanding problems were one reason for the designation of Ukraine as a Priority Foreign Country (PFC) and the Presidential proclamation in December 2017 to remove Ukraine’s Generalized System of Preferences (GSP) benefits.<sup>2</sup>

The Copyright Law CMO draft provisions contain several problematic provisions pertaining to the management, exercise and control of a CMO—including who can establish a CMO and mandates for government-

<sup>2</sup>The 2013 PFC designation was made for three reasons: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) concerns with prevalent government ministry use of unlicensed computer software.

run registration of works—which threaten to undo the positive changes adopted in 2019. In sum, IIPA welcomes the progress that was been made by the Government of Ukraine in 2019, and encourages the government to support properly accredited CMOs, to finalize the December 2020 accreditations, and continue progress in 2021. Proper accreditation should mean that no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. New proposed legislation (Bill No. 4537), to change the accreditation requirements, as well as to eliminate all private copying levies for rights holders, should be rejected.

**Camcording:** The 2017 package of anti-piracy reforms included the bill “On State Support of Cinematography” which criminalized camcording (Article 176 of the Criminal Code), as well as the activities of those who finance piratical operations. The new law clarifies that camcording in theaters is illegal for any purpose if done without authorization from the rights holder. Although there are no exceptions in the camcording law, the Copyright Law does include a general undefined “private use” exception that some experts fear may be problematic in regard to camcording activities. In June 2019, the first camcording sentence under the new law—a fine—was imposed; another case was completed in December 2019. However, even with the new law, camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry. These activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

Between 2011 and 2019, over 197 camcords (including audio only and video only recordings) were sourced from Ukraine. In 2020, there were two MPA-member titles sourced from Ukraine, and six audio only recordings sourced from Ukraine.<sup>3</sup> Unfortunately, there were no criminal cases commenced against theater owners for camcording in 2020. Theatrical piracy is also a problem in Ukraine, particularly in small theaters where films are screened without a license (a violation of the Administrative Offences Code (Article 164-6)). In 2020, 40 theaters were investigated by law enforcement agencies for screening prints without a license, 28 theaters were shut down, and five theaters were sanctioned.

**Broadcast and Cable Television Piracy:** Piracy of content by broadcast and cable television systems, including by the state-owned radio and television networks, continues to be a major problem for the motion picture and recording industries—both by regional and nationwide broadcasters. There are a large number of Ukrainian cable operators that continue to transmit audiovisual programming without licenses. The Government of Ukraine should take actions to ensure that state-funded enterprises pay for the copyrighted content they broadcast. Enforcement authorities should shut down unlicensed operations and use enforcement measures against the operators of these systems. Beginning in January 2020, 23 national television channels started to encrypt their satellite signals, which improved protections. In the music industry, radio broadcasters have refused to pay new (increased) tariffs for the use of music, and state-funded broadcasters in Ukraine are still not paying licensing fees for their use of recorded music.

**Administrative Enforcement:** Administrative courts should be empowered to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Offences Code (Article 51-2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the Code. The Administrative Offences Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). However, as noted, there are an insufficient number of state IP inspectors to enforce these (or other) IP violations.

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<sup>3</sup>The 2020 camcording statistics are anomalous given the extensive theater closures in Ukraine (and worldwide) due to the COVID-19 pandemic and delays in theatrical releases of motion pictures.

The Government of Ukraine should increase the number of administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions.

**Customs Enforcement:** The current Customs Code gives Customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, Customs officials can seize illegal material at the border without a court order. Unfortunately, Customs authorities within the State Customs Service are not sufficiently engaged in enforcement measures and underutilize their authority. Cooperation with rights holders could be improved as well. IIPA continues to recommend the abolition of the customs registration system altogether because it impedes effective border enforcement. Another matter of concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IPR infringements, may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). In practice, this procedure is applied only in cases where rights holders notify Customs officials about alleged infringing material; the destruction is then undertaken at the rights holder's expense and it releases the infringer of any administrative liability, and thus any deterrence from repeating its infringing activities. The 2019 amendments to the Customs Code (Law No. 202-IX) were aimed at bringing the Ukrainian code closer to European Union customs standards and practices, including for the destruction of infringing goods (but further improvements to simplify procedures are still needed). The 2019 amendments broadened the scope of authority against counterfeit and pirated goods to improve enforcement, and provided tax authorities with broader *ex officio* enforcement authority. However, the new provisions only entered into force in June 2020, so there is not industry data yet on their effectiveness.

**Hologram Stickering:** In 2018, Ukraine enacted a minor change to improve the hologram stickering system. The hologram stickering system is, nonetheless, an ineffective means of guaranteeing the authenticity of products or combatting piracy, and the entire system should be repealed.

## **LEGAL REFORMS**

In 2001, Ukraine acceded to the WIPO Internet Treaties. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of "intentional" circumvention, which is a major impediment to protection. The two 2017 laws—Law of Ukraine #1977-VIII (Cinematography Law) and Law of Ukraine #2147-VIII (procedural amendments) amended the Copyright Law, the Telecommunications Law (and the 2015 e-Commerce Law), the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code and the Administrative Offences Code. Significant additional amendments have been under consideration, and are necessary to modernize the Ukraine IP regime, including for full WIPO Internet Treaty implementation.

**Copyright Law:** There are many existing Copyright Law deficiencies even after the 2017 amendments. Some, but not all, are addressed in the new current draft. The improvements needed include: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local rights holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages and/or a system of enhanced damages in order to adequately compensate rights holders and deter further infringement (Article 52—to double actual damages)—the 2018 CMO legislation removed pre-established damages provisions from the law; and (5) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage. Important changes for the music industry include: (i) adding exclusive rights for phonogram producers and performers for broadcasting, public performances and cable retransmissions; (ii) adding definitions of rights compatible with the WPPT; (iii) extending the term for producers and performers from 50 to 70 years; and (iv) retaining Article 53 (Copyright Law) without amendment, so that non-payment to an accredited CMO is a copyright/related rights violation.

The 2017 amendments established a notice and takedown regime. Under the 2017 changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to take down the material; there is also a put-back provision (unless the rights holder commences infringement litigation within ten days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the Whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity from any (i.e., not just monetary) liability if it complies. The 2017 law included a “repeat infringer” provision, so that if the same material reappears twice within a three-month period on the same website or webpage, the owners of the site or page can be liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

There are numerous concerns with the new procedures: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with a digital electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) they only require the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; and (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures, the Copyright Law needs to be amended to broaden the scope of works covered under the notice and takedown procedures so that all copyrighted works are covered (it currently excludes literary works and photographs).

The current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Further, Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. Citing this statutory language, the Internet Association of Ukraine (IAU), representing the ISPs, takes the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation. The 2017 amendments to the Copyright Law (as well as amendments to the Telecommunications Law, but not Articles 38 or 40) only require defined “websites” and “hosting providers” to respond to proper takedown notices or be subject to copyright infringement. This only somewhat limits the overbroad exemption from liability for ISPs and hosting service providers, so many ignore takedown notices. The law is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., a “webpage”) is covered, and the 2017 law has not yet been tested in the courts.

Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be clear third party liability (that extends beyond merely responding to takedown notices) is applicable to website owners and ISPs. Providing clear third party (ISP) liability is critical for effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including obligations on service providers to reasonably gather and retain evidence. The e-Commerce law should also be amended accordingly. Additionally, the 2017 law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be provided.

**Criminal Code and Criminal Procedure Code:** The 2017 package of amendments included a change to Article 176 to apply criminal remedies to online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and, as noted, added sanctions for camcording. The codes should be further amended to provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); and (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement. Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to courts. It should also be clear that the police have the authority to seize all copyright products and equipment for use at trial (they currently only do so in software cases).

**Administrative Remedies:** The 2017 package of amendments added administrative remedies including: (1) Article 164-17 remedies for failure to properly respond to takedown procedures; and (2) Article 164-18 sanctions for “knowingly providing false information” for takedown notices.

## **MARKET ACCESS ISSUES**

There are a number of existing (and at least one proposed) onerous market access barriers impacting the film and television industry.

**Compulsory Manufacturing of Film Prints:** Ukrainian law requires film prints to be manufactured locally as a prerequisite to the issuance of a state distribution certificate. This requirement to make and transfer prints to the State Film Agency (Derzhkino) to get a distribution certificate applies only to owners of television rights and home video rights—as an obligation to provide film copies for audiovisual works created on different media. For theatrical distributors, the obligation is to provide an option to the Ukrainian licensee to obtain a dubbed film copy. The Law on Cinematography should be amended to repeal these requirements.

**Local Language Requirement (Dubbing/Quotas/VAT):** Another trade barrier is a 2019 law (that enters into force on July 16, 2021) to mandate that foreign films distributed in Ukraine on home entertainment, broadcast television, and Video-on-Demand (VOD), must be dubbed or voiced in the state language. It exempts theatrical exhibitions which can screen films in their “original” language accompanied by Ukrainian subtitles. The law includes quotas on foreign film screens (a 10% maximum per theater per month). Last, the law applies a VAT that discriminates against imported foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. Although the VAT provision went into force in 2017, it was suspended “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine. As an incentive to dub in the Ukrainian language, there is a 50% discount on the state distribution certificate fee for films dubbed, voiced or sub-titled in Ukrainian.

**Draft Media Bill:** A proposed new media law would be extremely problematic if adopted: it would require foreign media service providers to register their services, and require VOD services to apply for state certifications for permission to stream individual films or television programs on their services, along with quotas on VOD and other services. This would be a significant bureaucratic obstacle for audiovisual services, and is also contrary to international norms and trade and treaty obligations, including the U.S.-Ukraine BIT.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

IIPA filed a petition in 2011 to have Ukraine’s GSP benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413), the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. That partial suspension of GSP benefits entered into force on April 26, 2018 and remains in place, although some benefits were restored in October 2019.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2021.<sup>1</sup>

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

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

Vietnam's piracy problems would also be reduced if the country removed its restrictive market access barriers. It is past time for Vietnam to make good on its political commitments and international obligations to improve copyright protection in the digital environment, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace.

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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/2021/01/2021SPEC301HISTORICALCHART.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Ensure enforcement officials, including the MIC, the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and the Ministry of Public Security (MPS) IPR/High-Tech Police and related police units, increase the number and effectiveness of operations focused on online infringement, like addressing notorious piracy sites like *Phimmoi* or *Chiasenhac*; issue administrative penalties for infringement sufficient to deter piracy; ensure administrative orders are properly enforced; and bring criminal prosecutions applying objective criteria against commercial scale piracy, including flagrant piracy websites.
- Provide relevant copyright enforcement agencies with adequate resources, including additional staff, to develop and implement effective enforcement policies.

### **Legislation:**

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

### **Market Access:**

- Ensure that amendments to Decree 06 do not impose additional market barriers to e-commerce.
- Eliminate foreign investment restrictions, including in the latest draft cinema law amendments: screen quotas and broadcast quotas; caps on the number of foreign pay-TV channels in pay-TV regulations; requirements for local advertisement production that severely impede the growth of the pay-TV industry; and other entry barriers with respect to the production, importation and distribution of copyrighted materials.
- Deregister the Recording Industry Association of Vietnam (RIAV) and engage with local and foreign music producers to set up a new collecting society to enable all music producers to effectively manage rights that are subject to collective management in Vietnam. As part of this, elimination of all restrictions and limitations for foreign and joint venture entities and their involvement in collective management organizations is required.

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

## **PIRACY AND ENFORCEMENT UPDATES IN VIETNAM**

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

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

*Chiasenhac.vn* is the most popular pirate music site in Vietnam. It allows users to stream unlicensed Vietnamese and international music, attracting 84% of its traffic locally and the remainder from territories including the U.S., Mexico, and India. It receives about 2.11 million monthly visitors according to SimilarWeb. Stream-ripping sites have become a new and rapidly growing piracy trend in Vietnam, with five of the top ten most popular music pirate sites originating from this category. *Y2mate.com*, an internationally-popular stream-ripping site, received more than 35 million visits from Vietnam between October 2019 and September 2020. *Y2mate.com* is one of the most popular stream-ripping sites in the world, and the site owner is located in Vietnam. These and other sites are making it nearly impossible for legitimate online platforms to develop sustainable and properly-monetized content distribution services.

Some third party sites (especially open source sites) circumvent licensed sites' TPMs, including geo-blocking systems, to obtain music recordings for users to download or stream online without authorization both in and outside of Vietnam. This "deeplinking" problem appears to be under control through the coordinated efforts of rights holders and the licensed sites. Nevertheless, there need to be effective legal remedies against these deeplinking sites, and therefore, Vietnam's IP Code needs to afford adequate protections against circumventing TPMs.

The Government of Vietnam has been willing to take some steps in its enforcement against online piracy of audiovisual broadcasts over the past few years, demonstrating at least a willingness to cooperate with rights holders in enforcement actions, as well as with training and capacity building. Unfortunately, rights holders note that the administrative and criminal processes in Vietnam are cumbersome and slow, as they are subject to insurmountable evidentiary requirements. There is also no guidance with objective criteria for criminal liability, and Vietnam has a ban against investigations by foreigners. Moreover, the difficulty in identifying infringers makes civil actions nearly impossible because actions cannot be initiated against an unknown infringer even where the domain name, IP address,

and related email addresses are known. The police and prosecutors insist that extensive evidence must be produced before any action is taken, creating a very difficult task because the investigation is necessary to uncover the required evidence. Even where the infringement is clear, identification of the infringing website is not enough. All this results in lack of any effective criminal procedure or punishment to specifically deter online piracy operators, and lack of a general deterrent message to operators or consumers in Vietnam against copyright infringement. No criminal proceedings have been brought in Vietnam in relation to online copyright infringement to date, and there is a lack of coordination and transparency among related ministries and agencies. It is critical for enforcement authorities, including the relevant police units, as well as MPS, A05, and/or ABEI/MIC, to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites. Overall, Vietnam's current criminal enforcement system and legislation framework are unable to deter online piracy unless significant changes are made.

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

**PDs and Apps:** PDs have emerged as a significant means through which pirated motion picture and television content is accessed around the world, and are gaining popularity in Vietnam. The Government of Vietnam must increase enforcement efforts, including cracking down on PDs and vendors who preload the devices with apps that facilitate infringement. Moreover, the government should take action against key distribution points for PDs that are being sold and used illegally.

**Increase Efforts Against Camcording:** A great number of movies are stolen right off the screen by professional camcorders, who use video cameras to illicitly copy a movie during its exhibition in a movie theatre. These illicit copies are then distributed to pirate "dealers" throughout the world and over the Internet. Illegal camcording can damage the distribution of audiovisual works, harming the U.S. film industry and the local cinema business. More needs to be done in Vietnam to prevent this problem, including stronger cinema procedures for curtailing such activity, and corresponding criminal enforcement mechanisms.

**Collective Management:** Due to market access barriers, discussed below, the local music industry is very small. As a result, the collective management entity accredited for representing record producers, RIAV, is made up of just a handful of local producers and is not able to function effectively and professionally. COV should engage with foreign music producers to enable reform of collective management to put in place an entity that represents all producers, foreign and local, and has the relevant expertise and technical capability to effectively perform collective management functions to the benefit of right holders and users alike in line with international best practices.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (IP Code) (last amended in 2009), the Criminal Code (as amended in 2017), the Joint Circular (2012), and the Administrative

Violations Decree (No. 131) (as amended in 2017). The Civil Code of 2015 remains as a vestigial parallel law. Following the signing of the Regional Comprehensive Economic Partnership (RCEP) Agreement on November 15, 2020, the Vietnamese government released draft amendments to the IP Code for public consultation in early December 2020. The amendments make a number of changes to the IP Code, some of which improve the law. For example, the revised IP Code would appear to close gaps in substantive copyright protection to enable Vietnam to accede to the WIPO Internet Treaties, including protections against unlawful circumvention of TPMs and affording rights holders with a communication to the public/making available right. All this comes after Vietnam's formal ratification of the CPTPP in October 2018 and a Free Trade Agreement with the EU in August 2020. Passage of the draft IP Code amendments would set the stage for Vietnam to accede to the WIPO Internet Treaties, as is required by both trade agreements (i.e., by the entry into force of the CPTPP/within three years of the entry into force of the EU agreement). IIPA encourages Vietnam to take the necessary steps to accede and fully implement these treaties.

**Implementation of the Criminal Code is Critical and Should Be Consistent with International Commitments:** Vietnam's newly enacted Criminal Code became effective in January 2018. The new Criminal Code criminalizes piracy "on a commercial scale," although the meaning of "on a commercial scale" is not defined in the Criminal Code. Pursuant to its obligations under the WTO TRIPS Agreement and the BTA, Vietnam is required to criminalize copyright piracy "on a commercial scale." Vietnam should implement its new Criminal Code consistent with these obligations (there are also detailed obligations on point in the CPTPP). The Supreme People's Court has indicated it is working on a draft Resolution to provide guidelines for interpreting "commercial scale" and how to calculate the monetary thresholds, but those efforts that seemed hopeful a year ago appear to have stalled.<sup>3</sup> A Supreme People's Court Resolution should be issued without delay. In addition, further modernization of the Criminal Code would be helpful to ensure that there is congruity between acts considered copyright infringements (under Article 28 and 35 of the IP Code as proposed to be amended) and the Criminal Code (in other words, acts considered infringements, when carried out on a commercial scale, should be criminalized under the Criminal Code).<sup>4</sup>

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

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

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

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

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

- **Term of Protection:** The current IP Code does not provide for a term of protection for all copyrighted works, including sound recordings, in line with the international trend of 70 years after the death of the author, or, when the term is calculated based on publication, at least 75 years (or 100 years from fixation) as required by BTA Article 4.4.
- **Right of Producers of Sound Recordings:** The exclusive reproduction right of producers of sound recordings is not comprehensively set out under Article 30(1)(a), and the distribution, rental and making available rights are all set out under Article 30(1)(b) rather than being individually enumerated, which creates confusion. The IP Code should be amended so that it expressly and individually enumerates phonogram producers' exclusive rights in a manner that reflects the WPPT. To ensure consistency and clarity, acts that constitute infringement of phonogram producers' rights under Article 35 should be aligned with the exclusive rights of sound recording producers provided under Article 30.
- **TPMs:** A number issues relating to TPMs need to be addressed: (i) it is not clear whether the TPM provisions in the IP Code are sufficiently broad to cover access controls, important for effective TPM protection; (ii) Article 28.14 of the IP Code imposes a knowledge (or constructive knowledge) requirement that is too limiting and should be removed; and (iii) enactment of the IP Code created an apparent inadvertent gap; namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to "works") was not made applicable to neighboring rights (i.e., sound recordings).
- **Denial of Protection for Certain Works:** Articles 7(2), 7(3), and 8 of the current IP Code appear to give the state power to restrict the ability of rights holders to exercise lawful rights in broad circumstances, and remove copyright protection in ways similar to provisions in China's Copyright Law that were found by a WTO panel to violate China's WTO obligations.
- **Hierarchy of Rights:** Article 17(4) of the current IP Code creates an unacceptable hierarchy of the rights of authors versus neighboring rights owners. This is inconsistent with Vietnam's obligations to provide certain exclusive rights to neighboring rights holders, including producers, performers, and broadcasters, under international agreements, including the WTO TRIPS Agreement. Article 17(4) should be repealed.
- **Broad Exceptions and Limitations:** Certain exceptions and limitations in the current IP Code may be overly broad and call into question Vietnam's compliance with its international obligations, including WTO TRIPS Article 13 and Article 4.8 of the BTA. For instance, exceptions for "public information and education purposes," as well as importation of copies of others' works for personal use, are overbroad. Further, a broad compulsory license as to all works except cinematographic works is not in line with international norms. Further still, the draft IP Code introduces exceptions in draft Article 25 (as to works) and 32 (as to related rights) which must be examined for the compatibility with the three-step test, TRIPS Article 13, and BTA Article 4.8.
- **Ownership of Copyright:** Ensure that the current IP Code's proviso that organizations and individuals who invest finance and physical and technical facilities in making cinematographic works and dramatic works are the owners of the copyrights thereto remains the law, which is in line with the international best practices in determining ownership of such works. Article 203 fails to provide an adequate presumption of copyright ownership, potentially running afoul of Vietnam's commitments in the BTA (Article 3.2), as well as under WTO TRIPS (Article 9(1)) and the Berne Convention (Article 5, establishing that copyright exists in the absence of formalities, and Article 15, providing a presumption of ownership for an author whose name appears on the work in the usual manner).
- **Overbreadth of Draft Private Copy Exception:** Ensure that draft Article 25(1)(a) (private copy exception) expressly does not apply to cinematographic works and is limited to one physical copy to keep it in compliance with international standards.
- **Recirculation of Seized Good/Tools Into Channels of Commerce:** Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for "non-commercial purposes," rather than destroyed. These provisions fall short of Vietnam's BTA (Article 12.4) and TRIPS Agreement obligations.

**Decree No. 22/2018 Could Undermine Rights of Sound Recording Producers:** Decree No. 22/2018, issued in April 2018, provides guidelines for implementing certain provisions of the IP Code. Article 32(3) of this Decree is problematic because it appears to provide an exhaustive list of the types of venues where sound recordings can be used for public performance pursuant to Article 33 of the IP Code. Thus, this provision could be interpreted to mean

that the public performance right applies only to this list of venues, and no others, which would unacceptably limit the scope of the public performance right. Some of the most typical and heavy commercial users of recorded music (e.g. night clubs, discos, concert halls, exhibition galleries, parks, fitness gyms and hair salons) are not on the list, and the omission of these businesses unfairly and unjustifiably allows them to exploit and free-ride on the backs of rights holders. Furthermore, the list of venues includes “establishments providing . . . digital environment services.” While this appears to refer to venues providing Internet services, such as an Internet cafe, it could be misinterpreted to refer to the use of sound recordings online. As such, the provision is not sufficiently clear and, if misinterpreted, would raise uncertainty regarding the exclusive rights of phonogram producers for the digital uses of their sound recordings. This provision is not compatible with the three-step test.

**ISP Liability Should be Amended to Meet Modern Challenges:** Joint Circular 07/2012/TTLT- BTTT – BVHTTDL on stipulating the duties of enterprises providing intermediary service in protection of copyright and related rights on the Internet and in the telecommunication networks environment (“Circular 07”) merely requires intermediaries to take down infringing content and terminate services under certain circumstances, but this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing. The draft IP Code introduces new Article 198b, which appears to incorporate Articles 4, 5 and 6 of Circular 07. As such, despite the insertion of Article 198b, the draft Code maintains the spirit of the prevailing laws in relation to the liability of ISPs in protection of copyrights and related rights in the digital environment. As a result, copyright holders will still face unresolved difficulties in preventing copyright infringements on the Internet.

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

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

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

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

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

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

## **MARKET ACCESS BARRIERS IN VIETNAM**

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

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

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

**Decree Regulating OTT Services:** In August 2018, MIC issued draft amendments to Decree 06 with the intent to expand the scope of existing pay-TV regulations to encompass over-the-top (OTT) services. Several provisions of the draft Decree would create significant barriers to foreign investment, stunt the growth of Vietnam's e-commerce market, and limit consumer choice and access to information. Of most concern is a licensing scheme that would require a local presence through forced joint ventures and onerous censorship provisions. Over the past two years, U.S. industry stakeholders and the U.S. government have been intensely engaged in consultations pertaining to the draft Decree 06 amendments. In late 2020, the latest draft was submitted for finalization by the Office of Government. While this draft contains some concessions relating to the proposed content quota, the remaining licensing proposal and uncertainty around censorship requirements fall short of industry expectations.

**Laws Leave Potential Quotas In Place:** Under Cinema Law/Decree 54, Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. Domestic films in recent years have accounted for a growing share of the market and greater investment. Vietnam should remove any quota reference in proposed amendments to the Cinema Law, targeted for 2021 completion. The latest draft amendments to the Cinema Law, issued in December 2020 and expected to be deliberated (and possibly passed) in the National Assembly in 2021, disturbingly expanded the scope to include film dissemination on the Internet, raising serious questions about the policy objective of the Cinema Law in the Video-on-Demand sector. The latest draft includes an impractical requirement to obtain permit for all film dissemination and classification for Internet delivery, local presence for offshore film dissemination services, and establishment of a film fund drawn from a percentage of VAT collected from cinematographic business activities. Although the 20% screen quota was replaced with less prescriptive language, the provision should be eliminated completely to avoid uncertainties. In the television sector, foreign content is limited to 50% of broadcast time and foreign programming is not allowed during prime time. Broadcast stations must also allocate 30% of air time to Vietnamese feature films. These restrictions limit U.S. exports of film and television content. These quotas should be lifted or eased significantly, because they limit exports of audiovisual content to the detriment of U.S. producers.

**Foreign Investment Restrictions:** Foreign companies may invest in cinema construction and film production and distribution through joint ventures with local Vietnamese partners, but these undertakings are subject to government approval and a 51% ownership ceiling. Unfortunately, Vietnam's December 2020 proposed amendments to its Cinema Law maintained the 51% ownership ceiling in cinematographic sector activities. Such restrictions are an unnecessary market access barrier for U.S. film producers and should be eliminated.

**Law on Cybersecurity:** In June 2018, the National Assembly passed a new cybersecurity law, which took effect in January 2019. Unfortunately, this law did not include any provisions to improve copyright enforcement, which would have assisted in the law's goal of improving the health and security of Vietnam's online environment. In September 2020, the MPS released a revised decree that would implement the 2018 Cybersecurity Law. This revised decree, which contains onerous data localization requirements, is intended to be the final version and will be promulgated soon. Overly strict data localization requirements could negatively impact U.S. exports of audiovisual content. Vietnam should remove such a requirement to facilitate a dynamic and market-driven responsiveness to cybersecurity threats.

**Decree No. 72 Restricts Video Game Rights Holders:** Decree No. 72 on the management of Internet services and online information creates some room for foreign video game companies to operate in Vietnam, but still may undermine the ability of video game companies to provide various digital or online services in Vietnam. The Decree lifts the 2010 ban on issuance of new licenses for online games and the ban on advertising of online games. However, there remains a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. Article 31(4) provides, "[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam's law in accordance with this Decree and the laws on foreign investment." For some games, the Decree establishes the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including: censorship of the content of video games in order for them to be approved; outright prohibition of certain content within video games data collection;

age of users; and license duration limits. The implementation of this Decree should not create structures that unduly impede the ability of foreign rights holders to access the Vietnamese market or that discriminate against them. IIPA urges Vietnam to work towards commitments agreed to in previous trade negotiations to eliminate limitations on foreign investment for the provision of online games and related services in Vietnam.

**Onerous Market Access Restrictions on the Music Sector:** Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of industries to conduct investigations in Vietnam, hinders anti-piracy efforts. These restrictions effectively mean the Vietnamese government must enforce intellectual property rights related to U.S. content largely on its own, a task at which it has not succeeded thus far. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam, and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam. Under the applicable Decree today, circulation permits for tapes and discs are granted by provincial-level MCST Departments. However, restrictions placed on foreign companies limiting their ability to setup subsidiaries to produce and distribute “cultural products” in Vietnam, in turn, makes it difficult for foreign companies to obtain circulation permits, as the applications must be submitted by local companies. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

Due to market access barriers, the local music industry is very small. As a result, the collective management entity accredited for representing record producers, RIAV, is made up of just a handful of local producers and is not able to function effectively and professionally. Furthermore, the restrictions and limitations on foreign and joint venture entities and their membership in collective management organizations established as associations needs to be removed (found in Decree No. 45/2010/NĐ-CP). The COV should engage with foreign music producers to enable reform of collective management to put in place an entity that represents all producers, foreign and local, and has the relevant expertise and technical capability to effectively perform collective management functions to the benefit of rights holders and users alike in line with international best practices.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

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

- All infringements on a commercial scale may not be subject to criminal liability as required by TRIPS Article 61 and BTA Article 14;
- A number of copyright exceptions may be overbroad and inconsistent with the three-step test of TRIPS Article 13 and BTA Article 4.9;
- Remedies for civil, administrative, and border enforcement permit “non-commercial” distribution of infringing goods and the materials and means for producing them, which is inconsistent with the obligations of TRIPS Articles 46 and 59 and BTA Articles 12.4 and 15.12;
- Inadequate enforcement framework including no criminal infringement cases proceeding with prosecutors or to the courts, complicated and non-transparent civil procedures, and inadequate training of enforcement officials all are inconsistent with Vietnam's obligations under the TRIPS enforcement provisions, including Articles 41, 42, and 61, and under BTA Articles 11, 12, and 14;
- Limited and inadequate pre-established damages do not meet the requirements of BTA Articles 12.2D and 12.3;
- Term of copyright protection falls short of the requirements of BTA Article 4.4; and
- Presumptions of ownership are inadequate and do not meet the requirements of BTA Article 3.2, however, Article 198a of the draft IP Code amendments provides for the first time a presumption of ownership in Vietnamese law.

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Brazil's long overdue adherence to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties) is one of the main concerns for IIPA members in Latin America, as Brazil is one of the largest markets in the region for all creative industries. No executive action has taken place to ratify the WIPO Internet Treaties in over a year since the country's announcement it would do so. It is essential for Brazil to join the WIPO Internet Treaties to ensure its legal framework is interpreted in line with global standards.

There were positive enforcement developments in 2020, despite setbacks brought about by the COVID-19 pandemic. For instance, a second edition of *Operation 404* took down online piracy platforms in ten different Brazilian states, through site-blocking criminal injunctions—enforcement authorities also led search and seizure raids against major pirate targets as part of the operation. São Paulo's Public Prosecutor cybercrime unit, CyberGaeco, shut down 13 important infringing domains (accessed over 19 million times yearly) and secured an order requiring Internet service providers (ISPs) to block 15 infringing foreign stream-ripping sites responsible for 37 million monthly visits. Separately, the National Cinema Agency (ANCINE), in partnership with Brazilian Customs, seized 259,000 illegal devices (TV Boxes) between September and October 2020. Brazil officially initiated the accession and ratification procedure to join the Budapest Convention on Cybercrimes.

On the legislative and policy fronts, the Brazilian Ministry of Economy launched a public consultation in August on a National Intellectual Property Strategy (ENPI). The reform of the country's Copyright Act is one of ENPI's goals and will be based on the public consultation held in 2019 by the Secretariat on Authors Rights and Intellectual Property (SDAPI) of the Special Secretariat of Culture (former Ministry of Culture). We urge Brazil to draft a new Copyright Act that provides strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test. Separately, a temporary executive order was passed last year to exempt hotels and cruise ships from paying public performance royalties for uses of sound recordings and musical works in rooms and cabins. Although not passed into law permanently, an older bill was re-introduced in Congress in 2020 that threatened to undermine copyright protection by exempting activities such as governmental and philanthropic entities from their obligation to pay royalties for the use of music in their events, and included new provisions from the temporary order on hotels and cruise ships. This bill should not be passed.

Regarding market access barriers, IIPA commends the Government of Brazil's 2020 reduction of the industrial product tax (IPI) for video game consoles and accessories. Given that the tax burden on these products remains significant, we encourage Brazil to further reduce or eliminate this and other taxes. Concerns over film and television quotas continue.

IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies and practices that enable a sustainable and thriving creative sector.

