

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Vietnam should be elevated to the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** Vietnam is an important emerging market in Southeast Asia for the creative industries, but its market for creative works remains severely stunted due to worsening piracy and debilitating market access barriers. Vietnamese operators have been associated with some of the world's most popular piracy websites, which cause significant damage to the local marketplace and make Vietnam a piracy haven. IIPA commends Vietnamese authorities for enforcement actions taken in 2021 against *Phimmoi*; unfortunately, copycat sites have sprung up in its place. IIPA encourages Vietnam to continue to pursue action against the many other piracy sites that continue to pollute the Vietnamese marketplace.

Deterrence against infringement in Vietnam is lacking due to ineffective criminal procedures and penalties. While the Authority of Broadcasting and Electronic Information (ABEI), under the Ministry of Information and Communication (MIC) and the police unit A05 took a step forward and began enforcing a decree to disable access to dozens of infringing websites in Vietnam, disablement in Vietnam does not stop Vietnam-based piracy services and operators from harming overseas markets, including the U.S. market. This should be addressed due to the many globally focused services operating from Vietnam. There also remain procedural difficulties with the system for U.S. rights holders. Other major enforcement deficiencies include: (1) notwithstanding the recent action against *Phimmoi*, the government's 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.

In joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Government of Vietnam agreed to adopt high standards for criminal enforcement. IIPA is very pleased that the government acceded to the WIPO Copyright Treaty (WCT) on November 17, 2021 (effective February 17, 2022) and urges the government to join the WIPO Performances and Phonograms Treaty (WPPT) without delay. Unfortunately, the latest draft amendments to the IP Code fall short of fully implementing CPTPP, although they include measures to implement the WCT and the WPPT (collectively, WIPO Internet Treaties). IIPA hopes the Government of Vietnam will bring its enforcement norms in line with the CPTPP and evolving global norms, including by adopting a resolution that clearly defines and interprets "commercial scale" in accordance with Vietnam's international obligations. The government should also address deficiencies with the Copyright Office of Vietnam, which 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 2022**

### **Enforcement:**

- Ensure enforcement officials, including the MIC, the Ministry of Culture, Sports, and Tourism's (MCST) Inspectorate, and the Ministry of Public Security (MPS) Intellectual Property Rights (IPR)/High-Tech Police and related police units, increase the number and effectiveness of operations focused on online infringement, including by: taking long-overdue action to prosecute notorious piracy sites like *Phimmoi* or *Chiasenhac*; issuing administrative and criminal penalties for infringement that are sufficient to deter piracy; ensuring administrative orders are properly enforced; and bringing criminal prosecutions through to convictions applying objective criteria against commercial-scale piracy, including flagrant piracy websites.
- Clarify the rules regarding enforcement of a decree to disable access to infringing websites in Vietnam, ensuring that there are no costs associated with such actions.

### **Legislation:**

- Accede to and ratify the WPPT as required under the CPTPP.
- Swiftly enact the draft amendments to the intellectual property (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 market data to ensure that the monetary thresholds can realistically be met.
- 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 Internet service provider (ISP) liabilities, including specifying consequences for non-compliance with the Joint Circular, and ensuring that safe harbors under the Law on Information Technology apply to only passive and neutral services; (iii) easing the evidentiary requirements that interfere with the ability to take effective action against piracy websites, illegal theatrical camcording, live-streaming piracy, piracy devices (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; (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.

### **Market Access:**

- Ensure that amendments to Decree 06 remove the local presence requirement and do not impose additional barriers to e-commerce.
- Ensure that the draft Cinema Law allows self-classification of content disseminated on the Internet; eliminates foreign investment restrictions, screen quotas, and broadcast quotas; and removes a discriminatory film fund drawn from the box office of imported films
- Eliminate 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 (CMOs) is required.