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<sup>1</sup>For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Put in place a clear structure, with a high degree of political backing and adequate funding, to build on the success of *Operation 404*, CyberGaeco's actions and similar operations. Ensure that law enforcement agents all over the country are properly trained and coordinated to conduct complex online investigations and have access to the necessary legal tools to launch effective criminal prosecutions against major online piracy operators.
- Ensure that the *Conselho Nacional Contra a Pirataria* (CNCP) continues to have the resources and political backing to engage in cross-industry efforts against online piracy and develop a national strategic plan to implement the MOUs and Guidelines signed in 2019 and 2020.
- Implement a long-term national program to train judges and prosecutors on IPR law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions; adopt judicial policies that expedite criminal copyright investigations across state jurisdictions; and reform sentencing practices to achieve deterrent impact.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles and circumvention devices.
- Ensure the film, television, sound recording and publishing industries urge Brazil to ensure that ANCINE and the Brazilian Regulatory Agency for Telecommunications (ANATEL) continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Ensure the Brazilian Financial Intelligence Unit (COAF) will investigate suspicious financial transactions resulting from piracy commercialization and report its intelligence to competent enforcement authorities tasked with initiating actions against money laundering and organized crime.

### **Legislation and Regulation**

- Accede to, ratify, and implement the WIPO Internet Treaties.
- Ensure the Copyright Law, currently under review, and/or any legislation on copyright: (i) implements the WIPO Internet Treaties, in particular, the exclusive making available right, without conflating it with communication to the public right ("public performance" right as it is described in current Brazilian law) and clarifying that interactive streaming services are outside of the Central Bureau for Collection and Distribution's (ECAD's) statutory default mandate; the anticircumvention of technological protection measures (TPMs), and penalties for trafficking in circumvention devices and software; (ii) provides express legal basis and a streamlined process for civil and criminal courts to continue issuing orders to ISPs to block access to websites dedicated to copyright infringement; (iii) covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites; (iv) provides criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit, and criminalizes signal theft in the home entertainment sector; (v) implements special cybercrime courts and prosecution units; (vi) penalizes repeat infringers; (vii) ensures that any exceptions and limitations comply with the three-step test; and (viii) ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Immediately accede to and ratify the Budapest Convention on Cybercrime.
- Withdraw Bill #PL-3968/97 resubmitted "with urgency" to Congress at the beginning of August 2020 by a group of pro-government legislators, which would deprive music rights holders, composers, artists and sound recording producers of their present legal entitlement to be paid when their music is used in governmental or philanthropic events, among other new detrimental exceptions, as well as in hotel rooms and cruise ship cabins. Because of the emergency situation created by the pandemic, there is a serious risk that the initiative could be scheduled for an emergency vote at any moment.
- Ensure that implementation of the Marco Civil Internet law and related decrees and legislation does not interfere with voluntary notice and takedown efforts or other cooperative agreements to combat online piracy.

## **Market Access**

- Further reduce high tariffs and taxes placed on video game products, as well as on general on-demand content, in order to enable industry growth.
- Mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt over-the-top (OTT) services from compliance with the existing pay-TV Law.
- Reject attempts from Collective Management Organizations (CMO) of collecting royalties (already collected and paid) derived from audiovisual works’ public performance.

## **THE COPYRIGHT MARKETPLACE IN BRAZIL**

**Online marketplace:** Internet access and demand for online content continue to grow in Brazil. At least 80 online platforms offer legal viewing options to Brazilian television and film audiences, with Amazon Prime the most recent entry in the market.<sup>2</sup> Most pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Recent reports estimate that by 2020 the local online content consumption will reach US\$451 million. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. According to music industry research, for 2019, streaming revenues made over 75% of the entire recorded music revenue in Brazil.<sup>3</sup>

Despite this abundance of legal offerings, the ubiquity, variety and adaptability of piracy distribution channels—including infringing sites, devices, hard goods and camcording—continue to inhibit the development of a healthy legitimate online marketplace in Brazil. Studies carried out in 2019 indicate that 73 million people aged 11+ in Brazil have used pirate sources to access audiovisual content, consuming 1.7 billion pirated full-length movies and TV show episodes in a given three-month period. The infringing marketplace in Brazil offers different price points, from low cost hard media to sophisticated devices that can cost up to US\$200. The music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world’s sixth largest music market. Since then, per capita music revenue in Brazil has fallen from US\$8.50 in 1997 to US\$1.41 in 2019 in large part due to the rise of online piracy. For 2019, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

**Infringing Linking Sites, Stream-Ripping Sites, Stream Manipulation Sites, Cyberlockers and BitTorrent:** There are four main types of online distribution channels for infringing materials in Brazil: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking sites); (ii) file sharing via illicit peer-to-peer (P2P)<sup>4</sup> networks and indexing sites for torrent files; (iii) stream-ripping sites which circumvent technological protection measures on licensed streaming sites such as YouTube; and (iv) Internet streaming devices (ISDs), which use some of the previously listed pirate technologies to deliver non-authorized content to households where they are set up.

Online piracy based on linking sites remains dominant. Infringing sites dedicated to one specific content, such as those solely dedicated to video games, tend to attract audiences faster and remain popular. These websites rely on magnet torrent links and “sister domains,” i.e. sites that have the same look and feel as the original target site and are registered to the same operator but have no illegal content. “Sister domains” are increasingly used exclusively for payments which allows purveyors of illegal content to protect their revenue stream. Overall, the infringement ecosystem is now fragmented with multiple small new infringing sites competing for the Brazilian audience. In particular, the number of infringing video games linking sites increased over 30% in 2020. Online piracy likewise continues to plague

<sup>2</sup><https://videomind.com/ott-opportunity-in-brazil-grows-as-do-woes-for-pay-tv/>.

<sup>3</sup>International Federation of the Phonographic Industry, *Latin America: Major Markets, Global Music Report 2020 Data and Analysis for 2019*, 98 (2020).

<sup>4</sup>See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”), documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

the publishing industry. Among the several sites trafficking in infringing copies of books, Mercado Livre ([mercadolivre.com.br](http://mercadolivre.com.br)) remains the most problematic for publishers.

While cyberlockers and linking websites are nearly all hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many rely on social media profiles in Portuguese to promote user engagement, and appear to have local operators and intermediaries (such as advertising providers and payment processors) for monetization channels. Special mentions to video games on social media sites, such as on YouTube channels and Twitch, are very popular. The top 105 most active local infringing sites dedicated to music accounted for over 118 million visits in 2018. A study published in January 2016 found that almost 45 million Brazilians (nearly 41% of all those online) used the cyberlocker link site ecosystem to consume infringing audiovisual material.<sup>5</sup> Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

Stream-ripping continues to be a concern for the music industry and is the most prominent form of piracy in Brazil. The most popular stream-ripping site is [Savefrom.net](http://Savefrom.net), which received more than 32.6 million visits from Brazil alone during the third quarter of 2020, according to SimilarWeb. During the same time-period, other widely used sites in Brazil included [flvto.biz](http://flvto.biz) (27.2 million visits); [y2mate.com](http://y2mate.com) (23.8 visits) and [2conv.com](http://2conv.com) (12.9 million). [Savefrom](http://Savefrom.net) and [y2mate](http://y2mate.com) received more visits from Brazil than any other country worldwide. Such websites circumvent TPMs and enable the illegal permanent downloading of content hosted on popular and legal music streaming services such as YouTube, thus undermining the revenue models and premium tiers of licensed streaming services and of legitimate pay-for-download sites such as iTunes and Google Play. This form of digital piracy, generally monetized through advertising, is growing substantially in the Brazilian market. Brazilian Internet users also often turn to stream-ripping sites that have a localized version, but are hosted outside the country. While the closure of [YouTube-mp3](http://YouTube-mp3) was a positive improvement, new stream-ripping sites have surfaced with notable audiences.

However, in October 2020 the Criminal Justice Tribunal of the State of São Paulo (following an application filed by CyberGaeco, the Prosecutor's Office of the State of São Paulo (DEIC) and APDIF DO BRASIL (the recording industry anti-piracy association)), ordered all ISPs in Brazil to block access to 15 very popular foreign stream-ripping sites for 180 days. The court found that the sites were infringing copyright and blocking was an effective and necessary measure to curb the criminal conduct and safeguard the rights of the victims. The sites had received 384.4 million visits from Brazil in the year ending in September 2020, according to SimilarWeb.

Stream manipulation services create, by human or non-human means, online or offline plays on audio and audio-visual streaming services where those plays do not represent genuine listening. Stream manipulation may be undertaken in respect of individual or groups of recordings to artificially improve chart positioning, increase market share, increase royalty payments, or for other dishonest purposes. Stream manipulation is a serious and increasing problem because it can undermine the accuracy of charts and, ultimately, the accuracy of royalty payments from streaming services to music creators. It has the potential not only to cause economic harm to streaming service providers, rights holders, artists, and advertisers, but also to distort the media's and fans' impressions and understanding of the popularity of particular recordings and harm consumers' use and enjoyment of streaming services by influencing algorithmic playback results.

With regards to video games, BitTorrent network activity declined by 20% in the past two years and visits to cyberlockers declined by 27%. As the piracy landscape in Brazil continues to evolve with new technologies, however, these declines are likely the result of an increase in the popularity of specialized linking sites, apps and other services. For the music industry, overall piracy rates appear to be declining according to an industry survey, but still almost half

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<sup>5</sup>NetNames Ltd., *South American Television Piracy Landscape for Alianza Contra La Pirateria de Television Paga*, at 32, available at <http://www.alianza.tv/files/NetnamesAlianzaReport012016.pdf>.

of Internet users (44%) indicated they had downloaded pirated music in the previous month, one of the highest levels worldwide.<sup>6</sup>

**Circumvention Devices:** An increasing number of Brazilian sites and online marketplaces, such as *Mercado Livre*, offer so-called video game copiers, controllers and other circumvention devices, aimed at nullifying access control technologies used by copyright owners. ESA members identify Brazil as having the highest number of listings of circumvention devices and modified consoles via *mercadolivre.com.br* when compared to other Latin American countries. The positive news is that compliance has improved in 2020 (90%+), but there is a continued need for platforms to place more pressure on repeat sellers of infringing listings. These devices enable the play of pirate video games—often supplied by infringing torrent link sites—on modified consoles, which are the great majority of game consoles in Brazil. ESA members have recently recommended circumvention site *r4ds.com.br* in the 2020 Notorious Markets report, and despite a C&D issued to the site, the operator domain moved to the new domain, <https://loja.gameflip.com.br>, and continues to sell infringing goods. Likewise, the operator provides a list of modification and installation services to hack video game consoles.

**Piracy Devices (PDs) and Signal Theft:** Use of PDs continues to rise in Brazil, exemplified by the increased market penetration of IPTV boxes, and other piracy devices, such as the HTV model which offers a grid of 170+ live pay-TV channels and a Video-on-Demand (VOD) service that offers TV shows and motion pictures, many sourced through illegal camcording activity. These PDs are available at retail in Brazilian marketplaces, but are increasingly being delivered to individual customers by mail, thus evading enforcement and seizure efforts at ports and in retail markets. A significant amount of PDs are sold on the Internet, mainly in online marketplaces such as *Mercado Livre*. Brazil's economic crisis for the last years combined with the increased broadband availability across the entire country have set the stage for a likely spike in IPTV rogue devices and pirate live-streaming of news and sports in coming years, especially considering the COVID-19 pandemic in 2020. The enforcement against ISDs increased during 2020, including multiple actions led by ANCINE and Brazilian Customs, which interrupted the contraband of more than 300,000 ISD units entering Brazil.

**Hard Goods Piracy:** Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies that can be accessed and enjoyed offline. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly, but remains significant. The HTV box and other PDs have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) Pre-loaded devices, discs, and memory cards that are locally burned and assembled with illegal copies of video games; (ii) circumvention devices as mentioned above; (iii) modified consoles; and (iv) unauthorized digital goods, i.e., infringing versions of digital assets available within a video game environment, such as virtual currencies, digital accounts or “skins.” While some of this infringing product enters the Brazilian market through the nation’s relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes. The lack of criminal investigations and effective action against repeat infringers enable these businesses to continue to thrive.

**Camcording:** Camcording piracy, while a persistent problem in Brazil, is trending in the right direction. In 2019, 19 camcords of MPA-member films were traced to Brazilian theaters, down from 32 during the previous year. The COVID-19 pandemic, which caused the widespread closure of cinemas in Brazil for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume.

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<sup>6</sup>IFPI Music Consumer Study 2019, <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf> (examining the ways in which music consumers aged 16 – 64 engage with recorded music across 21 countries).

## **Piracy Challenges During the COVID-19 Pandemic**

The COVID-19 pandemic has exacerbated and created new forms of infringing activity in Brazil. For instance, the mandated lockdowns have led to an across-the-board increase in the consumption of illegal online content. Monitoring of a database of two thousand online film piracy platforms showed a 15% to 20% increase of Brazilian users' access between February and April. The pandemic emergency also had a large impact on law enforcement actions against online targets once the judiciary was shut down for a few weeks' time and then on remote and limited activity.

As a result of the social distancing measures, Brazilian movie theaters closed in March 2020 and remained inoperable throughout most of the year, which restricted the use of camcording as a means of piracy. Nevertheless, a surge of drive-in movie theaters was seen across Brazil, in many cases connected to illegal activities such as the showing of movies not previously licensed for public performance. Enforcement actions against these unauthorized operations were left to the rights holders as a result of government authorities' lack of engagement.

Much influenced by the COVID-19 pandemic shutdown that commenced in Brazil in March and has since remained in place for most of the country, the number of online marketplaces product/listings for circumvention devices and unauthorized digital goods (UDGs)<sup>7</sup> are now an immediate alternative to local street market vendors and booths. It is estimated that the number of online UDG listings available increased by 71% from March to October 2020. As e-commerce became a necessity for sales by small businesses during the pandemic through marketplaces and other platforms, the number of online e-shops selling infringing or illegal video game-related products has increased significantly.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Against Online Piracy**

Despite challenges brought about by the lockdowns implemented to contain the spread of COVID-19, the Brazilian government undertook the following enforcement actions:

**Operation 404, part 2:** In November, as a continuation of last year's enforcement operation under the same name, the Ministry of Justice's National Council to Fight Piracy (CNCP), the Secretariat of Integrated Operations (*Secretaria de Operações Integradas*, SEOPI) and local police in ten different Brazilian states executed 25 search, seizure and site-blocking orders against 252 streaming sites, 65 applications and their operators. Five people were arrested. The sites were removed from search results and their profiles were removed from social media platforms. In addition to copyright infringement, the operators were charged with money laundering and criminal organizing. ANCINE and CNCP cooperated in the operation, as well as the U.S. Department of Justice, the U.S. and the U.K. embassies.

**Cyber Gaeco's Disruptive Actions:** Continuing its disruptive actions against infringing online operations started in 2019, São Paulo's Public Prosecutor cybercrime unit, Cyber Gaeco, removed and confiscated 13 domains, accumulating over 19 million visits in the last twelve months. As referenced above, Cyber Gaeco—together with *Associação Protetora de Direitos Intelectuais Fonográficos do Brasil* (ADPIF do Brasil)—also obtained the first site-blocking order from a criminal court against 15 major foreign stream-ripping sites popular in Brazil.

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<sup>7</sup>UDGs are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

**Shutdown of various streaming manipulation services:** In December 2019, Pro-Música Brasil and APDIF Do Brasil filed a criminal complaint with the Federal Police in Sorocaba in São Paulo against the popular streaming manipulation service *Turbosocial*. As a result of police investigation and interviews with the site's operators, all services offering to create artificial 'plays' on digital music streaming sites were removed and a formal commitment to cease and desist was entered into with APDIF Do Brasil. Also, several affiliated sites have stopped offering music streaming manipulation services: *social10.com.br*; *paineldecurtidas.com.br*; *instaaautomatico.com.br*; *curtidasface.com.br*; and *instaaautomatico.com.br*. Six additional sites withdrew their music streaming manipulation services after receiving cease and desist letters from Pro-Música Brasil and APDIF Do Brasil, including *Shop Music Marketing*, *Infinity Grow Marketing*, *IGMidias*, *GramSocial* and *Impulsioneme*. A seventh site voluntarily removed these services.

**Budapest Convention on Cybercrime:** In July 2020, Brazil officially initiated the accession and ratification procedure to join the Budapest Convention on Cybercrimes. In doing this, Brazil joins a framework for international cooperation with over 60 countries.

These enforcement actions speak to Brazil's improvements in the past two years.<sup>8</sup> However, more needs to be done to tackle the larger, systemic problems that render Brazil's criminal justice system inadequate in deterring piracy. The main deficiencies—including inefficient and prolonged investigations; bottlenecks on appointments of "experts"; inadequately trained police, prosecutors and judges; lack of coordinated efforts among enforcement authorities; and grossly insufficient sentencing practices—have been described in detail in past IIPA reports.<sup>9</sup> Ultimately, too much of Brazil's judicial system continues to lack adequate understanding of intellectual property matters, though there are some exceptions, such as the specialized commercial courts in Rio de Janeiro. We urge Brazil to commit sufficient resources and political will to train its police, judges and prosecutors in best practices to effectively address the country's rampant piracy problem.<sup>10</sup>

In addition to these enforcement operations, Brazil's CNCP facilitated promising public-private agreements to tackle online piracy through a MOU and the release of two best practices guidelines. The MOU was signed in February by the Administration and several third parties (including IIPA member MPA, and associations representing advertisers). In this agreement, ANCINE committed to representing the audiovisual sector to provide information about infringing websites to the World Intellectual Property Organization (WIPO) Building Respect for IP (BRIP) Database Project, a "follow the money" initiative to combat online piracy whereby WIPO Member States identify sites known to be infringers of copyrighted material to stem the flow of their advertising revenue. On the e-commerce front, one set of guidelines aims to prevent the availability of non-certified devices (including rogue IPTV and key sharing devices) in popular online marketplaces. The second set of guidelines, to which the MPA formally adhered in August 2020, aims to stifle the cash income of pirate sites through Payment Service Processors (PSPs).

We encourage CNCP to build on its 2020 work, develop a strategic plan to give top priority to combatting widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.), to reach better standards and effective voluntary agreements to fight online piracy. To do all this, IIPA urges the Brazilian government to adequately fund the CNCP.

## Civil Enforcement and Case Developments

Civil enforcement should also be part of the solution to Brazil's piracy problem, including on the state and even city level.

<sup>8</sup>See IIPA 2020 report, at p. 120, <https://www.iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf> ("IIPA 2020").

<sup>9</sup>See, e.g., IIPA 2015 report, at p. 76, <https://iipa.org/files/uploads/2017/12/2015SPEC301BRAZIL.pdf> ("IIPA 2015").

<sup>10</sup>For instance, a few courts have taken steps to prevent the storage of vast quantities of seized pirate product from becoming an insurmountable impediment to prompt and cost-efficient prosecutions. IIPA hopes that this development is a harbinger of other steps the courts could take to expedite enforcement dockets, and to reform sentencing practices to deliver some measure of deterrence. For more details, see IIPA 2016 at pp. 71-72.

Administrative site-blocking would be another helpful tool in the fight against Brazil's rampant piracy. Backlogs and delays in the civil justice system routinely diminish the value of court-mandated site-blocking orders, and the timeframe for actions and replies from local hosting ISPs is usually not ideal. To address this issue, ANCINE and ANATEL (Agência Nacional de Telecomunicações) initiated discussions to come up with a normative instruction that would create language to enable *administrative* blocking of sites that make available infringing audiovisual content until the infringement activity ceases. However, discussions have been halted momentarily due to ANATEL's internal agenda priorities and the legal opinion issued by ANATEL's Attorney General's Office against the agency's authority on the matter. Notwithstanding, ANCINE is moving forward with initiatives on the judicial site-blocking front. A public consultation was launched in December 2020.

IIPA continues to closely monitor the Brazilian Federation of Associations for Information Technology Companies' constitutional challenge of Federal Decree 3.810/01, which requires U.S.-based companies that maintain user communications data abroad to comply with Brazilian authorities' orders to release this data pursuant to the Marco Civil da Internet. The case, known as ADC-51 (Ação Direta de Constitucionalidade Número 51), is currently pending before the Supreme Court (Supremo Tribunal Federal, STF). If the constitutional challenge succeeds, investigations of online crimes, including IPR violations, from local servers and sites may be blocked or delayed.

### **Enforcement Against Hard Goods Piracy**

Two operations headed by ANCINE, in partnership with Brazilian Customs, for the inspection of incoming cargo at ports located in the states of Rio de Janeiro and Pará, led to the seizure of more than 75,000 illegal TV Boxes verified to enable copyright infringement of content from both VOD and pay-TV channels. A similar operation seized 187,000 TV Boxes in the cities of Resende and Itaguaí (Rio de Janeiro), with an estimated R\$100 million in losses. ANCINE has confirmed that the total sum of TV boxes seized by Customs between September and October 2020 reached 259,000 illegal devices.

### **Enforcement Cooperation**

The copyright industries continue to enjoy good (in some cases, excellent) working relationships with Brazilian enforcement agencies. Given the COVID-19 social distancing measures, ESA provided one virtual training session to the São Paulo State Prosecutors Office in September to share investigative best practices and provide a detailed insight into industry issues related to digital piracy. The training aimed to help agents better identify and investigate infringing sites, online marketplaces, and UDGs and also to discuss potential effective strategies to address each case scenario.

## **LEGISLATION AND REGULATION IN BRAZIL**

**National Intellectual Property Strategy:** In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input to their proposal for a National Intellectual Property Strategy (NIPS), which was developed by the Interministerial IP Group (GIPI) (presided by the Economy Ministry) in the previous six months. One of the strategy's goals is to draft a bill to reform the Copyright Law (LDA) taking into account new technologies and business models on the Internet. In parallel, further developments are still awaited concerning the comments received during the 2019 consultation conducted by the SDAP of the Special Secretariat of Culture (former Ministry of Culture).

As part of any changes to the country's copyright law, it is essential for Brazil to join the WCT and WPPT to ensure a forward-looking legal framework that fosters a vibrant legitimate market for Brazilian and foreign content. Although Brazil announced over a year ago it would join the WIPO Internet Treaties, no executive action has been taken to complete the ratification process. The creative sector in Brazil and around the world is waiting for the Government of Brazil to fulfill its promise.

In addition to ratifying the WIPO Internet Treaties, Brazil's new law should provide strong copyright protection, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the three-step test. More specifically, IIPA makes the following recommendations for the new law:

- **Amend Article 105** to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs and dealings in circumvention devices, circumvention software and/or components including installation and modification; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- **Amend Article 107**, which covers TPMs, to encompass all forms of access and copy control technologies as well as dealing in circumvention devices.
- **Amend Article 103** to expressly allow rights holders to choose the method for calculating damages, including actual damages, infringer's profits and reasonable royalties.
- **Provide a specific administrative procedure for blocking access to infringing websites** that ensures speed and fairness. Since many infringing websites are foreign operated, but clearly targeted at the Brazilian market, local website blocking orders would be helpful to improve online enforcement. The new law should not require the operator of the site to have the opportunity to take part in the proceeding where the identity and location of the pirate site operator is unknown, as it is often the case. Brazilian authorities should also facilitate discussions between rights holders and ISPs to agree on a voluntary code to address website blocking. Please note that the video game industry does not take a position regarding site-blocking.
- **Amend Articles 98 and 99**, which govern Brazil's collective management of broadcast and public performance rights for authors, performers and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine whether to license their rights individually or collectively, which should be a voluntary decision; and (2) if they so choose, become direct members of the Central Bureau of Rights Collection and Administration (ECAD), a private umbrella CMO, and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to reconsider ECAD's use of a single fee for the licensing of uses of multiple rights of different categories or rights holders—this practice dramatically impacts the financial return for producers on their investments. For example, music producers receive only 13.8% of total distributions despite their significant investments.
- **Clarify that interactive streaming involves acts that fall within producers' exclusive distribution right, including the making available right arising from the WCT and WPPT.** As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi.FM* where the Superior Tribunal Court (STJ, Superior Tribunal de Justiça) erroneously ruled that both interactive and non-interactive streaming involved the public performance right and fell, therefore, under ECAD's collective management mandate. The new law should include sound recording producers' separate, exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right. Finally, the exclusive right of making available should be enshrined in Brazil's copyright law, for both sound recordings and audiovisual works, consistent with obligations under both WCT and WPPT.

In light of the ongoing copyright review, it is possible that other bills, laws and regulations relevant to rights holders will be superseded. However, IIPA continues to monitor the following legislative and regulatory activities:

- **Site-Blocking:** Bill 5204/16 amends the Marco Civil da Internet to expressly authorize Brazilian courts to issue orders requiring ISPs to block access to websites hosted outside and within Brazil that are dedicated to copyright infringement, among other crimes, and provides a penalty of at least two years of imprisonment. In October 2019, House Rep. Gustavo Fruet, from the Committee on Science and Technology, reported favorably on this bill and later changed the report. Given the lack of consensus among the involved stakeholders, the bill is yet to be put to a committee vote. The bill will require further approval by the full House Science & Technology Committee, the Constitutional Affairs Committee and the Senate. There is a similar site blocking bill in the Senate's Committee on Science, Technology, Innovation, Communications and IT. Originally authored by Senator Ciro Nogueira,

PL169/2017 is now being reported by Senator Major Olimpio, who is very engaged in fighting organized crime. Analyses of each bill have been stalled due to the COVID-19 pandemic and will likely resume in the first quarter of 2021.

- **Camcording:** The Head of the Committee of Justice and Constitutional Affairs released bill 2714/2019, which appropriately removes the requirement to prove a profit motive. After obtaining unanimous approval from the Committee on Culture, the bill currently sits at the Committee on Constitutional Affairs. While the pandemic has stalled further work on the bill, Brazil's legislature should resume consideration of this measure in 2021, particularly as movie theaters regain attendance, enabling camcording activity to resume.
- **Music royalty exemption for government and philanthropic events:** PL 3968/1997, a 1997 bill that exempts government and philanthropic entities from paying royalties for the use of musical and literary-musical works in their events, was revived in Brazil's Chamber of Deputies in August when Congressman Cardoso Junior asked for this bill to be "urgently" considered. MPA, several music and video game industry organizations have signed a letter opposing the bill. After the proposal to give the Bill "urgency" treatment passed, the Bill is now ready for a vote at a plenary session in Congress with no necessity for further analysis nor opinions. These proposals were defeated during previous attempts as they were included as part of Temporary Measures supported by the Presidency.
- **Music royalty exemption for hotel and cruise ship operators:** Introduced in the Chamber of Deputies by Rep. Zuliani, PL 3392/2020 exempts cruise ship and hotel rooms from paying music royalties for music played in the rooms of individual guests. Music is a valuable commercial input for hotel and cruise ship operators that use IIPA members' music to elevate their consumer offerings. Despite the commercial value of recorded music to these businesses, the actual sums being paid by an individual hotel or cruise ship to use recorded music comprise a very small fraction of their overall costs. Yet the order would reduce payments to right holders even further, effectively forcing the music industry to subsidize the much larger hotel and cruise ship industries.
- **General Data Protection Law:** Law 13,709 was enacted on August 15, 2018 and was fully implemented in August 2020, pursuant to Executive Act 869/2018. Heavily inspired by the European General Data Protection Regulation (GDPR), this law places Brazil on par with similar data protection laws around the world. On the positive side, the law allows controllers to access and use personal data as part of the normal course of business, including situations where the provision of personal data is required to render services or provide a specific product. The law also allows for the regulation of access to personal data via contractual arrangements. Unfortunately, however, this new law impairs copyright enforcement efforts because it limits access to Whols data and other official sources that are useful for rights holders to verify contact information of infringing sites. This issue is a priority for some creative industries. We urge Brazil to ensure this new law does not curtail any tools that are necessary or helpful for copyright enforcement.

## **MARKET ACCESS AND RELATED ISSUES IN BRAZIL**

**High Tariffs, Taxes and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on video game products are a long-standing concern, where some progress has been made but more progress is needed. They act as a significant barrier to legitimate market entry, as an incentive for the proliferation of infringing games, and as an obstacle to the growth of a legitimate video game industry, which could, if allowed to develop, deliver innovative content to fans and consumers, benefit the national economy, create jobs, and generate tax revenues that are now being lost to mass infringement. Under a 2013 interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. After seven years, IIPA urges the reconsideration of this interpretation. While the overall tax burden for video game products remains high, IIPA commends Brazil's October 2020 reduction of the federal industrial product tax (IPI) for video game consoles and

accessories. IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, as well as the state-level (ICMS) and municipal-level (ISS) taxes, on video game consoles and accessories.

**Pay-TV Content Quotas:** Effective September 2011, Law 12.485/2011 imposes local content quotas for pay-TV, requiring every qualified channel (those airing films, series and documentaries) to air at least three and one-half hours per week of Brazilian programming during prime time. It also requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. These quotas are set to expire in September 2023 and may be renewed. Lawsuits challenging the constitutionality of these local content quotas, and the powers granted to ANCINE are pending before Brazil's Supreme Court.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas, released in January 2020, imposed quotas for 2020 that are similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example, an exhibitor group with 201 or more screens is required to meet a 57-day quota, and all the screens in the exhibitor group's complexes must individually meet this quota. These quotas are set to expire in September 2021 and may be renewed. For 2021, ANCINE has just decided to postpone the fixation of any criteria until March 2021, at which time the Special Secretary for Culture will issue an official decision via Presidential Decree. Brazil's screen quota is facing a constitutional challenge at the Supreme Court and competing legislative proposals have been introduced that would either loosen or tighten the restrictions. Local content quotas limit consumer choice and can push consumers toward illegitimate content sources.

**Video-on-Demand (VOD) Tax and Regulatory Framework:** For six years, Brazilian leaders have contemplated how to both regulate and capture tax revenues from the fast-growing VOD marketplace. As of December 2020, on-demand platforms are not required to comply with any regulation. However, ANCINE's 2012 normative ruling allegedly extends to VOD services the existing tax model for audiovisual works (Condecine), which is levied per title every five years on theatrical, pay-TV, and home entertainment releases, and levied annually on audiovisual ads. Condecine would be burdensome if levied over VOD services, especially when charged on a per-title basis as prescribed in the current ANCINE ruling, and would limit the choices available to Brazilian consumers in the online content market. In 2019, a coalition of industry stakeholders filed a request before ANCINE to annul the 2012 Normative Ruling and warned against protectionist regulatory models that would impede local market development and investment. ANCINE has yet to reach a decision and has recently issued a public consultation.

**Media Cross-Ownership / OTT Regulation / Tax Discussions:** Brazil's legislature is about to examine policies of significant consequence to online audiovisual (A/V) platforms: 1) potential change to the 2011 pay-TV Law that would lift restrictions on cross-ownership between programmers/producers and operators of pay-TV content; 2) discussions on regulatory and fiscal asymmetries between OTT and pay-TV services; and 3) taxation over the digital space. First, lifting the current pay-TV Law's restriction on media cross-ownership would enable market verticalization, which would boost investment and allow businesses to innovate and freely compete. ANATEL (Brazil's telecom regulator) and ANCINE (cinema regulator) have already decided favorably on the media cross-ownership issue and both suggest an amendment to the law, to be scrutinized by the Congress. On the second point, if a programming company that distributes linear or live content on the Internet (OTT) were to be classified as a telecom service and then subjected to the pay-TV Law, such OTT direct-to-consumer service would face severe regulatory burdens, including local content quotas, oversight by ANATEL, and additional tax that would be passed on to programmers. Helpfully, ANATEL rendered a decision in September 2020 that OTT services are value added services and therefore not subject to the pay-TV regulatory framework; ANCINE, under its jurisdiction, decided likewise. The Supreme Court is also reviewing the matter. In parallel, tax reform discussions are gaining traction in Brazil, which may impact the digital space, including legislative bills that would impose taxes on OTT services. We urge USTR to support Brazil's legislative attempts to modernize the pay-TV Law and encourage a prompt passage of the required reforms, and to discourage additional taxation and regulation that would hamper the growth of the OTT market in Brazil.

**Collective Management Organizations (CMOs):** In late 2018, prior to its abolition, Brazil's then Ministry of Culture, granted the accreditation of three CMOs that represent directors, screenwriters and performers in audiovisual works. These entities sought to collect royalties on their behalf for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, pay-TV and digital distribution. Nevertheless, the CMOs have not taken a position as to whether they are only entitled to collect royalties if the rights that originate such collection have not been assigned to the audiovisual work's producer, which means the CMOs may still try to collect for previously assigned rights. This is patently incorrect because Brazil's copyright law establishes a voluntary collective rights management regime, which means CMOs must affirmatively prove representation of the rights holders they claim to represent rather than act based on a presumption of representation. The motion picture industry urges the Brazilian government to clarify that CMOs can assert rights to collect royalties for acts of communication to the public only for authors and performers in audiovisual works that have specifically mandated these CMOs to do so and only where relevant rights have not been assigned to producers of audiovisual works. This clarification is necessary to ensure the CMOs only assert properly authorized claims and to protect rights of freedom of contract for all stakeholders.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Canada's legitimate digital marketplace for copyright materials continues to grow, but the market remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming and download offerings; Subscription Piracy services (infringing paid Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services) and the ever-increasing Canadian re-sellers of these services; streaming sites and other online sources for unauthorized movies and TV shows; Piracy Devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and VOD services; and the sale of devices and software for circumventing access controls on video game consoles. Canadians are also actively engaged in the theft of telecommunication signals that provide content to Subscription Piracy services. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, and inter-industry cooperation remains insufficient. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act should have been a vehicle for addressing many of these problems. However, since the suspension of Parliament in advance of the October 2019 federal election, the Government of Canada has not acted upon the recommendations of the Parliament's Standing Committees on Canadian Heritage (Heritage Committee) and Industry, Science and Technology (Industry Committee) on the statutory review of the Copyright Act, many of which would improve copyright protection and enforcement in the country. As a result, the shortcomings in Canada's current copyright regime remain unaddressed. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market as a result of an overbroad interpretation of the education as fair dealing exception, lack of effective remedies and legal incentives to combat growing online piracy, an unjustified radio royalty exemption, a wholly ineffective "notice and notice" system, an unprecedented exception for user-generated content, inadequate duration of copyright protection, and weak enforcement. Many of the parliamentary recommendations address these concerns, and IIPA urges the Government of Canada to swiftly implement those recommendations to improve both the law and enforcement.

IIPA is encouraged that despite the absence of legislation, Canada's courts have issued injunctive relief against intermediaries whose services are used to infringe copyright. In addition, IIPA is hopeful that the reforms to Canada's Copyright Board will bring Canada's tariff-setting process into closer alignment with international norms in other developed markets, including by setting tariffs that reflect the economic value of the use of the rights concerned (i.e., willing buyer/willing seller standard). While Canada has taken steps to implement the U.S.-Mexico-Canada Agreement (USMCA), notably by extending the term of protection for sound recordings and amending its Ministerial Declaration to provide full national treatment for U.S. sound recordings, additional actions are needed to ensure compliance, including for Canada to bring its term of protection for all works into alignment with evolving global norms. Canada should meet its USMCA commitments and address pressing concerns, including Canada's deficient online copyright liability legal regime that lags behind global norms. IIPA asks the U.S. government to remain extensively engaged with Canada on these and other issues in 2021.

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<sup>1</sup>For more details on Canada's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2021**

Implement recommended reforms of the Copyright Act and achieve USMCA objectives, including by:

- Addressing the crisis in the educational publishing market, by clarifying that fair dealing should not apply to educational institutions when the work is commercially available; harmonizing remedies for collecting societies under the Copyright Act; and clarifying that a tariff approved by the Copyright Board of Canada is mandatory in nature and its enforceability is not dependent upon a person's assent to or agreement with its terms;
- Making further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international norms, including by: clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content, including removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder; introducing measures that have been demonstrated effective in preventing or restraining infringement; and following through on parliamentary recommendations to provide injunctive relief for deliberate online copyright infringement;
- Ensuring that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by elimination of the radio royalty exemption;
- Completing the process of bringing the duration of protection for copyright into conformance with evolving global norms; and
- Clarifying and/or removing the user-generated content (UGC) exception, in accordance with parliamentary recommendations and Canada's international obligations.

In addition, Canada should be urged to:

- Prioritize enforcement against online piracy (including stream-ripping), the operation and sale of Subscription Piracy services, and the trafficking in Piracy Devices and apps and other circumvention software tools and modification services;
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement the resources and training required to implement this priority; and
- Make progress on easing long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.

## **THE DIGITAL MARKETPLACE IN CANADA TODAY**

Canada remains one of the leading markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that more than three-quarters of Canadians spend three to four hours a day online, and two-thirds of the population spends at least one hour a day watching TV or movies online.<sup>2</sup> A 2019 study found that half the time Internet users in Canada listen to music is spent listening online through streaming services.<sup>3</sup> The growth of legitimate digital distribution of creative content remains robust. The total recorded music market grew 8.1% in 2019, while revenue from licensed music streaming services increased 28.7%, from US\$206.9 million in 2018 to US\$266.4 million in 2019.<sup>4</sup> Streaming's share of total music industry revenues continues to grow, increasing from 60% in 2018 to 69% in 2019, and digital consumption methods overall are now nearly 78% of all recorded industry revenues.<sup>5</sup> The legitimate online video market is growing in Canada, with studios and producers

<sup>2</sup>Canadian Internet Registration Authority (CIRA) Internet Factbook 2020, available at <https://www.cira.ca/resources/factbook/canadas-internet-factbook-2020>.

<sup>3</sup>IFPI Music Listening 2019, available at <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf>.

<sup>4</sup>IFPI Global Music Report 2020, p. 112, available at <http://www.ifpi.org/resources-and-reports.php#/recording-industry-in-numbers.php>.

<sup>5</sup>*Id.*

continuing to work with multiple partners and platforms. Canadians subscribe to a wide variety of services offering movies, TV programming, or both, online, with 53% of all Canadians reporting that they subscribe to Netflix.<sup>6</sup>

Evidence persists, however, that the digital marketplace for copyright content in Canada continues to underperform, and that the competition from illicit online sources is a key reason. "Stream-ripping" services, now the leading form of music piracy in Canada, are a major contributor to this problem.<sup>7</sup> Stream-ripping enables users of licensed streaming services, like YouTube, to convert streams into unauthorized audio downloads that can be stored and replayed at will, with no royalty payment to rights holders.<sup>8</sup> By circumventing the technological measures employed by most legitimate music streaming services to prevent copying and redistribution of streamed recordings, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. Canadian operated stream-ripping services include *Loudtronix*, *Anything2mp3.cc*, and *YTMP3.net*. Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada, with 28% of Canadians surveyed in 2019 engaging in this form of piracy in the past month. Use of peer-to-peer (P2P) sites remains high, with BitTorrent indexing sites including *Rarbg*, *ThePirateBay*, and *1337x* popular in Canada.<sup>9</sup> Cyberlocker sites, such as *Uptobox*, *Mixdrop*, and *Rapidgator*, are also a common way to access recorded music.<sup>10</sup>

As IIPA has previously noted, Canada has made progress in recent years rectifying its long-standing reputation as a safe haven for some of the world's most massive and flagrant Internet sites dedicated to the online theft of copyright material.<sup>11</sup> However, Canada remains home to various intermediaries that are popular with unlicensed services. For example, the stream-ripping site *convert2mp3.club* and the cyberlockers *Zippyshare* and *Anonfile.com* are registered by Canadian domain name registrar Tucows, which employs the Canadian proxy registration service Contact Privacy, Inc.<sup>12</sup>

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Frontier Economics estimates the commercial value of digital piracy alone is US\$160 billion worldwide, and the displacement of legitimate economic activity by counterfeiting and piracy has a negative impact on economic growth.<sup>13</sup> Research by Carnegie Mellon University found that if pre-release piracy could be eliminated from the theatrical window, U.S. and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).<sup>14</sup> It is nearly impossible to overstate the magnitude of the piracy problem in Canada. According to the Government of Canada's own study published in May 2018, more than one-quarter (26%) of content consumers reported having "consumed" (downloaded or streamed or accessed) illegal online content in the previous three-months, and movies (36%) and TV shows (34%) were among the forms of content most likely to be illegally "consumed."<sup>15</sup> Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.<sup>16</sup> In 2019,

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<sup>6</sup>CIRA Internet Factbook 2020, supra 2.

<sup>7</sup>Stream-ripping provided the special "Issue Focus" for the 2016 USTR Notorious Markets Report, which called it "an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services." USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) ("2016 USTR NM"), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

<sup>8</sup>The music industry reports that some 87% of Canadians who visited YouTube used the site to access music in 2018.

<sup>9</sup>In the 3<sup>rd</sup> quarter of 2020, according to SimilarWeb, *Rarbg* received over 13.4 million visits from Canada, *1337x* received 7.6 million visits, and *ThePirateBay* received 6 million visits.

<sup>10</sup>In the 3<sup>rd</sup> quarter of 2020, according to SimilarWeb, *Mixdrop* received over 3.2 million visits from Canada, *Uptobox* received 2.6 million visits, and *Rapidgator* received 2.4 million visits.

<sup>11</sup>See, e.g., IIPA's 2020 Special 301 country survey on Canada, at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301CANADA.pdf> ("IIPA 2020").

<sup>12</sup>In 2014, USTR included Tucows in its "Notorious Markets List" following complaints that Tucows failed to take action upon notification of its registrants' infringing activities. See USTR 2014 "Out-of-Cycle Review of Notorious Markets," available at [https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-20Published\\_0.pdf](https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-20Published_0.pdf). Tucows has also been the domain registrar for the U.S. imageboard website *8chan*, which Google delisted for hosting child pornography. While Tucows will disclose domain registrant details upon request from rights holders, the process is typically very slow and, in one case, the details disclosed were for a domain privacy service, indicating that Tucows does not always obtain detailed information from their customers.

<sup>13</sup>Frontier Economics, The Economic Impact of Counterfeiting and Piracy, February 2017, available at <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.

<sup>14</sup>Carnegie Mellon University, The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion, February 2016, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

<sup>15</sup>See Government of Canada, Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada, Final Report (March 2018), p. 27, [https://www.ic.gc.ca/eic/site/112.nsf/vwapj/07648-eng.pdf/\\$file/07648-eng.pdf](https://www.ic.gc.ca/eic/site/112.nsf/vwapj/07648-eng.pdf/$file/07648-eng.pdf).

<sup>16</sup>*Id.*

81% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 49% in 2015 and 74% in 2018; while, conversely, 19% of these visits were to P2P sites in 2019, down from 51% in 2015 and 26% in 2018.<sup>17</sup> In addition, since 2018, the rate of growth of video and television piracy in Canada has increased by 9.3%. Mimicking the look and feel of legitimate streaming services, infringing streaming websites continue to overtake P2P sites as a highly popular destination for Canadians seeking premium content in both English and French.

In addition, the Subscription Piracy ecosystem has continued to grow in Canada, in which widely marketed sellers and resellers of Subscription Piracy services enable cord-cutting Canadians to obtain unauthorized access to high quality digital streaming and VOD content. The Subscription Piracy services offer various forms of subscriptions, ranging from CAD \$10 per month to over CAD \$130 per year and are accessible through numerous devices, such as computers, mobile devices, and smart televisions. Canadians are also actively involved in the circumvention of technological protection measures (TPMs) and other means of stealing legitimate signals for the purposes of: (i) making available unauthorized streaming of live television and motion pictures on their own for-profit subscription IPTV service, or (ii) selling the content to other infringing subscription IPTV services available inside and outside of Canada. Sandvine reported in April 2018 that: (1) 10% of Canadian households now have at least one set-top box, computer, smartphone or tablet running Kodi software, a higher proportion than in the U.S. (6%); (2) 71% of these households with devices running Kodi software have unofficial add-ons configured to access unlicensed content; and (3) 8% of Canadian households are using known Subscription Piracy services.<sup>18</sup>

Both online and offline, the legitimate market is challenged by trafficking in Piracy Devices or set-top boxes (STBs) sold pre-loaded with infringing applications or as part of illegal IPTV subscription packages. Easily and widely available, STBs are sold online on dedicated Canadian-owned-and-operated websites, on third-party marketplace sites, and in traditional retail locations throughout Canada. The prices of these pre-loaded STBs range from CAD \$100-CAD \$600. The sale of paid Subscription Piracy services and STBs in otherwise legitimate retail spaces, combined with the deceptive marketing and high quality promotional materials produced by those selling these products and services, has led to consumer confusion regarding the their legality.

Canadians remain involved in the coding and development of infringing add-ons and Android application packages (APKs) that enable Subscription Piracy services and mass-market STBs to access streaming services without authorization. As discussed below, enforcement actions against these abuses are beginning to bear fruit, but the problem remains serious and widespread.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, and subsequent court decisions enforcing these statutes. The video game industry reports that sites operated and hosted in Canada, such as *gamersection.ca* continue to offer circumvention devices and game copiers for sale. Computer software that effects a "soft modification" of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada, such as *kijiji.ca*. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S., such as *Digitopz.com*, *Elespiel.com*, and *Digimartzs.com*, rely on Canadian ISPs for hosting, thus evading enforcement action under U.S. law. Many of these Canadian ISPs continue to ignore the multiple notices regarding these websites, which are violating the ISPs' own policies and terms of service.<sup>19</sup> This trend breathes new life into Canada's problematic "safe haven" reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. Even those sites that have been terminated from payment processing services can generate significant revenue, including from

<sup>17</sup>Sandvine, Video Piracy in Canada, April 2018, available at <https://www.sandvine.com/hubs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>; Sandvine. The State of Affairs: A Spotlight on Video and Television Piracy Worldwide, available at <https://www.sandvine.com/blog/the-state-of-affairs-a-spotlight-on-video-and-television-piracy-worldwide>.

<sup>18</sup>*Id.*

<sup>19</sup>The video game industry reports that Canada is ranked 8<sup>th</sup> globally for illegal file sharing of video game content.

advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing video game products sold via e-commerce sites that are managed through Canadian e-commerce service providers like *Shopify.com* or *Browze.com*, as well as growth in paid social media ads to target specific demographics to market and sell counterfeit products online. Video game companies see many local sites registered and created with Shopify but through cooperation with Shopify, have been able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces, such as *kijiji.ca* and *eBay Canada*, continue to rise.

## **KEY TOPICS FOR COPYRIGHT REFORM LEGISLATION**

In December 2017, Canada's Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).<sup>20</sup> The review provided an invaluable opportunity for Canada to assess whether the Copyright Act has kept pace with rapid changes in technology and markets, and to upgrade, improve, or correct the Copyright Act where it falls short of being fit for purpose for today's digital environment, including correcting deficiencies in the CMA. As IIPA reported last year, the review concluded with the May 2019 release of the Heritage Committee Report called "Shifting Paradigms" (Heritage Report)<sup>21</sup> and the June 2019 Industry Committee Report (Industry Report).<sup>22</sup>

The Heritage Report recognized the negative impacts the 2012 amendments to the fair dealing exception have had on the publishing industry, and the "disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries" (known as the "value gap"). The Heritage Report included a number of positive recommendations intended to address these concerns as well as other significant shortcomings of Canada's legal framework. Among other things, the Heritage Report recommended that the Government of Canada:

- clarify that fair dealing should not apply to educational institutions when the work is commercially available;
- increase efforts to combat piracy and enforce copyright;
- review the safe harbor exceptions and laws to ensure that ISPs are accountable for their role in the distribution of infringing content;
- harmonize remedies for collecting societies under the Copyright Act;
- narrow the radio royalty exemption so that it applies only to "independent and/or community-based radio stations";
- extend the term of copyright for works;
- increase support for creators and creative industries in adapting to new digital markets;
- create educational materials to raise awareness of copyright provisions and artist remuneration for consumers;
- review, clarify and/or remove exceptions contained in the Copyright Act, ensuring that any exception respects Section 9 of the Berne Convention for the Protection of Literary and Artistic Works;
- ensure that the Copyright Board reviews tariffs for online music services to ensure that royalty payments provide fair compensation for artists; and
- meet international treaty obligations (including Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement, and World Intellectual Property Organization Copyright Treaty).

The Industry Report also included some notable recommendations, including that the Government of Canada should: consider evaluating tools to provide injunctive relief against intermediaries in a court of law for deliberate online copyright infringement; monitor the implementation, in other jurisdictions, of legislation making safe harbor exceptions available to online service providers conditional on measures taken against copyright infringement on their platforms;

<sup>20</sup>The Copyright Modernization Act (CMA), adopted in 2012, was fully brought into force in January 2015. Section 92 of the Copyright Act mandated that a parliamentary review of Canadian copyright law begin in 2017.

<sup>21</sup>See "Shifting Paradigms: Report of the Standing Committee on Canadian Heritage" ("Heritage Report"), [https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19\\_e.pdf?mc\\_cid=d88779154e&mc\\_eid=0183856a67](https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19_e.pdf?mc_cid=d88779154e&mc_eid=0183856a67).

<sup>22</sup>See Statutory Review of the Copyright Act ("Industry Report"), <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16>.

and narrow the radio royalty exemption so it is available to only “small, independent broadcasters.” Unfortunately, in preparing its report, the Industry Committee did not consult the Heritage Committee, which was tasked with examining the specific issue of artist and creative sector remuneration. This lack of consultation created inconsistencies with the Industry Committee’s analysis, resulting in certain recommendations (often on those overlapping issues) that lack an evidentiary basis.

IIPA urges the Government of Canada to swiftly take up the recommendations identified above and adopt needed reforms. Consideration of copyright reform legislation has been delayed since the suspension of Parliament in advance of the October 2019 federal election. In March 2020, Canada’s Parliament did adopt legislation intended to implement Canada’s USMCA commitments (2020 USMCA Law), but as discussed below, it left many key commitments unaddressed. We encourage the Government of Canada to implement the above parliamentary recommendations as well as its remaining USMCA commitments in a timely manner so that substantive reform is effectively achieved. We offer the following evaluations of the strengths and weaknesses of Canada’s current copyright law and enforcement regime, and urge the U.S. government to encourage Canadian officials to take these issues fully into account in drafting legislation to reform the Copyright Act and implement Canada’s remaining USMCA commitments.

## **1. Strengths of the Canadian Regime—Recent Positive Developments**

Several recent decisions from Canadian courts reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the CMA. In addition, in 2020, Canada took important steps to provide full national treatment for U.S. sound recordings, and IIPA remains hopeful that reforms of the Copyright Board will bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

### **A. Injunctions Against Distributors of STBs and Enabling Apps**

Several recent decisions indicate that effective remedies against Subscription Piracy services and STBs and their enabling apps are available under current law. In August 2019, the Federal Court issued a final judgement and permanent injunction against an operator of the Vader Streams IPTV service.<sup>23</sup> In February 2018, the Federal Court of Appeal upheld orders to shut down and seize piracy websites that made available illegal add-ons enabling STBs to access streaming video without authorization.<sup>24</sup> In March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of “plug and play” set-top boxes pre-loaded with applications that allow consumers to access TV programs and movies without authorization or subscription.<sup>25</sup> The Heritage and Industry Reports recommend that the Government of Canada should “increase its efforts to combat piracy and enforce copyright,” provide injunctive relief for deliberate online copyright infringement, and narrow the scope of safe harbor exceptions available to online service providers. Such legislative enhancements are needed to disrupt this growing illicit marketplace, especially in light of the alarming growth of Subscription Piracy services.

### **B. Injunctions Against Intermediaries to Block Access to and De-Index Sites Dedicated to Intellectual Property Infringement**

In November 2019, the Federal Court in *Bell Media Inc. v. GoldTV.Biz*<sup>26</sup> granted an injunction to order a group of ISPs to block access to an illegal IPTV service. The Court rejected arguments that the injunction was improper due to the absence of an express site blocking provision in the Copyright Act and the ongoing debate about the role of site blocking in Canada’s telecommunications regulatory regime (discussed below). This landmark ruling, the first site

<sup>23</sup>*Disney Enterprises, Inc. et al v. Vader Streams*, Federal Court File No. T-329-19.

<sup>24</sup>*Bell Canada v. Lackman*, 2018 FCA 42. The Court noted that the add-ons were “clearly designed to facilitate access to infringing material” and that the exception to infringement “where one merely serves as a ‘conduit’” should not apply.

<sup>25</sup>*Wesley dba MTLFreeTV.com v. Bell Canada*, 2017 FCA 55, affirming *Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net*, 2016 FC 612. The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes.

<sup>26</sup>2019 FC 1432.

blocking order to be issued by a Canadian Court, is an important step in Canada's progress towards cleaning up its digital marketplace. One of the ISPs, TekSavvy, has appealed the order to the Federal Court of Appeals (FCA).

The Court in *Bell Media* based its authority to issue the injunction on the June 2017 decision of the Supreme Court of Canada (SCC) in *Google v. Equustek Inc.*, which affirmed that Canadian courts can issue injunctions against search engines to stem illegal activities on the Internet.<sup>27</sup> The SCC's conclusions—that "the only way to ensure that the injunction attained its objective was to have it apply where Google operates—globally" and that the search engine was "the determinative player in allowing the harm to occur"—have laid the groundwork for Canadian courts to issue effective injunctive relief to combat sites dedicated to copyright infringement. Nevertheless, this remedy continues to be opposed and, as discussed below, such a remedy should be explicitly provided in the Copyright Act.

### C. Copyright Board Reform

As reported last year, sweeping reforms to the Copyright Board took effect in April 2019.<sup>28</sup> Importantly, the amendments introduced statutory rate-setting criteria that requires the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the Board may consider other factors, including "any other criterion that the Board considers appropriate," if implemented properly, the new criteria should be a welcome improvement.<sup>29</sup> It will be very important to ensure that the Board applies the willing buyer/willing seller criterion properly, and that it is not undermined by other criteria, such as taking into account the "public interest." This "public interest" criterion, which the Industry Report notes could cause unpredictable results prompting costly, lengthy appeals and significant effects or other tariffs,<sup>30</sup> is unclear and does not have a basis in economics.

The amendments also broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to users who have paid or offered to pay tariffs that have been approved. It is critical that, in implementation, this broadened enforcement prohibition does not delay or undermine the ability of CMOs to collect royalties from active users. Unfortunately, as discussed below, the April 2020 decision by the FCA in *York University v. Access Copyright* that the approved tariff issued by Access Copyright is not mandatory and, therefore, not enforceable against York University or other non-licensees, presents a significant obstacle to a well-functioning market for the collective management of rights.<sup>31</sup> CMOs should be able to enforce the rights they represent, in accordance with their mandates from rights holders.

IIPA applauds Canada's commitment to reforming its tariff-setting process, and is hopeful that the implementing measures bring Canada's system into closer alignment with comparable rate-setting and dispute resolution entities in major developed markets by improving timeliness, ensuring greater predictability, and yielding tariffs that more accurately reflect the economic value of the rights.

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<sup>27</sup>2017 SCC 34. The injunction required Google to de-index from search results (both in Canada and worldwide) the websites infringing Equustek's trade secrets. Google's attempt to vary the Supreme Court of Canada's (SCC's) decision based on a U.S. court ruling it obtained was rejected in 2018 by a lower court, which concluded that "there is no suggestion that any U.S. law prohibits Google from de-indexing."<sup>28</sup> 2018 BCSC 610.

<sup>28</sup>These reforms included: an overhaul of the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings; substantial revisions to the timelines for proposing and objecting to the tariffs, which allow tariffs to be filed earlier and remain effective longer, that should help to avoid the extreme delays that have made economic forecasting nearly impossible for stakeholders (both users and rights holders) and have made it very difficult for Collective Management Organizations (CMOs) to collect and distribute license fees by forcing them to apply tariffs retrospectively; and streamlined procedures and formalized case management to allow the Board to operate more efficiently, and to focus its resources on contested tariffs in cases in which negotiated agreements are not possible. The government has implemented regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

<sup>29</sup>Under the old framework, the Board's assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

<sup>30</sup>Industry Report at 106.

<sup>31</sup>*York v. Access Copyright*, 2020 FCA 77.

## D. Full National Treatment for Sound Recordings

Canada committed in the USMCA to provide full national treatment for U.S. sound recordings. IIPA applauds the steps Canada has taken to extend full national treatment to all U.S. repertoire on July 1, 2020, without exceptions, limitations or reservations. In addition, in response to the U.S. adoption of the Music Modernization Act, on April 29, 2020, Canada amended the Ministerial Statement of Limitations, removing restrictions on eligibility, making pre-1972 U.S. recordings immediately eligible for Canadian royalties.

## 2. How Canada's Legal Regime Falls Short

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime, and unintended adverse consequences from the adoption of the CMA. The main goal of any amendments to the Copyright Act should be to correct these issues.

### A. The Educational Publishing Crisis, and Other Fallout of New/Expanded Copyright Exceptions

The bulk of the 2012 CMA consisted of a number of new or significantly expanded exceptions to copyright protection. None has had a more concrete and negative impact than the addition of “education,” undefined and unlimited in application, to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

Previous IIPA submissions have analyzed extensively how the CMA amendments, in combination with broad judicial interpretations of the pre-CMA fair dealing provisions, led to the weakening of the well-established collective licensing regime to license and administer permissions to copy excerpts of books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.<sup>32</sup> This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.–Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled investment in the development of new content and in innovative means to deliver textual materials to consumers. A detailed study by PricewaterhouseCoopers (PwC) in June 2015 documented and quantified the damage stemming from severe reductions in licensing royalties as educational institutions across English-speaking Canada stopped paying remuneration for their use of copyrighted materials.<sup>33</sup>

USTR’s 2020 Special 301 Report noted the U.S. government’s continuing concerns with “the ambiguous education-related exception added to the copyright law in 2012, which has significantly damaged the market for educational publishers and authors.”<sup>34</sup> Unfortunately, there has been little progress in rectifying the current situation, despite the CMA review. A 2017 Federal Court decision in the long-running case brought by Access Copyright against York University provided a glimmer of hope for ameliorating the disastrous impact on licensing in the educational publishing market, but an April 2020 decision by the FCA has blunted the impact of that decision. The main issues in the case were whether the university could copy materials within the limits of its “fair dealing guidelines” and whether the university could disregard the Copyright Board-approved tariff issued by Access Copyright for post-secondary institutions. The Federal Court’s answer on both issues was no, marking a clear rejection of the very expansive

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<sup>32</sup>See IIPA’s 2017 Special 301 country survey on Canada (“IIPA 2017”), available at <https://www.iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf>, at 97–100.

<sup>33</sup>PricewaterhouseCoopers, *Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines* (June 2015), available at [http://accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://accesscopyright.ca/media/94983/access_copyright_report.pdf) (hereafter “PwC”). The PwC study noted that “[t]he education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the ‘fair dealing’ exception in the Copyright Act.” At the time, the PwC study estimated the annual loss from the demise of revenue from licensing to copy parts of works at C\$30 million (US\$22.9 million). In its 2017 Annual Report, Access Copyright reported that the income it distributed to authors and publishers had declined “a full 46% from 2016.” See Access Copyright Annual Report 2017 at 7, [https://www.accesscopyright.ca/media/1289/access\\_2017ar.pdf](https://www.accesscopyright.ca/media/1289/access_2017ar.pdf). In addition to declines in licensing revenue, the educational publishing industry also saw significant declines in full textbook sales, with PwC concluding that massively expanded unlicensed copying “competes with and substitutes for the purchase of tens of millions of books” by educational institutions each year.

<sup>34</sup>See USTR, 2020 Special 301 Report at 79.

interpretation of the statutory exception favored by Canada's educational establishment.<sup>35</sup> The FCA affirmed the holding of the Federal Court that the Guidelines "did not ensure that copying that complied with them was necessarily fair dealing," but unfortunately decided that the approved tariff is not mandatory and, therefore, not enforceable against York or other non-licensees.<sup>36</sup> This decision has been appealed to the SCC.

The sense of impunity from copyright responsibility that Canada's educational establishment displays not only has decimated copyright owners' licensing revenue for copying, but also has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. While the 2015 PwC study provided examples of potential revenue loss,<sup>37</sup> a fresh example emerged in 2017, when it was revealed that Concordia University's Center for Expanded Poetics was creating high-quality scans of entire books by at least a dozen contemporary Canadian and U.S. poets and making them available for free download, rather than purchasing them for use by students.<sup>38</sup> Although Canadian publishers and authors are the most profoundly impacted, the fallout has reverberated in the U.S. creative sector, because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector.

The Heritage Report provided recommendations to address this problem, most importantly that the Government of Canada should clarify that the fair dealing exception should not apply to educational institutions when the work is commercially available.<sup>39</sup> This would bring needed clarity to Canada's law regarding the circumstances under which the use of certain works may not require a license. Until the legal framework is clarified, the crisis in the educational publishing sector will continue. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing articulated by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Nor is the educational fair dealing amendment the only problematic CMA provision for educational publishers. The broad exception in Section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done "for educational or training purposes" by an educational institution or its agent with respect to "a work or other subject matter that is available through the Internet," so long as the Internet site or the work is not protected by a TPM.

Canada's government is well aware of the dire state of its educational publishing market. Even the flawed Industry Report acknowledged a problem, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach. Canadian federal authorities, and its Parliament, should be encouraged to address this crisis by expeditiously implementing the recommendations in the Heritage Report intended to address this crisis, including clarifying the scope of the education as fair dealing exception. In addition, to prevent educational institutions from circumventing the tariff system, the Copyright Act should be amended to confirm that an approved tariff by the Copyright Board is mandatory in nature, and its enforceability is not dependent upon a person's assent to, or agreement with, its terms. The goal must be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially published educational materials.

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<sup>35</sup>The court concluded the university's guidelines were "arbitrary and not soundly based in principle," that Access Copyright had proved "that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors," and that the approved tariff was mandatory and enforceable against any person or entity, such as York University, that carried out acts covered by the tariff. See *Canadian Copyright Licensing Agency ("Access Copyright") v. York University*, 2017 FC 669.

<sup>36</sup>*York v. Access Copyright*, 2020 FCA 77.

<sup>37</sup>See PwC at 9, 71; see also *This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

<sup>38</sup>Kate Taylor, "Concordia University caught on the wrong side of copyright," <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

<sup>39</sup>Other helpful recommendations in the Heritage Report include that the Government of Canada: review Canada's exceptions to ensure they meet its international obligations; promote a return to licensing through collecting societies; review, harmonize and improve the enforcement of statutory damages for infringement for non-commercial use in section 38.1(1) of the Copyright Act; and harmonize remedies for collective societies under the Copyright Act.