## **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 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. Vietnamese piracy operators have been associated with some of the world's most popular piracy websites, like *123movies* (before the original site shut down), *fmovies*, and *Chiasenhac*, which cause significant damage to the local marketplace and make Vietnam a piracy haven.<sup>2</sup> There is 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 (P2P) networks, linking sites, streaming sites, search engines, cyberlockers, apps, and on social media networks. Infringers often take advantage of free platform file hosting resources, including those from Facebook and Google, to store and share pirated contents and stream it 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.

Stream-ripping was the most popular form of music piracy in Vietnam, with more than 26.7 million visits during Q3 2021, according to data from SimilarWeb. Sites like *Y2Mate* (12.3 million visits from Vietnam in Q3 2021 and the most popular single piracy site of any kind), *savefrom.net* (3.7 million visits from Vietnam during that period), and *y2meta.com* (1.6 million visits from Vietnam during that period) offer the ability to illegally download music from YouTube as an MP3. Six of the top ten music piracy sites in Vietnam were stream-ripping destinations. Cyberlockers were also a widely used method of piracy, with 13.7 million visits in Q3 2021. *Mega.nz* (6.5 million visits from Vietnam in Q3 2021) and *zippyshare.com* (0.75 million visits from Vietnam during that period) were key sources of pirated music content. Long-standing domestic Vietnamese language websites focused on pirated music content were also major threats. For example, *chiasenhac.vn* had 3.9 million visits in Q3 2021 and was the third most popular piracy site of any kind in Vietnam.

One of the operators of the notorious streaming piracy site *Fmovies* (also known as *Bmovies* or *Bflix*, among other names), which provides unauthorized access to popular movies and TV series is believed to be located in Vietnam.<sup>3</sup> In a positive development, in August 2021, according to press reports, the founder and two employees of the notorious piracy site *Phimmoi* were identified and called in for questioning by the Vietnamese police.<sup>4</sup> The domains of the website have been taken offline; however, *Phimmoi* has simply moved to alternate domains, some of which have become very popular in a short period of time.<sup>5</sup> Hopefully, the action against *Phimmoi* will lead to Vietnam's criminal enforcement authorities taking effective enforcement actions against other popular piracy sites, such as *Bilutvs.net*,<sup>6</sup> *Motchill.net*,<sup>7</sup> and *Dongphymtv.com*.<sup>8</sup>

Vietnam is the home of notorious markets *BIPTV.best* and *BestBuyIPTV.store*, which are very popular

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<sup>2</sup>In addition, several stream-ripping sites are operated from Vietnam, including *Y2mate.com*. Enforcement efforts in Vietnam by the music industry against *Y2mate* proved futile.

<sup>3</sup>The site's Alexa rank is 1,156 globally and 1,028 in the U.S., with 80.08 million global visits from 6 million unique visitors in August 2021, according to SimilarWeb. The site has been blocked in many countries, some due to MPA action, including India (which drove down its popularity ranking significantly), Australia, Denmark, Malaysia, and Singapore. The former domain, *Fmovies.se*, was blocked in nine countries.

<sup>4</sup>The *Phimmoi* website, which offered thousands of unauthorized feature films and television series from the United States and all over the world, was one of the most popular pirate websites in Vietnam. At its peak of popularity between June 2019 and June 2020, *Phimmoi* was the 22nd most popular website in Vietnam and averaged over 69 million visitors per month from 10.69 million unique visitors, according to SimilarWeb.

<sup>5</sup>Alternative domains include *Phimmoiplus.net*, *Phimmoi.online*, *Phimmoi247.com*, *Phimmoi.be* and, most recently, *iphimmoi.net*, which has been identified by local media and uses similar domain names, website designs, and a logo to appear to be associated with the original *Phimmoi* and thus attract users who are unable to find it. *iphimmoi.net* is ranked as the 453rd most popular site in Vietnam after just a month, according to SimilarWeb data in October 2021.

<sup>6</sup>*Bilutvs.net* is a Vietnamese streaming site with 3.8 million monthly visits in August 2021, according to SimilarWeb. The site which has been redirected to *biluu.tv*, which had 1.5 million monthly visits in December 2021.