**Non-Commercial User-Generated Content Exception:** In addition to those impacting the educational publishing sector, the exception in Section 29.21, entitled “Non-commercial User-generated Content,” also merits close scrutiny. This provision allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (commercial or otherwise), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is “solely for non-commercial purposes” and does not have a “substantial adverse effect” on the market for the underlying work. The provision could substantially undermine exclusive rights that Canada is obligated to provide under international agreements and treaties, including the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.<sup>40</sup> Although enactment of the exception was globally unprecedented, it has spawned would-be imitators, such as the proposal for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of clarifying and/or removing the UGC exception as part of revisions to the Copyright Act, in accordance with recommendations in the Heritage Report.<sup>41</sup>

## B. Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement

Despite the narrow “enablement” provision in Section 27(2.3), Canada’s Copyright Act fails to respond adequately to the broader challenge of online infringement.<sup>42</sup> The statute lacks important tools that leading copyright regimes now routinely provide to incentivize intermediaries to address infringement of copyright committed with the aid of their services, and the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law lacks incentives for cooperation among a range of essential legitimate players, such as advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services. As described above, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision in Section 27(2.3) establishing civil liability for providing online services primarily for the purposes of enabling acts of copyright infringement was an important step forward, but it is unduly limited. For example, because it applies only to the provision of services, it is a far less optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in STBs pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even trafficking in such software tools, may fall outside the scope of the “enablement” provision. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision’s significant gaps should be corrected to address all actors that enable acts of infringement.

Beyond enablement, the Canadian online enforcement regime relies heavily on the “notice and notice” system, which came into force in January 2015. There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so; it was intended merely as an educational tool aimed at end-users, but there is no evidence that it is contributing to mitigation of infringing activity of consumers. Simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving the notices lacks any meaningful consequences under the Canadian system. Furthermore, it creates little meaningful incentive for service providers to try to rid their services of illicit material, in effect providing free rein to build services on the back of unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.<sup>43</sup> ISPs have insufficient incentive

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<sup>40</sup>See, e.g., Article 13 of the WTO TRIPS Agreement. In the U.S.-Mexico-Canada Agreement (USMCA), Canada reinforced its commitment to confine copyright exceptions and limitations to the three-step test. See USMCA Article 20.64.

<sup>41</sup>A key recommendation in the Heritage Report is that the Canadian government review, clarify, and/or remove broad exceptions to ensure that exceptions in Canada’s law are consistent with its obligations under the TRIPS Agreement and the Berne Convention.

<sup>42</sup>The shortcomings of the legislation are detailed in past more extensive analyses of the CMA by IIPA. See e.g., IIPA, *Canada, 2013 Special 301 Report*, February 8, 2013 (“IIPA 2013”), available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CANADA.pdf>, at 127-131, and other sources referenced therein.

<sup>43</sup>See IIPA 2017 at p. 96 for a summary of concerns.

to respect the legislated “notice and notice” system, because their failure to forward notices from rights holders has no significant consequences.<sup>44</sup>

Fundamentally, the “notice and notice” regime was never even intended to address a different and very serious problem: hosting service providers that fail to disable access to infringing hosted materials, even after it is brought to their attention. So long as known infringing content remains readily accessible online, the battle against online piracy is seriously compromised. Canada’s steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting service providers leaves it an outlier in the global community, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread online infringement. The law lacks necessary incentives for legitimate Internet intermediaries to cooperate with rights holders to combat online infringement. For example, the law’s conditioning of liability for hosting infringing material on obtaining a judgment against an end user<sup>45</sup> is unworkable in practice, particularly regarding valuable, time-sensitive pre-release content, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of content they know or ought to know is infringing. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Canada should revise its law to introduce incentives for intermediary cooperation, including by clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content. Effective action should include removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder; other measures that have been demonstrated effective in preventing or restraining infringement; and maintaining and effectively implementing a policy that provides for termination of accounts of repeat infringers in appropriate circumstances. The 2020 USMCA Law did not address these deficiencies.<sup>46</sup> The amendments of Bill C-86 were another missed opportunity. While they further clarified the information to be included in notices of claimed infringement issued to ISPs, the amendments failed to include any meaningful incentives for intermediaries to cooperate with rights holders.

Taken as a whole, the deficiencies in Canada’s online liability regime significantly disadvantage licensed services, and continue to send the wrong signals to consumers about whether infringing activities are tolerated. The Heritage and Industry Reports recommend that Canada’s government review the current law to ensure ISPs are accountable for their role in the distribution of infringing content, and that the government monitor the implementation of safe harbor legislation in other jurisdictions as well as other international developments, a clear acknowledgement of Canada’s status as a global outlier on this issue. Canada should follow through on these parliamentary recommendations and look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

### C. Injunctive Relief Needed Against Online Infringement

In accordance with recent case law, Canada should provide tools to effectively address the problem of infringing online content, particularly content hosted outside of Canada, including providing effective injunctive relief against intermediaries whose services are used in connection with infringements of copyright to disable access to such infringing content. A growing list of countries around the world have adopted such a framework to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. As previously noted, in response to a 2018 proposal to create a website-blocking mechanism, the Canadian Radio-television and Telecommunications Commission (CRTC) acknowledged the harm caused by piracy, but declined to consider the merits of the proposal, holding that copyright enforcement falls solely within the statutory scheme of the Copyright Act.

<sup>44</sup>See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

<sup>45</sup>See Section 31.1 of the Copyright Act.

<sup>46</sup>It is unfortunate that the USMCA exempted Canada’s flawed system and does not even obligate Canada, at an absolute minimum, to require takedown of infringing content in response to a proper notice (or upon the service having knowledge or awareness of the infringement).

In granting the website blocking order, the Court in *Bell Media* (discussed above) cited this decision to reject the argument that disabling access to infringing websites will interfere with the CRTC's regulatory role. The Industry Report recommended that the Government of Canada evaluate tools to expressly provide injunctive relief in a court of law for deliberate online copyright infringement. In accordance with the recommendation, the Canadian government should revise the Copyright Act to provide express injunctive relief to effectively disable access to infringing content in line with recent case law.

#### **D. Discrimination and Duration**

Other deficiencies in Canada's legal framework should be addressed in the implementation of Canada's Copyright Act review recommendations and USMCA obligations, or otherwise.

##### ***i. The Radio Royalty Exemption Should be Removed***

A key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada.<sup>47</sup> The Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."<sup>48</sup> This royalty exemption applies only to sound recordings; musical works are fully protected. Furthermore, this exemption discriminates against other Canadian businesses that publicly perform or communicate recorded music (such as online music services, satellite radio, restaurants or background music suppliers), none of which are subject to such an exemption from paying royalties to sound recording producers and performers. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of over C\$160 million (US\$121 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the "equitable" remuneration that Canada is obligated to provide by Article 15 of the WPPT and that Canada committed to provide under the USMCA.<sup>49</sup> Unfortunately, the 2020 USMCA Law did not address this problem. Both the Heritage Report and the Industry Report called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. The C\$1.25 million commercial radio royalty exemption should be eliminated.

##### ***ii. Provide Full Rights for Communication to the Public of Sound Recordings, Including Retransmissions***

The Copyright Act should be amended to provide full rights for communication to the public of sound recordings, which includes the retransmission of sound recordings. This is a major gap in protection for sound recording producers.

##### ***iii. Provide Full Rights for Public Performance of Sound Recordings, Including Indirect Uses***

Although Article 15 of the WPPT is clear that the right to remuneration for public performances encompasses both direct and indirect uses of phonograms, there is a gap in Canadian law regarding "indirect" uses, e.g. where commercial businesses like shops or bars play music as part of their business operations/ambiance, but the music comes from the radio rather than from a CD player or a background music provider service (for example). This exception substantially undermines the public performance market by providing a means for users to avoid entering into licenses for the performance of music. Canada should amend the Copyright Act to ensure that the right expressly includes indirect uses in accordance with Article 15 of the WPPT.

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<sup>47</sup>See Section 68.1(1) of the Copyright Act. As previously reported, each of Canada's nearly 700 commercial radio stations, regardless of its size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on its first C\$1.25 million (US\$951,000) of annual advertising revenue. Other than a nominal C\$100 (US\$176) payment, radio stations pay the Copyright Board-approved tariff only for revenues in excess of the C\$1.25 million threshold.

<sup>48</sup>See Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

<sup>49</sup>See USMCA Article 20.62.

#### *iv. Term of Protection*

A notable example of a needed modernization of Canadian copyright law that was not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed, the vast majority of Organisation for Economic Co-operation and Development (OECD) economies. Although Canada extended the term of protection for sound recordings in 2015, Canada should join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. It is commendable that Canada made this commitment in the USMCA, but it negotiated a 30-month window to implement this extension. While the 2020 USMCA Law extended copyright term of protection to USMCA-required minimums for sound recordings and certain other works for an extra five years to 75 years, it did not extend the term of protection for all works measured by the life of the author, as Canada is obligated to do under USMCA Art. 20.62(a). Canada should not delay bringing its law into line with this global norm, particularly in light of the Heritage Report's recommendation to do so. Bringing its term of protection in line with evolving global norms is long overdue. Furthermore, any extension of the term of copyright protection should not be accompanied by Berne-prohibited formalities, such as by requiring registration for the additional period of protection, introducing provisions for reversion and/or termination of rights, or other such measures that undermine contractual certainty.

### **GOVERNMENT ACTIONS ON COPYRIGHT ENFORCEMENT**

The 2015 entry into force of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).<sup>50</sup> But Bill C-8 did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general, and copyright crimes in particular, are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy, and thus, increasingly fail to pursue even well documented referrals from industry. However, there has been some recent progress. For example, recently, local law enforcement has engaged positively with rights holders regarding two separate cases involving infringing subscription IPTV services, including one case in Nova Scotia that includes multiple criminal charges. As both matters are ongoing, the ultimate outcome—and the resulting deterrent impact—remain to be determined. Given the widespread availability of hundreds of Subscription Piracy services, more resources are needed to address this growing problem. On the whole, because Canadian law enforcement remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged.<sup>51</sup>

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown Counsel are now declining training offered by rights

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<sup>50</sup>In practice, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 72 times in the first two years under the legislation, and in only 59 such cases were rights holders even contacted to assist in interdicting the infringing imports. IIPA is encouraged, however, that Canada has committed in the USMCA to provide *ex officio* authority for its customs authorities, including regarding goods in transit. See USMCA Article 20.84(5).

<sup>51</sup>For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level. See [http://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391\\_INDU\\_Rpt08/391\\_INDU\\_Rpt08-e.pdf](http://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf). A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/securp10/securp10-e.pdf>.

holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.<sup>52</sup> The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism. And in too many cases, law enforcement action never materializes, even when law enforcement is notified of a sale of a physical product that threatens public safety (such as a Piracy Device that fails to comply with electrical safety standards). In addition, Canadian customs procedures place a legal compliance burden on rights holders (who must file a claim and track down importers of counterfeit goods) rather than on importers. The Canadian government should change these procedures so this burden falls on the importer, as is the case in the U.S.

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat, as noted above, increasingly involves the widespread sale of Subscription Piracy services and STBs pre-loaded with applications that enable significant infringement. The problem extends to the sale of devices and software intended to circumvent access controls on video game consoles, as well as counterfeit video game copies, the use of which is enabled by such circumvention, including through sites on Canadian e-commerce services. But since Canadian law enforcement authorities are almost completely unengaged in criminal enforcement against online piracy of any kind, their inability to deal with the sale of physical goods, such as these Piracy Devices and circumvention devices and software, is even more discouraging.<sup>53</sup>

Thus, it is more important than ever for the U.S. government to press Canada to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including specialized training regarding Subscription Piracy services, Piracy Devices, and other devices and software that enable circumvention of TPMs, particularly in light of the Heritage Report's recommendation to increase enforcement efforts. IIPA encourages RCMP, which is a member of the National Intellectual Property Rights Coordination Center (IPR Center), to work collaboratively with U.S. enforcement officials on online piracy cases. Since the availability of pirated products (and of Piracy Devices or other circumvention tools) will not be reduced without criminal prosecutions against traffickers and the imposition of deterrent sentences, particularly jail time, Crown Counsel must take on and fully prosecute more copyright infringement and TPMs circumvention cases, and should be provided with the training and other support needed. Rights holders remain at the ready to assist and have extended offers to provide such training. In addition, Canadian courts should more consistently issue deterrent sentences, including jail time for piracy cases.

## **MARKET ACCESS**

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. Unfortunately, Canada has not made progress on longstanding market access issues as part of its USMCA implementation efforts, and, as noted below, is considering additional measures that would discriminate against foreign online digital service providers. In accordance with its market access commitments in the USMCA, Canada should change course and eliminate the following measures that restrict access by U.S. film and TV producers to Canada's market:<sup>54</sup>

- *Proposed Obligations on Non-Canadian Digital Services*—the Government of Canada is currently considering legislation and other regulatory measures imposing obligations on non-Canadian online digital service providers, which are currently exempt from most requirements under the Broadcasting Act.

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<sup>52</sup>This is another long-standing deficiency. The Industry, Science and Technology Committee of the House of Commons opined as long ago as 2007 that “the justice system should be imposing stiffer penalties for such offences within the limits of current legislation,” and recommended that the government “immediately encourage prosecutors” to do so. There is no evidence that this has been done.

<sup>53</sup>As noted in text above, the affirmance of an interlocutory injunction against retailers of “plug-and-play” Piracy Devices strikes a more positive note for enforcement through civil litigation. In addition, the video game industry notes good cooperation with Canada Border Services Agency (CBSA) on seizures of counterfeit video game products.

<sup>54</sup>IIPA expects that if Canada resorts to the “cultural carve out” under Article 32.6 to avoid implementing any of its obligations under the USMCA, USTR will use the robust retaliation provision under that provision to ensure that Canada meets its commitments.

- *Television Content Quotas*—The CRTC imposes quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.
- *CPE Quotas*—Large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of each group's gross revenues from its conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. As their licenses are being renewed, CPE obligations are being assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas became effective September 1, 2018 and are based on historical levels of actual expenditure.
- *Exhibition Quotas*—Private conventional broadcasters must exhibit not less than 50% Canadian programming from 6PM to midnight. The overall 55% exhibition quota was removed in 2017. Private English-language discretionary services (specialty and pay-TV) that are not part of a large private broadcasting group must exhibit not less than 35% Canadian programming overall.
- *Non-Canadian Signal and Service Restrictions*—Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian services. These protectionist measures inhibit the export of U.S. media and entertainment services.
  - BDUs must offer an all-Canadian basic tier for not more than C\$25 per month. This basic tier may include one set of "U.S. 4+1" (ABC, CBS, FOX, NBC and PBS) signals from the same time zone as the BDU's headend, where available, or, if not available, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may only offer a second set of U.S. 4+1 signals to its subscribers if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.
  - Except as permitted by a BDU's license from the CRTC, all other non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. A service may be removed from the Authorized List if it changes formats and thereby becomes competitive with a Canadian pay or specialty service; if it solicits advertising in Canada; or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is "consistent with the intent and spirit of the Wholesale Code." A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.
- *Broadcasting Investment Limitations*—The Broadcasting Act provides that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians." Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) the licensee's CEO must be Canadian; (2) at least 80% of the licensee's directors must be Canadian; and (3) at least 80% of the licensee's voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the subsidiary must be beneficially owned and controlled by Canadians. In addition, the parent corporation or its directors cannot exercise control or influence over programming decisions of its licensee subsidiary where Canadians own and control less than 80% of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80% of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an "independent programming committee" must be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on the independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

- *Québec Distribution Restrictions*—The Québec Cinema Act severely restricts the ability of film distributors not based in Quebec to do business directly in the province. Since 1986, the Motion Picture Association (MPA) member companies may apply for a Special License for any film produced in English that meets the less-restrictive requirements set out in an Agreement between the MPA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Canada's international agreements with the U.S. most relevant to copyright obligations include TRIPS and the USMCA.<sup>55</sup> As noted above, some aspects of Canada's current copyright regime may raise significant issues of compliance with these agreements (for example, whether Canada's copyright exceptions, as applied, comply with the well-established "three-step test"),<sup>56</sup> and Canada's market access restrictions raise issues regarding its commitments under the USMCA.

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<sup>55</sup>IIPA commends Canada's accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)), which were enabled by bringing the CMA into force.

<sup>56</sup>See TRIPS Article 13 and USMCA Article 20.64.

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Despite Colombia's adoption of law 1955/2019, known as the National Development Plan, which created a set of regulations for copyright and neighboring rights contracts, and the amendment to the Colombian copyright law in 2018, these reforms did not introduce adequate enforcement mechanisms for countering the country's significant online piracy problem. Enforcement actions in 2020 remained largely non-existent. The lack of coordination and expertise among the country's judicial and law enforcement personnel continues to be one of the major obstacles for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the country's Copyright Office (DNDA) to coordinate and train all relevant actors on copyright and enforcement best practices.

IIPA urges Colombia to bring its regime for the protection of Technological Protection Measures (TPMs) into compliance with the provisions of the Colombia-U.S. Trade Promotion Agreement. It would also be helpful for Colombia to reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties, and to avoid legislation seeking to require DNDA's authorization for the operation of digital music platforms in the country.

In October, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed update to Colombia's National Intellectual Property Policy. The policy acknowledges the insufficiency of Colombia's institutional capacity to effectively protect and exploit IP rights. CONPES also acknowledges that Colombia has limited mechanisms to address the country's high levels of infringement, and includes proposals for amendments for Colombia's copyright law, enforcement actions and new functions for DNDA. This initiative is promising and IIPA urges Colombia to continue to move towards increased enforcement and a legal framework that fosters the growth of a vibrant creative economy.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Implement a specialized program for judges and law enforcement on copyright protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on MOUs and industry best practices.

Design and implement a coordinated strategy of the National Tax and Customs Directorate, the General Prosecutor's Office (*Fiscalía General de la Nación*), the DNDA, and the Superintendence of Industry and Commerce for the ongoing training of customs officials at the border to identify and seize copyright infringement and circumvention devices.

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<sup>1</sup>For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

## **Legislation and Regulation**

- Implement legislation that regulates the responsibility of Internet service providers (ISPs) to ensure effective remedies against copyright infringing websites, specify that only passive and neutral intermediaries are eligible for the safe harbors from ISP liability, and provide for a legal basis that requires ISPs to cooperate with rights holders.
- Ratify international agreements relevant to copyright protection, including the Beijing Treaty on Audiovisual Performances.
- Clarify, via regulation from the Ministry of Information Technologies and Communications, and DNDA on the implementation of Law 1915 of 2018, that circumvention of a TPM is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia Trade Promotion Agreement (TPA).
- Reconsider Law 1915 of 2018's annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress.
- Amend Article 181 of Law 1955-2019, Colombia's National Development Plan, to preserve contractual freedom for future forms of commercialization.
- Amend the final paragraph of Article 3 of Law 23 of 1982 (Copyright Law) to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. The so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia's obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.<sup>2</sup>
- Provide adequate comment periods of at least 30 days to facilitate stakeholder input on public policy consultations.

## **THE COPYRIGHT MARKETPLACE IN COLOMBIA**

Online piracy is a significant and largely unaddressed problem in Colombia. According to government figures, Colombia had 7.65 million Internet subscriptions by the end of the first half of 2020.<sup>3</sup> Piracy in Colombia comes in many forms, and the number of visitors to infringing websites and online marketplaces for creative content continues to increase.

There are more than one million illegal pay-television connections, which amount to operator industry losses of more than US\$247 million and government losses due to tax evasion of US\$197 million per year. For music, the predominant form of piracy in Colombia is stream-ripping sites followed by the use of cyberlockers. The most popular stream-ripping sites in Colombia are *y2mate.com* and *savefrom.net*, with each site receiving over 4.6 million and over 4.2 million visits from Colombia, respectively, during the third quarter of 2020. The most popular cyberlockers in Colombia are *1fichier.com* and *zippyshare.com*, with each site having received over 1.9 million and over 1.1 million visits from Colombia, respectively, during the same period. The term "juegos" (games in Spanish) was the 11th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. Following this general trend, there has also been a rise by 10% of audience visits to infringing video game websites in Colombia. These illegal sites are mostly small communities for local users or regional sites with better infrastructure, including links maintenance, game release schedules, and Spanish language support for users. With better technological skills and access to up to date hardware and software, the local audience for illegal game content download is growing in Colombia. The country ranks 23<sup>rd</sup> in the world in terms of the number of peers or people detected in infringing video game swarms or groupings.

Another important channel for illegal digital games, mostly unauthorized digital goods (UDGs), are online marketplaces in Colombia, which are important commercial platforms to infringers, given that in Colombia,

<sup>2</sup>U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

<sup>3</sup>Ministerio de Tecnologías de la Información y las Comunicaciones de Colombia, Internet Dedicado, <https://colombiatic.mintic.gov.co/679/w3-propertyvalue-47271.html> (last visited Jan 19, 2021).

entertainment products are among the top two categories of items purchased online. Most of these marketplace users are also gamers at 85% (38% via consoles, 42% via laptop and 67% via mobile devices) while only 11% of gamers play on streaming/cloud platforms. Marketplaces saw an audience increase of 50% during the pandemic. Offers of illegal game products on these platforms also increased by 56% from January to October 2020. Infringing products are also being promoted and sold via social media platforms.

## **COPYRIGHT LAW IN COLOMBIA**

**Copyright Act Amendments:** To fully comply with the U.S.–Colombia TPA, some of Colombia’s 2018 copyright amendments need clarification and reconsideration. IIPA urges Colombia to clarify that (1) the new permanent exemptions to TPMs are subject to review, requiring proponents to offer substantial evidence of actual or likely adverse impact on non-infringing uses; and, (2) a TPM may not be circumvented to exercise any exception or limitation because the TPA establishes that circumvention of TPMs “is a separate civil or criminal offense, independent of any infringement that might occur under the Party’s law on copyright and related rights.” IIPA also asks Colombia to amend the last paragraph in Article 3 to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. This so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia’s obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.<sup>4</sup> In addition, IIPA urges Colombia to reconsider (1) the profit requirement for the crime of retransmission or reception of illegally decrypted satellite signals; and (2) the annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress because such revision creates uncertainty for both enforcement and private investment.

**National Intellectual Property Policy Consultation:** In October, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed update to Colombia’s 2008 National Intellectual Property Policy. The proposal acknowledges the insufficiency of Colombia’s institutional capacity to effectively manage, protect and exploit IP rights. Although copyright registration applications increased from 65,138 to 86,250 in the 2014-2019 period, the DNDA needs to improve its technological and data generation capacities to enable public policymaking that is in tune with rapidly changing market and cultural trends. CONPES also acknowledges that Colombia has limited mechanisms to address the country’s high levels of infringement, and includes proposals for amendments for Colombia’s copyright law, enforcement actions and new functions for DNDA. If carried through, the impact is deemed to be significant for the Colombian online piracy landscape, ranging from the regulation of ISP liability and anti-circumvention of TPMs to specialized IPR training programs for judges and legal operators.

Ideally, the final version of the IP Policy would recommend the implementation of strict regulation and auditing of Performance Rights Organizations (PROs) so that they collect and distribute their fees in a manner that is transparent, non-discriminatory and proportional to the use of the works they represent.

**Constitutional Challenge to National Development Plan Article 181:** In May 2019, Colombia adopted law No. 1955-2019, which created the National Development Plan. Article 181 created a set of regulations for copyright and neighboring rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties. For instance, in the absence of a specified term, agreements will last five years; in the absence of specification of a territory, the agreement is limited to the territory in which the contract was signed, and all contracts are limited to the uses specified by parties. In addition, contracts for forms of commercialization unknown at the time a contract is signed are void which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their businesses and produce new local talent. On August 13, 2020, the Colombian Supreme Court agreed to hear the lawsuit filed by Pro Musica Colombia

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<sup>4</sup>U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

challenging both the substance and the approval procedure of this obstacle to the free assignment of copyright rights and neighboring rights. The procedure before the Court may last up to one year.

**Bill # 49-2020 on the “Professionalization, Entrepreneurship and Protection of the Music Industry”** was introduced before the Colombian Senate on October 6, 2020. This bill proposes the creation of a national registry of Colombian artists and musicians, among many other initiatives to promote the education of participants and right holders in the music sector. However, the Bill includes several provisions that could potentially harm the music sector and create obstacles for the development of a healthy digital marketplace for music in Colombia.

For instance, Article 8 requires music platforms to obtain an authorization from DNDA to offer music produced in Colombia. This is not only bad for the wide participation of national and foreign digital services in the sale of music, it also creates a *de facto* discrimination against Colombian musicians, authors and producers who must register before the DNDA in order to exercise their rights. Foreign musicians, authors and producers are not subject to this registration requirement. The proposal is also unprecedented and departs from standard international practice (with the notorious exception of China).

Article 10 requires Digital Music Services (DSPs) to sign contracts with *all* the artists that participated in the music promoted, commercialized, and distributed by such platforms. This proposal is irreconcilable with contractual practices in the music industry around the world, including in Colombia. DSPs are currently the predominant point of access (whether for sale or streaming) of recorded music in Colombia. Recording companies invest to produce talent and sign contracts with artists to make the music that consumers want. When the recorded music reaches the platforms, all necessary contractual arrangements for the clearance of relevant rights have already been made. Otherwise, the platform would not be able to legally offer such music for sale/streaming in Colombia.

Article 11 creates the legal power to block access to DSPs operating in Colombia without authorization from the DNDA. This provision assigns a new power to a “competent authority” to order Internet Service Providers to block access to DSPs “as a preventive measure.” Although well intended, this proposal is unhelpful to the extent it makes the availability of blocking orders dependent on whether a service has been authorized by DNDA rather than on whether a service has been licensed by right holders themselves. This aspect of the proposal should be reconsidered.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

**Lack of coordination and expertise:** The lack of coordination among a multiplicity of investigative and judicial proceedings with competing jurisdictions, including civil and administrative authorities, leads to inefficiencies in Colombia’s enforcement of copyright. Additionally, increased resources should be dedicated to the National Police and prosecutors. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to coordinate or conduct enforcement actions and the current proposals for entrusting DNDA with some enforcement powers (see Art.11 of the Bill # 49-2020 on the “Professionalization, Entrepreneurship and Protection of the Music Industry”, discussed above) do not go in the right direction. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA’s functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector. IIPA is encouraged by the March 2020 decision of expanding DNDA’s jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is not clear how this would be applied to unauthorized content distribution online and disruptive measures, including injunctions. Another example of the lack of coordination for enforcement is the several challenges to the DNDA’s authority from ISPs, which are regulated by a different agency. The “Orange Economy” (or creative economy) initiative that the new government is instituting as a major public policy through the National Development Plan needs to have a powerful component to engage authorities to more actively protect IP and the digital economy in Colombia. But again, the DNDA should lead the protection of the creative sector ecosystem and develop a conscious coordination effort.

The proposed National IP Policy identified the lack of knowledge and training in intellectual property rights among its judicial and law enforcement personnel as one of the obstacles for effective copyright enforcement. It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement at the local and regional levels.

**ISP Cooperation:** While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited and there is no cross-industry MOU or government pressure on ISPs to cooperate more. We urge Colombia to hold public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on industry best practices and facilitate a cross-industry agreement. Colombia must follow through with legal reform to incentivize and urge cooperation by all intermediaries, including marketplaces and social media platforms, to effectively address online piracy. Specifically, the law should require intermediaries to take action against copyright-infringing websites. The U.S. government should seek high standard remedies that support today's business models of the creative industries.

**BajarYouTube Criminal Case:** In January 2020, IFPI and Pro Musica Colombia filed a criminal complaint before the Criminal Prosecutor #75 (Bogota Section) against the stream-ripping site known as "*BajarYouTube*". The administrator behind the operation of the site is a Colombian national presumably residing in the Bogota area. The case has been delayed because of the pandemic. Recently, the recording industry's local body Pro Musica Colombia urged the prosecutor in charge of the case to complete the criminal investigation.

**Y2mate Competition Case:** In August 2020, IFPI and Pro Musica Colombia filed an action before the Superintendence of Industry and Commerce (SIC) against the stream-ripping site *y2mate*, which has a significant audience in Colombia. Pro Musica is seeking a declaratory judgement and a blocking order based on the fact that *y2mate* is competing unfairly in the music market and violating several intellectual property laws. The competition authority in Colombia ordered in previous cases, the blocking of apps and websites, and its authority on the matter has never been questioned. With this case, the Colombian music industry expects to set a precedent for Colombia and the rest of the Latin American region.

**Video Game Industry Cooperation with Online Marketplace *MercadoLibre.com.co*:** Through the company's headquarters in Buenos Aires, Argentina, the video game industry is able to remove some infringing or illegal content from *Mercado Libre Colombia*, the most relevant e-commerce platform in the country.

**Video Game Industry Cooperation with local Colombian domain registrar, *Nic.co*:** This domain name registrar cooperates on the suspension and/or seizure of domain names that the police reports as used for illegal activities. Local law enforcement authorities have reported and demonstrated to industry representatives that cooperation has been established to tackle illegal online activities via .co domain name seizures and/or suspensions.

## **MARKET ACCESS**

**Law to Increase Visibility of Local Content on Video-on-Demand (VOD) Platforms:** On May 21, the Ministry of Information and Communications Technology released the final decree to regulate Article 154 of the National Development Plan, which aims to increase the visibility of local content on VOD platforms for users in Colombia. Helpfully, the final decree appears to provide a flexible and non-prescriptive approach; i.e., it allows each service provider to comply using virtually any mechanism of the platform's choosing, with no quota, and with a nine month extended timeline for implementation until February 21, 2021. U.S. motion picture industry stakeholders are currently implementing the requirement.

**Implementation of VAT on Digital Services:** Colombia Law 1819 applied 19% VAT to digital services. The law entered into force in October 2018 with a retroactive effect to July 2018. To compensate for the effects of the pandemic on the Colombian economy, the government published several executive decrees in 2020. Executive Decree # 818 of June 4, 2020 established a temporary tax relief for the music sector whereby VAT is reduced from 19% to 4%

for one year for the production of phonograms, the reproduction of sound recordings, and live shows. Colombia's actions regarding the cultural sector and the music industry have been among the best structured in Latin America and should be extended to other industries of the creative sector through the "Orange Economy" in order to generate appropriate and proportional relief effect for the local market stakeholders.

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Four years since the enactment of Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador's creative sector has stagnated due to COESCI's dramatic weakening of the country's copyright protection.

In sum, COESCI upends the copyright framework, asserting that public domain is the norm and copyright is the exception. COESCI features 30 copyright exceptions and limitations (up from 11 in the prior law), many of which clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement, and interfere with rights holders' ability to contract and freely transfer rights. In addition, COESCI includes a five-factor "fair use" clause, which is an unwelcome first for a Latin American country and is broader than the fair use provision found in U.S. law. Ecuador, unlike the United States, has a civil law system and does not follow judicial precedent. Additionally, Ecuadorian judges have no experience or training on the doctrine of fair use. These realities impair the proper application of the fair use doctrine and create unacceptable legal uncertainty for both rights holders and users.

In November, Ecuador implemented regulations of some of COESCI's provisions. Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) do not adequately correct COESCI's egregious deficiencies and do not bring Ecuador into compliance with its international obligations. We understand that the *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology and Innovation, SENESCYT) is working on a legislative proposal to amend some of COESCI's exceptions. We commend SENADI and SENESCYT for undertaking these initiatives and urge them to engage in consultation with all relevant stakeholders to ensure that both regulations and amendments to the law meet the country's treaty obligations and best practices for copyright protection.

To foster a vibrant, legitimate creative marketplace, we also recommend that Ecuador direct considerable attention and resources to its enforcement efforts. We commend SENADI's issuance of administrative site blocking orders against pirate sites. This is a step in the right direction. However, Ecuador's piracy problems remain and need prompt action. For instance, the country's pay-TV penetration has declined in recent years due to piracy. Camcording legislation is still necessary because, once the COVID-19 pandemic ends, Ecuador will likely continue to rank as a top regional provider of camcorded films.

### **PRIORITY ACTIONS REQUESTED IN 2021**

- Urgently amend COESCI and its regulations to bring Ecuador's framework for copyright protection and enforcement in compliance with its treaty obligations and international best practices.
- Encourage SENADI to continue issuing administrative blocking orders against online piracy platforms, as warranted, by providing more resources and funds.

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<sup>1</sup>For more details on Ecuador's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators pay royalties for the music and sound recordings that they use.

## **THE COPYRIGHT MARKETPLACE IN ECUADOR**

Official government statistics indicate that, for 2019, more than 59% of the population uses the Internet and over 76% has a smartphone.<sup>2</sup> According to the International Federation of the Phonographic Industry's (IFPI's) 2020 Global Music Report, in Ecuador, digital revenues amount to 81.1% of total music revenues and streaming sales make up 80% of total music sales. There are nine legitimate online music services.<sup>3</sup>

Stream-ripping is the predominant form of music piracy in Ecuador. The most popular stream-ripping sites are [y2mate.com](http://y2mate.com), [savefrom.net](http://savefrom.net) and [flvto.biz](http://flvto.biz), with each site respectively receiving over 1.8 million, over 1.3 million and over 720,000 visits from Ecuador during the third quarter of 2020. In addition, online piracy of film and television content, including through infringing streaming devices (ISDs), has been on the rise during the COVID-19 pandemic in 2020.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, which makes it the third largest source of movie theater piracy in Latin America, behind Mexico and Brazil. Although 2020 was an exceptional year due to the COVID-19 pandemic, Ecuador is likely to remain a major regional provider of camcorded films once movie theaters re-open.

## **COPYRIGHT LAW IN ECUADOR**

Ecuador's 2016 COESCI established numerous exceptions and limitations to copyright, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"). These exceptions are overbroad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention, Article 13 of TRIPS and the WIPO Internet Treaties (in force in Ecuador since 2002). COESCI also fails to meet Ecuador's other copyright protection obligations pursuant to its free trade agreements with the European Union (EU), Peru, and Colombia, which entered into force January 1, 2017.

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns. We understand that SENESCYT is working on a legislative proposal to amend some of COESCI's exceptions. We urge SENADI and SENESCYT to fulfill the promise of the Moreno administration to reverse the most damaging provisions in COESCI and bring the law into compliance with the country's treaty obligations. Instead of addressing the most urgent concerns regarding the overbroad exceptions, the November regulations imposed a number of new obligations to Collective Management Organizations (CMOs) that go beyond the regional standards and, in practice, mandate CMOs to invest significant time and resources on attending multiple requests and inquiries from SENADI.

**Fair Use:** Transplanting the U.S. fair use provision alone in the COESCI law creates an unacceptable level of uncertainty and risk in the copyright ecosystem. While decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret Section 107 of the Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, there is no body of case law to which a judge may refer in evaluating whether the contested use is indeed fair. To make matters worse, COESCI's Article 211 is broader and more uncertain than the U.S. provision on which it is based because it adds a fifth factor, i.e. "use and enjoyment of other fundamental rights." Finally, although Article 211 indicates it is to be applied in accordance with

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<sup>2</sup>See <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

<sup>3</sup>See <https://www.pro-music.org/legal-music-services-latin-america.php>.

international treaties to which Ecuador is a party, the very letter of the provision and the absence of binding judicial precedent, make such application virtually impossible.

**Other Exceptions:** COESCI's list of exceptions and limitations is extensive. Moreover, it includes language akin to a fair use savings clause which suggests that if a use that is generally regulated by a specific exception does not meet the requirements of such exception, it may still be considered under the fair use provision. The following exceptions allow widespread uses that conflict with the normal exploitation of works and unreasonably prejudice rights holders' legitimate interests, in clear contravention of the three-step test that is enshrined in the international copyright treaties and that establishes the international standard for the scope and application of exceptions and limitations to copyright:<sup>4</sup>

Exception 9 for libraries and archives is broader than U.S. law in important respects and contravenes the parameters of the three-step test. It allows libraries and archives to reproduce a copyrighted work to: (1) deliver to another library or archive that may, in turn, make its own additional copy for purposes of lending to its users or preserving the copy it received; and (2) replace the lost or destroyed copy of the requesting library or archive. The provision also provides for eight further acts that a library or archive may undertake without authorization or payment, including text mining, and the translation of works originally written in a foreign language if, after three years from publication, they have not been translated into Spanish or other local languages. Unfortunately, Article 64 of SENADI's regulation does not correct the overbroad scope of this provision. For instance, the regulation allows libraries, archives and museums to reproduce a work "in the amount necessary" and to rely on third parties for the reproduction of a work for preservation purposes. As drafted, these library exceptions and their regulations can harm publishers' legitimate market.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This long period makes this a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music right holders in Ecuador from licensing the reproduction rights in their contents and unreasonably interferes with right holders' normal business.

Exception 24 allows websites, without the permission from rights holders, to reference or link to online sites, as well as for the reproduction and storage of content when necessary for the operation of a search site provided that there is no "violation" of the protected content. This exception is contradictory because any "use" of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is itself a "violation" of copyright.

Exception 26 allows small businesses to freely communicate works to the public. Given that the majority of businesses in Ecuador qualify as "small businesses," this is one of the most damaging exceptions in COESCI. It conflicts with the normal licensing of sound recordings in numerous venues across the country and fundamentally undermines rights holders' legitimate economic interests in 95% of the Ecuadorian public performance market.

Exception 27 eliminates music rights holders' ability to license to private transportation companies for the public performance of their works and recordings. This is especially the case with coaches and "busetas," which are popular forms of transportation in the region and a non-negligible market for music rights holders. This is another example of an unfair and an unjustified exception, protecting a particular interest of a group of companies against the legitimate interest of copyright and neighboring rights holders.

Exception 30 allows "community radios" to communicate works to the public. Radios covered by this exception account for 30% of the radio broadcasts in the country, operate as commercial businesses, sell advertising, and compete with other broadcasters. This exception is, therefore, prejudicial not only to the music sector as content

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<sup>4</sup>Berne Convention, Art. 9 ("Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."); see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for “public communication,” which can encompass any means by which works are made accessible to the public, including through digital media.

In addition to the foregoing exceptions, other COESCI provisions provide for compulsory licenses, various rights and ‘default’ clauses to govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. For instance, Article 217 establishes a compulsory license for the translation of literary works that are not available in Spanish or other local languages in the national market. Articles 69 and 70 of SENADI’s regulations insufficiently narrow the scope of this provision by requiring a seven year period of unavailability and that the party who seeks the license show there is a need for the work among “the general public or for school or university teaching.” COESCI’s Article 221 imposes a mandatory interpretation of the law in favor of the author if there is a conflict regarding neighboring rights. Such provisions frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and complicate rights transfers.

**Camcording legislation:** SENADI is working on a legislative proposal to amend Article 208A of Ecuador’s Penal Code, which establishes penalties for piracy and counterfeiting, to penalize camcording.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. Rights holders struggle to enforce their copyrights in practice, and attempts to do so through administrative authorities can linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions hamper effective enforcement and protection against infringing acts. IIPA recommends Ecuador develop an official enforcement plan for the National Police formal agenda. Ecuador is the only country in the region where serious piracy is treated as a misdemeanor with fines instead of prison terms, which is yet another violation of Ecuador’s obligations under the TRIPS Agreement.

In a positive development, in the past two years, SENADI has issued administrative site-blocking orders against pirate sites. We urge SENADI to continue this type of action to foster the growth of Ecuador’s creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were originally designed to provide a faster and less expensive alternative to civil litigation. However, the music industry’s experience has been the opposite. A single administrative action is subject to four instances of review before a final ruling and, at that point, the alleged infringer has the option to challenge the administrative decision before the judiciary. Additionally, SENADI’s section in charge of deciding these cases, known as the *Órgano Colegiado de Derechos Intelectuales*, has an erratic record in decisions about neighboring rights. In July 2020, SENADI decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers’ and performers’ rights. These cases were initiated in 2014 by SOPROFON, a sound recording industry CMO, when SENADI (then known as IEPI) ruled in favor of SOPROFON and imposed fines to DIRECTV for about half a million USD for the unauthorized communication to the public of sound recordings. Despite the favorable 2020 decisions, DIRECTV’s fines were reduced to about half of their initial value. Additionally, DIRECTV has paid no fine because every administrative ruling triggers another automatic review of the case, known as a “reposition.” This situation plays against the effective protection of phonogram producers’ rights in Ecuador and is a major obstacle for the industry’s business development. Ecuador should conduct a comprehensive review of the administrative procedure for copyright infringement cases in the context of the COESCI amendments process in order to make the process expeditious and effective.

# KENYA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kenya be placed on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** In 2019, Kenya's Attorney General Kihara Kariuki highlighted the creative industries' contribution to Kenya's economy, citing a study estimating the contribution to be 5.3% of GDP and stating, "The protection of the copyrights will essentially put money into the pockets of authors, producers and all creators."<sup>2</sup> Yet Kenya's copyright legal and enforcement frameworks remain deficient, and piracy, particularly online, remains a significant barrier for the creative industries in Kenya. While the Government of Kenya has indicated its intention to ratify the WIPO Internet Treaties (WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT)), it has yet to do so. Kenya's 2019 Copyright Act amendment was intended to address some of the challenges of the digital age, but Kenya's copyright framework remains deficient in a number of significant respects. A 2020 draft Intellectual Property Bill (IP Bill), which largely incorporated 2019 amendments to the Copyright Act, failed to address many of these deficiencies, and included additional provisions that fall short of Kenya's international obligations and best practices.

The Government of Kenya should take the necessary steps to update Kenya's copyright legal and enforcement regimes, and improve its marketplace for legitimate digital trade in copyright protected materials. IIPA is hopeful that trade agreement negotiations between the U.S. and Kenya will result in a high-level agreement that is truly built for the digital age, including much-needed copyright protections and enforcement provisions. This would serve both as a model for the regional Africa agreement, while also improving the market in Kenya for the continued growth of the American and Kenyan copyright industries. As Kenya's Attorney General recognized, Kenya should incentivize its own creative industries and foster economic growth and stability by improving the effectiveness of its intellectual property law and enforcement mechanisms. In support of such efforts, at a minimum, any trade agreement with Kenya should reflect global best practices for copyright protection in the digital era.

#### **PRIORITY ACTIONS REQUESTED IN 2021**

- Ratify and fully implement the WIPO Internet Treaties;
- Revise the IP Bill to ensure consistency with international obligations and best practices and to address shortcomings in Kenya's copyright and enforcement framework, including by:
  - deleting the provisions requiring copyright registration and compulsory recordation of assignments, and removing the requirement in the Copyright Act that authentication devices be affixed to sound recordings, all of which are incompatible with Kenya's international obligations, including under the Berne Convention, the TRIPS Agreement, and the WPPT;
  - ensuring that the exclusive rights of communication to the public and making available are clearly defined and meet the requirements of the WPPT;
  - ensuring that exclusive rights apply to all sound recordings, including "born digital" recordings;
  - retaining the rights of communication to the public and broadcasting as exclusive rights;
  - providing adequate and effective protections for technological protection measures (TPMs) and rights management information (RMI), in line with international standards;

<sup>1</sup>For more details on Kenya's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country>. For the history of Kenya's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>See Anyango Otieno, "AG: Kenya to ratify copyright protection, information laws", June 11, 2019, [The Standard](https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp), <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.



- providing a term of protection consistent with international standards (life of the author plus 70 years, or at least 70 years from fixation or publication for sound recordings or works not measured by the life of a natural person);
  - expressly incorporating the three-step test into the law to properly confine the scope of exceptions and limitations to copyright protection;
  - adding secondary liability principles to ensure adequate legal incentives for cooperation between Internet Service Providers (ISPs) and rights holders;
  - clarifying the correct scope of ISP safe harbors from liability as applying to only passive and neutral intermediaries that do not contribute to infringing activities;
  - revising notice and takedown procedures to ensure expeditious takedown of infringing materials and other measures demonstrated effective in preventing or restraining infringement, and by removing onerous notice requirements;
  - introducing an obligation for ISPs to adopt and implement a repeat infringer policy;
  - ensuring effective, transparent and accountable collective management of rights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights;
  - introducing a rate-setting standard applicable to the licensing of collectively managed rights requiring that rates reflect the economic value of the use of the rights in trade (i.e., willing buyer/willing seller standard);
  - providing deterrent civil and criminal penalties to combat piracy; and
  - clarifying the role of the proposed IP Tribunal.
- Improve cooperation with rights holders on copyright enforcement efforts.

## **THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN KENYA**

Internet use in Kenya has grown significantly in the 21<sup>st</sup> Century. According to Internet World Stats, in September 2020 there were 46.9 million Internet users in Kenya, up 23,335% since 2000.<sup>3</sup> This impressive technological growth, unfortunately, is accompanied by illegitimate activities that will continue to hamper legitimate economic growth if left unchecked. To ensure, effectively, a safe, healthy, and sustainable digital marketplace, the Government of Kenya should assess whether its legal regime is capable of responding to today's challenges, including rampant online piracy.

Digital piracy in Kenya is a growing problem and, recently, the dominant form of piracy in Kenya shifted dramatically from web downloads to streaming. For example, a 2019 Muso and GumGum Sports study found that Kenya was among the top five countries in the world illegally streaming English Premier League (EPL) soccer games.<sup>4</sup> Kenya's local artists and producers are stymied by the negative impact of widespread piracy in the country, which has stunted its marketplace for creative content.<sup>5</sup>

Kenya has a nexus to locally popular piracy music services, which provide links to infringing content and generate revenues from advertising. Examples include *djcelebu.co.ke* and *sunsetkenya.co.ke*. A particular problem is stream-ripping, which has exploded in the past year to become the most dominant method of music piracy. The music industry reports that stream-ripping accounted for 44.4% of piracy traffic in 2019-2020, up from 14.2% in 2018-2019. The most popular stream-ripping sites in Kenya include *savefrom.net* (782,298 visits), *y2mate.com* (759,542 visits),

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<sup>3</sup>See Internet World Stats at <https://www.internetworldstats.com/stats1.htm>.

<sup>4</sup>See Kariuki, James "Kenyans Lead in Illegal Streaming of EPL Matches," July 11, 2019, *Daily Nation*, <https://allafrica.com/stories/201907120142.html>.

<sup>5</sup>See, e.g., "DStv 'Sambaza' lowers pay for MultiChoice creatives," October 30, 2019, available at <https://www.businessdailyafrica.com/corporate/companies/DStv-piracy-lowers-pay-for-MultiChoice/4003102-5330054-14kuv4bz/index.html> (MultiChoice Kenya, a television producer, states that infringement "has made it hard for us to pay our talents adequately at the prevailing market rate" and is "stifling the company's ability to pump more investments into the Kenyan economy."); Agade, Halligan "Film industry: How to get fans back into the cinema," January 27, 2020, available at <https://africa.cgtn.com/2020/01/27/film-industry-how-to-get-fans-back-into-the-cinema/> ("Film producer Michael Mwangi says the big issue is piracy and unless authorities come up with radical measures then the already low numbers in the cinema halls will continue to nosedive.")

and *mp3juices.cc* (684,871 visits). Peer-to-Peer (P2P) piracy is also a problem in Kenya. The P2P site *1337x.to* is very popular (1,269,791 visits).<sup>6</sup>

Cooperation between rights holders and government officials on copyright enforcement is relatively new. A coalition of rights holders, including representatives of the music industry, has engaged with the Kenya Copyright Board (KECOBO) and other stakeholders with a view toward future cooperation regarding the prevention of copyright infringement. IIPA hopes that this effort will result in enhanced cooperation.

## **COPYRIGHT LAW AND RELATED ISSUES**

Kenya has yet to ratify and fully implement the WIPO Internet Treaties, which set global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. While the Government of Kenya has announced its intention to ratify the Treaties, there has been no stated timeframe for ratification.<sup>7</sup> In 2019, Kenya enacted an amendment to its Copyright Act intended to address some of the challenges of the digital age. While the new law provides rights holders with some important protections, there are concerns regarding the scope of those protections, including whether they are consistent with international standards and best practices. The 2019 amendments were followed by the introduction of the IP Bill, which would further revise the law.

While the 2019 Copyright Act amendments and the IP Bill appear to provide many of the exclusive rights required by the Treaties, unfortunately there is uncertainty regarding the nature and scope of these protections. For example, the law is inconsistent with the requirements of the WPPT in that it does not expressly include public performance as part of the right of communication to the public and it does not expressly define the making available right. The Government of Kenya should revise the law to ensure that the exclusive rights of public performance and making available are fully and explicitly protected, consistent with the WPPT. Also in accordance with the WPPT, the definition of “publication” in Kenya’s law should be revised to clarify that protections for exclusive rights apply to all sound recordings, including “born digital” recordings that are not released in physical formats, reflecting the realities of today’s digital marketplace.

Kenya lacks proper protections for TPMs, which are critical for enabling business models that foster many of the innovative products and services available online. A major reason why so much legitimate creative content is now available to consumers, and in so many formats and on so many platforms, is because of the widespread use of TPMs by content producers and (licensed) services. These TPMs ensure that only authorized users and consumers have access to copyrighted content. The definition of TPMs in the Copyright Act should be amended to refer to technologies that are designed to have the effect of preventing or restricting infringement, and the prohibitions against the circumvention of TPMs should be updated to bring the protection of TPMs in line with the requirements of the WIPO Internet Treaties.

Protection for RMI is also critical for enabling legitimate trade of copyrighted content in the digital marketplace. The Copyright Act defines “electronic rights management information” as any information that identifies the work or recording. This definition is too narrow and should be amended to include information about the terms and conditions of use of the work or recording and any numbers or codes that represent such information.

Kenya provides an outdated term of protection of life plus 50 or 50 years from creation or publication for works, and 50 years after creation for sound recordings (which is retained in Section 219 of the IP Bill). Kenya should extend its term of protection to the global consensus, which is consistent with current U.S. law. For works, this is a term of life of the author plus 70 years, or at least 70 years from date of publication for works not measured by the life of a natural person. For sound recordings, the term of protection under U.S. law is 95 years from fixation. By adopting a term of

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<sup>6</sup>All traffic data highlighted in this paragraph is for the third quarter of 2020, according to SimilarWeb.

<sup>7</sup>Kenya’s Attorney General recently affirmed that the government “is considering ratification of the WIPO Internet Treaties.” See Anyango Otieno, “AG: Kenya to ratify copyright protection, information laws”, June 11, 2019, *The Standard*, <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.

protection in line with evolving global norms, Kenya would provide greater incentives for the production of copyrighted works and sound recordings. This change would also provide Kenyan recording artists with the security of knowing that their recordings have the potential to generate income during their lifetimes. In addition, it would provide producers with a stronger incentive to invest in the local creative industries, which would spur economic growth and tax revenues, and enable producers to continue offering works and recordings to local consumers in the latest formats.

Kenya should expressly incorporate the longstanding “three-step test” into its law to properly confine the scope of exceptions and limitations to copyright protection.<sup>8</sup> Incorporating this well-established global norm into the law is critical to ensure that exceptions and limitations do not devalue the underlying exclusive rights that should be protected.

The ISP liability provisions in Kenya’s amended Copyright Act fall short of global best practices. As an initial matter, Kenya’s law does not include secondary liability principles to hold service providers responsible for infringements carried out by third parties using their services. In U.S. law, secondary liability doctrines (under vicarious, contributory, and inducement theories of law) provide legal incentives for cooperation, and are a deterrent to the unauthorized storage and transmission of copyrighted materials. Second, the scope of the safe harbors from liability in Kenya’s law (also included in Section 238 of the IP Bill) is too broad, and not limited to only passive and neutral intermediaries that do not contribute to infringing activities. In addition, the law also does not require expeditious takedown of notified content (and this deficiency, unfortunately, remains in the IP Bill). Instead, the law allows an ISP to take 48 business hours between receiving a notice and taking down or disabling access to the infringing content. This is inconsistent with baseline international practices and undermines any effectiveness of the system because enormous harm can be caused in 48 hours before the infringing content is taken down. ISPs should be required to expeditiously remove or disable access to infringing content upon receiving notice, as is the global standard, and to take other measures demonstrated effective in preventing or restraining infringement. Furthermore, the requirements for a takedown notice are onerous because they include submission of an affidavit or declaration regarding ownership and validity of rights and additional extraneous information. Consistent with best international practice, the requirements for the notice should instead include simply a statement that the person sending the notice is authorized to act on behalf of the copyright owner and is acting in good faith, and information reasonably sufficient to permit the ISP to locate the content. Finally, the law does not include any requirement for an ISP to adopt and effectively implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers (i.e., a repeat infringer policy).

Kenya’s copyright law should clarify that exclusive rights should not be subject to management by collective management organizations (CMOs) unless rights holders expressly authorize a CMO to manage their rights on a voluntary basis and, in that case, only in accordance with the terms of that authorization. In addition, Kenya’s legal framework for CMOs, including proposed regulations, falls well short of international standards and best practices for transparency, accountability, and governance. Moreover, government intervention has undermined rights holders’ freedom to contract and control over their works and sound recordings. The rate-setting process for royalties is non-transparent, arbitrary, and unaccountable to rights holders. As a result, royalty rates are not set according to the commercial value of the use of the rights (i.e., the rate that would be agreed between a willing buyer and willing seller). Furthermore, there are serious concerns about the Government of Kenya’s attempts to remove the ability of CMOs to collect revenues from users of collectively managed rights and its appointment of a third party, not controlled by rights holders, to carry out collection activities instead.

Kenya’s Copyright Act provides for a legal basis for injunctions against intermediaries to disable access to infringing content and penalties for infringement. These are important enforcement tools to combat online piracy, but Kenya’s enforcement framework remains deficient. To ensure adequate and effective enforcement, Kenya should upgrade its criminal, civil, and border enforcement frameworks, including by providing increased, deterrent-level criminal and civil penalties for copyright infringement.

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<sup>8</sup>See, e.g., TRIPS Agreement Article 13.

Section 36 of the Copyright Act requires authentication devices to be affixed to sound recordings and audiovisual recordings. Authentication devices were once thought to be an effective means to combat piracy. Unfortunately, authentication devices did not fulfil this promise due to problems such as the use and illicit sale of unauthorized authentication devices. This outdated provision also may be regarded as a formality contravening the international prohibition on formalities in the Berne Convention (and the WIPO Internet Treaties) to the extent that it has the effect of precluding the exercise of rights in cases where authentication devices are not used. This provision should be removed.

In addition to failing to address the deficiencies in the law discussed above, the IP Bill also includes registration and recordation requirements that appear to be inconsistent with Kenya's international obligations. Section 218 of the IP Bill runs afoul of the prohibition on formalities in Article 5(2) of the Berne Convention (as well as the requirements of WIPO Internet Treaties, which, noted above, Kenya should ratify and implement) because copyright owners would be required to register their works in order to enjoy the presumption of ownership that enables rights holders to exercise their rights more efficiently. Section 234(4) of the IP Bill also proposes to invalidate assignments that are not lodged at the Copyright Office, which clearly would constitute a formality on the exercise of rights that is incompatible with the Berne Convention (and the WIPO Internet Treaties), and place an onerous burden on rights holders, creating a substantial obstacle to a thriving creative economy.

Finally, the IP Bill proposes to establish an IP Tribunal. The Government of Kenya should clarify whether the IP Tribunal is intended to be a specialized IP Court or whether the IP Tribunal is intended to adjudicate only disputes concerning the collective management of rights. It is normal practice for the jurisdiction of such a tribunal to be limited to disputes over the collective management of rights. In any event, the law should clarify that rights holders may elect to bring claims under the IP Bill to the IP Tribunal or to the courts.

While IIPA applauds the Government of Kenya's efforts to upgrade its copyright legal framework in the IP Bill, as noted, the draft legislation fails to address many of the concerns outlined above. Moreover, certain provisions—including regarding scope of protections, term of protection, TPMs, exceptions and limitations, intermediary safe harbors, collective management, and formalities on the exercise of rights—fall short of the requirements of the TRIPS Agreement, Berne Convention, the WIPO Internet Treaties, and/or international best practices.

IIPA hopes the Government of Kenya will address these concerns to ensure Kenya meets its international commitments and complies with international norms.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

As noted above, Kenya's existing copyright regime falls short of the requirements of the WIPO Internet Treaties, and the IP Bill raises questions regarding compliance with the TRIPS Agreement, Berne Convention, and the WIPO Internet Treaties.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendations:** IIPA recommends that Switzerland remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** For the past decade, rights holders in Switzerland have been deprived of the ability to enforce their copyrights in civil and criminal cases involving the online environment. In 2013, the Government of Switzerland embarked upon a legislative process to revise the Copyright Act, ostensibly to provide more effective enforcement mechanisms and bring Swiss copyright law closer in line with international norms. That process resulted in the adoption of a Copyright Act in September 2019, that went into force in April 2020. Despite some modest positive changes, the new Copyright Act, as adopted, largely maintains the status quo and does not address the most glaring enforcement problems in Switzerland.

IIPA urges the U.S. government to convey to the Government of Switzerland that the Copyright Act does not sufficiently comply with Switzerland's obligations to provide for effective and deterrent remedies against any act of copyright infringement, especially with respect to civil claims. The enforcement deficit remains deeply problematic, particularly within the context of our otherwise strong bilateral trade relationship with Switzerland. IIPA further urges the Government of Switzerland to consider amendments to the Copyright Act to bring it in line with its international treaty obligations, current best practices in Europe, and international norms. The Government of Switzerland has expressed interest in a possible Free Trade Agreement (FTA) with the United States. Any negotiations of such an agreement should address the deficiencies in copyright protection and enforcement outlined in this report.

#### **PRIORITY ACTIONS REQUESTED IN 2021**

- Amend the Copyright Act to provide sufficient tools to combat all types of piracy, regardless of technical details and including cross-border piracy. This should include the ability of rights holders to use IP address evidence in connection with civil claims, and effective remedies with regard to intermediaries or Internet service providers (ISPs).
- Amend the Copyright Act to affirm that Switzerland's private use exception permits single copies for private use only if they derive from a legal (authorized) source. Further, limit catch-up TV services that are not authorized by content owners, a problem resulting from an overly-broad interpretation of the private use exception. In the alternative, do away with the remuneration caps for catch-up TV, which interfere with the contractual freedom and licensing practices for film and television series.
- Remove the extended collective licensing (ECL) regime.
- Require data centers and ISPs to implement better "know-your-business-customer" protocols and enforce that requirement.
- Permit effective enforcement against ISPs based in Switzerland and hosting infringing services and introduce a legal framework for combating copyright infringements.
- Clarify those areas of the Swiss Film Act that currently negatively affect the distribution of audiovisual works in Switzerland, including limiting the requirement (under Article 19 par. 2) that rights holders must exclusively control all language versions exploited in Switzerland (and the accompanying reporting obligations), to apply only to distributors or platforms located in Switzerland.

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<sup>1</sup>For more details on Switzerland's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Switzerland's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

- End the unfair treatment of neighboring rights under collective rights management by modifying the 3% cap in Article 60(2) of the Copyright Act, which remains below other European countries and substantially below the cap of 10% for authors.
- Improve draft amendments to the ordinances of the Telecommunications Act (TCA), proposed in spring 2020, to ensure that rights holders are able to obtain information about domain name registrants and operators of infringing websites.

## **THE NATURE OF PIRACY IN SWITZERLAND**

Switzerland suffers from high domestic piracy rates for music, film, and video games. Moreover, the country has been turning into an attractive base of operations for some ISPs dedicated to piracy on a global scale. In particular, there is a serious problem with host and data centers based in Switzerland that provide hosting services to other ISPs, including pirate services, often without checking the identities or businesses of their customers. The uncertainties of the new Copyright Act provisions will likely hinder the objective of reducing such piracy.

Piracy continues to undermine and disrupt the growth of the legitimate digital content market and leads to lower willingness to pay for legitimate offerings. Although the Swiss music market has been growing for the last three years, it still accounts for less than one-third of the revenue it generated 20 years ago. Thus, it is as important as ever that the Government of Switzerland strongly enforce against piracy that could disrupt the growth of the legitimate market. The main methods of music piracy remain cyberlockers, stream-ripping, and BitTorrent indexing sites.

Cyberlocker services for storage and sharing of illegal files continue to be a concern. The cyberlockers *Rapidgator.net* and *uptobox.com* attract a significant number of visits from Switzerland, with each site receiving over one million visits during the third quarter of 2020, according to SimilarWeb. *Uploaded.net*, a very popular “cyberlocker” also responsible for pre-release leaks, is still run by a Swiss company (Cyando AG). There is a pending case (C-683/18) with the CJEU against the site and a decision is expected in early 2021. It was reported in January 2021 (in what would be a highly concerning decision), that the operators of the cyberlocker, *Rapidshare*, together with the site’s lawyer, have all been acquitted of facilitating mass copyright infringement.<sup>2</sup>

Industry reports a number of host and data centers based in Switzerland that provide hosting services to other ISPs, often without any review to ensure their customers do not include pirate services. The popular cyberlocker site *oboom.com*, which notes that it is “Swiss made” on its home page, is hosted via SwissBrothers AG. Though reports indicated that the site would be deactivated for business reasons, it remains active. Panama Connection, a Switzerland-based “bulletproof” ISP, offered “no questions asked” hosting services and was also involved in other criminality, before it was removed by RIPE, an entity that controls the allocation of IP addresses in Europe. Following the removal action by RIPE, the company dissolved. Some ISPs that purport to be based in the Seychelles, in fact, have data centers in Switzerland. Private Layer, which provides hosting services for numerous copyright infringing sites, is routinely used by both pirate sites and users that operate VPNs to mask their identities. Despite being apparently based in Panama with no known operation in Switzerland, Private Layer appears to use P.O. box services and server capacity at an ISP in the Zurich area. It also appears to use Swiss telephone numbers. These distributors of pirated content rely on and refer to Switzerland’s legislation that places high value on privacy protection. Swiss authorities should take action and should ensure that these ISPs/data centers operate a meaningful “know-your-customer” policy and take action to have it enforced.

Stream-ripping sites and applications, which permit users to create an unauthorized local copy of streamed content, are still widely used, and there is currently no effective solution in Switzerland. For example, *YTMP3.cc* is the most popular stream-ripping service in Switzerland with over 1.4 million visits from Switzerland during the third quarter of 2020, based on SimilarWeb data. Following the closure of the stream-ripping site *Convert2mp3.net*, due to legal

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<sup>2</sup>The court’s written decision has not yet been released, but a press report on this can be found here: <https://torrentfreak.com/former-rapidshare-operators-lawyer-acquitted-of-copyright-infringement-210111/>.

action coordinated by rights holder representatives, other stream-ripping services, including *ytmp3.cc*, *flvto.biz*, *savefrom.net*, *2conv.com*, *y2mate.com* and *mp3juices.cc*, saw an increase in traffic from Switzerland.

Illegal streaming platforms operated from remote or unknown jurisdictions continue to be highly popular in Switzerland and carry copyrighted material that undermines the legitimate market. This is facilitated by the notion that private use of copyrighted works from illegal sources is legally permitted. Peer-to-Peer (P2P) BitTorrent activity for sharing infringing material remains popular. Downloading and streaming of unauthorized content for private use are likewise viewed by many as legal in Switzerland as long as no uploading occurs. A number of BitTorrent indexing sites, including *yggtorrent.si*, *thepiratebay.org* and *1337x.to*, are very popular. According to SimilarWeb data gathered in the third quarter of 2020, *Yggtorrent.si* is the most popular pirate site in Switzerland receiving over 1.5 million visits during this period. *Thepiratebay.org* received over 740,000 visits, and *1337x.to* over one million visits, during this same period.