<sup>7</sup>*Motchill.net* is a Vietnamese site with rank in Vietnam of 130 and 8.3 million visits in August 2021, according to SimilarWeb data for former domain *Motphim.net*

<sup>8</sup>*Dongphymtv.com* is a Vietnamese site with 21.7 million visits in August 2021, according to SimilarWeb data for former domain *Dongphim.ne*.

Internet protocol television (IPTV) piracy services in Europe.<sup>9</sup> Vietnam also hosts emerging “piracy as a service” (PAAS) businesses like *Abyss.to* (formerly *HydraX.net*), which offers a “Google pass through,” i.e., a service that allows users to upload videos via Google Drive or dragging and dropping files onto the site’s page.<sup>10</sup> The service then obfuscates the location of the hosted content to prevent enforcement and shield the identity of the website’s operator. *Abyss.to* also provides the ability to embed videos with the Abyss media player on separate sites for free, although viewers are served ads by *Abyss.to*. Many piracy sites including *123movies.fun*, *gostream.site*, *solarmoviez.ru*, and *yesmovies.to* have previously used, or currently use, *Abyss.to*. Another PAAS hosted in Vietnam is *Fembed*, a content management service (CMS) that launched in early 2018 and is commonly used by pirate movie streaming websites.<sup>11</sup>

Piracy of ebooks, test banks, and solutions manuals continues to pose significant problems for publishers. In addition to infringing sites being hosted in Vietnam, information obtained from recent publisher-initiated lawsuits (in the United States) has revealed that a significant percentage of the sites have operators located in Vietnam (despite efforts by the perpetrators to obscure their actual location). By way of a few examples: (1) *ccbooks.org* is an infringing site operated by a Vietnamese defendant, against whom publisher plaintiffs obtained a \$400,000 default judgment; the site is currently down; (2) *ebookshelf.com* and *itsebooks.com* are infringing sites operated by a Vietnamese defendant, against whom publisher plaintiffs obtained a \$1.8 million default judgment; *ebookshelf.com* is down, but *itsebooks.com* is still active and infringing despite the permanent injunction entered by the court; and (3) *etextworld.com* is a site operated by a group of infringers, including multiple Vietnamese operators, against which publisher plaintiffs obtained a \$3.15 million default judgment; the site is down and currently displays a notice indicating that, pursuant to a court order, plaintiffs have seized the domain.

Ineffective copyright enforcement in Vietnam is a serious concern. Without significant changes, Vietnam’s current criminal enforcement system and legislative framework are unable to deter online piracy. Regardless of extensive evidence of serious infringement provided by rights holders, there has traditionally been a lack of coordination and transparency among related ministries and agencies and a lack of demonstrated government commitment to ensure effective copyright enforcement. Administrative and criminal processes in Vietnam are cumbersome and slow. 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. 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. It is critical for responsible enforcement authorities, including the relevant police units, the MPS, and the ABEI under the MIC, to follow through on infringement complaints, take meaningful and effective enforcement actions, and impose deterrent sanctions against infringing websites. While the enforcement action against *Phimmoi* discussed above is a positive step, it remains to be seen whether this action will produce a deterrent result and send a signal that other notorious

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<sup>9</sup>*BestBuyIPTV* offers country-specific channel lists, with more than 10,000 channels from 38 countries and 19,000 video-on-demand (VOD) titles in multiple languages and is available on several platforms and operating systems, including iOS, Kodi, and Roku. It uses resellers, which leads to pricing variations, but the main site charges USD\$70 per year for the service. *BestBuyIPTV* advertises that it provides services to over 900,000 users, 12,000 resellers, and 2,000 re-streamers worldwide.