While the Government of Switzerland has demonstrated a willingness to pursue pirate sites on the *.ch* domain (the Swiss country code top-level domain (ccTLD)), numerous copyright infringing sites that have been adjudicated as illegal in other countries rely on the *.ch* domain, such as *yggtorrent.ch*, *kickass2.ch*, *wootly.ch*, *movierulz.ch*, *project-free-tv.ch*, and *torrentdownload.ch*. IIPA recommends that the Government of Switzerland expand its enforcement actions, as its jurisdiction is not necessarily limited to sites with a *.ch* domain in Switzerland.

## **COPYRIGHT ENFORCEMENT IN SWITZERLAND**

Switzerland lacks meaningful remedies and effective enforcement against online copyright infringement, and implementation of the Copyright Act, as adopted, may well cement a low level of protection. Copyright industries in Switzerland have made efforts to resume criminal and civil actions against online infringement under Swiss law, which almost entirely ceased in the aftermath of the 2010 *Logistep* decision of the Swiss Federal Supreme Court. Prosecutors—who voiced their own frustration with the situation—interpreted the *Logistep* precedent as a *de facto* ban barring the collection and use of any IP address data identifying defendants in criminal copyright cases. The Copyright Act confirmed that IP address data is now available in connection with criminal claims, but not civil claims, creating a *de jure* ban on the use of such evidence in civil actions. Prosecutors have historically tended to consider copyright enforcement cases as low priority, and the extent to which they take advantage of this development remains to be seen. It took the legislator ten years to patch up this enforcement gap and yet it only provides a partial solution. The use of IP addresses in civil procedure (e.g., to obtain injunctions) remains unlawful in many cases.

Two major copyright cases that concluded in 2019 do not encourage confidence in the government's ability or will to engage in effective copyright enforcement. A criminal trial against the notorious cyberlocker, *Cyando/Uploaded*, which facilitates rampant infringement, ended in March 2019 with the government's announcement that it found "no real ties" to Switzerland, despite the parent company Cyando AG's apparently blatant ties to Switzerland. And, in February 2019, the Swiss Federal Supreme Court found, in a case that had been pending since 2015, that Swisscom, a major hosting provider, could not be liable because it did not participate in copyright infringement, in the absence of any provision of law specifically dealing with access providers' responsibilities. The court explained that Swiss citizens who download infringing content are not liable under the private use exception, and that Swisscom is not responsible for infringement that occurs on its system. Rather, according to the court, the direct infringers are the pirate site operators, and those pirate sites, it should be noted, cannot be blocked under Swiss law. Further, while the Copyright Act allows IP address data for criminal copyright cases, as explained above in this submission, it does not change the status of IP address collection for civil cases. Barring any amendments, rights holders therefore remain proscribed from collecting and analyzing the IP addresses of suspected infringers (individuals or website operators) for purposes of establishing the existence of an underlying direct infringement, or as part of a secondary liability claim.

Proceedings were also filed by a number of broadcasters challenging the collective licensing/remuneration practice for catch-up TV recording and making available services. These services currently have seven-day full recordings of TV programs from several hundred channels, amounting to several tens of thousands of hours of content

that is available to the public at any given moment. Litigation proceedings are currently pending before the Federal Court on a procedural issue. A new tariff arrangement was negotiated in 2020, but, as of early 2021, it has not yet been settled. Unfortunately, the Copyright Act contains no provisions limiting time-shifting and catch-up TV, and Parliament expressed strong support for this practice during its debates.

A distributor of a device commonly pre-loaded with piracy software, called the Kodi Box, operating in the French part of Switzerland, continues to be in business despite a criminal investigation that has been ongoing since 2015. IIPA is informed that prosecuting authorities seemed to be taking the case seriously. The future of that prosecution remains uncertain given the unclear legal status of linking as infringement and the law that private use of works from illegal sources is not actionable. Notwithstanding investigations, criminal proceedings continue to lag and distribution of this and other piracy devices continues.

As explained in more detail below, the Copyright Act includes a “stay down” provision for certain hosting providers that create a “particular danger” of copyright infringement (Article 39d). For the past several years, hosting providers have purported to take down infringing content, subject to notification, while “sharehosters,” such as sites like *Uploaded.net*, practiced takedown, but have not prevented (and have even supported) quick re-upload. It remains to be seen how these new provisions in the Copyright Act will be implemented and enforced.

Switzerland also has never introduced reliable rules for considering ISP liability, and has not adopted practices that have become standard elsewhere in Europe. “Know your customer” policies for ISP hosting services are needed in order to prevent ISPs from providing hosting services to online platforms that facilitate infringing activity. The government should amend the Copyright Act or pass other implementing legislation to require or encourage host and data centers to adopt and enforce such policies, which reflect the basic duty of care applicable to businesses operating in this area. Swiss law also still allows circumvention of technological protection measures for purposes of uses permitted by law, including the wide scope of the private use exception. In combination, these protection deficits leave the Swiss marketplace largely unprotected against cross-border piracy services.

It remains critical that the Swiss government come into compliance with the Berne Convention/WTO TRIPs, WIPO Internet Treaties, and internationally acceptable enforcement standards. Necessary minimum changes include: (1) ensuring broader liability under Swiss law for parties who facilitate, encourage, and profit from widespread infringement; (2) engaging ISPs, including access providers, in the fight against online piracy; (3) affirming that current law does not permit copying from unauthorized sources; and (4) implementing adequate civil and criminal enforcement tools.

## **COPYRIGHT ACT AND RELATED LAWS IN SWITZERLAND**

### **Copyright Act that went into force in April 2020**

In September 2019, Parliament adopted the Copyright Act amendment bill, which went into force in April 2020. The bill was prepared by the Working Group on Copyright (AGUR12) in 2013,<sup>3</sup> but fell short of implementing the full AGUR12 compromise recommendations agreed to by rights holders. As expected, the version of the Copyright Act that went into force falls short of addressing several major concerns regarding copyright protection and enforcement. As explained herein, amendments or other legislation are needed to adequately address rights holders’ concerns and to raise the level of copyright enforcement in Switzerland to that available elsewhere. Most importantly, the law’s affirmation that private use of illegal sources is permitted is a blow to rights holders, inconsistent with Switzerland’s international obligations and impairing cooperation with intermediaries.

Revisions to Article 77i were meant to address the *de facto* ban on the use of IP address evidence in civil and criminal copyright actions arising out of the 2010 *Logistep* case. However, the law did not solve the problem *Logistep* created and puts rights holders in a worse position than they were in following the *Logistep* decision. While the

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<sup>3</sup>For a full description of the AGUR12 process, see prior years’ IIPA Special 301 reports, at <https://iipa.org/reports/reports-by-country/>.

Copyright Act allows rights holders to use personal information (including IP addresses) for filing criminal complaints, it does not allow for collection or processing of this information solely to bring civil claims, and criminal cases are rare given prosecutorial discretion and reluctance. This needlessly limits rights holders' ability to pursue their rights. To properly address the privacy concerns raised in the *Logistep* case, the provision should be amended or modified in implementing legislation or regulation to simply limit data collection to that which is reasonably necessary for the pursuit of violations of law (this would mirror the standing opinion of the Federal Data Protection and Information Commissioner (FDPIC),<sup>4</sup> as well as the recommendation of the AGUR12).

The Copyright Act provides a limited "stay down" obligation that applies to certain hosting providers that create a "particular danger" for copyright infringement, such as those that incentivize illicit uploads and undermine take down efforts (Article 39d). While this may help deter the operation of cyberlocker businesses that thrive due to copyright infringement, it is left to the courts to determine whether the hosting provider, in fact, has such a business model, which will create legal uncertainty.

The Copyright Act includes a compulsory collective right to remuneration for authors and performers for exploitation of their audiovisual works on Video-on-Demand (VOD) online platforms. This mandatory collective remuneration scheme only applies if a film is of Swiss origin, or produced in a country that provides a similar collectively enforced right of remuneration.<sup>5</sup> While the provision excludes certain rights holders from claiming remuneration, it is not clear whether audiovisual works from countries that do not offer a comparable remuneration scheme could nevertheless be subject to remuneration demands from Swiss collective management organizations (CMOs). It should therefore be clarified in the law that works from countries whose rights holders cannot claim remuneration will not be subject to CMO payment demands.

Other potentially problematic provisions in the Copyright Act as adopted include:

- (i) **Extended collective licensing (ECL), i.e., collective licensing schemes including non-affiliated rights owners, with a case-by-case opting-out option (Article 43a).** Although the provision was purportedly motivated by the desire to make difficult-to-license content, such as large archive stock, more accessible, the provision's scope is overbroad. This creates a risk that extended collective licenses could be applied in areas where they undermine the enforcement of exclusivity and individual licensing. The opt-out provision does not render an extended collective license voluntary, and the language of the provision suggests that opting out must be declared for each individual license. There is, therefore, substantial risk that extended collective licenses applied in the online space devalues the market value of the work, setting a tariff "norm" that could undermine exclusivity and licensing terms for rights holders who choose to exercise their exclusive rights and opt-out. In addition, requiring opt-out in order to exercise exclusive rights could constitute a formality prohibited by international law, including the Berne Convention and TRIPS. In short, extended collective licenses, even with opt-out rights, are wholly inappropriate with respect to services that are already licensed directly around the world.
- (ii) **An orphan works provision (Article 22b), including compulsory licensing of extended orphan works.** This provision allows works to be considered "orphan" after "research performed with appropriate thoroughness." The dispatch on this article produced during the legislative process troublingly noted that "this responsibility is considered fulfilled if [the users] have consulted the relevant databanks for the corresponding work category." A better standard would be the requirement for a "diligent search" set out in the EU Orphan Works Directive. A recordation requirement for rights holders to protect their works could constitute a formality prohibited by international law, including the Berne Convention and TRIPS.

<sup>4</sup>A standing opinion of the Federal Data Protection and Information Commissioner (FDPIC) made in the wake of the *Logistep* decision—even as it stood by the Federal Court's opinion—underscored, in the context of online piracy cases, that "we still believe that there is an overriding interest involved which would justify a violation of privacy rights as a result of the data processing."

<sup>5</sup>The Memorandum accompanying the adopted Copyright Act states that the Government of Switzerland anticipates to "grant" reciprocal rights to foreign authors of audiovisual works from: Argentina, Belgium, Bulgaria, France, French-speaking Canada, Italy, Luxembourg, Monaco, Poland, and Spain.

Also, the provision does not specify that the institution (such as a public or publicly accessible library, school, museum, collection, archive or broadcaster) possessing the orphan work copy must be domiciled in Switzerland; it merely requires that the copy is created, copied or made available in Switzerland, including, potentially, copies made available from foreign sources, thus opening the provision to content hosted outside of Switzerland.

- (iii) **A free reproduction license for scientific research (Article 24d), meant to cover “text-and-data mining.”** There is a potential for this license to exceed its intended purpose. For example, if combined with other exceptions such as the existing, unusually broad private use exception, which can apply even to commercial organizations.
- (iv) **Protection of photographs regardless of their “individual character” or level of creativity (Article 2, paragraph 3bis).** In keeping with international norms, all types of photographs should be protected under the same standard generally applicable to other copyrightable works (e.g., music, film, literature). Under Swiss law, photographs that “do not necessarily have an individual character” are only protected for 50 years after their publication (or production). This dual-standard for photographs should be eliminated and the term of protection for all copyrighted photographs should be 70 years.

One positive change in the Act is the extension of the term of protection for performances and recordings, including audiovisual content, from 50 years to 70 years. This will provide greater incentives for the production of (*inter alia*) audiovisual and recorded content, and will provide a stronger incentive to invest in the local recording industry, spurring economic growth, as well as tax revenues. This would also bring Switzerland in line with the EU term of protection.

On June 4, 2019, the Council of States requested the Federal Council, following the implementation of the revision of the copyright law, to present in a report, developments in the areas affected by copyright. The purpose of the study is to examine the effectiveness of the revision in light of the development of the relevant law at the European level. The report will focus on the situation of publishers and media professionals. The Federal Council is now expected to present this report in 2022 or 2023.

### **Additional Concerns Under the Copyright Act and Related Laws**

IIPA continues to have other long-standing concerns with certain aspects of Swiss laws related to copyright, which are further detailed below.

**Private Copy Exception:** Another long-standing priority of the creative industries is the narrowing of the private copying exception, which is too broad and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. This broad private copying exception, together with serious concerns regarding the protection of technological protection measures (TPMs) (see below), constitute significant hurdles for the protection against stream-ripping services that dominate the list of top pirate services, as well as other infringing services. Moreover, the Swiss Federal Arbitration Commission imposes a levy on catch-up TV, placing these services within the scope of the private copy exception. Cable and over-the-top providers, including major telecom corporations, offer seven-day “catch-up” services on integral recordings of hundreds of TV programs, relying on this government-approved collective remuneration tariff. This system abolishes exclusivity of audiovisual works and precludes direct licensing by rights holders, which limits their right to maximize and exclusively control these significant primary rights, including the initial broadcaster, on a platform-by-platform basis. This extension of the private copy exception to catch-up TV services impinges on the exclusive making available right, and thus, likely violates Switzerland’s international obligations, including under the WIPO Copyright Treaty (WCT).

**Circumvention of Technological Protection Measures:** Swiss law allows acts of circumvention of TPMs “for the purposes of a use permitted by law” (Article 39(a)(4)). This exception is far too broad, particularly given the inappropriately wide scope of the private copy exception. Taken together, these exceptions allow individuals to

circumvent access or copy control measures from illegal sources and share with friends. As a consequence, circumvention devices and software are widely available in Switzerland. Furthermore, the country's Monitoring Office for Technological Measures is currently evaluating country restrictions that affect the cross-border portability of copyright protected content.<sup>6</sup> This appears to be in service of assessing the possibility of legislating the portability of audiovisual content, similar to and inspired by the EU's Portability Regulation.<sup>7</sup> This consultation is particularly troubling in light of the broader "Digital Switzerland" Strategy, currently underway.<sup>8</sup>

**Provide Neighboring Rights More Fair Treatment:** Despite lobbying efforts, the Swiss Copyright Act continues to cap the remuneration payable to rights owners at 10% of the licensees' income for authors and 3% for owners of related rights. In 2010, Swissperform, the Swiss CMO for performers and producers, initiated arbitration proceedings against this cap, but in 2014, lost the case in the Federal Supreme Court. The Court acknowledged that the remunerations for performing rights are, in fact, higher in other European countries, but saw itself unable to intervene on the merits. Instead, it held that it is up to the Swiss legislature to set these caps based on a political assessment. However, the legislature declined to address this issue in the recent Copyright Act amendments. This unusual and unjustified discrimination against the neighboring rights owners should be ended and replaced with a fair and equitable remuneration for both performing artists and producers.<sup>9</sup> IIPA notes that there are no independent broadcasting and public performance rights for sound recording producers under current Swiss law, as producers merely have an entitlement to receive a share of artists' remuneration.

**Criminal Sanctions Needed for Distribution that Prejudices the Public Performance Right:** Article 12 Section 1bis of the Copyright Act states that copies of audiovisual works may not be distributed or rented if the distribution or rental prejudices the rights holder's public performance right—e.g., if a motion picture audiovisual work is still in the theaters. An explicit criminal sanction for the violation of this principle is needed to deal effectively with an influx of French-language DVDs imported from Canada and freely distributed while those motion pictures are still playing in Swiss cinemas.

**Amendments to the Telecommunications Act:** Following public consultations in Spring 2020, amendments to the ordinances of the TCA have come into force as of January 2021. The ordinances may create a further obstacle for anti-piracy activities because they will make it harder for rights holders to gather information about the domain name registrants and operators of infringing websites. While registrars will have to identify holders, (i) publication of such domain registrant's identification and contact details in WHOIS is banned for individuals and is not an obligation even where the registrant is a legal entity; and (ii) there is no obligation for registrants to provide and update all information, which is needed for enforcement purposes. While free-of-cost access for rights holders to non-public domain registrant data is provided in principle, its quickness and effectiveness will depend on the access proceedings and the required level of substantiation, unilaterally defined by the registrar.

## **SWITZERLAND'S COMPLIANCE WITH EXISTING INTERNATIONAL OBLIGATIONS**

Switzerland is a member of the Berne Convention, TRIPS, WCT, and the WIPO Performances and Phonograms Treaty (WPPT). It is thereby obligated under these international agreements to provide "effective" remedies to prevent and deter infringement. For example, under Article 41(1) of TRIPS (and similarly the WCT Article 14(2) and WPPT Article 23(2)), it is required to "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further

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<sup>6</sup>See <https://www.ige.ch/en/protecting-your-ip/copyright/monitoring-office-otm.html>.

<sup>7</sup>Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

<sup>8</sup>See <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80379.html>.

<sup>9</sup>Moreover, as discussed above, it is inappropriate and detrimental that the government has created additional collectively managed rights in the Copyright Act without addressing first the fundamental unfairness in Switzerland's collective management system—namely, the discrimination against neighboring rights holders. This discrimination is fundamentally contrary to the standard U.S. policy of not establishing a hierarchy of rights, and should be amended.

infringements.” Switzerland is not currently doing so, and, as explained in this report, the newly-adopted Copyright Act does not bring Switzerland in line with its existing obligations.

## **MARKET ACCESS BARRIERS IN SWITZERLAND**

**Film Act Amendment:** Effective since 2016, a Film Act provision known as the “unique distributor clause” has been extended to all forms of exploitation, including DVD/physical home entertainment and all forms of VOD/online distribution, with the exception only of linear television (broadcasters’ ancillary on-demand rights are excepted only for seven-day catch-up). Exploitation of a film in any media in Switzerland now requires exclusive control over all language versions in Switzerland, to the extent actually exploited, in the hands of a single distributor. This is accompanied by laborious registration and reporting duties, which address foreign entities owning and exploiting rights in Switzerland. Despite a revised guideline published by the Federal Office in 2020, the provision still lacks clarity regarding the extent of “grandfathering” protection for existing contractual fragmentation of film rights; output deals made prior to 2016 lost “grandfathering” treatment as of 2019. In sum, this amendment interferes with internationally established licensing practices.

**Copyright Act:** A new provision, effective since April 2020, interferes with VOD licensing by imposing a mandatory, inalienable collective author and performance rights remuneration on VOD services available in Switzerland for films produced in Switzerland or in countries practicing similar remuneration schemes. Films from other countries are not affected; however, the provision lacks clarity on qualifying countries or remuneration schemes and co-productions.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Thailand remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Thailand continues to struggle with the fight against piracy. Though amendments to the Computer Crime Act (CCA) establishing a no-fault judicial remedy to disable access to infringing content gave rights holders hope of improving rampant online piracy in Thailand, the mechanism has faced difficulties resulting from unclear procedures and spotty implementation. Late 2018 actions taken by the Department of Special Investigations (DSI) against sites like *doo4k* and *movie2free*, and further raids carried out in October 2020, disrupting the *Sakkarsai8* piracy network, and November 2020, seizing three movie/TV/live broadcast piracy websites *Skyhdbox.com*, *Kingiptv.info*, and *Hdlive.site*, also signaled the potential for positive change in the fight against piracy. Unfortunately, these raids and CCA actions have not resulted in significant reductions in piracy or needed deterrence, and Thai-language piracy sites continue to dominate the online ecosystem, unfairly competing with legitimate rights holders. Unauthorized camcording of motion pictures continues to damage the market for audiovisual works.<sup>2</sup> The Department of Intellectual Property (DIP) proposed protocols to improve implementation of CCA orders going forward, but is now under new leadership, and it is yet to be seen whether these protocols will be implemented or whether they will provide a needed panacea to the piracy dilemma in Thailand.

In 2018, the government embarked on some important copyright law reform efforts, the latest draft of which now sits with the House of Representatives. Unfortunately, the most recent draft amendments to the Copyright Act do not include some needed developments, for example, a CCA-type remedy devoted solely to copyright piracy and key provisions needed to comply with the obligations in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together, WIPO Internet Treaties) related to technical protection measures (TPMs).<sup>3</sup> IIPA urges the House of Representatives committee that will be reviewing the latest draft to also address the shortfalls with respect to intermediary liability, revert to the 2018 version on TPMs, and make other modernizing changes (such as extending copyright term in line with current international best practices); in this regard, it will be helpful if an appropriate creative industry representative can serve on the committee.

Moreover, certain 2019 amendments to the copyright law in the name of Marrakesh Treaty implementation created new problems by the erroneous inclusion of sound recordings in the scope of certain exceptions. In order to address the continued operation of rogue collective management organizations (CMOs) that undermine music rights holders and users, the Royal Thai government should promulgate legislation in line with the draft guidelines on CMO governance and greater transparency developed by stakeholders, with dispute resolution and enforcement measures to bring order to music collecting societies that are distorting the market.

The Royal Thai government should also remove market access barriers, including screen quotas in the amendments to the Motion Picture and Video Act, and refrain from imposing any new barriers in over-the-top (OTT) regulations.

<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Thailand's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>Camcording statistics for 2020 are anomalous due to the wide-scale closure of theaters and limited releases due to COVID-19.

<sup>3</sup>In those amendments, the government had made a number of constructive proposals, including proposed strong protections against the act of circumventing, and the trafficking in, devices and technologies (including hacking code/software and false authentication code) intended to circumvent technological protection measures used by rights holders in the digital and online environment to protect their content from unauthorized access, copying and distribution. The government is strongly encouraged to revert to the draft published in 2018 and enact provisions that grant safe harbor exemptions, which are in keeping with international norms, i.e., that service providers would be excluded from liability for monetary relief only, and not exempt from all liability for copyright infringement.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Bring effective enforcement actions against: illegal distribution of copyright materials over social media platforms, including live-streaming; piracy streaming devices and applications (apps) that make it impossible for legitimate services to compete; illegal camcording activities; and large-scale pirate operators in Thailand, ensuring that these services stay offline and the operators receive appropriate punishment under the law that will carry a deterrent message through the broader community.
- Take action against rogue CMOs and combine this enforcement action with regulatory reforms to change the criteria for CMO registration.
- Ensure proper implementation and application of the CCA regarding actions to combat pirate websites, including ensuring expeditious and non-burdensome procedures, and full and fast compliance by the Internet service providers (ISPs) in Thailand.

### **Legislative**

- Address shortfalls on intermediary liability and protection of TPMs in the proposed amendments to the Copyright Act through promulgation of effective legislative amendments that: (i) provide adequate incentives for passive and neutral online intermediaries to cooperate with rights holders and implement international best practices to combat infringement, such as establishing a clear legal basis for the liability of ISPs and appropriately delineating the proposed safe harbor liability privilege regime, while imposing adequate conditions for eligibility thereto, including effective notice and takedown mechanism; (ii) provide adequate protection against the act of circumvention of TPMs; (iii) prohibit trafficking in circumvention technologies, devices, components, and services; and (iv) ensure that the TPM provisions do not permit overly broad exceptions.
- Amend the Copyright Act to: (i) ensure that measures addressing camcording effectively prohibit possession of an audiovisual recording device in an exhibition facility with the intent to make or transmit an audiovisual work, in whole or in part, and provide that exhibition facilities have standing to bring complaints; (ii) ensure copyright offenses are non-compoundable; and (iii) extend the term of copyright protection consistent with international best practices to 70 years from the death of the author, or for sound recordings (and performances) or other subject matter calculated from publication, at least 70 years from publication.
- Promulgate legislation that reduces the number of, and bring order to, the multitude of CMOs currently active in the market to protect rights holders and users from rogue CMOs, including measures addressing the establishment and governance of CMOs.

### **Market Access**

- Formally remove market access barriers impacting foreign audiovisual content, including:
  - Remove foreign ownership restrictions like the National Broadcasting and Telecommunications Commission (NBTC) rules restricting media mergers, acquisitions and cross-media ownership.
  - Delete Section 9(5) (and the related Section 68) of the 2008 Motion Picture and Video Act (MPVA) which, on paper, allows the Film Board to establish ratios and quotas against foreign films, and amend the MPVA to avoid onerous film censorship and classification provisions.
  - Remove the NBTC approved “must carry” provisions, since they could, if improperly interpreted or misunderstood, restrict the companies’ contractual freedom to license.
  - Avoid onerous OTT regulations, e.g., that could require streaming operators to set up a local presence or to require foreign e-commerce services to register for VAT payments.

## **PIRACY AND ENFORCEMENT UPDATES IN THAILAND**

Prior IIPA reports on Thailand contain a more 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>4</sup> Overall, piracy in Thailand, especially online piracy, continued to cause damage to legitimate rights holders and licensees in 2020. Rights holders continued to have good cooperation with Thai authorities, who were proactive in rights protection, albeit raids and actions to disable access to flagrantly infringing sites have not resulted in significant overall reductions in piracy or needed deterrence.

**Online Piracy:** Notwithstanding the expanding availability of legitimate services for music and audiovisual materials,<sup>5</sup> the increasing access to broadband Internet, particularly on mobile devices, has led to escalating piracy of recorded music, motion pictures and television content, video games, published materials, and broadcasts. Legitimate services find it difficult or impossible to compete with pirate offers, and some longtime licensed operators have stopped doing business as a direct result of intractable piracy. Both U.S. producers and distributors, as well as local Thai producers and services, are profoundly harmed by Internet pirate platforms, which specifically target Thai users with Thai-language sites. Streaming unauthorized content is the most popular form of piracy, whether through streaming websites, apps, Piracy Devices, circumvention devices or software, or even through social media. Many websites serve as portals that allow users to download apps that provide access to pirated content, including the latest theatrical run motion pictures, television content, sporting events, and live streamed pay-per-view events and concerts. BitTorrent indexing and tracker sites, cyberlockers, and BBS/forums also remain problematic. The popularity of peer-to-peer networks, including BitTorrent (e.g. *thepiratebay.org*, *Siambit.me*, *dedbit.com*, and *tt-torrent.com*), has declined for piracy of music, but has been replaced by a considerable increase in the use of stream-ripping services, which is now the primary problem for the music industry in Thailand. Popular stream-ripping services include *youtubeto.com*, *y2mate.com*, *ytmp3.cc* and *x2convert.com*. Some of these services have been subject to website blocking orders or other litigation in some jurisdictions, yet, no action has been taken in Thailand.

For the music industry, problematic linking sites such as *2sh4sh.com*, *4sh.xyz* (formerly *4shworld.com*), *mp34u.cc* and *olozmp3.xyz* remain popular in Thailand. Illegal apps on smartphones, readily available from Apple and the Google Play stores, are popular among Thai users to access vast amounts of pirated content either for free or at a very low cost. Piracy continues to take its toll on the market for legitimate creative content. Increasingly, piracy websites are using content delivery networks and cloud services such as Google Drive, making identification of website operators and server locations very difficult. This said, in April 2018, music rights holders obtained a blocking order from the criminal court under the CCA provisions related to pirate site *4shworld.com*, however they noted bureaucratic problems in the process, and following the block the site started redirecting to new domains. Similarly, court orders to block pirate sites *kakzmuzik.com* and *olozmp3.net* were obtained. Most of the criminal investigations launched out of these cases remain pending and, unfortunately, after the sites were blocked, some began redirecting to new domains and/or changed their functionality to become different kinds of infringing websites.

The motion picture industry has reported that many of the top 500 most accessed sites in Thailand are piracy sites, according to Alexa and SimilarWeb rankings. These sites specifically target Thai Internet users, and include Thai, as well as foreign, motion picture and television content. These include *doomovie-hd.com*, *037hdmovie.com*, *123-hd.com*, *Siambit.me*, *newmovie-hd.org*, *TT-Torrent.com*, *Nanamovies.com*, and *fwiptv.cc*. The local motion picture industry succeeded in March 2018 with the first-ever site blocking order under the CCA against a site called *nungmovies* and succeeding in getting the first variant blocked, as well, but the Thai system does not have a dynamic blocking mechanism. In late 2018, a major set of raids and criminal referrals resulted in the disruption of several key Thai piracy sites, including *Doo4K*, which provided subscription piracy Video-on-Demand to Thai users. In November

<sup>4</sup>See, e.g., IIPA, *Thailand*, 2020 Special 301 Report, February 6, 2020, at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301THAILAND.pdf>; 2019 Special 301 Report, February 7, 2019, at <https://iipa.org/files/uploads/2019/02/2019SPEC301THAILAND.pdf>; and 2018 Special 301 Report, February 8, 2018, at <https://iipa.org/files/uploads/2018/02/2018SPEC301THAILAND.pdf>.

<sup>5</sup>Legitimate services in Thailand for content include iTunes, Google Play Store, Hollywood HDTV, Prime Time, iFlix, HOOQ, Doonung, ZABMOVIE, Deezer, KKBox, Spotify, YouTube, AIS, GTH Movie Store, AIS Movie Store, HTV (from True Visions), and Clickplay TV, among others.

2019, the DSI took enforcement action resulting in the notorious Thailand piracy site *movie2free.com*, which was ranked the 20th most accessed website in Thailand, ceasing operations and the site administrator being placed under arrest. *Movie2free.com*, which launched in 2014, was reported to have had ten million page views per day with up to a million different IP addresses connected daily to the site and was globally ranked at 1,700 with 27 million monthly visits. This action was possible due to industry efforts working with the DSI. The DSI is continuing its investigation into a network of individuals associated with the operation of the site. Industry has informed the government of the severity of piracy on all of the other sites, and the government is supportive of addressing industry's concerns.

In October 2020, DSI conducted raids at multiple locations following a lengthy investigation of an infringing network, *Sakkarsai8*. *Sakkarsai8* provided content and servers for multiple websites involved with online gambling and piracy content. The raids included one at Chiang Mai (location of the website owner of sites *iptvhero*, *ufoiptv*, *xstream4k*), Nonthaburi (location of the website owner of *biggapp.tv*), Phitsanulok (location of a live broadcast website administrator), and three data centers in Bangkok. In total, 11 servers were seized and several websites were taken offline. The investigation is ongoing. Following the raids, the DSI expanded its operation and additional raids were executed at four locations in Bangkok, comprising a server system for transmitting live signals and feeding a range of piracy websites. Three key piracy domains providing movies, live broadcasts and TV programs, namely, *Skyhdbox.com*, *Kingiptv.info*, and *Hdlive.site*, were seized and the investigation is ongoing.

IIPA is encouraged by actions the government has taken in an effort to improve the copyright ecosystem in the online and mobile environments to support legitimate entertainment services, particularly the amended CCA, which permits disabling of access to infringing websites. Although a promising reform, the mechanism has met with mixed results, with court processes leading to orders to disable access to infringing websites, but sometimes spotty implementation as ISPs claim to have technical hurdles to properly comply with orders. In August 2020, the DIP announced the introduction of a new site blocking process. The previous administrative procedure, albeit sanctioned by court, was largely ineffective. In October 2020, after the announcement of the Ministry of Digital Economy & Society (MDES) with the support of DIP, ten more sites were blocked. An additional site was blocked in November 2020 and eight actions remain pending. The new website blocking process will hopefully address many of the failings of the previous process, but it is important that the MDES facilitates the progression of the eight pending actions. While law enforcement authorities are able to investigate IP related crimes, enforcement against piracy operators remains very challenging given the scale of the problem, lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection.

**Camcorder Piracy Traced to Thailand Continues to Harm Motion Picture Market:** Thailand continues to represent a risk for illicit camcording in the region, particularly in relation to the illegal sourcing of Thai audio tracks. In 2019, 13 audio files and three video files of MPA member titles were forensically traced to theater locations in Thailand. Increasing broadband Internet and higher-speed mobile connections in Thailand mean faster uploads to the Internet of motion pictures illegally camcorded. In addition, the rise of live-streaming content over the Internet has contributed to the growing camcording problem. If strongly implemented (and ultimately improved), the Copyright Act provision that deems camcording an infringement of copyright could help.

**Retail and Hard Goods Piracy Still Prevalent:** Physical piracy is decreasing, mainly due to the shift to online and mobile platforms. Nonetheless, physical piracy remains a concern, harming local and foreign creators alike. The Royal Thai government has designated many of the pirate markets "Red Zones" and "Yellow Zones" to indicate that it views these markets as vulnerable to piracy activities. Pirated music, video games, and published materials remain available.

**Piracy Devices and Apps Represent a Growing Problem:** Piracy Devices include 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, and they have become an increasing problem in Thailand. China is a hub for the manufacture of these devices and the deployment of middleware and apps used to access infringing

materials. Piracy Devices are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The devices are either pre-installed with apps that facilitate infringement or include instructions for users to easily obtain apps to access unauthorized motion picture and television content. These apps allow users to connect to a supporting online infrastructure, including foreign piracy sites that provide users with instant access to infringing audiovisual content. Piracy Devices are sold on e-commerce websites such as *Lazada.co.th*, but are also made available through traditional retailers found in popular malls, and are often promoted and/or advertised to enable infringement of copyright or other illegal activities. The website *fwiptv.cc* and related sites are portals that allow users to subscribe to an “Internet Protocol Television (IPTV) package” and download apps. The apps allow users to access illegally the latest run movies, television content, sporting events, and live streamed on-demand or pay-per-view events. These sites are extremely popular in Thailand. The *fwiptv.cc* site averages around 200,000 visitors a month, which only serves as a way to download the file to install the app. Consequently, Royal Thai authorities should increase enforcement efforts, including cracking down on Piracy Device vendors or those that market piracy apps, or pre-load the devices with apps that facilitate infringement or offer them as an aftersales service, and take action against key distribution points for devices and apps that are being used illegally. Thailand should also amend its legal framework to specifically address this problem. The Royal Thai government has taken some action against an IPTV/Piracy Device service called *ThaiExpat.tv*, and in December 2019, the Central Intellectual Property and International Trade (IP&IT) Court ordered damages of THB 15 million (US \$480,000) and suspended sentences against two key operators in Thailand.

**Reforming the Market for the Collective Management of Rights:** The music industry is concerned that many operators of restaurants, bars, shops and other commercial establishments have been harassed by “rogue” entities, despite having obtained licenses from legitimate CMOs and paid royalties for the use of sound recordings played on their premises. A proliferation of these “rogue” entities has caused serious market disruption, directly harming music rights holders, as well as users in Thailand.

## **COPYRIGHT LAW AND RELATED LEGISLATIVE UPDATES**

**CCA Amendment:** In a significant development, the 2016 Amendment to the Computer Crime Act B.E. 2550 (2007) added IP infringement as a predicate crime in Section 20, permitting injunctive relief against ISPs to disable access to infringing websites hosted outside of Thailand. The Amendment entered into force in July 2017. In November 2018, DIP had received 62 requests for blocking or disabling access to IPR infringing content or activities, and 48 of those requests were forwarded to the MDES for further action. The IP&IT Court and the Criminal Court have issued 26 court orders to block or disable access to copyright infringing content, totaling 634 URLs (however, in most of these cases, the orders were to disable access to specific content identified in the URLs, not entire websites). As indicated above, as of October 2020, ten more sites were blocked, an additional site was blocked in November 2020, and eight actions remain pending. IIPA encourages the Court to finally adjudicate the remaining cases, so that it can be determined whether the CCA is having the desired effect of reducing online infringement in Thailand.

**Copyright Act Revisions Approved by Cabinet Prior to Presentation to the House of Representatives:** The Copyright Act amendment bill was approved by the Cabinet on September 29, 2020, and is now set for second review under a House of Representatives committee. Unfortunately, there is no creative industry representative on the committee and one should be added. The amendments are aimed at improving Thailand’s copyright laws and focus mainly on online intermediary liability and TPMs. Thailand’s National Assembly has already approved the WCT accession, which now depends on appropriate Copyright Act amendments also being promulgated, with accession to the WPPT planned thereafter within the next five years. However, IIPA is very concerned that the government has deleted a number of comprehensive amendments it had proposed in 2018.<sup>6</sup> The following are critical issues with the

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<sup>6</sup>In those amendments, the government had made a number of constructive proposals, including proposed strong protections against the act of circumventing, and the trafficking in, devices and technologies (including hacking code/software and false authentication code) intended to circumvent technological protection measures used by rights holders in the digital and online environment to protect their content from unauthorized access, copying and distribution. Those amendments, put forward in 2018, would have immediately prepared Thailand to join the WIPO Copyright Treaty. We would strongly encourage the government to revert to the draft published in 2018 and enact provisions that grant safe harbor exemptions that are in keeping with international norms.

Copyright Act and the draft amendments that should be addressed to ensure that the Royal Thai government achieves its stated goals of modernizing its copyright law, complying with its international obligations, and implementing and adhering to the WCT and WPPT.

- **Infringement a Non-Compoundable Offense:** IIPA urges the Royal Thai government to amend the Copyright Act to ensure that intellectual property infringement becomes a non-compoundable state offense, thus enabling the police to act on their own initiative without any requirement of a formal complaint from rights holders. In the age of online piracy, this ability for authorities to take ownership of investigations and cases is critically important.
- **Service Provider Liability Amendments:** Originally, the amendments had retained from previous drafts the four types of online intermediaries that may be eligible for the copyright infringement liability limitation privileges (Section 43/1), but the provisions in relation to the conditions and eligibility, as well as the notice procedures, were substantially cut down. It was IIPA's understanding that these details would be moved to the administrative regulations, which are to be promulgated after the amendments of the Copyright Act have been passed—a move which is concerning to rights holders. The proposed liability exemption provisions in Section 43/1 are defective and fail to fulfil the modernizing aims of the law. First, they appear to provide a full exemption from liability for the qualifying service providers, instead of a limitation of liability by which, for example, a service provider may still be subject to injunctive relief. Second, they fail to clarify that the eligible service providers will only enjoy the liability privileges in respect of their activities which are of passive and neutral nature, and when the service providers have neither knowledge nor control over the information which is transmitted and stored by them. These clarifications are essential to ensure that the liability privileges are appropriately delineated so as to avoid the market distortions that occur when such privileges are applied beyond their intended scope. Additionally, the amended law should clearly establish the liability of the relevant service providers as the condition precedent for the introduction of the safe harbor.
- **Technological Protection Measures:** TPMs are critical for the success of services that are providing legal content to users in Thailand today, and they need to be protected. The amendments should improve the law to cover access controls and prohibit trafficking. Most critically, the TPM provisions should close the loophole of permitting circumvention of a TPM for the purpose of benefiting from a specified copyright exception. IIPA members welcome the amendment in the approved bill that any service, manufacture, sale or distribution of a service, product, or device that affects any function of a technological protection measure is now an act of copyright infringement. IIPA also welcomes the proposed amendment to Section 53/4 to the effect that "*any act that results to the technological measures for controlling an access to be ineffective shall be deemed infringement of technological measures*," but recommends that this be clarified expressly to refer to acts of circumventing a copy control TPM. However, certain exceptions to TPM infringement are still overly broad and should be narrowed. Broad exemptions for such entities, instead of exemptions for certain specific and narrow acts, is inconsistent with treaty requirements. IIPA is also concerned with the newly proposed section 53/5(1), which would grant Ministerial powers to publish exceptions to TPM protections; although the proposed deletion of the existing section 53/5(1) is welcome, any exceptions to TPM protections should be subject to the full legislative process and must at all times comply with the three-step test. As weak copyright and TPM protections create *de facto* barriers to trade, efforts to strengthen such protections effectively reduce such barriers.
- **Camcording Provision Should Be Revised:** Thailand enacted anti-camcording legislation in 2014. However, the anti-camcording provision falls short because it requires a link between the act of camcording and a copyright infringement, instead of simply criminalizing the camcording act itself. Criminalizing the act of camcording including audio, without requiring a link to copyright infringement, would empower law enforcement to intercept illegal recordings before they enter the online pirate ecosystem. Preferably, these provisions will be revised to ensure that the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both) is prohibited, and that exhibition facilities are given standing to bring complaints. Those engaging in the act proscribed should be subject to

interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used and any unlawful copies made, as well as civil and criminal penalties.

- **Collective Management Provisions:** The current collective management and collection system for music is unwieldy and remains unclear, with many collecting bodies operating in the market. We welcome indications from DIP that it is keen to resolve this issue. However, the DIP proposal at this stage is only to introduce a voluntary code of conduct for CMOs, which is not a sufficient response to the long-standing challenge in the Thai market. The Copyright Act should therefore be amended to include provisions setting out certain principal conditions for CMOs to operate in Thailand, such as complying with a code of conduct that requires good governance, transparency, fair and accurate distribution, and of course actually representing the right holders it claims to represent. In respect of the latter point, it is recommended that the Copyright Act be amended to provide that an entity wishing to act as a CMO must be registered with the Ministry of Commerce and must comply with the code of conduct. Registration criteria shall be fair, objective, transparent, and reasonable and include the requirement for the CMO to operate in a transparent and non-discriminatory manner and in accordance with principles of good governance. In deciding whether to grant permission to a CMO to operate (i.e. register a CMO), the Ministry should consider the number of members, as well as the size of the catalogue of titles and rights under management, and should be entitled to refuse any application for registration or revoke any registration if the CMO does not satisfy such conditions.
- **Exception for the Visually, Hearing, Intellectually, or Learning Impaired:** Copyright Act Number 4 B.E.2561 (2018) was published in November 2018 and went into effect in March 2019. The Act permits persons with disabilities who do not have access to copyrighted work due to impairment in vision, hearing, movement, intellect or learning or other deficiencies to have equal opportunities to other persons to access, make copies, modify, or distribute the copyrighted work. DIP has issued a Ministerial Regulation on the details of authorized or recognized entities and how such copies may be distributed. The Thai exception goes well beyond the mandate of *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* which creates a limitation and exception for the benefit of the blind, visually impaired and otherwise print disabled. That exception will be mandatory for individual WIPO members that ratify the Treaty. From the music industry's perspective, in accordance with the Marrakech Treaty, sound recordings should not be covered by the exception at all, and in the alternative, the exception should be properly defined and restricted in scope to apply solely to specific acts in respect to specific works, for the benefit of specific individuals, with adequate safeguards, and with equitable remuneration payable to rights holders. This exception should be amended or implemented in such a way that it faithfully implements the Marrakech Treaty and does not conflict with the Berne Convention, WTO TRIPS and WIPO Internet Treaties "three-step test."
- **Inadequate Term of Protection:** Thailand should extend its term of copyright protection to be in line with the international trend of 70 years after the death of the author, or, in cases in which term is calculated based on publication, to at least 70 years. Unfortunately, the amendment to section 21 in the current draft of proposed amendments does not change the term of protection, which remains at 50 years. There are now 67 countries worldwide providing for a term of protection of 70 years or more. Further, if the term of protection is not extended in time, some Thai classics from the 1970s—the classics of Soontaraporn, Suraphol Sombatcharorn and Paiboon Buth—will soon fall out of copyright protection, despite the fact that they are still widely consumed by the public. This will have a negative effect on local artists' income, especially those who have retired and rely on the royalties for a living. Further, Thailand should be urged to catch up with the new international standard of protecting sound recordings for at least 70 years; otherwise the development of the Thai music market will lag behind a vast number of countries in North America, Europe and APAC.
- **Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Articles 32(6) and (7) of the Copyright Act, and to ensure administrative guidance on fair use is kept within the legal bounds of existing exceptions and that affected publishers and stakeholders are afforded the opportunity to provide input into the guidelines.

## **MARKET ACCESS UPDATES IN THAILAND**

**Screen Quota and Film Classification:** Section 9(5) of the 2008 MPVA allows the Film Board to establish ratios and quotas against foreign films. If implemented, such restrictions would create new barriers to foreign film distribution, discourage cinema infrastructure investments, and reduce consumer choice. Since 2017, the Ministry of Culture has been in the process of considering amendments to the MPVA. The motion picture industry continues to urge the Ministry to delete Section 9(5) and the related Section 68, as such limitations, if implemented, could adversely affect Thai distributors and exhibitors, impede the development of the local film industry, limit the variety of entertainment available to Thai consumers, and exacerbate piracy. The MPVA also imposes onerous classification (ratings) requirements on films, music videos, and live performances, as well as censorship requirements on films, audiovisual products, and video games. Thailand should remove onerous ratings requirements, including the 15-day period for obtaining ratings and censorship approval, the associated high costs for film ratings, and the severe penalties for failure to comply. As countries today are moving towards self-classification for audiovisual products across all distribution formats, IIPA encourages Thailand to do the same. In a positive development in 2019, the film industry was encouraged when the Film Ratings Office removed the requirement for submissions of Digital Cinema Packages with open encryption keys, which would have otherwise raised significant content security risks.

**Must Carry Requirements:** In 2012, the NBTC hastily approved “must carry” provisions requiring all platforms to carry public and commercial free-to-air television channels nationally, on an equal basis. The regulations, which have not been clearly drafted, raise important intellectual property rights issues, i.e., they call into question the ability of rights holders to enter into exclusive distribution arrangements in Thailand.

**OTT Regulations:** The NBTC is in the process of considering policies on OTT services, including requiring streaming operators to set up a local presence to respond to government requests around content that the government finds objectionable (a form of mandatory content filtering). Thailand is also proposing amendments to its Revenue Code that will require foreign e-commerce services to register for VAT payment. A tax rate of 10% is being proposed on non-resident business operators who employ electronic payment for e-commerce services, including digital online services. Under the existing VAT guidelines implemented in 1992, any person or entity supplying goods or providing services in Thailand with an annual turnover exceeding 1.8 million baht (US \$55,000) is subject to VAT. Such regulations, if extended to OTT services, would impose burdensome requirements on foreign content providers, stifle innovation and raise costs, particularly in the absence of a robust content protection regime to protect digital delivery of content.

**Investment/Ownership Restrictions in Media Sector:** In January 2015, the NBTC issued rules governing media mergers, acquisitions and cross-media ownership. The rules require prior NBTC approval when a television license holder seeks to invest more than 25% directly, or more than 50% indirectly, in another licensed company. This rule severely limits investment and creates unnecessary barriers to entry for U.S. companies.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Many of the deficiencies in Thailand’s enforcement framework described above—including inadequate efforts to combat piracy, burdensome and inefficient civil and criminal procedures, and inadequate and non-deterrent civil and criminal remedies—run afoul of Thailand’s obligations under the TRIPS enforcement provisions, including Articles 41, 42, 45, and 61.

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Turkey remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** For over a decade, the Government of Turkey has promised to modernize the Copyright Law (1951), last amended in 2014, to fully implement the obligations of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Turkey acceded to the Internet Treaties in 2008, but has yet to fully implement the treaties, including by providing proper remedies against the circumvention of Technological Protection Measures (TPMs) and protecting Rights Management Information (RMI).

In 2018, the Government of Turkey circulated a comprehensive Copyright Law reform bill, but that draft was withdrawn in 2019, in large part because of disagreements about the collective management organization (CMO) provisions. Reports are that a new smaller package of amendments is being prepared by the Government of Turkey, in part modeled on European Union laws, for consideration in 2021. Unfortunately, in the interim, piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike.

Digital piracy—via stream-ripping, cyberlockers, BitTorrent and other peer-to-peer (P2P) linking sites, and “topsites” (i.e., high speed servers used covertly to share content)—is widespread and has stifled the legitimate market. The motion picture industry reports the most common forms of piracy of motion picture and television materials are streaming websites, piracy apps and via illegal Internet Protocol TV (IPTV) activities. Overall, the copyright industries report that the nature and levels of piracy remained the same in 2020.

Currently, Turkish laws do not provide proper incentives for cooperation between rights holders and Internet Service Provider (ISPs). The current Copyright Law (Article 4bis) does have notice and takedown provisions, but without sanctions for ISPs that do not comply. In addition, the current takedown requirements do not remove infringing content expeditiously (the existing timeframes—allowing material to stay up for a week—are too long). One prior draft law would have mandated takedowns within 24 hours of a notification. IIPA recommends that the obligations should be revised to require that content be removed “expeditiously” (and to clarify a time period in regulations or best practices).

The Internet Law sets out broad liability exceptions which are inadequate to incentivize ISPs to address infringements on their sites or by those using their services. The law provides that service providers are not liable for third party content unless “it is clear that [the provider] adopts the content to which it provides a link and that the user intends to access that content.” The definition of a provider is unclear, but apparently includes services other than intermediaries carrying out activities of a merely technical, automatic and passive nature. The law should be clarified to define who is, and is not, eligible for the limitation on liability, and the liability limitation should only apply to passive and neutral intermediaries that do not contribute to infringing activities. Also, the liability exemption, unlike in most countries, is a complete exemption, so denies the ability of a rights holder to obtain injunctive relief, which also should be corrected.

Current law provides that a service provider should remove notified infringing content within a week of a notification. This is not a condition for the liability exemption and, as noted, there are no sanctions for not removing infringing content. If a service provider does not remove the infringing content, the rights holder’s only option is to seek a court order for its removal, and the service provider is only liable if it fails to comply with the court order. The penalties include administrative fines imposed by the Ministry of Transportation. Instead, penalties for noncompliance with

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<sup>1</sup>For more details on Turkey’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Turkey’s Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



takedown notices or court orders should include both meaningful administrative fines and civil law damages. IIPA recommends that notice and takedown should be a condition (but not the only one) for the liability exemption. Even the most effective takedown procedures and processes to disable access to infringing content can only slow piratical activities. To have lasting deterrence, digital enforcement needs to rely on criminal, not civil, measures, and especially those directed at operators and owners of sites engaging in infringing content.

Amendments to the Internet Law pertaining to social media (Amendments to the Regulation of Internet Broadcasts and the Prevention of Broadcast Crimes, Law No. 5651) entered into force on October 1, 2020. The new provisions: (i) set out procedures for removing infringing content; (ii) define a “social network provider”; (iii) require appointment of a contact (local) representative in Turkey for service providers; (iv) require user data to be retained in Turkey; and (v) require regular (six month) reports from each provider. In these semi-annual reports, the providers are required to provide statistical and categorical information on the removal of content, and the blocking of access, to the Information Technologies and Communications Authority.

Also under the Internet Law, if after a notice from a rights holder, a content provider (i.e., a website) does not remove infringing content from its website, the rights holder can, apparently, directly contact ISPs and hosting providers to seek to block the content provider’s website. However, local counsel report that while this is hypothetically possible, there is a current legal disagreement about whether an Internet Law violation is also an infringement under the Turkish Copyright Law, and thus can be used to block infringing content. There have, reportedly, been a few instances where websites were blocked by hosting providers in this manner, but this is difficult because hosting providers are not required to provide contact information.

Turkey is considering further amendments to the Civil Code to address online infringement and ISP liability. Recent draft proposals, including one in 2018, would have revised the responsibilities of Internet access and hosting providers. Any future proposals should include the recommendations above, as well as clearly deny the safe harbors to services that are either direct infringers or those who are inducing or encouraging infringement by third parties.

The current Internet Law does not include any criminal penalties for copyright violations. It does include eight specific crimes and offenses, and should be further amended to add “copyright” as the ninth specific category. There are procedures in the Criminal Code for siteblocking, applicable only to URL takedowns. However, these procedures require rights holders to file an application for each (newly infringing) uplink which is burdensome and very time consuming for rights holders.

The Copyright Law (Article 4(3)) also provides a basis for civil injunctions against third parties (i.e., intermediaries) either assisting infringers, or whose platforms or services are used to infringe copyright materials by third parties (i.e., direct infringers). Unlike criminal proceedings, civil court orders are not limited to URL takedowns and can cover an entire infringing service. However, applications for civil injunctive relief are complicated, costly, take a long time (often requiring the appointment of experts), and can only be directed against specifically identified infringers. They can, however, result in damage awards, but only after a lengthy and burdensome process.

IIPA recommends amendments to the Civil Code provide certainty for injunctive relief. These injunctions should be available against third parties without a prerequisite of the filing of an infringement claim, since many infringers are anonymous or difficult to identify. Additionally, remedies should not be limited to takedowns of specific content (as is the case for criminal proceedings) and should cover new media and platforms, including stream-ripping sites, whether hosted in Turkey or abroad.

Some courts and prosecutors are reluctant to treat IPR offenses as a priority and will not order the confiscation of pirated materials or grant injunctive relief. The reorganization of the courts that began in 2016 has further exacerbated the workload of specialized courts dealing with IP cases. There have in the past also been prosecutorial delays (or indifference), especially to takedown notices with ISPs or actions to remove links to pirate sites. One recent improvement has been the Access Providers’ Association that has worked as a clearinghouse, in lieu of individual ISPs, to receive notices. This has helped to funnel and streamline notices and responses (including takedowns). Additionally, the training of judges has yielded results. By one estimate, approximately 70% of takedown notices now

are responded to with a removal of material. The copyright industries reported that there were many websites taken down in the past few years (over 2,500 sites between 2005 and 2018), but these actions slowed in the past two years. Partial data from 2020 shows that there were 107 enforcement operations carried out, 440,882 pirated items seized, and 1,297 websites were either blocked or shut down by enforcement authorities. In 2019, the Board of Judges and Prosecutors increased the number of judges in the Civil Courts for copyright, trademark and patent cases, helping to reduce a backlog (and resulting in the appointment of one additional judge assigned to each court).

Since 2019, the criminal courts no longer accept registration documents to prove ownership of rights. Instead, the courts (including the Criminal Supreme Court) require all documents showing a full chain of title and all assignments and transfers—this is very cumbersome for both local and foreign rights holders (in fact, a burden almost impossible for foreign rights holders to meet). In the past, copyright notices or registrations were sufficient for presumptions of ownership; this system should be reinstated in the courts.

One change that was made to the Civil Code in 2019 requires all copyright complainants seeking monetary damages to first try to settle disputes via mediation before court proceedings can commence. Proponents of the legislation hoped that smaller infringement claims would be expedited, because of otherwise burdensome procedural issues and delays in the courts. There have been no industry reports to date on whether this has or has not worked as intended.

The 2018 draft amendments to the Copyright Act included provisions for the formation and operation of CMOs, referred to locally as Collective Licensing Societies. The 2018 proposal would have created four such CMOs—one each for literary works; music; film; and works of the visual arts, but this legislation stalled and will have to be re-introduced. The prior CMO legislative drafts did not address the long-standing discrimination against foreign members of CMOs. The other part of the CMO legislation would establish a Copyright Arbitration Committee to resolve tariff price negotiation disputes (with fees initially proposed by the CMOs). Last, the draft would allow those Arbitration Committee decisions to be appealed to the courts for final resolution.

The governance and management of CMOs has been a long-standing problem in Turkey. Currently, foreign rights holders face discriminatory policies that prevent foreign producers from being fully participating members of Turkish CMOs (with full voting rights and management and decision-making authority). Because of this, the monetary distribution rules and practices are discriminatory to foreign rights holders, and there is no transparency for non-management rights holders. The prior drafts of CMO legislation (including the 2018 draft) would not have addressed the fundamental problem of banning non-Turkish producers from full participation in, or management of, the CMOs. The discriminatory treatment of foreign rights holders that is now prevalent in CMOs was an issue noted in the April 2020 Special 301 Report by the U.S. government. It recommended, and rights holders agree, that any future CMO revisions should permit “fair, transparent and non-discriminatory procedures” for CMO governance of all rights holders’ rights.

One loophole in the 2018 draft law would have allowed Turkish collecting societies to license theaters to screen motion pictures without authorization from film producers, and to subject them only to a compulsory license with a collecting society-determined remuneration. This statutory license of an exclusive public performance right, if enacted, would interfere with the freedom to contract by the copyright owner and be a violation of international treaties and norms, and should not be adopted in any CMO law (or Copyright Law) revision.

Another related concern in Turkey is that judicial decisions have incorrectly interpreted the right of communication to the public, specifically, the right of public performance, in violation of the Berne Convention, the WCT, and the WPPT. These interpretations treat “indirect” performances of sound recordings—i.e., the public performance of a recording on radio, television, or by another indirect manner in a bar, hotel, or other public place—as a use not requiring a public performance license and exempt from collections. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed to broadcasters. This fails to distinguish between the use and licensing of a sound recording to broadcasters for broadcasting, and the use and licensing of a sound recording in public performance venues, which are separate and distinct uses and markets for licensing music.

IIPA urges the Government of Turkey to correct the misinterpretation of public performances to capture “indirect” performances, as is required by Turkey’s obligations under the international treaties and the Copyright Law of Turkey.

In 2019, Turkey adopted a formal registration and “stickering” (banderole) procedure for hard copy goods. These provisions were implemented by the Ministry of Culture and Tourism. Unfortunately, although well intended, experience in other countries has shown that banderole requirements have proven to be onerous and burdensome, especially for foreign rights holders. The 2018 legislative proposals would have also extended this requirement to musical recordings and tied them to CMO representation for digital music services. Banderoles are relics of an era of physical copy distribution, not the digital distributions that now predominate the marketplace, and should not be required for foreign rights holders.

Another piece of the 2018 draft Copyright Bill would have provided the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases. It would also have included provisions to more fully implement the Internet Treaties’ TPM obligations regarding enforcement against the making, selling or trafficking in anti-circumvention devices or software. These reforms should be incorporated into any new draft law.

IIPA members have also encouraged the Government of Turkey to establish specialized digital piracy task forces with dedicated and specially-trained prosecutors; provisions to do this were in a 2017 draft, but not the 2018 draft. IIPA members continue to encourage the establishment of such task forces.

There are other concerns with the 2018 Copyright Law Bill which should be corrected in any future draft legislation. The 2018 draft bill concerns included: (i) a broad exception to the right of reproduction, including for reprography and digital education; (ii) loosening the right of distribution for imported copies with authorization, making it more difficult for rights holders to prevent the distribution of pirated copies; and (iii) limiting the private copy levy royalty rate to rights holders to 37.5%, with the remainder going to the Government of Turkey.

Also adopted in 2019 was a law (Act on Evaluation, Classification and Promotion of Cinema Films) intended to create economic incentives for foreign film producers to shoot films in Turkey. It included provisions to finance 30% of production costs for foreign film producers or Turkish co-producers who produced and shot their films in Turkey.

To encourage practical training in all IP services and law, including copyright law, an Intellectual Property Academy was established by the Government of Turkey in November 2019 to organize training programs, conferences and related activities for IP protection, enforcement, and investment. It is hoped by the Government of Turkey, that after the pandemic ends, the work and training of the Academy will re-launch in earnest.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the United Arab Emirates (UAE) be placed on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Despite one of the top-ten highest gross domestic product (GDP) per capita levels worldwide, the copyright sector in UAE struggles as the result of crippling market access barriers, sub-par copyright protection in its laws, and weak enforcement that allows diverse methods of piracy to persist. The UAE has seen some positive movements in intellectual property rights (IPRs) protection education, but has yet to fully implement the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—and does not protect copyrighted content for a term consistent with international practices.

It has been 18 years since the UAE passed federal legislation providing for the possibility of collective management of certain rights, and the music industry's repeated attempts to establish a market for the collective management of broadcasting and public performance rights have been frustrated by the government's failure to permit rights holders to establish a collective management organization (CMO) and commence collective licensing activities. The UAE is a major hub for tourism and retail and is a regional hub for legitimate music services, sold-out concerts, and the upcoming EXPO 2020 in Dubai, which has been postponed to late 2021 due to the pandemic. Yet, the widespread use of music in shopping malls, hotels and other public settings cannot be licensed, denying American and other foreign rights holders the opportunity to effectively exercise their rights, and undermining the rule of law in the country. This directly and substantially reduces the revenues available to invest in the development of a robust local industry that can advance local talent and increase jobs in the entertainment sector. The government needs to end its delay and immediately work with music rights holders, allowing them to establish a CMO in accordance with international best practices in transparency, accountability and governance, and issue an operating license to a CMO to enable music rights holders to start licensing and collecting royalties. The government's inaction constitutes a direct market access barrier for international music rights holders.

Two other concerns for the copyright industries are: (1) the Dubai Department of Economic Development's (DED) requirement for a UAE copyright registration certificate as a prerequisite to initiate a copyright infringement case, applicable to both domestic and foreign authors, in contravention of the treaty prohibitions on formalities; and (2) the DED's and Custom Authorities' failures to take action against infringement and inspect markets without first receiving a complaint from a rights holder. There should be *ex officio* authority to commence these actions.

On a positive note, the UAE Cyber Crime Law has been used effectively against virtual private networks (VPNs), domain name system (DNS) "masks" (that hide domain names), and Tor (anonymous) networks—all used to otherwise disguise piratical sites and activities from enforcement officials. Moreover, the enforcement of the Cyber Crime Law has resulted in some severe and deterrent penalties. The UAE has implemented many non-legislative reforms dealing with Customs practices and held focused workshops to increase awareness of, and respect for, IPRs, which is also helping improve the treatment of unauthorized uses in the country.

#### **PRIORITY ACTIONS REQUESTED IN 2021**

- Take immediate action to enable rights holders to establish a CMO in UAE, in accordance with international best practices of transparency, accountability and governance, and to permit such CMO to commence operations in

<sup>1</sup>For more details on UAE's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of UAE's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



the UAE so that music rights holders can finally begin collectively licensing their broadcast and public performance rights under the UAE copyright law.

- Modernize the copyright law to implement the WIPO Internet Treaties and harmonize the copyright term with the emergent international norm of life plus 70 years pma, and 70 years for sound recordings.
- Proactively enforce against Internet piracy by encouraging the Telecommunication Regulatory Authority (TRA) to engage domain name registrars and other intermediaries (advertisement providers; payment providers; helpdesk support services; and dedicated VPNs) that enable structurally infringing services to cooperate with rights holders and require them to take effective action to prevent their services from being used by infringers. In some instances, the proposed online enforcement remedies are outdated. The U.S. government should seek high standard remedies that support today's business models of the creative industries, including remedies that effectively respond to current challenges and reflect international best practices.
- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit products.
- Encourage Customs authorities to ban the importation of illegal set-top boxes (STBs) such as servers for Dish TV of India.
- Put more restrictions over the services that facilitate the subscription of unauthorized paid TV channels such as Dish TV, Airtel TV, and TataSky.
- Support rights holders in enforcing their rights under UAE copyright law.
- Introduce laws providing for more transparency among enforcement authorities.

## **COPYRIGHT PIRACY IN UAE**

Online and mobile device piracy in the UAE remains a problem, including websites that provide illegal access to music, movies, television content, video games, reference books, online journals, and trade books of top publishers. Piracy of copyrighted content not only affects rights holders, but also harms content creators and owners, cinemas, producers and other legitimate content providers that invest significant sums to license content and develop business models in the region. These legitimate efforts contribute to the economic development of the country, fund production of local content, create jobs, and generate revenue for advertising and auxiliary industries. Dubai is a commercial hub for the region and may affect legitimate markets in surrounding countries—such as India, Iraq, Iran, and the Gulf Cooperation Countries—by exporting copycat products and digital piracy equipment, like hybrid STBs.