<sup>10</sup>“Piracy as a service” (PaaS) offerings constitute a suite of off-the-shelf services that make it easy for would-be pirates to create, operate, and monetize a fully functioning pirate operation. PaaS providers lower the barriers to entry into commercial piracy. They include: (i) website templates that facilitate setup of streaming websites; (ii) content management systems (CMS), which are databases providing access to tens of thousands of infringing movies and TV series, in exchange for the payment of a fee or a cut of the advertising revenue; (iii) dashboards that allow an illegal Internet protocol television (IPTV) operator to oversee the infrastructure of their service (including monetization, content-hosting servers, and user interactions); (iv) hosting providers that provide a safe haven for pirates because they do not respond to DMCA notices of copyright infringement; (v) video hosting services that obscure links to infringing content (i.e., instead of providing a single weblink for each piece of content, a PaaS video host may break up the content and host it across dozens of random links to inhibit its takedown, without inhibiting its access via a streaming site that pieces the content back together); and (vi) decentralized streaming software that acts as a third-party tool between a streaming site and a cyberlocker or video host, allowing for quicker upload of content with a large variety of cyberlockers and video hosting services. PaaS is a subset of the larger threat of Cybercrime-as-a-Service identified by Europol, and shows the scale, sophistication, and profitability of modern online commercial copyright infringement.

<sup>11</sup>*Fembed* is popular worldwide with an average of 6 million monthly visitors, according to SimilarWeb (although these SimilarWeb numbers only reflect end-user traffic that comes directly to its site and not to traffic that passes through its CMS customers that operate their own streaming services). *Fembed* generates revenue either from advertising – by inserting ads in *Fembed*’s media players embedded in its customers’ illegal streaming services – or by charging a premium fee that allows its customers to generate revenue by inserting their own ads.

piracy services operating with impunity in Vietnam will not be tolerated.

**Authority of Broadcasting and Electronic Information (ABEI) Mechanism to Disable Access to Piracy:**

Over the past couple of years, MIC's ABEI worked with several 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 infringing sites blocked in Vietnam by ABEI and the MCST. While this is a useful step forward, there are many other infringing sites that remain accessible. Moreover, disablement in Vietnam does not stop these Vietnam-based services from harming overseas markets, including the U.S. market. There also remain procedural difficulties for U.S. rightsholders.<sup>12</sup> In particular, the process for submitting sites should be transparent, with documentation setting out the process and explaining how sites will be blocked, and measures are needed to ensure ISPs comply.

**Piracy Devices (PDs) and Apps:** PDs have emerged as a significant means through which pirated motion picture and television content is accessed around the world, and they are gaining popularity in Vietnam. PDs are cheap and easy to use, provide a range of unauthorized content, and are available from online retailers as well as physical stores. 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 Theatrical 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 theatrical 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 address this problem, including stronger cinema procedures for curtailing such activity and corresponding criminal enforcement mechanisms.

**Collective Management:** Due to barriers against foreign music producers and distributors (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. Furthermore, the restrictions and limitations on foreign and joint venture entities and their membership in CMOs established as associations needs to be removed (found in Decree No. 45/2010/ND-CP). The Copyright Office of Vietnam should engage with foreign music producers to enable reform of collective management to establish 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 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. As IIPA noted last year, the amendments would make several changes to the IP Code, including adding important protections required by the WIPO Internet Treaties. IIPA is very pleased that the government acceded to the WCT on November 17, 2021,

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<sup>12</sup>As reported last year, in 2019, the music industry petitioned the Authority of Broadcasting and Electronic Information (ABEI) to block two sites, *saigonoclean.com* and *chiasenhac.vn*. The ABEI only agreed to consider the petition against *chiasenhac.vn*. After significant delays, the Ministry of Information and Communication (MIC) finally notified the music industry that Yeu Ca Hat Entertainment Joint Stock Company, owner of *chiasenhac.vn*, had, per request by MIC, monitored the accounts of those who uploaded copyright infringing works, removed over 6,000 works from the company's system, sent warnings and blocked 41 infringing accounts, and simultaneously provided information to MIC relating to the 41 accounts that had been blocked. Despite this action by ABEI, *Chiasenhac* is back to being the principal source of unlicensed music in Vietnam, with both local and international repertoire easily accessible via the site.

effective February 17, 2022, and urges the government to accede to the WPPT, as required under the CPTPP and Vietnam's Free Trade Agreement with the EU, without delay.<sup>13</sup> In addition, IIPA encourages Vietnam to take the necessary steps to fully implement these treaties.

**Implementation of the Criminal Code is Critical and Should Be Consistent with International Commitments:** Vietnam's Criminal Code became effective in January 2018. The Criminal Code criminalizes piracy "on a commercial scale," although the meaning of "on a commercial scale" is not defined in the Criminal Code. Vietnam should implement its new Criminal Code consistent with Vietnam's obligations under the WTO TRIPS Agreement and the Bilateral Trade Agreement (BTA) with the United States, which require Vietnam to criminalize copyright piracy "on a commercial scale" (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 appear to have stalled.<sup>14</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>15</sup> Unfortunately, to date, the government has not followed through on these important changes and has not set in motion a more deterrent approach to rampant local piracy.

**Intellectual Property (IP) Code Draft Amendments Leave Some Issues Unresolved:** While the draft IP Code amendments would result in some improvements to the law, they leave some issues and questions unresolved, including regarding Vietnam's compliance with the BTA, TRIPS, and other international obligations. The issues that should be resolved in the current IP Code (or the draft Code) include the following:

- **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.
- **Technological Protection Measures (TPMs):** Several issues relating to TPMs need to be addressed, including:
  - (i) it is not clear whether the TPM provisions in the IP Code are sufficiently broad to cover access controls, which are 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) the IP Code includes 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

<sup>13</sup>Vietnam formally ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in October 2018, and it entered into force in January 2019. Vietnam entered into a Free Trade Agreement (FTA) with the EU in August 2020. Vietnam's obligation to accede to the WIPO Performances and Phonograms Treaty (WPPT) (and the WIPO Copyright Treaty (WCT)) became effective upon entry into force of the CPTPP. Vietnam has three years to meet its obligation under the FTA with the EU.

<sup>14</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 market data to ensure that the monetary thresholds can realistically be met. It should also take notice of the 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>15</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 technical protection measures (TPMs) or trafficking in circumvention devices/services.

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 Article 13 of the WTO TRIPS Agreement 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 applicable 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) that must be examined for the compatibility with the three-step test (e.g., 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 in, or finance, the physical and technical facilities involved in the making of 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 alignment 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.

**Amend Internet Service Provider (ISP) Liability Framework to Meet Modern Challenges:** Joint Circular 07/2012/TTLT- BTTTT – BVHTTDL on stipulating the duties of enterprises providing intermediary service in protection of copyright and related rights on the Internet and in the telecommunication networks environment ("Circular 07") merely requires intermediaries to take down infringing content and terminate services under certain circumstances. Moreover, this authority has been used in practice only in very narrow circumstances where online services and websites are directly infringing.

The draft IP Code would introduce new Article 198b, which maintains the spirit of the existing laws regarding ISP liability and does not resolve the current difficulties faced by rights holders in preventing copyright infringements on the Internet.<sup>16</sup> The draft IP Code would not enable copyright holders to cooperate with ISPs directly to take down infringing content. Rather, like Circular 07, the draft IP Code would only require ISPs to take down infringing content upon requests by the authorities.<sup>17</sup> To improve online copyright protection and meet international best practices, Vietnam should introduce a mechanism to allow an immediate takedown of infringing content upon request of copyright holders. In addition, Vietnam's legal framework does not include secondary liability. The IP or Civil Code should identify the criteria for legal liability of ISPs to foster cooperation between ISPs and rights holders.