**Unlawful Public Performance and Broadcasting of Music:** At present, because of the impossibility of licensing public performance and broadcasting by rights holders collectively, the vast majority of music that is used in such a way is *de jure* unlawful in the UAE. This is due to the government's 18 year hold out in issuing an operating license to a music CMO. Despite attempts by industry, in cooperation with the Abu Dhabi media authority, to establish a CMO and obtain an operating license, there has been no information as to whether the Ministry of Economy (MOE) even considered the application at the federal level. The last application was submitted in 2016, but no formal reply was issued. The lack of government engagement with the industry, and the bar to the collective exercise of existing rights resulting from the government's inaction, raise questions about the UAE's compliance with the WTO TRIPS Agreement and the state of the rule of law in the country. Simply put, the UAE's regulatory inaction means that the existing law has limited effect and there is no remedy for the ongoing, country-wide infringement of music public performance and broadcast rights. As such, music rights holders are denied revenues from the widespread use of their works and recordings (see also below section "Other copyright law and related issues").

**Online and Mobile Piracy:** Several notorious online piracy sites are heavily accessed in the UAE, including *cima4u.io*, a streaming website that embeds popular movie and series content from third-party cyberlockers. SimilarWeb also reports movie piracy websites *fmovies.to* (streaming) and *yts.mx* (torrents) within the top 100 most popular websites in the UAE. In 2017, the TRA reported that it had blocked approximately 83,900 websites, which includes 473 websites for IP violations. However, the TRA stopped publishing the number of the blocked websites thereafter. The Dubai DED blocked more than 15,050 accounts on social media in 2017, while in 2018, Dubai DED

reduced the blocking of infringing accounts on social media and did not publish the total number of blocked accounts. In 2019, the blocking process was stopped completely. In 2020, the DED reactivated monitoring of social media and started closing accounts violating IP rights. Popular pirate music sites in the UAE include the BitTorrent indexing sites *The Pirate Bay* and *1337x.to*, and stream-ripping sites *savefrom.net*, *y2mate.com*, and *ytmp3.cc*. Recently, there has been an increase in mobile applications that enable illegal showings of copyrighted TV programs or exclusive TV channels, which are extremely difficult to monitor. One example is the *Mobdro* app.

**Hybrid Set-Top Boxes:** The use of illicit streaming devices (ISDs) has increased in the UAE. There are STBs that can be used either to receive the free-to-air (FTA) channels—which is a legal act—or to receive the pirated TV channels by way of installing certain Internet Protocol TV (IPTV) applications. These STBs and the channels or content they carry are illegally marketed, promoted, and sold to consumers in high volumes through several sales channels such as door-to-door, small retailers, Internet sales, or over social media accounts. While the equipment and hardware used for these types of services seem legitimate, it is the loaded operating software that allows access to the pirated content. Unless these hybrid STBs are preloaded with the required piracy software, it is difficult to identify their illegal nature. Examples of these hybrid STBs are the ones known and used for UKTV Abroad, *King-iptv.net*, *Kingiptv.org*, and Expat TV. Expat TV is gaining popularity amongst western expats in the UAE, operating under the brands Tiger Z280, MXQ, Mag250, iStar and IP888.

**Pirate Free-To-Air Channels:** Pirate FTA channels continue to constitute a problem in the motion picture and television industry. The FTA channels are clear, unencrypted channels that can be received and viewed without requiring a subscription. They are uploaded from many different locations across the region to satellites that have region-wide reach. The MENA Broadcast Satellite Anti-Piracy Coalition, a group of stakeholders in the Middle East satellite television industry, has a goal of preventing FTA channel piracy. Voluntary collaboration among rights holders and satellite operators in this anti-piracy coalition has been effective at helping to control FTA channel piracy in the UAE.

## **COPYRIGHT ENFORCEMENT ISSUES IN UAE**

**Raids and Piracy Prevention:** Industry sectors report that enforcement has become very slow in the past year, and that the UAE police and economic departments are hesitant in considering serious actions against infringers. However, the Dubai DED did conduct several raids in 2019 against entities using software without authorization from the copyright holder, and shut down social media accounts selling counterfeit products. Also, the Dubai Police has created a dedicated platform on its website to encourage rights holders to file criminal complaints against IP violating websites, and the Criminal Investigation Department (CID) has been working closely with rights holders and licensees to stop sales of hybrid STBs. Unfortunately, such operations require arrangements between different departments, which slows down investigations. For example, the electronic crime unit is not allowed to correspond with organizations outside of the UAE, such as social media service providers, without a court order.<sup>2</sup> Correspondence between the TRA and CID is also relatively slow, which impedes the collection of information and evidence in piracy investigations. These are areas the UAE can focus on to strengthen its enforcement regime.

**Legal Reforms:** On July 4, 2019, the UAE issued Cabinet Resolution No. (51) on the official fees for the Ministry of Economy (in force, July 7, 2019). This resolution reduced many of the official fees for registering IP rights in the UAE. For example, the trademark registration fee has been reduced from 10,000 AED (US\$2,723) to 6,700 AED (US\$1,824).

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<sup>2</sup>Though this remains an issue in general, the Department of Economic Development (DED) has found an alternative path via the rights holders to address, at least the issue of infringing social media accounts. The DED is closing social media accounts without court orders. The DED communicates with brand owners/IP rights holders or with the Telecommunication Regulatory Authority (TRA) to close those accounts. Basically, the DED has a team which monitors social media accounts in the UAE and reports accounts that include violations of IP rights on a regular basis to the IP rights holders/legal representatives. The IP rights holders communicate directly with the IP enforcement team within the social media platform – subsequently this team closes the violating accounts upon receiving notifications from the IP rights holders. If the IP rights holders could not close the account via outreach with the social media providers, the DED refers the matter to the TRA, which blocks the access to the IP infringing accounts in the UAE.

**Judicial and Case Law Developments:** The judicial system has shown some signs of improvement. Prosecutors have been analyzing facts of IPR cases and referring cases to the courts on the grounds of violations of IP or cybercrime-related laws. Also, the punishment under UAE Cyber Crime Law has become more severe. As a result, use of VPNs, DNS masks, and Tor networks for piracy is decreasing. Also, the Higher Criminal Court in Dubai issued a judgment in a case against an administrator of the torrent website called [arabscene.org](http://arabscene.org). The court decided to block the website, as it showed exclusively licensed TV channels without permission. In addition, the administrator was fined and deported out of the country. The judgment was enforced in 2021. The case is significant as it involved a website that was hosted outside the UAE, setting a strong precedent for other similar offenders. Evidencing this, the criminal courts of Abu Dhabi and Sharjah have found defendants guilty in cases relating to piracy through IPTV apps.

**Enforcement in Free Zones and Areas Outside City Limits:** Enforcement in Free Zone areas is limited to criminal actions by police based on complaints by the copyright owner. There is a high volume of goods imported to the UAE, and the territory is used as a regional hub for goods in transit. The UAE should ramp up efforts to enforce against pirate and counterfeit traffickers with deterrent enforcement actions and enhanced customs controls.

**Customs Piracy Prevention:** The Ajman Customs authorities activated their IP department in 2017, and they can now take actions against copyright and trademark infringers. In 2017, Dubai Customs began to recycle counterfeit products instead of re-exporting such products. Recycling means that the products are sent to a local recycling company that destroys the products and the raw material is thereafter used in various industries. Previously, Dubai Customs would re-export the counterfeit products to the country of origin instead of destroying or recycling such counterfeit goods. Abu Dhabi Customs also extended the protection for recorded trademarks from one year to ten years, in line with other local customs authorities in the UAE. A continuing challenge, however, is that Customs authorities are not taking action against counterfeit copies of copyrighted works unless they first receive a complaint from a rights holder. The law needs to be amended so that Customs authorities may take actions even in the absence of complaints by rights holders.

**Training Programs:** The IPR Department at Dubai Customs is the first of its kind in the Middle East. It is a federal law enforcement agency that works towards securing the 21 air and sea entry/exit points of the mainland. Apart from operating in a reactive capacity and intercepting the supply of infringing content/goods, the department has also been working in a preventive capacity by employing educational means to limit the demand for infringing content in the first place. The objective is to raise awareness to avoid the direct, and often physical, harm that counterfeit goods cause, as well as to create an anti-infringement culture and eliminate other issues stemming from IPR infringements. Additionally, Dubai Customs offers customs inspectors training courses to increase their knowledge and understanding of IPR. The IPR department has, in cooperation with the communication department at Dubai Customs, held theoretical and practical courses on IPR protection in schools. Moreover, seminars have been held in universities, summer camps, and shopping malls, targeting large segments of society. They are also open to representatives from other government ministries and other member states of the Gulf Countries Council. The past four years, Emirates IP Association and INTERPOL co-hosted an IP awareness session with Dubai Customs, Brand Protection Group, Dubai Police, and Ministry of Economy. The session hosted a number of speakers from the private and public sectors that shed light on various IP violations. These organizations continue to conduct events combatting IP crime and illicit trade. Due to the COVID-19 pandemic, Dubai Customs began to conduct online training sessions. In addition, the Emirates IP Association is designing paid courses to promote the education of IP in the state, and the Dubai DED has started an IP awareness program for starter companies and IP violators to educate them about IP and the benefits of respecting IPRs. The audience for this program has been reacting positively, i.e., owners of companies are registering their IP and some IP violators are sharing information about the source of specific counterfeit products.

**Ensuring Consistent Enforcement:** For a period of time, enforcement authorities were reluctant to take action when the Prime Minister called on officials to cooperate as much as possible with companies to encourage the investment. This call was misunderstood, and the effect was that enforcement authorities waived or reduced fines against IP violators, including the Dubai DED, which reduced fines by up to 50%. IP rights holders would like to see this reduction applied to complainants (the brand owners) instead of infringers. Additionally, the Dubai DED's failure to

inspect markets absent a complaint from copyright holders encouraged infringers to trade in illicit products, including STBs containing IPTV apps for pirating paid TV channels.

## **OTHER COPYRIGHT LAW AND RELATED ISSUES**

**Prevention of Music Rights Holders' Exercise of Legal Rights:** Revenue collected from broadcasting and public performance of music (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.), estimated to be in the tens of millions of U.S. dollars if collection were allowed, is an essential element in supporting the development of local artists and in the UAE becoming a hub for the production of music in the region. Yet, due to the government inaction to accredit a collecting society as noted above, no monies are currently being collected, substantially undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. It also means that the U.S. music being exported to the UAE cannot be monetized when broadcast or performed publicly, and that various UAE businesses are using music without any payments to rights holders, despite the protection recognized in the UAE law.

The UAE copyright law provides the relevant rights in Article 18 of the Federal Law No. 7 of the 2002 law concerning Copyrights and Neighboring Rights, which states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms. Article 37 provides that anyone who engages in such exploitation without permission from the rights holder infringes copyright and is subject to criminal penalties and civil remedies. The law also enables the creation of collecting societies and provides for the undertaking of collective rights administration. Additionally, the Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighboring Rights established the basis on which licenses permitting collective management activities would be granted.

For 18 years, no collecting society has been accredited, so rights holders have no means to manage their rights collectively, which for certain uses of rights is the only practicable way to license users. In 2015, there was some optimism for progress when Twofour54—an Abu Dhabi Media Zone entity supported by a rights holder coalition—submitted an application to the Ministry of Economy for an operating license as a music rights CMO. However, the Ministry of Economy never responded. Another application (the most recent) was submitted in 2016, with the same result—no response. Unfortunately, requests by the International Federation of the Phonographic Industry for a government intervention with the UAE Ministry of Economy and the Department of Economic Development have not been answered. The UAE should take immediate action to enable rights holders to establish a CMO in the UAE, in accordance with international best practices of transparency, accountability and governance, and to permit that CMO to commence operations in the UAE so that music rights holders can finally begin collectively licensing their broadcast and public performance rights under the UAE copyright law.

**Challenges with Internet Service Providers (ISPs):** ISPs in the UAE, namely Etisalat and Du, cooperate with rights holders to a limited degree by responding to notice and takedown requests, however, in the past year there was no significant cooperation from ISPs. All ISPs currently have special platforms on their websites for reporting IP violations, but they do not publish any statistics related to the takedown rates. They normally ask the rights holders to contact the TRA for enforcement actions, which is the governmental body that monitors the operations of the ISPs in the UAE. The government needs to encourage the ISPs to restrict access to the following: illegal IPTV services; advertisement to pirated TV services; illegal credit card payment gateways and alternative online methods of payment; websites that offer gift cards or redeemable vouchers to buy or refill personal accounts to these services; helpdesk support numbers for these illegal services; and illegal VPN IP addresses dedicated to streaming content to hybrid set-top boxes. Additionally, ISPs need to be encouraged to act more expeditiously. While some provide the above-mentioned platforms for reporting IP violations, they act slowly on complaints.

**Amendments to the UAE Copyright Law:** The current Copyright Law falls short of the obligations in the WIPO Internet Treaties and modern standards of protection. It contains only rudimentary protections against the

unauthorized act of circumvention of technological protection measures (TPMs) and against some activities relating to trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs. The law needs to be amended to more broadly include prohibitions against: 1) the act of circumvention of a TPM that effectively controls access to copyright-protected materials<sup>3</sup> or the exercise of exclusive rights; and 2) the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs (independent of the existence of any infringement). It should be made clear that violations involving TPMs are subject to both civil and criminal remedies. Other recommended changes include: 1) removal of unreasonable restrictions on the ability to freely contract;<sup>4</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention (the Appendix);<sup>5</sup> 3) ensuring WTO TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 4) providing for statutory (pre-established) damages; 5) adding a presumption of subsistence of copyright; 6) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings (or at least 70 years from publication); 7) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 8) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; and 9) raising minimum and maximum fines for copyright infringement (Article 37).

**Cyber Crime Law Should Include IP:** The Cyber Crime Law was updated in 2018 to include, among other things, a specific provision on ISP liability. The Cyber Crime Law and its amendments include general rules to criminalize publishing illegal contents on the Internet. For example, Articles 34 and 39 impose fines and imprisonment against those who use communication services, audio, or video broadcasting channels without the legal right and against those who own or administer a website or computer network and deliberately make illicit content available. This law should be further updated to include clear criminal offenses relating to copyright infringement. Moreover, it does not include ISP liability for IP infringement carried out through the ISP. Implementing regulations should be issued clarifying that the Cyber Crime Law applies in cases of IP infringement.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Many of the deficiencies in the UAE copyright law identified above may constitute violations of UAE's obligations under the WTO TRIPS Agreement. UAE has also acceded to the WIPO Internet Treaties. Some of the shortfalls in its copyright law (e.g., with respect to the circumvention of technological protection measures) and the state-sanctioned, non-application of existing legal rights of music rights holders, raise issues of compliance with the UAE's obligations under those treaties.

## **MARKET ACCESS**

**Music Licensing:** The failure to implement a music licensing regime in the country effectively prevents producers and performers from licensing large parts of the market, which serves as a market access barrier. This inaction is also protectionist and discriminatory, given that various UAE families, as well as the state, have stakes in most shopping malls, hotels, restaurants, and other such establishments that require licenses to play music. In view of the upcoming EXPO 2020 in Dubai (postponed to 2021), which has worldwide attention, it is imperative that the music licensing problem be solved without any further delay.

**UAE Copyright Registration Requirement:** Dubai DED requests UAE copyright registration certificates in order to proceed with any action for copyright infringement. This is a detrimental change from its old policy, in which it

<sup>3</sup>It should be confirmed that access control technological protection measures (TPMs) are covered (at present, Article 38(1) covers a TPM "for preservation of specific standard of quality of the copies," which does not seem to cover all access control TPMs).

<sup>4</sup>For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid "any action" with respect to "more than five" of an author's works) are unreasonable restrictions, and should be left, in general, to marketplace solutions rather than be restricted by statute as they are here.

<sup>5</sup>Article 21 provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See "Berne Convention Members," World Intellectual Property Organization, available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

allowed a copyright infringement case to be heard if the plaintiff had a copyright registration certificate in any country that is a member of the Berne Convention (and, as applied to Berne member authors and producers, is a violation of Article 5(2) of Berne and equivalent provisions, such as Article 20 of WPPT). Such restrictions limit the power of rights holders to protect themselves from infringement and hinder their ability to thrive in the UAE market.

**Administrative Fees:** The UAE National Media Council imposes administrative fees to imported copyrighted works, such as US\$270 for theatrical releases and US\$108 for TV programming. The Economic Departments and Customs authorities imposes administrative fees of US\$7,500 to file complaints against infringers/copyright violators.

# **APPENDIX B**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2020) & IIPA's 2021 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2020)  
AND IIPA 2021 SPECIAL 301 RECOMMENDATIONS**

| COUNTRY            | IIPA<br>RECOMMENDATION<br>JANUARY 2021 | USTR 301 PLACEMENT<br>(as of April/May of each year) |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
|--------------------|--|--|------|------|--------|--------|------|------|---------|------|---------|------|------|------|------|------|------|------|------|------------------|----------|----------|-----------|-----------|------|------|------|------|------|------|------|------|------|-----|-----|-----|-----|--|
|                    |  | 2020   | 2019 | 2018 | 2017   | 2016   | 2015 | 2014 | 2013    | 2012 | 2011    | 2010 | 2009 | 2008 | 2007 | 2006 | 2005 | 2004 | 2003 | 2002             | 2001     | 2000     | 1999      | 1998      | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |     |     |     |     |  |
| ALGERIA            |  | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL     | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |      |     |     |     |     |  |
| ARGENTINA          | PWL                                    | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL     | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |      |     |     |     |     |  |
| ARMENIA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| AUSTRALIA          |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| AUSTRIA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| AZERBAIJAN         |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | WL       | WL       | WL        |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| BAHAMAS            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | PWL      | PWL      | WL + OCR  | OCR       | OCR  |      |      |      |      |      |      |      |      |     |     |     |     |  |
| BAHRAIN            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| BARBADOS           |  | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| BELARUS            |  |  |      |      |        |        |      |      | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | OO   |      |     |     |     |     |  |
| BELIZ              |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | PWL              | WL       | WL       |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| BOLIVIA            |  | WL   | WL   | WL   | WL     | WL     |      | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | OO   | WL   | OO   |      |      |      |      |      |      |     |     |     |     |  |
| BRAZIL             | WL                                     | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | OO   | PFC  | PWL  | PWL  | PWL  | PWL  |      |      |     |     |     |     |  |
| BRUNEI             |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  |     |     |  |
| BULGARIA           |  |  |      |      |        |        |      |      | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |     |     |     |     |  |
| CANADA             | WL                                     | WL   | WL   | PWL  | WL     | WL     | WL   | WL   | WL      | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | WL   | WL               | WL + OCR | WL + OCR | WL + OCR  | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |     |     |     |     |  |
| CHILE              | PWL                                    | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL     | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |      |     |     |     |     |  |
| CHINA (PRC)        | PWL                                    | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL+306 | PWL  | PWL+306 | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |      |     |     |     |     |  |
| COLOMBIA           | WL                                     | WL   | WL   | PWL  | WL+OCR | WL+OCR | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |      |     |     |     |     |  |
| COSTA RICA         |  |  | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| CROATIA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| CYPRUS             |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| CZECH REPUBLIC     |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  |     |     |  |
| DENMARK            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| DOMINICAN REPUBLIC |  | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| ECUADOR            | WL                                     | WL   | WL   | WL   | WL     | WL     | PWL  | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| EGYPT              |  | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| EL SALVADOR        |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| ESTONIA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| EUROPEAN UNION     |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| FIJI               |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | OCR  |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| FINLAND            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  |     |     |  |
| GEORGIA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| GERMANY            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| GREECE             |  | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| GUATEMALA          |  | WL   | WL   | WL   | WL     | WL     | WL   | WL   | WL      | WL   | WL      | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |     |     |     |     |  |
| HONDURAS           |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | OCR  |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| HONG KONG          |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| HUNGARY            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  | WL  |     |  |
| INDIA              | PWL                                    | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL+OCR | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |     |     |     |     |  |
| INDONESIA          | PWL                                    | PWL  | PWL  | PWL  | PWL    | PWL    | PWL  | PWL  | PWL+GSP | PWL  | PWL     | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL              | PWL      | PWL      | PWL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |     |     |     |     |  |
| IRELAND            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |
| ISRAEL             |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | PWL (9/12 to WL) | PWL      | Pending  | PWL + CCR | PWL + OCR | PWL  | PWL | PWL | PWL | PWL |  |
| ITALY              |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | WL + OCR | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  | WL  |     |  |
| JAMAICA            |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      | WL   | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  |     |     |  |
| JAPAN              |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      | WL   | WL               | WL       | WL       | WL        | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  | WL  | WL  |     |  |
| JORDAN             |  |  |      |      |        |        |      |      |         |      |         |      |      |      |      |      |      |      |      |                  |          |          |           |           |      |      |      |      |      |      |      |      |      |     |     |     |     |  |

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2020)  
AND IIPA 2021 SPECIAL 301 RECOMMENDATIONS**

| COUNTRY               | IIPA<br>RECOMMENDATION<br>JANUARY 2021 | USTR 301 PLACEMENT<br>(as of April/May of each year) |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
|-----------------------|--|--|------|------|---------|--------|------|--------|----------------|------|------|------|------|------|------|------|----------|--------------------------------|----------|----------|----------|-----------|------|------|------|------|------|------|------|------|------|------|------|-----|-----|
|                       |  | 2020   | 2019 | 2018 | 2017    | 2016   | 2015 | 2014   | 2013           | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 | 2005     | 2004                           | 2003     | 2002     | 2001     | 2000      | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |     |     |
| KAZAKHSTAN            |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                | WL       | WL       | WL       | WL        | WL   | WL   | WL   | OO   |      |      |      |      |      |      |      |     |     |
| KENYA                 | WL                                     |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| KUWAIT                |  | WL   | PWL  | PWL  | PWL+OCR | PWL    | PWL  | WL+OCR | WL             | WL   | WL   | WL   | WL   | WL   | WL   | WL   | PWL      | PWL                            | WL       | WL       | WL       | WL        | PWL  | PWL  | WL   | WL   | OO   |      |      |      |      |      |      |     |     |
| KYRGYZ REPUBLIC       |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      | OCR  |      |      |      |      |      |      |      |      |     |     |
| LATVIA                |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                | WL + OCR | WL       | WL       | WL        | WL   | WL   | WL   | WL   |      |      |      |      |      |      |      |     |     |
| LEBANON               |  | WL   | WL   | WL   | WL      | WL     | WL   | WL     | WL             | WL   | WL   | WL   | WL   | WL   | WL   | PWL  | PWL      | PWL                            | PWL      | PWL      | PWL      | PWL       | WL   | WL   | OO   |      |      |      |      |      |      |      |      |     |     |
| LITHUANIA             |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                | WL       | WL       | WL       | WL        | WL   | WL   | WL   | WL   |      |      |      |      |      |      |      |     |     |
| LUXEMBOURG            |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      | WL   |      |      |     |     |
| MACAU                 |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      | WL   | WL   | PWL  | PWL  |      |      |      |      |      |     |     |
| MALAYSIA              | OCR                                    | OCR  | OCR  |      |         |        |      |        |                |      |      |      |      |      |      |      | WL       | WL                             | WL       | WL       | WL       | WL        | WL   | PWL  | PWL  | OCR  |      |      |      |      |      |      | WL   | WL  |     |
| MEXICO                | PWL                                    | WL   | WL   | WL   | WL      | WL     | WL   | WL     | WL             | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL       | WL                             | WL       | WL       | WL       | WL        | WL   | WL   | OO   | OO   | OO   |      |      |      | PWL  |      |      |     |     |
| MOLDOVA               |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      | WL   |      |      |      |      |      |      |      |     |     |
| NAMIBIA               | OCR                                    |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| NIGERIA               | OCR                                    |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| NETHERLANDS           |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      | OO   |      |      |     |     |
| NEW ZEALAND           |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      | WL   | WL   | WL   |      |      |      |      | WL   | WL   |     |     |
| NICARAGUA             |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      | OO   | OO   |      |     |     |
| NORWAY                |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      | WL   | WL       | WL                             | WL       | WL       | WL       | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |     |     |
| OMAN                  |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      | WL   | WL   | WL   | WL   | WL   | WL   | OO   |      |     |     |
| PAKISTAN              |  | WL   | WL   | WL   | WL      | WL+OCR | PWL  | PWL    | PWL            | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | WL+OCR   | WL                             | PWL      | PWL      | PWL      | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |     |     |
| PALESTINIAN AUTHORITY |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      | OCR  |      |      |      |      |      |      |     |     |
| PANAMA                |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      | OO   | WL   | OO   | OO  |     |
| PARAGUAY              |  | WL   | WL   |      |         |        |      | WL+OCR | WL+306<br>+OCR | WL   | 306  | 306  | 306  | 306  | 306  | 306  | 306      | 306                            | 306      | 306      | 306      | 306       | 306  | 306  | 306  | 306  | PFC  | PWL  | WL   | OO   | OO   | WL   |      |     |     |
| PERU                  |  | WL   | WL   | WL   | WL      | WL     | WL   | WL     | WL             | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL       | WL                             | WL       | WL       | WL       | PWL       | PWL  | WL   |      |      |     |     |
| PHILIPPINES           |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      | WL + OCR | WL + OCR                       | WL + OCR | WL + OCR | WL + OCR | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |     |     |
| POLAND                |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      | WL + OCR | WL                             | WL       | WL       | WL       | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  |     |
| PORTUGAL              |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      | WL   |     |     |
| QATAR                 |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      | WL   | WL   | WL   | WL  | WL  |
| ROMANIA               |  | WL   | WL   | WL   | WL      | WL     | WL   | WL     | WL             | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL       | WL                             | WL       | WL       | WL       | WL        | WL   | WL   | WL   | OO   | OO   | WL   |      |      |      |      |      |     |     |
| RUSSIAN FEDERATION    | PWL                                    | PWL  | PWL  | PWL  | PWL     | PWL    | PWL  | PWL    | PWL            | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL      | PWL+OCR                        | PWL+GSP  | PWL+OCR  | PWL      | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  |      |     |     |
| SAN MARINO            |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SAUDI ARABIA          |  | PWL+OCR  | PWL  | WL   |         |        |      |        |                |      |      |      |      |      |      |      |          | WL + OCR                       | WL       | WL       | WL + OCR | WL + OCR  | WL   | PWL  | PWL  | WL   | WL  | PWL |
| SERBIA AND MONTENEGRO |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SINGAPORE             |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SLOVAK REPUBLIC       |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SLOVENIA              |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SOUTH AFRICA          | PWL                                    |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SOUTH KOREA           | OCR                                    |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          | WL                             | WL       | WL       | WL       | PWL       | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL |     |
| SPAIN                 |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      | OCR      | OCR                            | OCR      | OCR      | OCR      | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  |     |
| SWEDEN                |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| SWITZERLAND           | WL                                     |  | WL   | WL   | WL      | WL     |      |        |                |      |      |      |      |      |      |      |          |                                |          |          |          |           |      |      |      |      |      |      |      |      |      |      |      |     |     |
| TAIWAN                | PWL                                    |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      |          | WL (then<br>OFF due to<br>OCR) | WL       | WL       | WL       | PWL + OCR | PWL  | PWL | PWL |
| TAJIKISTAN            |  |  |      |      |         |        |      |        |                |      |      |      |      |      |      |      | WL       | WL                             | WL       | WL       | WL       | WL        | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL  |     |

**APPENDIX B: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2020)  
AND IIPA 2021 SPECIAL 301 RECOMMENDATIONS**

| COUNTRY              | IIPA<br>RECOMMENDATION<br>JANUARY 2021 | USTR 301 PLACEMENT<br>(as of April/May of each year) |      |      |      |      |        |      |         |      |           |      |           |      |      |      |      |           |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |  |  |
|----------------------|--|--|------|------|------|------|--------|------|---------|------|-----------|------|-----------|------|------|------|------|-----------|----------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--|--|
|                      |  | 2020   | 2019 | 2018 | 2017 | 2016 | 2015   | 2014 | 2013    | 2012 | 2011      | 2010 | 2009      | 2008 | 2007 | 2006 | 2005 | 2004      | 2003     | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | 1992 | 1991 | 1990 | 1989 |  |  |
| THAILAND             | WL                                     | WL   | WL   | PWL  | PWL  | PWL  | PWL    | PWL  | PWL     | PWL  | PWL + OCR | PWL  | PWL + OCR | PWL  | PWL  | WL   | WL   | WL        | WL + OCR | WL   | WL   | WL   | WL   | WL   | WL   | PWL  | PFC  | PFC  | PFC  | PWL  | PWL  |      |      |  |  |
| TRINIDAD & TOBAGO    |  | WL   |      |      |      | WL   | WL     | WL   |         |      |           |      |           |      |      |      |      |           |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |  |  |
| TUNISIA              |  |  |      |      |      |      |        |      |         |      |           |      |           |      |      |      |      |           |          |      |      |      |      |      |      | OO   |      |      |      |      |      |      |      |  |  |
| TURKEY               | WL                                     | WL   | WL   | WL   | WL   | WL   | WL     | WL   | WL      | WL   | WL        | WL   | WL        | WL   | WL   | WL   | WL   | WL        | WL       | WL   | WL   | WL   | WL   | PWL  | PWL  | PWL  | PWL  | PWL  | PWL  | WL   | WL   | WL   |      |  |  |
| TURKMENISTAN         |  | WL   | WL   | WL   | WL   | WL   | WL+OCR | WL   | WL      | WL   | WL        | WL   | WL        | WL   | WL   | WL   | WL   | WL        | WL       | WL   | WL   | WL   | WL   |      |      |      |      |      |      |      |      |      |      |  |  |
| UNITED ARAB EMIRATES | WL                                     | WL   | WL   | WL   |      |      |        |      |         |      |           |      |           |      |      |      |      |           |          |      |      |      |      |      |      |      |      |      |      |      |      |      |      |  |  |
| UKRAINE              | PWL                                    | PWL  | PWL  | PWL  | PWL  | PWL  | 301    | PFC  | PWL+GSP | WL   | WL        | WL   | WL        | WL   | WL   | PWL  | PWL  | PFC + OCR | PFC      | PFC  | PFC  | PWL  | PWL  | PWL  | WL   |  |  |
| URUGUAY              |  |  |      |      |      |      |        |      |         |      |           |      |           |      |      |      |      |           | WL       | WL   | WL   | PWL  | PWL  | PWL  | WL   | OO   | OO   |      |      |      |      |      |      |  |  |
| UZBEKISTAN           |  | WL   | WL   | WL   | WL   | WL   | WL     | WL   | WL      | WL   | WL        | WL   | WL        | WL   | WL   | WL   | WL   | WL        | WL       | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |      |  |  |
| VENEZUELA            |  | PWL  | PWL  | PWL  | PWL  | PWL  | PWL    | PWL  | PWL     | PWL  | PWL       | PWL  | PWL       | PWL  | PWL  | PWL  | PWL  | PWL       | PWL      | PWL  | PWL  | PWL  | PWL  | PWL  | WL   |  |  |
| VIETNAM              | PWL                                    | WL   | WL   | WL   | WL   | WL   | WL     | WL   | WL      | WL   | WL        | WL   | WL        | WL   | WL   | WL   | WL   | WL        | WL       | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   | WL   |  |  |
| YEMEN                |  |  |      |      |      |      |        |      |         |      |           |      |           |      |      |      |      |           |          |      |      |      |      |      |      | OO   |      |      |      |      |      |      |      |  |  |

301: 301 Investigation  
 PFC: Priority Foreign Country  
 PWL: Priority Watch List  
 WL: Watch List  
 OO: Other Observations (an informal listing formerly used by USTR)  
 SM: Special Mention  
 OCR: Out-of-Cycle Review to be conducted by USTR  
 GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.  
 DS: Dispute Settlement