In addition to permitting rights holders to request removal of infringing content, Circular 07 should be clarified in other ways to improve its effectiveness. Article 5.5 provides a few cases in which ISPs will be held directly responsible for damages because of copyright violations, including: making available; transmitting or distributing digital content without permission of the rights holder; modifying, truncating, or reproducing content without permission of the right holder; willfully circumventing or bypassing TPMs; and operating as a secondary distributing source of infringing content. Article 5.5 should ensure that an ISP is liable for copyright infringement by its users if the ISP has actual or constructive knowledge of the infringement and fails to act expeditiously to terminate the infringement and take other measures demonstrated effective in preventing or restraining infringement (including if the ISP does not comply with government's or right holders' requests to remove or block access to infringing content), knowingly facilitates the infringement, or enables users to commit infringement. Circular 07 should also expressly provide penalties for non-compliance. Furthermore, it is not clear whether the authority under Circular 07 to take down (or block) infringing content applies only to websites that use the "internet services of a Vietnam company" (i.e., a Vietnamese hosting company, registrar, or IP address manager). If that is the case, the effectiveness of this measure will be undermined because domain names can be registered, and websites can be hosted, anywhere while still targeting users in Vietnam. Circular 07 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 require adoption of a repeat infringer policy and other measures demonstrated effective in preventing or restraining infringement.

**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 for the judges, but also for police and prosecutors, who will ultimately play an important role in bringing criminal cases before the courts.

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<sup>16</sup>Article 198b of the draft IP Code appears to incorporate Articles 4, 5 and 6 of Circular 07.

<sup>17</sup>Under Article 5.3 of the Circular 07, only the MIC or the Ministry of Culture, Sports, and Tourism (MCST) or other Competent State Authorities may request Internet service providers (ISPs) to remove infringing content or suspend the access to it.



## **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 government has publicly indicated that it prioritizes preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products. Unfortunately, Vietnam’s restrictions on foreign investment in cultural production undermine this objective, severely limiting 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 toward illegal alternatives. The restrictions instigate a vicious circle in which less legitimate product is produced or available. To facilitate commercial development of Vietnam’s cultural sector and the development of a potentially very significant digital content market, Vietnam should look to internationally accepted standards and practices, which recognize that constraining market access for legitimate creative content complicates efforts to effectively combat piracy. IIPA urges Vietnam to quickly discard the longstanding market access barriers identified below and open its market in the creative and cultural sectors.

**Pay-TV Regulation:** In March 2016, Vietnam enacted pay-TV regulations (Decree 06/2016/ND-CP) requiring the number of foreign channels on pay-TV services be capped at 30% of the total number of channels any such service carries. These regulations also require operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. Furthermore, most foreign programming is required to be edited and translated by an approved licensed press agent. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced or otherwise “conducted” in Vietnam. Additionally, 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 Over-the-Top (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. In August 2021, the latest draft was submitted for finalization by the Office of Government. While this draft removes an earlier-proposed content quota and provides an option for self-classification, the remaining licensing proposal and continued uncertainty around some censorship requirements fall short of industry expectations.

**Draft Amendments to Cinema Law:** Under Cinema Law/Decree 54, Vietnam requires that at least 20% of total screen time be devoted to Vietnamese feature films. In recent years, domestic films have accounted for a growing share of the market and greater investment. Vietnam is in the process of amending its Cinema Law, with the latest draft of proposed amendments issued in October 2021. Vietnam should ensure the draft amendments to the Cinema Law, and subsequent implementing decree, maintain the positive changes: 1) allow self-classification for films disseminated online (including video-on-demand (VOD) content), 2) allow a grace period for content that has yet to display ratings, 3) remove a discriminatory film fund sourced from the box office of imported films, and 4) remove screen quota and local presence requirements. Foreign investment restrictions, which remain in the draft, should also be removed before the Law is passed in mid-2022.

**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. 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 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 IPRs related to U.S. content largely on its own, a task at which it has not succeeded thus far. 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 establish 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.

## **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;
- Several 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, although Article 198a of the draft IP Code amendments provides for the first time a presumption of ownership in Vietnamese law.